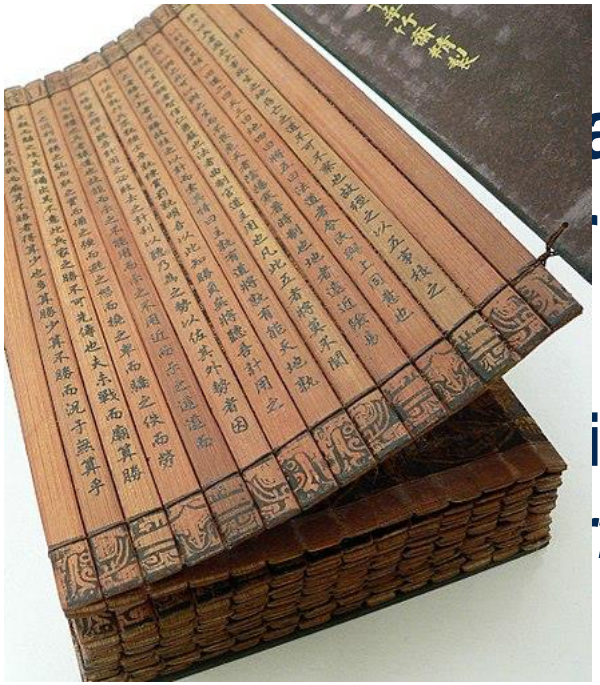
UNIVERSITAT JAUME I

Jurisdiction and Competition in the Air Transport Sector

—

"Extraterritoriality" after *Airfreight*



or

and Competition Transport Sector

—

itoriality" after *freight*

The Art of War against misdeeds committed abroad

Ach tz

Associate Professor of Commercial Law
Institute for Transport Law
Jaume I-University, Castellon

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I. 計篇 – Laying Plans

孫子曰兵者國之大事

Sun Tzŭ said: The art of war is of vital importance to the State

Why

do we discuss “extraterritorial” application of European law?

曰主孰有道將孰有能天地孰得法令孰行兵衆孰强士卒孰練賞罰孰明

[…] In which army is there the greater constancy […] in […] punishment?

[i.e. on which side is there the most absolute certainty that […] misdeeds [will be] summarily punished?]

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I. 計篇 – Laying Plans

1999

Example

The "Airfreight" cartel

7 December 2005
Application for immunity under the 2002 Leniency Notice

必取於人知敵之情者也

Knowledge of the enemy's dispositions
can only be obtained from other men.

9 November 2010
Commission Decision I
Case COMP/39258 – *Airfreight*

- single and continuous infringement
- 15 addressees
- fine: EUR 790 million

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I. 計篇 – Laying Plans

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I. 計篇 – Laying Plans

1999

Example

The "Airfreight" cartel

7 December 2005
Application for immunity under the 2002 Leniency Notice

9 November 2010
Commission Decision I
Case COMP/39258 – *Airfreight*

- single and continuous infringement
- 15 addressees
- fine: EUR 790 million

16 December 2015
General Court
cases T-9/11, T-28/11, T-36/11, T-38/11, T-39/11, T-40/11, T-43/11, T-46/11, T-48/11, T-56/11, T-62/11, T-63/11, T-67/11

17 March 2017
Commission Decision II

- single and continuous infringement
- 14 addressees
- fine: EUR 776 million

II. 作戦 – Waging War

其用戦也勝久則鈍兵挫鋭攻城則力屈

When you engage in actual fighting, if victory is long in coming, then men's weapons will grow dull and their ardor will be damped […]

some of the controversial issues in the *Airfreight*-case refer to the

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of the European institutions

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II. 作戦 – Waging War

Jurisdiction defined

jurisdiction *noun*

C1

/ˌdʒʊərɪsˈdɪkʃn/

/ˌdʒʊrɪsˈdɪkʃn/

(formal)

1 ★ C1 [uncountable, countable] the authority that an official organization has to make legal decisions about somebody/something

- **jurisdiction over somebody/something** *The English court had no jurisdiction over the defendants.*
- **jurisdiction (of somebody/something) to do something** *The Court of Appeal exercised its jurisdiction to order a review of the case.*
- **within/outside somebody's jurisdiction** *These matters do not fall within our jurisdiction.*

Source: Oxford Learner's Dictionary

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II. 作戦 – Waging War

Jurisdiction

(1 ★ C1 [uncountable, countable] the authority that an official organization has to make legal decisions about somebody/something)

controversial issues in the "Airfreight"-case

1. the material and territorial scope of the Commission's jurisdiction over time (*internal* provisions)

2. the "extra"-territorial application of European law (international public law)

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II. 作戦 – Waging War

controversial issues in the “Airfreight”-case (I)

1. the material and territorial scope of the Commission’s jurisdiction over time

controversial issues in the “Airfreight”-case

Regulation No 141/1962
declares the non-application of Regulation No 17/1962 to the transport sector

1. t… mat… sc… e of …isdi…

Article 100

(ex Article 80 TEC)

1. The provisions of this Title shall apply to transport by rail, road and inland waterway.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.

“peculiarities” of the sector

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II. 作戦 – Waging War

before 1 January 1988
no jurisdiction of the Commission (transitional provisions)

1 January 1988
Regulation No 3975/87 confers powers to investigate <u>international</u> transport *between* Community airports

1 January 1994
EEA Agreement allows for the investigation of international air transport between EEA airports

1 January 2002
EC-Swiss Air Transport Agreement: international air transport between the Community and Switzerland

1 May 2004
Regulation No 1/2003 (as amended) confers jurisdiction on routes between EU and third country airports

19 May 2005
EEA Agreement amended to implement R 1/2003 (as amended): international transport between the EEA and third countries

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III. 謀攻篇 – Attack by Stratagem

故曰知彼知己百戰不殆不知彼而知己一勝一負不知彼不知己每戰必殆

If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.

controversial issues in the “Airfreight”-case (II)

1. the material and territorial scope of the Commission’s jurisdiction over time

does the Commission have jurisdiction under *international (public) law*?

2. the “extra”-territorial application of European law

2. the “extra”-territorial application of European law

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III. 謀攻篇 – Attack by Stratagem

does the Commission have jurisdiction under *international (public) law*?

(traditional) criteria that *do* provide jurisdiction

does the Commission have jurisdiction under *international (public) law*?

territoriality

personality

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III. 謀攻篇 – Attack by Stratagem

territoriality

a State has unlimited jurisdiction over the State's territory, including foreign nationals who merely reside or temporarily find themselves therein

personality

a State has jurisdiction over its nationals, although they find themselves abroad

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III. 謀攻篇 – Attack by Stratagem

extra-territoriality

jurisdiction over acts committed
1) by non-nationals 2) abroad

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III. 謀攻篇 – Attack by Stratagem

principles derived from the principle of territoriality

- *subjective* territoriality
  - a State is allowed to deal with acts which originated within its territory, even though they have been completed abroad
- *objective* territoriality
  - a State is allowed to deal with acts which originated abroad but which have been **completed**, at least in part, within its own territory

does a State have jurisdiction where acts of foreign nationals committed abroad have “effects” in the investigating State’s marketplace?

“effects”-doctrine

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III. 謀攻篇 – Attack by Stratagem

***quid iuris* in the Airfreight case?**

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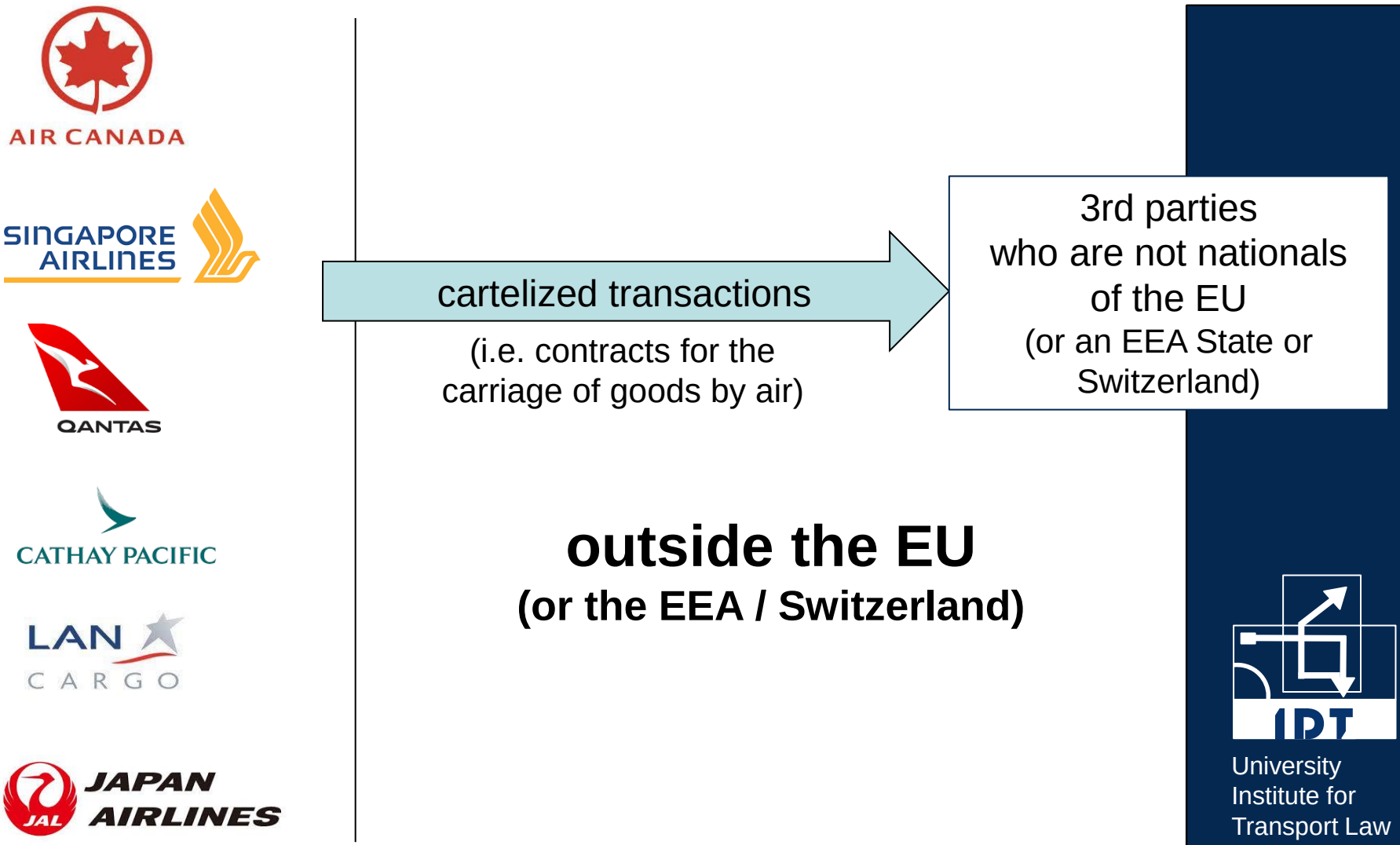
III. 謀攻篇 – Attack by Stratagem



IV. 形篇 – Tactical Dispositions

故曰勝可知而不可爲

Hence the saying:
One may know how to conquer without being able to do it.

SO…

…does the Commission *have* jurisdiction to investigate the case?

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IV. 形篇 – Tactical Dispositions

prescriptive jurisdiction
(jurisdiction to legislate)

curial jurisdiction
(jurisdiction to adjudicate)

enforcement jurisdiction
(jurisdiction to enforce)

The **LOTUS**-case

On 2 August 1926, a collision occurred between the French ship 'Lotus' and the Turkish ship 'Boz-Kourt', the latter of which broke in two and sank, causing the death of eight Turkish nationals. Upon arrival of the 'Lotus' in Istanbul, the first officer, who was in charge of the watch on the ship at the time of the accident, and the captain of the 'Boz-Kourt' were arrested by the Turkish authorities accused of involuntary manslaughter. Since the collision had occurred on the high seas, no jurisdiction other from those of France or Turkey came into account.

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IV. 形篇 – Tactical Dispositions

Had Turkey to be able to point to some title to jurisdiction recognized by international law?
(position of the French government)

OR

Was Turkey allowed to exercise jurisdiction unless such jurisdiction came into conflict with a principle of international law?
(position of the Turkish government)

Permanent Court of International Justice judgment of 7 September 1927, *S.S. Lotus* (France v Turkey)

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IV. 形篇 – Tactical Dispositions

"It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law". "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules". In the absence of such prohibitive rules, "every State remains free to adopt the principles which it regards as best and most suitable"

prescriptive jurisdiction

curial jurisdiction

~~enforcement jurisdiction~~
~~(jurisdiction to enforce)~~

"the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State"

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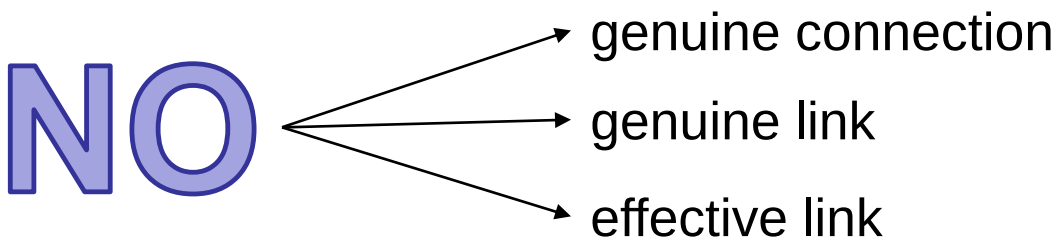
IV. 形篇 – Tactical Dispositions

SO…

…impossibility to exercise enforcement jurisdiction and unlimited prescriptive and curial jurisdiction?



International Court of Justice judgments of 6 April 1955, *Nottebohm*, and 5 February 1970, *Barcelona Traction*

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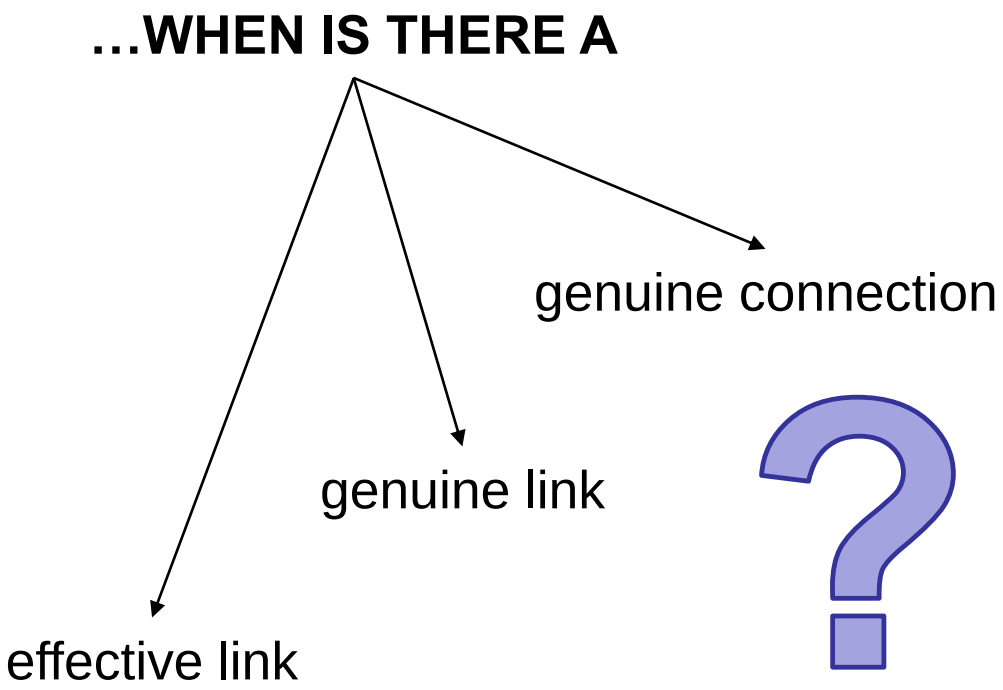
IV. 形篇 – Tactical Dispositions

BUT…



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IV. 形篇 – Tactical Dispositions

1. The “single economic entity”-doctrine: the *Dyestuffs*-case (1972)

- AG Mayras considered the convenience to apply the “effects”-doctrine, albeit limited to those cases in which the effects are
  - a direct result of the conduct occurring abroad
  - reasonably foreseeable
  - substantial on the territory of the EC

  he also considered that *imposing* a fine is *not* an act of enforcement justice (the recovery by way of forcible execution is)

- **BUT** the CJEU (14 July 1972, case 48/69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*) did not apply the “effects”-doctrine, but rather the so-called “single economic entity”-test

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IV. 形篇 – Tactical Dispositions

2. The “implementation”-doctrine: the *Woodpulp I*-case (1988)

- AG Darmon once again considered it convenient to apply the “effects”-doctrine
- **BUT** the CJEU (27 September 1988, joined cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*) did *not*
- rather, according to the Court, a distinction has to be made between the formation and the implementation of the agreement, decision or concerted practice
- the *place of formation* of the agreement is irrelevant (otherwise, it would be easy to avoid the application of antitrust laws); the decisive factor is where the agreement *is implemented* (direct sales to customers within the Single Market)

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IV. 形篇 – Tactical Dispositions

3. The “qualified effects”-doctrine: the *Intel*-case (2017)

- Intel had been sanctioned by the Commission, who did not analyse its own jurisdiction
- Intel challenged the Decision, among other reasons, for a lack of jurisdiction of the Commission with regard to the so-called “Lenovo agreements”, which had been concluded by a US and a Chinese company and they referred to CPUs that had been manufactured and sold outside the territory of the EU and were to be incorporated into computers manufactured in China

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IV. 形篇 – Tactical Dispositions

3. The “qualified effects”-doctrine: the *Intel*-case (II)

- in first instance, the GC applied the “qualified effects”-test
  - <u>foreseeable effects</u>
    although the effects have to be *foreseeable*, they need not be *actual* (potential effects are enough)
  - <u>direct effects</u>
    despite the fact that the computers were not sold directly in the EEA, there was a direct effect (postponement of the launch of computers with CPU’s manufactured by Intel’s main competitor in the Common Market)
  - <u>substantial effects</u>
    the agreements formed part of a “single and continuous infringement”, so the effects are substantial even if, viewed in isolation, each conduct might not be liable to produce such substantial effect
- it also applied (but only for the sake of completeness) the “implementation”-test (implementation by Intel’s customers)

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IV. 形篇 – Tactical Dispositions

3. The “qualified effects”-doctrine: the *Intel*-case (and III)

- on appeal, the CJEU upheld all and every single one of the arguments
  - the readiness with which it accepted the “effects”-doctrine is surprising (Brexit?)
  - “The qualified effects test pursues the same objective [as the implementation test], namely preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market”
  - the ”qualified effects”-test is an *alternative* to the “implementation”-test
    - ⇢ even if the GC had erred when applying the implementation test, the complaint could not lead to the judgment’s being set aside (for the sake of completeness only)

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V. 軍爭篇 – Manœuvering

莫難於軍爭軍爭之難者以迂爲直以患爲利

[…] The difficulty of tactical maneuvering consists in turning the devious into the direct, and misfortune into gain.

BUT…

…are the conditions for “extra”-territorial application met with regard to inbound flights in the *Airfreight* case?

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V. 軍爭篇 – Manœuvering

1. The “implementation”-test

- *Woodpulp I:* an agreement is “implemented” in the EU when the cartel sales are made directly with buyers established in the Common Market, but for <u>inbound flights</u>
  - customers that purchase air freight transport services from air cargo carriers are, in general, established within the country of departure

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ANTARCTICA

V. 軍爭篇 – Manœuvering

1. The “implementation”-test

- *Woodpulp I:* an agreement is “implemented” in the EU when the cartel sales are made directly with buyers established in the Common Market, but for <u>inbound flights</u>
  - customers that purchase air freight transport services from air cargo carriers are, in general, established within the country of departure
  - sales of these air freight transport services are usually made by local personnel or a local general sales agent within the country of departure

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AUSTRALIA
SOUTHERN OCEAN
ANTARCTICA
contract of carriage

V. 軍爭篇 – Manœuvering

1. The “implementation”-test

- *Woodpulp I:* an agreement is “implemented” in the EU when the cartel sales are made directly with buyers established in the Common Market, but for <u>inbound flights</u>
  - customers that purchase air freight transport services from air cargo carriers are, in general, established within the country of departure
  - all sales of these air freight transport services are made by local personnel or a local general sales agent within the country of departure
  - prices for air freight transport services are, in general, expressed in the currency of the country of departure

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V. 軍爭篇 – Manœuvering

1. The “implementation”-test

- *Woodpulp I:* an agreement is “implemented” in the EU when the cartel sales are made directly with buyers established in the Common Market, but for <u>inbound flights</u>
  - customers that purchase air freight transport services from air cargo carriers are, in general, established within the country of departure
  - all sales of these air freight transport services are made by local personnel or a local general sales agent within the country of departure
  - prices for air freight transport services are, in general, expressed in the currency of the country of departure
  - sales of air freight transport services, including surcharges are, in general, regulated by the authorities in the country of departure in accordance with the applicable Air Service Agreements (ASAs)

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1. The “implementation”-test (II)

- Regulation No 1/2003 (as amended by R 411/2004) arguably does not make distinctions between outbound and inbound flights
  - ⇢ true, but not decisive for the Commission’s *external* jurisdiction
- many of the contacts between the addressees had taken place in the EEA or involved participants established therein
  - ⇢ also true, but unless the agreement *affects trade* between Member States, the place where the agreement is concluded seems to be irrelevant *(Woodpulp I)*
- the services affected by the agreement are partly provided within the territory of the EEA
  - ⇢ necessarily true, but the mere fact that the services are provided partly within the Common Market does not imply that competition there is affected
- implementation by a customer (GC in Intel)?
  - ⇢ very farfetched (“implementation” = passing-on of surcharges?)

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V. 軍爭篇 – Manœuvering

2. The “qualified effects”-test

- effects on European territory cannot be denied (at least, increase in the end-consumer prices), **but** are they direct, substantial and foreseeable?
- **direct effects**
  - ⇢ an increase of the end-consumer prices seems to be a knock-on effect rather than a direct effect

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PACIFIC OCEAN
sales contract
(price + transport
+ surcharge)
contract of
carriage

V. 軍爭篇 – Manœuvering

2. The “qualified effects”-test

- effects on European territory cannot be denied (at least, increase in the end-consumer prices), **but** are they direct, substantial and foreseeable?
- **direct effects**
  - ⇢ an increase of the end-consumer prices seems to be a knock-on effect rather than a direct effect
  - ⇢ there are, however, *immediate* effects where the freight-forwarder is established in the Common Market (refusal to satisfy the commission due; or when acting on behalf of a buyer in the EEA)
- **substantial effects**
  - ⇢ the effects must be direct *and* substantial
  - ⇢ it is sufficient if there is a single and continuous infringement, the effects of which are, considered as a whole, substantial *(Intel)*
- **foreseeable effects**
  - ⇢ better test than that of directness? reason: not to surprise actors applying foreign laws the application of which they could not foresee because the number of intermediary factors is too large

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V. 軍爭篇 – Manœuvering

What does the General Court think about this?

Cases T-323/17 (Martinair); T-324/17 (SAS Cargo); T-326/17 (Air Canada); T-334/17 (Cargolux); T-337/17 (Air France-KLM); T-338/17 (Air France); T-340/17 (Japan Airlines); T-341/17 (British Airways); T-342/17 (Deutsche Lufthansa); T-343/17 (Cathay Pacific); T-344/17 (Latam); T-350/17 (Singapore Airlines)

→ decided on 30 March 2022

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- **the judgments are important because**:

  first(?) opportunity ⟨
  - to rule on extraterritorial application after *Intel*
  - to rule on jurisdiction regarding services
  - to rule on the *Intel* effects-test in a cartel case

- **we already know *(Intel)* that**
  - ⇢ the implementation and the effects test are *alternative* approaches
  - ⇢ no *actual* effects required (probable effects suffice)
  - ⇢ the “qualified effects”-test allows the application of competition rules under public international law when it is foreseeable that the conduct at issue will have an immediate and substantial effect in the common market

also GC T-441/14, *Brugg Kabel*, 2018, which –surprisingly– did not rely on *Intel*, but on *Béguelin Import*, 1971

V. 軍爭篇 – Manœuvering

- **the GC distinguishes between**

effects of coordination in relation to inbound freight services taken in isolation

The effects of the single and continuous infringement taken as a whole

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V. 軍爭篇 – Manœuvering

- **the GC (Martinair Holland) distinguishes between**

effects of coordination in relation to inbound freight services taken in isolation

⇢ relevance of effects

a) *restriction by object?* there have to be effects, but no *actual* effects (probable effects suffice; no proof, no quantification)

b) there are *probable* effects because goods are imported (at a higher price?) into the common market

⇢ foreseeability of effects

a) *experience* shows that price-fixing cartels lead to higher prices and poor allocation of resources, to the detriment of consumers (end-consumers, but also shippers)

b) a "waterbed effect" (surcharges are set off by lower rates and charges) might render and effect unforeseeable, *but* not proven by the applicant

c) it was foreseeable that the freight forwarders (for whom transport is an input) would pass the increase on to their own clients (shippers) ⇢ ↑ price of imported goods

The effects of the single and continuous infringement taken as a whole

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V. 軍爭篇 – Manœuvering

- **the GC (Martinair Holland) distinguishes between**

effects of coordination in relation to inbound freight services taken in isolation

⇢ substantiality of effects

a) all circumstances are to be taken into account (duration, nature and scope of the infringement, proportion of the price of the finished product or service represented by the cartelised service)

b) hic, long duration (21 months), restriction by object, surcharges represent a significant proportion of the total price of freight services (22 %), high market share of the participants in the cartel (34 % in the world market)

⇢ immediacy of effects

a) not *all* effects, however remote, for which the conduct is *conditio sine qua non* ⇢ causal link

b) action of a third party (contributory cause), even located outside the EEA, not necessarily breaks the chain of causality (*hic*: if it is foreseeable that the forwarder will pass on the surcharge; passing-on as normal response of the market)

The effects of the single and continuous infringement taken as a whole

inbound freight services are *specifically intended* to transport goods from third countries to the EEA

V. 軍爭篇 – Manœuvering

- **the GC (Martinair Holland) distinguishes between**

effects of coordination in relation to inbound freight services taken in isolation

The effects of the single and continuous infringement taken as a whole

- ⇢ qualified effects may stem from *different* conducts, provided that it is foreseeable that, *taken together*, they will have immediate and substantial effects in the internal market
  - ⇢ prevent the risk of undertakings avoiding competition rules by adopting numerous practices that pursue the same object, but with insignificant individual effects (*hic*: uniform anticompetitive strategy to avoid that forwarders adopt alternative strategies – indirect *en lieu de* direct routes)
- ⇢ not only 'foreclosure' or 'squeezing out' strategies *(Intel),* not necessary to rely on the intentional participation of the customers of the participants in the infringement

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V. 軍爭篇 – Manœuvering

- **other issues raised before the court**

⇢ Regulation 411/2004 (which extends jurisdiction of the Commission to EU-third country routes) applies to both outbound *and inbound* routes

⇢ effect on trade between MMSS (condition for the application of EU competition law) v. qualified effects (condition for the Commission to have jurisdiction)

⇢ a definition of the *relevant market* is not necessary when there are no doubts as to whether the conduct restricts competition in the internal market and affects trade between Member States (e.g. Air Canada)

⇢ the effects as per jurisdiction do not necessarily have to occur on the same market as that concerned by the infringement (market for imported goods v. market for carriage services) (e.g. Japan Airlines)

⇢ the effects-test need not lead to conflicts of jurisdiction: no rule under international public law prevents public authorities of different States from trying and convicting the same person on the basis of the same facts (e.g. Deutsche Lufthansa); no *ne bis in idem*, no international comity (e.g. Cathay Pacific)

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VI. 虛實篇 – Weak Points and Strong
(Concluding remarks)

故善戰者致人而不致於人

Therefore the clever combatant imposes his will on the enemy, but does not allow the enemy's will to be imposed on him.

- ⇢ the qualified effects-test now seems to be a valid criterion to justify the Commission's jurisdiction to enforce competition law
- ⇢ <u>but</u> all airlines have appealed the decisions before the ECJ
  - · validity of the test
  - · conclusion regarding inbound flights and single and continuous infringement
- ⇢ necessity to distinguish effects (on trade between MMSS) as a substantive rule and (qualified) effects to exercise jurisdiction under IPL
- ⇢ immediacy (causality) defined

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VI. 虛實篇 – Weak Points and Strong
(concluding remarks)

BUT

is all this necessary

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VI. 虛實篇 – Weak P[illegible]nts and Strong

(concludi[illegible]arks)

a conspiracy between two foreign shipping companies ‘to fix the price of shipping services, which are closely connected to the importation of goods into the United States, is conduct involving import commerce’, so that the special requirements in the FTAIA (which establishes the “qualified effects”-test) do not apply (‘import commerce exclusion’)

DoJ and FTC, ‘Antitrust Guidelines for International Enforcement and Cooperation’, 2017, at 20-21

general test of effects on commerce

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VII. 九變篇 – Variation of Tactics

故將通於九變之利者知用兵矣

The general who thoroughly understands the advantages that accompany variation of tactics knows how to handle his troops.

Other issues related to the (extra)territorial application of competition law in the air sector

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VII. 九變篇 – Variation of Tactics

1. Inter-State agreements on co-operation in the field of competition law

- since 1967, the OECD has issued **Recommendations concerning international co-operation on competition investigations and proceedings** (last version: 2014)
  - only procedural issues, not jurisdiction ("co-operation should not be construed to affect the legal positions of Adherents with regard to questions of sovereignty or extra-territorial application of competition laws")
  - objective: observance of international "comity" (consultation with other States)
- on the basis of these Recommendations, bilateral agreements have been concluded between the European Union and other countries
  - ⇢ EU/US Agreement (1991) and Exchange of interpretative letters
  - ⇢ Positive Comity Agreement (1998): possibility that one of the parties requests the other to remedy anti-competitive behaviour which originates in the latter's jurisdiction, but which affects the requesting party as well

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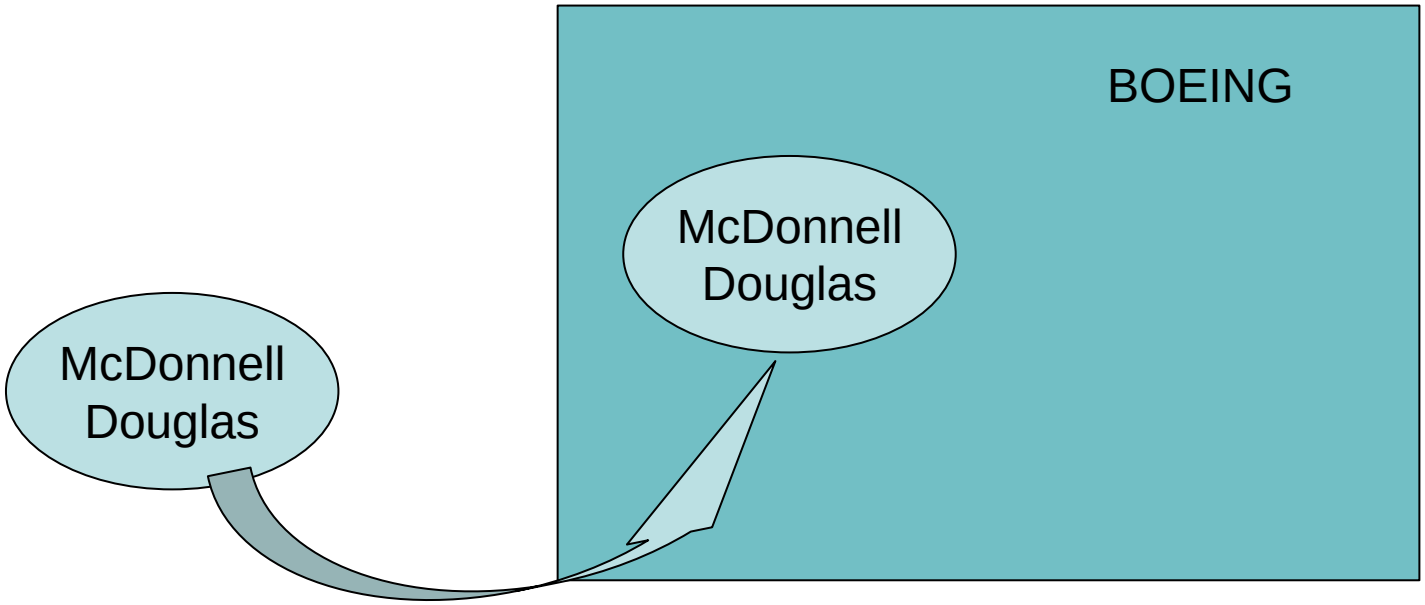
VII. 九變篇 – Variation of Tactics

2. Merger control

- EU/US Agreement has *inter alia* be applied in a merger in case in which none of the merging enterprises had their registered office within the Common Market



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VII. 九變篇 – Variation of Tactics

3. Subsidies and other advantages of non-EU carriers

- importance of State-aid law within the European Union (private investor test, non-discrimination)

BUT

- NOT applicable to subsidies by non-EU Member States

Which are the possible solutions?

a) apply unilateral sanctions to third-country airlines

b) (re)negotiate Air Service Agreements (ASAs)

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VII. 九變篇 – Variation of Tactics

3. Subsidies and other advantages of non-EU carriers

a) apply unilateral sanctions to third-country airlines

- difficulty to address the question:
  - ⇢ subsidies by third countries directly affect, not important interests of the State, <u>but the State itself</u>
  - ⇢ competition is also distorted by other issues (e.g. lower costs, less demanding obligations)
- Regulation No 868/2004, concerning protection against subsidisations and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community

subsidisation **unfair pricing practices**

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VII. 九變篇 – Variation of Tactics

3. Subsidies and other advantages of non-EU carriers

a) apply unilateral sanctions to third-country airlines

subsidisation

financial contribution by a government, regional body or other public organisation that confers a benefit on the carrier

unfair pricing practices

non-EU carrier benefits from the existence of *non-commercial* advantages and charges fares which are sufficiently below those that are offered by competing EU-carriers to cause injury

Regulation No 15/89, Hyundai Merchant Marine (container shipping)

no definition in the Regulation / hardly any examples in case-law:

⇢ a cargo reservation scheme (an exclusive right to carry certain goods from the country in question)
⇢ an industry rationalization plan (including tax benefits and debt moratoria)

⇢ "Fly America Act" (49 U.S.C. 40118)?
⇢ labour standards?
⇢ fiscal regimes?
⇢ **geographical situation of some carriers?**

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VII. 九變篇 – Variation of Tactics

3. Subsidies and other advantages of non-EU carriers

a) apply unilateral sanctions to third-country airlines

⇢ long-haul hub
⇢ almost every airport in the world can be reached with a single flight

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VII. 九變篇 – Variation of Tactics

3. Subsidies and other advantages of non-EU carriers

a) apply unilateral sanctions to third-country airlines

- practical problems for the implementation of Regulation No 868/2004:
  - ⇢ ”unfair pricing” badly defined, other issues not contemplated and redressive measures (mainly, duties imposed upon the non-Community carrier concerned) taken from *trade* agreements (mainly, GATT and WTO)
  - ⇢ difficulty to start investigations (written complaint on behalf of the Community industry, if there is sufficient evidence of the existence of countervailable subsidies (including, if possible, of their amount) or unfair pricing practices within the meaning of this Regulation, injury and a causal link between the allegedly subsidised or unfairly priced air services and the alleged injury)
  - ⇢ the measures arguably enter into conflict with existing Air Service Agreements

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“toothless tiger”

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VII. 九變篇 – Variation of Tactics

3. Subsidies and other advantages of non-EU carriers

a) apply unilateral sanctions to third-country airlines

- Regulation No 868/2004 has recently been superseded by **Regulation No 2019/712, of 17 April, on safeguarding competition in air transport**:
  - ⇢ practices redefined: subsidisation and *discrimination*
  - ⇢ the Commission is obliged to consider the "Union interest"

    A determination of the Union interest for the purpose of point (b) of Article 13(2) shall be made by the Commission based on an **appreciation of all the various interests**, which are relevant in the particular situation**, taken as a whole**. When determining the Union interest, priority shall be given to the need to **protect consumer interests** and to maintain a **high level of connectivity** for passengers and for the Union. In the context of the whole aviation chain, the Commission may also take into account relevant **social factors**. […]
  - ⇢ lower burdens to start an investigation (*prima facie* evidence, any Union carrier)
  - ⇢ better co-ordination with Member State's ASAs
  - ⇢ new redressive measures: financial duties and operational measures (e.g. suspension of concessions)

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VII. 九變篇 – Variation of Tactics

3. Subsidies and other advantages of non-EU carriers

b) (re)negotiate Air Service Agreements (ASAs)

- difficulty:
  - ⇢ many of the existing ASAs have been negotiated by the Member States and not by the Commission
  - ⇢ such ASAs do not necessarily envisage a “fair competition”-clause
- in the U.S., agreements have been negotiated with Qatar and the United Arab Emirates —Etihad and Emirates airlines— (they mainly oblige Gulf companies to adopt internationally accepted rules on financial accounting and to abandon fifth-freedom flights)

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VII. 九變篇 – Variation of Tactics

3. Subsidies and other advantages of non-EU carriers

b) (re)negotiate Air Service Agreements (ASAs)

- difficulty:
  - ⇢ many of the existing ASAs have been negotiated by the Member States and not by the Commission
  - ⇢ such ASAs do not usually envisage a “fair competition”-clause
- in the U.S., ASAs have been negotiated with Qatar and the United Arab Emirates —Etihad and Emirates airlines— (they mainly oblige Gulf companies to adopt internationally accepted rules on financial accounting and to abandon fifth-freedom flights)
- the EU has just finished to negotiate an “open skies” agreement with Qatar, that allows for unrestricted access to the markets in 2024, but includes a “fair competition” clause (the negotiations with the UAE have terminated abruptly)

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VII. 九變篇 – Variation of Tactics

However,

competitive differences between airlines can also be levelled by other strategies

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VII. 九變篇 – Variation of Tactics

Example

Emission allowances

- 13 October 2003: Directive 2003/87/EC
  Directive establishing a scheme for emission allowance trading

- 19 November 2008: Directive 2008/101/EC
  Amends Directive 2003/87/EC so as to include aviation activities in the scheme for emission allowance trading

- 21 December 2011
  CJEU
  case C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*

Are flights over the high seas subject to the emission allowance trading scheme?

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VII. 虛實篇 – Variation of Tactics

- principal findings of the court:
  - ⇢ there are only three principles of international law that can be relied upon:
    - · each State has complete and exclusive sovereignty over its airspace
    - · no State may validly purport to subject any part of the high seas to its sovereignty
    - · freedom to fly over the high seas
  - ⇢ the principle of territoriality is respected by the scheme
    - · it only applies to aircraft which depart from or arrive at European airports (which is a commercial decision by the airline)
    - · aircraft which are flying over the high seas are not affected, inasmuch as they do so (and do not take off or land at a European airport)
    - · the fact of crossing the airspace of the Union (without taking off or landing at a European airport) does not necessarily entail the application of the scheme
  - ⇢ the EU is free to apply the scheme even to parts of the journey which are performed over the high seas and calculate the allowances to be surrendered according to the whole flight

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Annex I

—

Internal provisions on the jurisdiction of the European Commission

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II. 作戦 – Waging War

其用戦也勝久則鈍兵挫鋭攻城則力屈

When you engage in actual fighting, if victory is long in coming, then men's weapons will grow dull and their ardor will be damped […]

controversial issues in the "Airfreight"-case

1. the material and territorial scope of the Commission's jurisdiction over time (*internal* provisions)

2. the "extra"-territorial application of European law

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II. 作戦 – Waging War

controversial issues in the “Airfreight”-case (I)

1. the material and territorial scope of the Commission’s jurisdiction over time

controversial issues in the “Airfreight”-case

Regulation No 141/1962
declares the non-application of Regulation No 17/1962 to the transport sector

1. t… mat… sc… e of …isdi…

Article 100

(ex Article 80 TEC)

1. The provisions of this Title shall apply to transport by rail, road and inland waterway.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.

“peculiarities” of the sector

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II. 作戰 – Waging War

CJEU **4 April 1974**
case 167/73, *Commission v France (French Sailors)*
the rules of Part Two of the Treaty (e.g. rules on free movement of workers) are applicable to the transport sector

CJEU **30 April 1986**
joint cases 209-213/84, *Ministère Public v Lucas Asjes et al. (Nouvelles Frontières)*
the rules of Part Three of the Treaty (e.g. rules on competition) *also* apply to the transport sector

BUT

the Commission lacked the competence to directly investigate cases of (alleged) infringement of the corresponding prohibitions in the air sector

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II. 作戰 – Waging War

Regulation No 3975/87, of 14 December, *laying down the procedure for the application of the rules on competition to undertakings in the air transport sector*

- the Commission is entitled to
  - investigate suspected or alleged infringements of Arts. 85 and 86 TCE (today, Arts. 101 and 102 TFEU: cartels and abuse of dominant position that affect trade between Member States), either on complaint or on its own initiative (Art. 3(1))
  - request all necessary information (Art. 9)
  - exercise all investigation powers envisaged by Art. 11 (e.g. the examination and taking copies of books and other business records, or to enter premises)
- **BUT** the scope of application of the Regulation was limited to *international* transports between *Community airports*

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II. 作戰 – Waging War

1 May 2004
Regulation No 1/2003, of 16 December 2002, *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, becomes applicable

- supersedes Regulation No 3975/87 (in its major part)
- initially, it *was not meant to apply* to transports between Community airports and third countries (Art. 32(c))
- **BUT** the Regulation was amended by Regulation No 411/2004 even *before* it became applicable on 1 May 2004: Art. 32(c) was *repealed*

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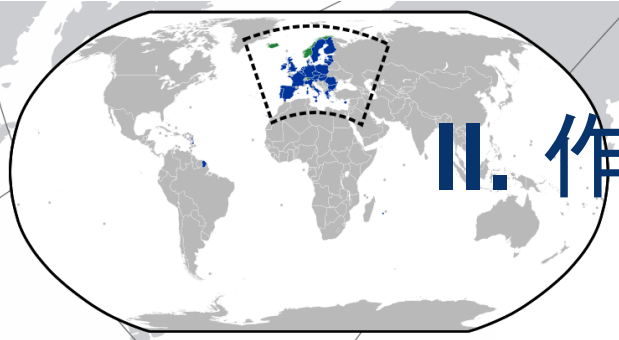


II. 作戦 – Waging War

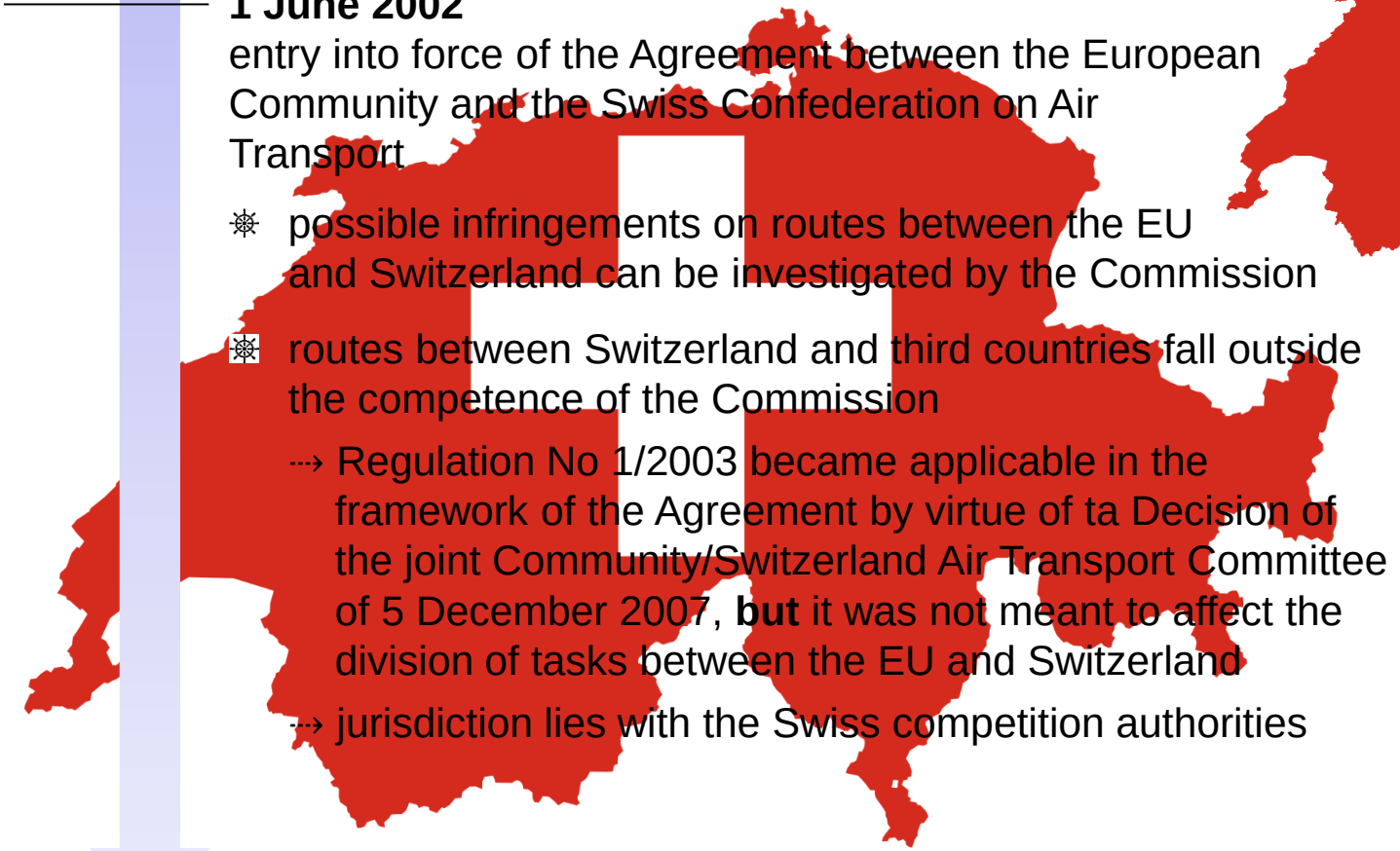
1 January 1994
entry into force of the Agreement on the European Economic Area (2 May 1992)

- Arts. 53 and 54 of the EEA Agreement prohibit cartels and the abuse of a dominant position (≈ Arts. 101 and 102 TFEU)
- Art. 56 EEA Agreement

  "Individual cases falling under Article 53 shall be decided upon by the surveillance authorities in accordance with the following provisions: […]
  - (c) the EC Commission decides […] where trade between EC Member States is affected […]."
- **BUT** only *international flights* between *EEA airports*

19 May 2005
two Decisions of the EEA Joint Committee enter into force, which implement Regulation No 1/2003 (including the suppression of Art. 32(c)) into the EEA Agreement

II. 作戦 – Waging War



1 June 2002
entry into force of the Agreement between the European Community and the Swiss Confederation on Air Transport

- possible infringements on routes between the EU and Switzerland can be investigated by the Commission
- routes between Switzerland and third countries fall outside the competence of the Commission
  - ⇢ Regulation No 1/2003 became applicable in the framework of the Agreement by virtue of ta Decision of the joint Community/Switzerland Air Transport Committee of 5 December 2007, **but** it was not meant to affect the division of tasks between the EU and Switzerland
  - ⇢ jurisdiction lies with the Swiss competition authorities

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Annex II

—

ECJ Doctrines on Extraterritorial Application

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IV. 形篇 – Tactical Dispositions

1. The “single economic entity”-doctrine: the *Dyestuffs*-case

- price-fixing agreement between different undertakings between 1964 and 1967 (three general and uniform increases in prices)
- the claimant, a UK-based parent company, did not have a seat within the EC (the UK was not then a Member State yet)
- the Commission attributed the infringements of the parent company’s subsidiaries within the Common Market to the parent itself (instructions received from the parent were mandatory)
- AG Mayras considered the convenience to apply the “effects”-doctrine, albeit limited to those cases in which the effects are
  - a direct result of the conduct occurring abroad
  - reasonably foreseeable
  - substantial on the territory of the EC

  he also considered that imposing a fine is *not* an act of enforcement justice (the recovery by way of forcible execution is)

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IV. 形篇 – Tactical Dispositions

1. The “single economic entity”-doctrine: the *Dyestuffs*-case (II)

- **BUT** the CJEU (14 July 1972, case 48/69, *Imperial Chemical Industries Ltd. v Commission of the European Communities*) did not apply the “effects”-doctrine, but rather the so-called “single economic entity”-test
- **reasoning:** “the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition” and that “[i]t was in fact the applicant undertaking which brought the concerted practice into being within the Common Market”, since it “was able to exercise decisive influence over the policy of the subsidiaries as regards selling prices […] and in fact used this power” in the case at hand
- this same reasoning was used then with respect to the abuse of a dominant position in the *Continental Can*-case (CJEU 21 February 1973, case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*)

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IV. 形篇 – Tactical Dispositions

2. The “implementation”-doctrine: the *Woodpulp I*-case

- the “single economic entity”-test is useless when the cartel members do not have subsidiaries within the territory of the EC: where they only sell their products to the Common Market, they do not “bring the (agreement or) concerted practice into being” therein
- in the *Woodpulp*-case, wood pulp producers and two associations of wood pulp producers, all of them established abroad, were sanctioned by the Commission for a price-fixing agreement
- AG Darmon once again considered it convenient to apply the “effects”-doctrine
- **BUT** the CJEU (27 September 1988, joined cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*) did *not*

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IV. 形篇 – Tactical Dispositions

2. The “implementation”-doctrine: the *Woodpulp I*-case (II)

- rather, according to the Court, a distinction has to be made between
  · the formation and
  · the implementation
  of the agreement, decision or concerted practice
- the *place of formation* of the agreement is irrelevant (otherwise, it would be easy to avoid the application of antitrust laws)
- the decisive factor is where the agreement *is implemented* (*hic:* the wood pulp producers had *sold directly* to purchasers established in the Community
  ⇢ they competed among each other in order to win orders from such costumers, so that concerted action referred to price restricted such competition)
- **BUT:** non-interference with the jurisdiction of other States (Webb Pomerene Act)? No: exempts cartels from the Sherman Act, but does not oblige to conclude such agreements

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IV. 形篇 – Tactical Dispositions

3. The “qualified effects”-doctrine: the *Intel*-case

- Intel had been sanctioned by the Commission for
  - awarding rebates to three original equipment manufacturers (OEM), conditioned on them purchasing all or almost their x86 CPUs from Intel
  - making payments to a retail seller conditioned on the latter selling exclusively computers containing Intel’s x86 CPUs;
  - and by making payments to OEMs conditioned on them postponing or cancelling the launch of computers with products based on CPUs manufactured by a competitor (AMD) and/or putting restrictions on the distribution of such products
- the Commission did not analyse its own jurisdiction
- Intel challenged the Decision, among other reasons, for a lack of jurisdiction of the Commission with regard to the so-called “Lenovo agreements”, which had been concluded by a US and a Chinese company and they referred to CPUs that had been manufactured and sold outside the territory of the EU and were to be incorporated into computers manufactured in China

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IV. 形篇 – Tactical Dispositions

3. The “qualified effects”-doctrine: the *Intel*-case (II)

- in first instance, the GC applied the “qualified effects”-test
  - <u>foreseeable effects</u>
    although the effects have to be *foreseeable*, they need not be *actual* (potential is enough)
  - <u>direct effects</u>
    despite the fact that the computers were not sold directly in the EEA, there was a direct effect (postponement of the launch of computers with CPU’s manufactured by Intel’s main competitor in the Common Market)
  - <u>substantial effects</u>
    the agreements formed part or a “single and continuous infringement”, so the effects are substantial even if, viewed in isolation, each conduct might not be liable to produce such substantial effect
- it also applied (but only for the sake of completeness) the “implementation”-test (implementation by Intel’s customers)

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IV. 形篇 – Tactical Dispositions

3. The “qualified effects”-doctrine: the *Intel*-case (and III)

- on appeal, the CJEU upheld all and every single one of the arguments
  - the readiness with which it accepted the “effects”-doctrine is surprising (Brexit?)
  - “The qualified effects test pursues the same objective [as the implementation test], namely preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market”
  - the ”qualified effects”-test is an *alternative* to the “implementation”-test
    - ⇢ even if the GC had erred when applying the implementation test, the complaint could not lead to the judgment’s being set aside (for the sake of completeness only)

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Annex III

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Freedoms of the Air and EU ASAs

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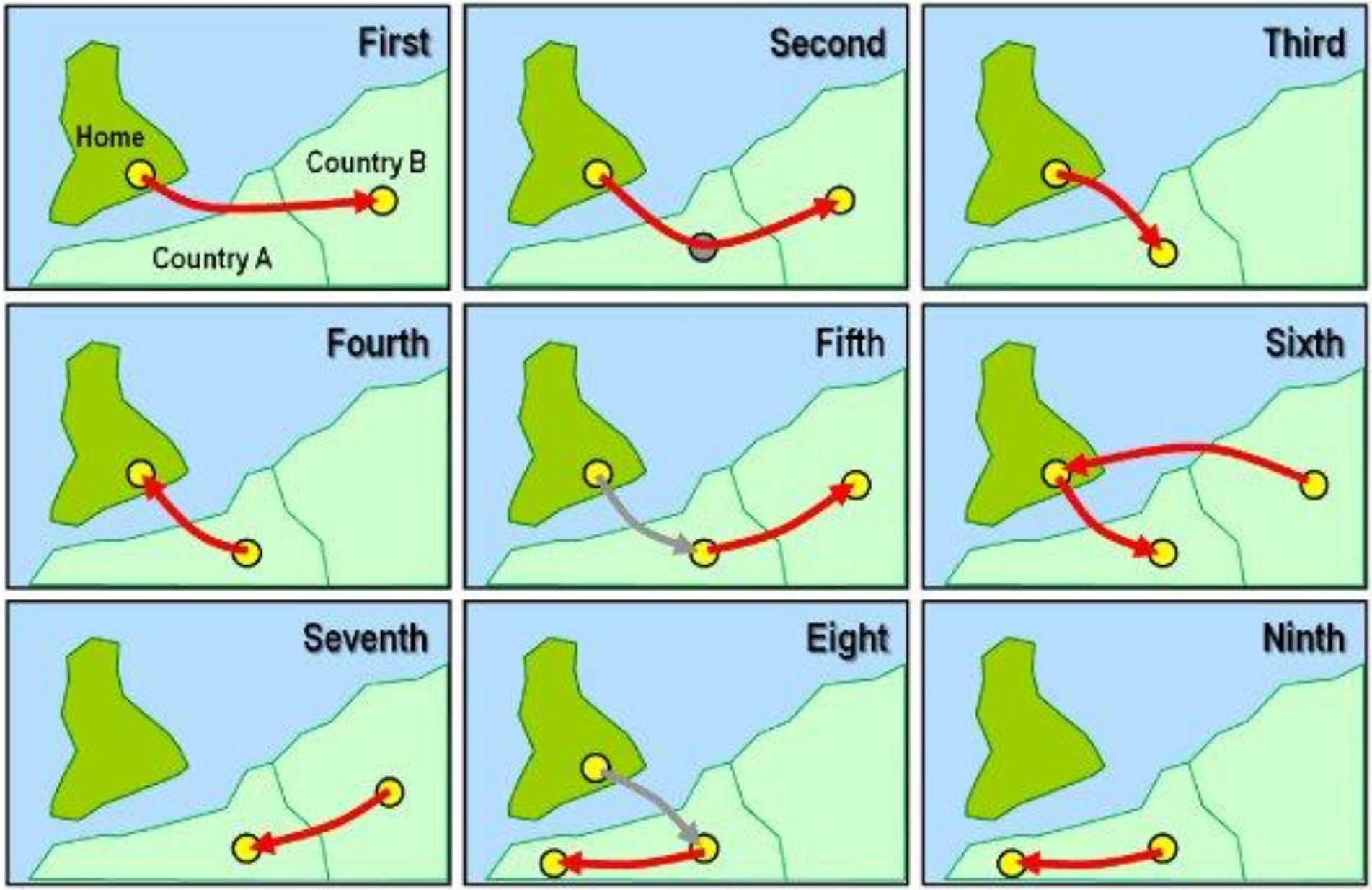

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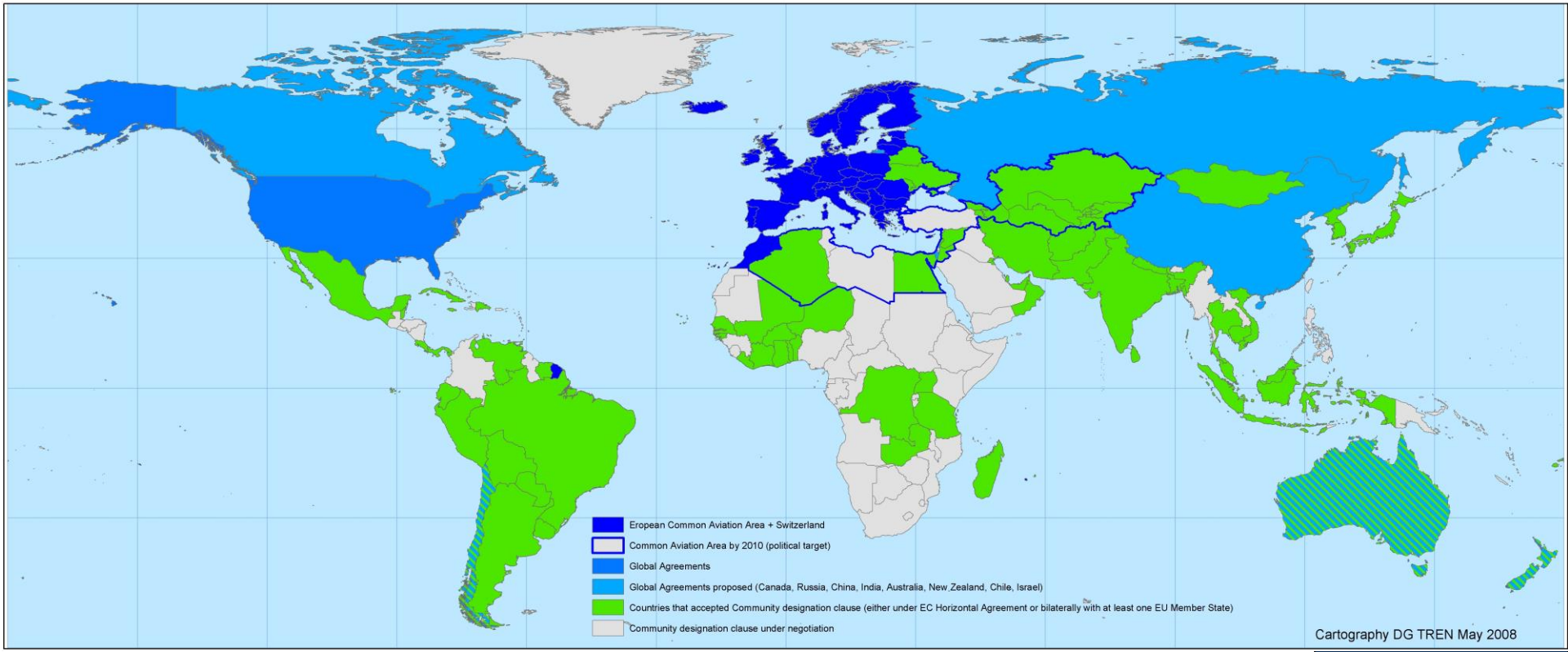
European Community Aviation Agreements



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