The International Civil Aviation Organization Is the Appropriate Jurisdiction to Settle Hushkit Dispute between the United States and the European Union

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I. Introduction

On March 14, 2000, the United States filed a complaint with the International Civil Aviation Organization (ICAO) against the nations that make up the European Union (EU) over an EU regulation that prohibits the introduction of aircraft fitted with hushkits into Europe after May 2000. The U.S. alleges that the EU’s regulation is discriminatory against non-EU countries. The U.S. further alleges that the EU did not fully evaluate the impact the regulation would have on the environment, nor its effect on aircraft manufacturers and operators. Finally, the U.S. alleges that the EU’s regulation does not focus on noise reduction as the regulation’s preamble asserts.

The EU’s answer to the U.S. complaint rejects the ICAO as the forum for the arbitration of this dispute. The EU’s answer goes on to assert that the U.S. has failed to adequately negotiate with the EU over this dispute and has failed to pursue avenues for dispute resolution outside the ICAO (such as the European Court of Justice). The EU’s answer further asserts that the United States’ requested remedy falls outside the ICAO’s authority. The U.S.

1. Press Release, RAPID, Actions Against Noise Nuisance In the Airports: The EU Deeply Regrets the US Decision to File Article 84 Action With ICAO (Mar. 15, 2000) (on file with author) [hereinafter Actions Against Noise Nuisance].
3. *Id.* at 1.
4. *Id.* at 1.
6. *Id.* at 2.
countered by stating that the EU’s answer to its complaint was “a weak attempt to delay the inevitable.”

What follows is a review of the ICAO Convention on noise reduction; the disputed EU regulation; the effects this regulation could have on U.S. aircraft manufacturers and operators; and a detailed look at the three-part charge the EU made in answer to the United States’ complaint. This review will demonstrate three things. First, the U.S. has attempted to negotiate a settlement but has met only resistance from the EU. Second, any attempt to resolve this dispute in the European Court of Justice would only lead to further delays. Lastly, the ICAO has jurisdiction and is the fairest tribunal in which to arbitrate a resolution to this dispute.

II. The Regulations and Its Effects

This dispute centers on the way the EU attempted to codify the intent of the ICAO Convention on aircraft noise reduction (known as Annex 16 to the Convention on International Civil Aviation). The disputed EU regulation is Council Regulation (EC) No. 925/1999 of 29 April 1999. To determine the best forum for settling this dispute, one must look closely at the ICAO noise standards and recommended practices, Council Regulation (EC) No. 925/1999, and the effects the Council Regulation would have on the U.S.

A. ICAO Convention on Aircraft Noise Reduction

With the advent of jet aircraft and the resulting rapid increase in air traffic, airport noise became a concern for all nations enjoying the expansion of air travel. The nations experiencing this increase in aircraft noise met to determine how to address this new byproduct of progress. This international conference, held in London in November 1966, was known as the International Conference on the Reduction of Noise and Disturbance Caused by Civil Aircraft (commonly referred to as the London Noise

The London Noise Conference was not an ICAO conference, but did make conclusions about the problem of aircraft noise that were introduced to the ICAO at the Fifth Air Navigation Conference of the ICAO held in Montreal in November 1967. The ICAO adopted a resolution to address aircraft noise in 1968 at the Sixteenth Session of the Assembly in Buenos Aires, entitled “A16-3: Aircraft Noise in the Vicinity of Airports.” The resolution identified the problems and created a framework for the ICAO to address those problems. In response to the direction of Resolution A16-3, the ICAO convened its first meeting on Aircraft Noise in the Vicinity of Aerodromes in Montreal in 1969. This meeting created the International Standards and Recommended Practices for Aircraft Noise published in Annex 16 To The Convention on International Civil Aviation (CICA), entitled Environmental Protection. Annex 16 contains two volumes, with volume one containing the provisions dealing with aircraft noise and volume two containing the provisions dealing with aircraft engine emissions. Annex 16 established the standards and recommended procedures for all contracting states to follow.

11. Int’l Civil Aviation Org., supra note 8, at v.
12. Id.
13. Id.
14. The relevant parts of Resolution A16-3 are:
   Whereas the problem of aircraft noise is so serious in the vicinity of many of the world’s airports that public reaction is mounting to a degree that gives cause for great concern and requires urgent solution;
   Whereas the noise that concerns the public and civil aviation today is being caused by increase in traffic of existing aircraft;
   Whereas the introduction of future aircraft types could increase and aggravate this noise unless action is taken to alleviate the situation;

   THE ASSEMBLY RESOLVES to instruct the Council:
   1) to call an international conference within the machinery of ICAO as soon as practicable, bearing in mind the need for adequate preparation, to consider the problem of aircraft noise in the vicinity of airports;
   2) to establish international specifications and associated guidance material relating to aircraft noise;
   3) to include, in appropriate existing Annexes and other relevant ICAO documents and possibly in a separate Annex on noise, such material as the description and methods of measurement of aircraft noise and suitable limitations on the noise caused by aircraft that is of concern to communities in the vicinity of airports.

15. Id.
17. We will concern ourselves only with Volume one of Annex 16 of the Convention on International Civil Aviation (Chicago, 1944).
18. Contracting states are those nations that have signed and agreed to the CICA.
The ICAO was given authority to adopt international standards and recommended practices by Article 37 of the CICA, adopted in Chicago in 1944. The force of the standards and recommendations are defined in Annex 16. Standards are defined in Annex 16 as “[a]ny specification... which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention...” Annex 16 goes on to define a recommended practice as “[a]ny specification... which is recognized as desirable in the interest of safety... to which Contracting States will endeavour [sic] to conform in accordance with the Convention.”

In other words, Contracting States are only required to make every effort to follow recommended practices, but are required to follow the standards, unless it is impossible for them to do so. Knowing what is expected of each contracting state is important when looking at the specific provisions of Annex 16 and how each contracting state implements those provisions.

The European Council Regulation (EC) No. 925/1999 was written with the intent to enforce the standards established for subsonic jet aircraft contained in Annex 16 to the CICA, third edition (July 1993). This Chapter of Annex 16 defines what type of aircraft the standards apply to, how to measure the noise level, where to measure the noise level, the maximum noise levels, and the test procedures. The detailed method for evaluating aircraft noise defined in Chapter 3 is addressed in great detail in Appendix 19.

19. Id. The relevant parts of Article 37 of the Convention on International Civil Aviation (Chicago, 1944) are:
   Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:
   (b) Characteristics of airports and landing areas;
   (c) Rules of the air and air traffic control practices;
   (d) Licensing of operating and mechanical personnel;
   (e) Airworthiness of aircraft;
   (f) Registration and identification of aircraft;

21. Id. Int’l Civil Aviation Org., supra note 8, at vi.
22. Id. Council Regulation, supra note 9.
23. Id. Int’l Civil Aviation Org., supra note 8, at 5-8.
A closer look at how Annex 16 defines and measures aircraft noise is important, as it is one of the critical elements of this dispute.

As stated above, Chapter 3 defines the unit of measure and the maximum level of noise for each aircraft type, under certain conditions. Chapter 3 states that “[t]he noise evaluation measure shall be the effective perceived noise level in EPNdB as described in Appendix 2.” Chapter 3 also gives the maximum noise levels, at several measuring points, that an aircraft shall not exceed. This is significant to the dispute because the European Union regulation uses engine by-pass ratio as the measure for compliance with Chapter 3 standards.

The Chapter 3 standards pertain to aircraft applying for airworthiness certificates, which are required before any aircraft design can carry passengers. Airworthiness certification is also required when an aircraft undergoes certain types of modification. One such modification is a new or modified engine design added to an existing aircraft design. In order to meet the Chapter 3 standards, many older aircraft designs, such as the Boeing 707, 727, and McDonnell Douglas DC 8 and DC 9 aircraft, were either re-engined or modified with hushkits. The U.S. Federal Aviation Administration (FAA) certified these aircraft as meeting the Chapter 3 standards. Appendix 2 of Annex 16 to the CICA notes that “[t]he instructions and procedures given in the method are clearly delineated to ensure uniformity during compliance tests, and to permit comparison between tests of various types of aircraft conducted in various geographical locations.” Therefore, since the FAA followed the instructions and procedures delineated in Annex 16, all contracting states should recognize those results and not discriminate against those aircraft. To understand how the EU regulation could discriminate against American manufacturers, and aircraft operators, one must fully understand the regulation itself.

24. Id. at 61-92.
25. Id. at 5.
26. Id. at 6.
27. Council Regulation, supra note 9, at 2.
28. Int’l Civil Aviation Org., supra note 8, at 5.
30. Actions Against Noise Nuisance, supra note 1.
31. Id.
32. Int’l Civil Aviation Org., supra note 8, at 61.
B. The European Union Regulation

The dispute between the U.S. and the EU centers on the effect the European Council Regulation (EC) No. 925/1999 has on American aircraft manufacturers and operators. While the stated purpose of the regulation is to reduce aircraft noise around airports, the effects of its provisions are actually targeted at non-EU members and will do little to reduce aircraft noise within Europe.

European Council Regulation (EC) No. 925/1999 begins by defining and limiting the types of aircraft it is applicable to. EC Regulation No. 925/1999 states that it applies to "the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and recertificated as meeting the standards of volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993)."3 In other words, this regulation does not apply to aircraft that were designed and originally certified to meet CICA Annex 16 standards. However, it does apply to aircraft that were designed and certified under previous standards and subsequently modified to meet the newer and tougher standards. The regulation goes on to state the background facts that established the need for this new legislation.

The background portion of the regulation begins by outlining the worldwide effect air travel has had and how the transportation policy of the EU directs them to address those effects.4 Next, the factual framework explains that the people within the EU should not be subjected to noise levels that are detrimental to their health or life, and then identifies older aircraft that have been modified as being both significantly louder than newer aircraft and the cause for

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3. Council Regulation, supra note 9, at 1.
4. The relevant portions of the Council Regulation (EC) No. 925/1999 are:

   Acting in accordance with the procedure referred to in Article 189c of the Treaty(3),
   (1) Whereas one of the key objectives of the common transport policy is sustainable mobility whereas such a policy can be defined as a global approach which aims at ensuring both the effective functioning of the Community's transport systems and the protection of the environment; whereas it is appropriate to take technical measures which contribute to the achievement of sustainable mobility;
   (2) Whereas the Commission communication on the future development of the common transport policy: a global framework to the construction of a Community framework for sustainable mobility explicitly refers to the introduction of a non-addition rule for the noisiest aeroplanes. . .

Id.
most of the detrimental aircraft noise.\textsuperscript{35} The regulation explains how the rule prohibiting the introduction of additional modified aircraft maintains the current status quo of aircraft noise, and that national borders within the European Union prevent the European Council from taking further steps to reduce aircraft noise.\textsuperscript{36} The final portion of the framework for this regulation states that in order to maintain fair competition, the regulation must apply to non-EU countries flying aircraft into the EU, but it also recognizes that this regulation can not affect aircraft operated outside the

\begin{quote}
35. The relevant portions of the Council Regulation (EC) No. 925/1999 are:

(3) Whereas the fifth action programme of 1992 on the environment, the general approach of which was endorsed by the Council and the representatives of the Governments of the Member States, meeting within the Council, in their resolution of 1 February 1993(4) envisages further legislative measures aimed at reducing noise emissions from aeroplanes; whereas the said programme lays down the objective that no person should be exposed to noise levels which endanger health and quality of life;

(4) Whereas the growth in air transport activities at Community airports is increasingly subject to environmental constraints; whereas the operation of less noisy aeroplanes at these airports can contribute to a better use of available airport capacity;

(5) Whereas older types of aeroplanes modified to improve their noise certification level have a noise performance which is significantly worse, mass for mass, than that of modern types of aeroplanes originally certificated to meet the standards of Volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993); whereas such modifications prolong the life of an aeroplane that would normally have been retired; whereas such modifications tend to worsen the gaseous emissions performance and fuel burn of earlier technology aero engines; whereas aeroplanes may be re-engined to achieve a noise performance comparable to that of those originally certificated to meet Chapter 3 requirements. . .

Id.

36. The relevant portions of the Council Regulation (EC) No. 925/1999 are:

(6) Whereas a rule which prohibits the addition of those older modified types of aeroplanes to Member States’ registers as from 1 April 1999 can be considered as a protective measure aimed at preventing a deterioration of the noise situation around Community airports as well as improving the situation regarding fuel burn and gaseous emissions;

(7) Whereas in a Community without internal frontiers it is appropriate to exclude from this non-addition rule aeroplanes entered in any Member State’s register prior to 1 April 1999;

(8) Whereas, in view of existing Community legislation on aeroplane noise, the present initiative needs to be taken at Community level by binding Community rules;

(9) Whereas a non-addition rule, and a non-operation rule with an appropriate transition period, combines technical feasibility with environmental benefits without imposing an undue economic burden. . .

Id. at 1-2.
\end{quote}
This factual framework laid out in EC Regulation No. 925/1999 establishes the political as well as geographical restraints imposed upon the European Council when they drafted the regulation.

With the framework in place, EC Regulation No. 925/1999 then defines its objective; which aircraft are covered; how the aircraft will be limited; and the exceptions to those limitations. EC Regulation No. 925/1999 states that its objective “is to lay down rules to prevent deteriorations in the overall noise impact in the Community of recertificated civil subsonic jet aeroplanes while at the same time limiting other environmental damage.” The Regulation defines recertificated civil subsonic jet aeroplanes as aircraft originally certified under the older standards of Annex 16 to the CICA (known as chapter 2) and modified to meet the Chapter 3 standards of Annex 16. The regulation prohibits the

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37. The relevant portions of the Council Regulation (EC) No. 925/1999 are: 
(10) Whereas it is necessary to minimise [sic] possible distortions of competition by establishing equivalent requirements applicable to aeroplanes registered in third countries; whereas, since the Community has no competence over third-country registers, that objective can be achieved only by restricting the operation of non-complying aeroplanes registered as from 1 April 1999 in third countries; whereas the date for introducing such restrictions should take account of the final cut-off date for the operation of Chapter 2 aeroplanes as provided for in Council Directive 92/14/EEC of 2 March 1992 on the limitation of the operation of aeroplanes covered by Volume I, Part II, Chapter 2 of Annex 16 to the Convention on International Civil Aviation, second edition 1998(1), as well as the extent of the non-addition provisions for Chapter 2 aeroplanes as laid down in Council Directive 89/629/EEC of 4 December 1989 on the limitation of noise emission from civil subsonic jet aeroplanes(2); 
(11) Whereas, in order to ensure equal treatment of aeroplanes regardless of their country of registration, non-complying aeroplanes in the registers of Member States should also be stopped from operating in accordance with the terms imposed on non-complying aeroplanes in the registers of third countries; 
(12) Whereas, given that the main objective of the measure is to limit noise at Community airports, aeroplanes may be exempted from the non-addition and non-operation rules when they are not operated in the Community territory; whereas, in order for these rules to produce their full environmental benefits, temporary exemptions may be possible only for operations of an exceptional nature; 
(13) Whereas the provisions of this Regulation shall not be implemented in the overseas departments referred to in Article 227(2) of the Treaty, in view of their geographical location...

Id. at 2.
38. Council Regulation, supra note 9, at 2.
39. The relevant portions of the Council Regulation (EC) No. 925/1999 are: 
(2) 'recertificated civil subsonic jet aeroplane' shall mean a civil subsonic jet aeroplane initially certificated to Chapter 2 or equivalent standards, or initially not noise-certificated which has been modified to meet Chapter 3
registration of recertificated civil subsonic jet aircraft after 1 April 1999, and any aircraft not so registered cannot operate within the EU after 1 April 2002. The regulation also prohibits non-EU members from operating recertificated civil subsonic jet aircraft within the EU after 1 April 2002 unless they were registered in the non-EU nation prior to 1 April 1999 and operated within the EU from 1 April 1995 to 1 April 1999. Finally, the regulation has a provision to allow EU nations the power to grant exceptions to this regulation for certain specified reasons stated in the regulation. Because of the dispute with the United States over this regulation, the EU changed the effective date of EC Regulation No. 925/1999 from 1 April 1999 to 4 May 2000.

standards either directly through technical measures or indirectly through operational restrictions; civil subsonic jet aeroplanes which initially could only be dual-certificated to the standards of Chapter 3 by means of weight restrictions, have to be considered as recertificated aeroplanes; civil subsonic jet aeroplanes which have been modified to meet Chapter 3 standards by being completely re-engined [sic] with engines having a bypass ratio of three or more are not to be considered as recertificated aeroplanes;

(3) ‘Chapter 2’ and ‘Chapter 3’ shall mean the noise standards as defined in Volume I, Part II, Chapter 2 and Chapter 3 respectively of Annex 16 to the Convention on International Civil Aviation, third edition (July 1993).

Id. at 2-3.

40. The relevant portions of the Council Regulation (EC) No. 925/1999 are:

1. Recertificated civil subsonic jet aeroplanes shall not be registered in the national register of a Member state as from 1 April 1999.
2. Paragraph 1 shall not affect civil subsonic jet aeroplanes which were already on the register of any Member State on 1 April 1999 and have been registered in the Community ever since.
3. Recertificated civil subsonic jet aeroplanes which are on the registers of Member States may not be operated at airports in the territory of the Community as from 1 April 2002 unless they have been operated in that territory before 1 April 1999.

Id. at 3.

41. The relevant portions of the Council Regulation (EC) No. 925/1999 are:

3. Notwithstanding the provisions of Directive 92/14/EEC and in particular Article 2(2) thereof, as from 1 April 2002 recertificated civil subsonic jet aeroplanes registered in a third country shall not be allowed to operate at airports in the territory of the Community unless the operator of such aeroplanes can prove that they were on the register of that third country on 1 April 1999 and prior to that date have been operated, between 1 April 1995 and 1 April 1999, into the territory of the Community.

Id. at 42.

42. Id.

43. Andy Chuter, EU Seeks To Buy Time In USA Hushkit Fight, FLIGHT INTERNATIONAL, Sept. 5, 2000.
While the stated purpose of EC Regulation No. 925/1999 is to reduce the effects of noise that is detrimental to the health and life of the citizens of EU members, it fails to meet that lofty purpose. The regulation does not eliminate the older modified aircraft; it only prevents more of them from being introduced into the EU. Therefore, the only way for there to be a reduction of noise caused by these older aircraft is for these aircraft to lose their economic viability in that market and to be retired. Since all of these older modified aircraft were designed and built in the same era, they will lose their economic viability at the same time in a particular market regardless of which country operates them now. EC Regulation No. 925/1999 states that while these aircraft do meet the noise standards in Annex 16 to the CICA on account of their modifications, it qualifies them by stating that “mass for mass” these modified aircraft have a “noise performance which is significantly worse... than that of modern types of aeroplanes...”44

The regulation further deviates from Chapter 3 of Annex 16 by using an engine by-pass ratio of 3 instead of the noise limit measure of EPNdB as defined in Appendix 2 of Annex 16.45 By-pass ratio is the ratio of the volume of air that enters a jet engine and goes around (by-passes) the combustion chamber over the volume of air that goes through the thrust producing combustion chamber.46 This change has the effect of altering the standard for meeting the noise limits from a performance-based standard to a design-based standard that was not agreed to by all the contracting states to the CICA.47 This design-based standard for measuring aircraft noise has a disproportionate and discriminatory effect on American manufacturers and aircraft operators.

C. The Effect Council Regulation (EC) No. 925/1999 Has on United States Manufacturers and Aircraft Operators

EC Regulation No. 925/1999 has a broad and far reaching effect on American aircraft manufacturers and operators. This regulation has already affected the value of aircraft fleets owned by U.S. airlines and aircraft lessors. The regulation has abrogated the

44. Council Regulation, supra note 9, at 1.
45. Id. at 2.
46. European Union Ban on Aircraft “Hush Kits” Before the House Transpor.
    Statement of Ambassador David L. Aaron on Behalf of the U.S. Department of
    Commerce U.S. Department of State Federal Aviation Administration)
    [hereinafter European Union Ban Statement].
47. United States Believes Hushkit Ban is Unsound Policy, supra note 2, at 1.
ICAO noise standard that aircraft manufacturers and airlines relied upon in making long-term investments. Finally, it arbitrarily discriminates against aircraft operators outside the EU.

Aircraft operators invest millions of dollars in aircraft that have a useful life of thirty years and require about twenty-two of those years to pay them off.\textsuperscript{48} Thus aircraft operators must look far into the future when making investment decisions. While the full effect of the regulation will not take place until 2002, a couple of years are an exceedingly short period of time when you are planning fleet compositions ten to twenty years into the future. The regulation is affecting the aircraft operators' ability to obtain financing for hushkits or engines that do not have a 3-to-1 by-pass ratio required by the EC regulation. An example of this is Omega Air, which has not been able to secure financing for over $1 billion worth of Pratt & Whitney engines.\textsuperscript{49} Pratt & Whitney has also experienced canceled orders for hushkit and engine spare parts estimated at $515 million.\textsuperscript{50} As of the end of 1998 there were 1,850 aircraft in the American aircraft fleet that were or could have been modified with hushkits or replacement engines whose total asset value was approximately $10 billion.\textsuperscript{51} It has been estimated that the value of these aircraft has decreased by five percent because of the EC regulation.\textsuperscript{52} That loss in value has affected the balance sheets of aircraft operators, hindering their ability to obtain capital for current and future operations.\textsuperscript{53} The EU's unilateral change in aircraft noise standards has affected the aircraft industry as a whole and in particular the American aircraft industry.

The aviation industry is a global industry affecting the economy, industry and people of every nation. Because of this global impact, the United Nations established the ICAO to set standards and procedures that are universal. Without ICAO standards and procedures, there would be far too many regulations making it economically impossible for aircraft operators to operate throughout the world. This EC regulation is a prime example of what nationalistic regulations can do to disrupt the international aircraft industry.

\textsuperscript{49} European Union Ban Statement, supra note 46, at 4.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.}
The EC regulation establishes a standard different from the ICAO standard without evaluating the new standards impact on the environment or aircraft operators. The requirement that aircraft operated within the EU must use engines with a 3-to-1 by-pass ratio is discriminatory against non-EU aircraft manufacturers. Most of the aircraft that do not meet this standard are aircraft that were manufactured in the U.S., such as Boeing 727s, 737s, 747s, and DC9s. It also affects American manufacturers of hushkits such as FedEx, Nordam, AvAero and ABS. Interestingly enough, the 3-to-1 by-pass ratio standard set by the EC regulation allows the operation of the Rolls-Royce-manufactured Tay 650 that has a by-pass ratio of 3.1-to-1. Rolls-Royce is a corporation headquartered in the EU. While this regulation may have an effect on noise pollution, its main purpose is to increase the value of EU manufactured aircraft and their components at the expense of their American competitors.

III. Avenues to Resolution

Since there is no question that the EU regulation in dispute will have a negative impact on American aircraft operators and American manufacturers, the next question to be answered is how the United States and the EU should go about resolving this dispute. The United States believes that the ICAO, under Article 84 of the Chicago Convention, is the proper forum, and has filed a complaint with the ICAO. The EU believes that negotiations or use of a regional court, like the European Court of Justice, should be given a chance before the dispute is sent to the ICAO for settlement. The EU also believes that the ICAO complaint filed by the U.S. requests relief that is outside the ICAO's jurisdiction under Article 84 of the Chicago Convention.

As will be shown below, the U.S. has assessed the EU's suggested avenues to a resolution in this dispute and correctly determined that the ICAO is the proper forum for a fair and just settlement. The U.S. has attempted to negotiate with the EU, but

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54. Id. at 2.
56. Id. at 1.
58. See European Union Rejects ICAO as Forum to Resolve Noise Dispute, supra note 5.
59. Id.
has met only delay and resistance from the EU. The U.S. has also correctly determined that the European Court of Justice would not be a proper forum for resolution by looking at how a European corporation was treated by a European court involving the same issues. Finally, a look at Article 84 of the Chicago Convention and a previous case establishing ICAO jurisdiction will show that the U.S. correctly concluded that the ICAO is the proper forum for a fair and just resolution of this dispute.

A. Negotiations

As with any concern or dispute between two nations, the U.S. began to negotiate with the EU and its member states early in the dispute.60 In answer to U.S. concerns about the EC Regulation, the EU made unrealistic counter offers and continually stalled to gain leverage.61 The EU also used language technicalities to claim to the ICAO that the U.S. had not properly negotiated as required under Article 84 of the ICAO Convention.62

The European Parliament started work on EC Regulation No. 925/1999 in 1998 and approved it on February 10, 1999.63 This was an accelerated process for the European Parliament.64 As early as September 1998 U.S. Cabinet members met with their EU counterparts to discuss the regulation’s ramifications.65 These Cabinet members, as well as U.S. ambassadors, requested that the EU not ratify the proposed regulation until further discussions could be held.66 In February 1999 the U.S. Transportation Secretary sent a letter to the EC Transportation Commissioner addressing U.S. concerns.67 These are just a few examples of the United States’

61. See European Union Rejects ICAO as Forum to Resolve Noise Dispute, supra note 5.
63. U.S. Trade Agreement Statement, supra note 60, at 5.
64. Id.
67. European Union Rejects ICAO as Forum to Resolve Noise Dispute, supra note 5.
early and conscientious efforts to avert the dispute through
negotiations.

While the EU has responded to U.S. concerns about its
regulation, these responses have not adequately addressed those
concerns. On April 29, 1999, the EU Council adopted EC
Regulation No. 925/1999, making it law. In response to the U.S.
request that the EU not ratify the regulation, the EU postponed the
implementation of the regulation until May 2000. This action by
the EU did not address a major U.S. concern. The delayed
implementation of the regulation by one year did not eliminate the
detrimental effect the regulation has on the market value of aircraft
covered by the regulation. The regulation was still law and aircraft
operators still had to factor in the regulation's effect on the value of
their long-term investments in aircraft.

The EU then proposed that if the U.S. would agree on
common objectives for the upcoming ICAO conference on future
aircraft noise standards, the EU would suspend the regulation. The U.S.
could not agree to the EU objectives because those
objectives basically adopted the disputed regulations objectives,
which were objectionable to the U.S. to begin with. In addition,
the suspension of the regulation would not give the relief the U.S.
requested because the regulation would still be on the books, thus
still threatening aircraft market value and aircraft operators' investments. Because of the long-term investment required to buy
and operate aircraft, it would take a complete repeal of the
regulation to fully alleviate the regulation's effect.

Finally, the EU claims that the U.S. did not properly negotiate
before filing a complaint with the ICAO. The EU claims that the
negotiations had not addressed the disputed regulations compliance
with the current ICAO noise standards as required by Article 84. The
EU contends that the negotiations up to this point only focused
on U.S. economic concerns. In fact, the U.S. has addressed its
concerns about the regulation going beyond the ICAO standards
on several occasions during the negotiations.
The U.S. has attempted to negotiate in good faith with the EU but has encountered only resistance and delay from the EU. The EU has stalled the negotiations and delayed ICAO action over this dispute in order to influence the agenda for upcoming conferences on new ICAO aircraft noise standards. In essence, the EU has not negotiated in good faith up to this point and will not unless pushed by another influential international entity.

**B. European Court of Justice as Forum for Resolution**

The EU asserts that the U.S. must use avenues to resolution outside the ICAO before going to the ICAO for resolution. They insist that the U.S. could seek a resolution through a European court such as the European Court of Justice. The EU holds out as an example the case of Omega Air, an Ireland-based hushkit installer. While Omega Air’s case did get referred to the European Court of Justice, the Chairman of the company stated that “for the EU to use my court case against [the U.S.] as an example of how to resolve this issue is laughable.” The Omega Air Chairman went on to say that “[t]he Commission made every attempt to kill my court case before it got to the courts, and even disputed the judgments of both the Irish and British legal systems. . . .”

A look at the British opinion that referred the Omega Air case to the European Court of Justice will be instructive as to how well the U.S. would fair in the same forum. The case involves complaints by Omega Air about EC Regulation 925/1999 that are similar to those filed by the U.S. with the ICAO. Omega Air claimed that “[t]he effect of the art. 2 definition [of Regulation

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76. *European Union Rejects ICAO as Forum to Resolve Noise Dispute*, supra note 5.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *European Union Rejects ICAO as Forum to Resolve Noise Dispute*, supra note 5.
82. The relief that Omega Air requested was stated in the opinion as follows: Pursuant to Permission granted by Mr. Justice Maurice Kay on 15 June 1999, the applicant seeks a reference to the European Court of Justice for annulment of Council reg EC No 925/1999 insofar as its purpose to extend its restrictions to aeroplanes completely re-engined, with engines having a by-pass ratio (bpr) of less than 3 (thus catching Omega’s aeroplanes) as invalid.

*R v Sec’y of State for the Env’t, Transp. and Regions, ex parte Omega Air Ltd (Queen’s Bench Division Nov. 25, 1999)*, at 1.
925/1999] is to prevent the applicant’s re-engined 707s from being operated in the EU and thus making them commercially unviable for potential customers.\textsuperscript{83} Omega Air claimed five grounds for the relief it requested, most of which were rejected.\textsuperscript{84}

The first claim contends that the EC Regulation 925/1999 does not state the reasons why it was drafted the way it was.\textsuperscript{85} Specifically, Omega Air contends that the regulation did not give a reason for adopting a by-pass ratio of 3.0 as the standard instead of the decibel standard established by the ICAO.\textsuperscript{86} On this ground, the Court states that in its “judgment, there is plainly a strong argument that the Regulation offends art. 253” of the EC treaty.\textsuperscript{87} While the Court referred Omega Air’s complaint to the European Court of Justice on this ground, it would not necessarily be a ground that the U.S. could use. This ground rests on a requirement of a treaty (the EC Treaty) that the U.S. is not a party to. Therefore, the U.S. may have a difficult time invoking the same provision that Omega Air, a European based corporation, invoked.

The second ground rested on the principle that the regulation is discriminatory.\textsuperscript{88} Omega Air claims that the regulation is discriminatory because it restricts them from re-engining aircraft with engines that would be permitted by the regulation if they were on the aircraft when it was new.\textsuperscript{89} The court rejected this argument on the grounds that it is far different to require aircraft operators to remove engines at an extreme expense than it is to prevent the introduction of new engines.\textsuperscript{90} There is nothing in the opinion to indicate that the U.S. would fare any better on this argument in a European court.

The Court also rejected Omega Air’s third ground. It was based on the EC treaty’s requirement that any EC action “shall not go beyond what is necessary to achieve the objectives of this Treaty.”\textsuperscript{91} The court stated that without knowing the reason for the regulation (which was Omega Air’s first ground) the court could

\textsuperscript{83.} Id. at 2.
\textsuperscript{84.} Omega Air initially filed six grounds but withdrew the sixth ground during the trial. See Id.
\textsuperscript{85.} The treaty establishing the EU states that “[r]egulations . . . adopted jointly by the European Parliament and the Council shall state the reasons on which they are based.” Id. at 5.
\textsuperscript{86.} Id. at 10.
\textsuperscript{87.} Id.
\textsuperscript{88.} See id.
\textsuperscript{89.} Id. at 10.
\textsuperscript{90.} Id. at 11.
\textsuperscript{91.} Id.
not determine if the regulation was proportional to its purpose.92 As stated previously, the U.S. would have an even more difficult time, than a European corporation would, of winning this argument in a European court.

The rejection of the fourth ground is very instructive of how difficult it would be for a non-EU member to win such a case in an EU court. Omega Air’s fourth ground invoked the principle of legitimate expectation.93 This ground was based on Omega Air’s expectation that the EU would follow the ICAO noise standards, and that Omega Air invested vast sums on that expectation. This argument was rejected by the court because the EU is not a party to the ICAO convention; therefore, it is not bound by ICAO standards and Omega Air should not have relied on the fact that they would.94 The court held this even though all EU members are signatories to the ICAO Convention. In other words, each EU member can be held to the ICAO standards individually, but collectively as the EU they cannot. Obviously the U.S. would fare no better in a European court than Omega Air did.

The Court agreed to forward Omega Air’s fifth ground based on the World Trade Organization (WTO) because of conflicting interpretation of the WTO treaty and its predecessor, the General Agreement on Tariffs and Trade.95 However, there is nothing in this court’s opinion to indicate that the European Court of Justice would rule in Omega Air’s or the United States’ favor on this issue.

While Omega Air is going on to the European Court of Justice to try and gain relief from EC Regulation 925/1999, it is on only two weak grounds. While the U.S. may have been able to argue other grounds to the European Court of Justice, it is clear from the Omega Air case that the EU courts will use every technicality to advance their agenda and uphold this regulation.

C. Article 84 of the ICAO Convention

As demonstrated above, the U.S. has not been able to get their concerns about EC Regulation 925/1999 alleviated through high level negotiations and would not be able to get a fair hearing in a European court. Therefore, the U.S. properly turned to the ICAO,
the organization responsible for establishing international aviation standards. Article 84 is the provision of the ICAO Convention that gives the ICAO jurisdiction over certain disputes between contracting states. This provision has been upheld by the International Court of Justice in cases that established the jurisdiction of the ICAO Council in Article 84 disputes, one of which will be discussed below.96

1. Article 84. Article 84 establishes the power of the ICAO to settle disputes between multiple contracting states.98 While in the present dispute the EU is not a contracting state to the ICAO, its members are. Thus, the U.S. had to name each EU member state and not the EU in its Article 84 complaint to the ICAO.99 The Article only gives power to the ICAO Council to settle issues involving "the interpretation or application of [the] Convention and its Annexes."100 In the present case the dispute is over how the European contracting states have applied Annex 16 to the ICAO Convention. Article 84 has an additional constraint that the ICAO cannot intervene until the parties to the dispute have attempted to negotiate a settlement. As demonstrated above, this requirement has been met in the present case.

With all of the above conditions met, one or more of the parties to the dispute can ask the ICAO Council to settle the dispute. The ICAO Council is made up of 33 of the 185 ICAO

96. "In the history of ICAO, there have been only 4 other Article 84 actions filed—two between India and Pakistan, one between the UK and Spain regarding Gibraltar, and one between Cuba and the US." Testimony Development of Reduced-Noise Aircraft Before the House Transportation and Infrastructure Committee Aviation Subcommittee, 106th Cong. (2000) (Prepared Testimony of Ambassador Edward W. Stimpson U.S. Representative on the Council, International Civil Aviation Organization), at 3.

97. Below is the full text of Article 84 of the ICAO Convention:

If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.

Int'l Civil Aviation Org., supra note 19.

98. Id.

99. EU/United States: Effort to Block Hushkits Appeal Fails, supra note 62.

100. Int'l Civil Aviation Org., supra note 19.
If the ICAO Council cannot resolve the dispute, the issue goes before the entire 185 ICAO contracting states for settlement. Another condition that Article 84 imposes is that “[n]o member of the Council shall vote in the consideration by the Council of any dispute to which it is a party.” This condition could affect the ICAO Council outcome because neither the U.S. nor any European member of the ICAO Council can vote on the resolution of the dispute. The Article goes on to establish a procedure to appeal any ICAO decision.

One of the EU’s answers to the U.S. Article 84 complaint was that it asked for a remedy that was beyond the scope of Article 84. While the Article does state that it deals with disputes concerning interpretation and application, it does not delineate any specific remedies that the ICAO Council can use. The lack of specific remedies does not put the elimination of the disputed regulation beyond the scope of the Article. Implicit in the right of the ICAO Council to settle disputes involving the application of ICAO Annexes is the right of the ICAO Council to change or invalidate any regulation improperly applying an Annex. Therefore, it is not beyond the scope of the ICAO Council to instruct its European contracting states to repeal EC Regulation No. 925/1999 as the U.S. has requested.

2. India v. Pakistan. The first case that established ICAO Council jurisdiction over a dispute involving the ICAO Convention and its Annexes was a dispute between India and Pakistan. This dispute arose out of a war between these two nations and India’s subsequent denial of over-flight rights to Pakistan. India claimed

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102. Id.
103. Int’l Civil Aviation Org., supra note 19.
104. Hills, supra note 101.
105. Int’l Civil Aviation Org., supra note 19.
107. The complaint as described in the opinion of the I.C.J.: Appeal from decisions of the Council of the International Civil Aviation Organization assuming jurisdiction in respect of an ‘Application’ and a ‘Complaint’ made to it by Pakistan concerning the suspension by India, in alleged breach of the 1944 Chicago International Civil Aviation Convention and International Air Services Transit Agreement, of flights of Pakistan civil aircraft over Indian territory—Competence of the Court to entertain this appeal—Interpretation of the jurisdictional clauses of these instruments—Jurisdiction of the Council to entertain the dispute between India and Pakistan—Question of whether this dispute involved a ‘disagreement . . . relating to the interpretation or application’ of the
that because of the war, a treaty issued under the ICAO Convention giving Pakistan permission to over-fly India was no longer in existence.\textsuperscript{108} Pakistan filed an Article 84 complaint disputing India's interpretation of the treaty.\textsuperscript{109}

The International Court of Justice (ICJ) stated that the question it was resolving in the case was whether there was an "existence of a dispute of such a character as to amount to a 'disagreement . . . relating to the interpretation or application' of the Chicago Convention . . . ."\textsuperscript{110} For if it found that there was such a dispute, then the ICAO would have jurisdiction.\textsuperscript{111} India contended that since the treaty at issue was no longer in existence the ICAO Council could not interpret the treaty; therefore, it did not have jurisdiction.\textsuperscript{112} The ICJ did not agree with India's argument because it was up to the ICAO Council to interpret the treaty to determine if it was nullified or not.\textsuperscript{113} In a vote of fourteen to two the ICJ held that the ICAO Council did have jurisdiction over the complaint.\textsuperscript{114}

In the present dispute there is no question that the regulation at issue involves the application of Annex 16 to the ICAO Convention. Therefore, as the ICJ found in the \textit{India v. Pakistan} case, the ICAO Council, through Article 84, has jurisdiction. Now it is up to the ICAO Council to hear the merits of each side's case and decide on a proper settlement to the dispute. If, after the ICAO Council issues its order, the EU believes that order is beyond the ICAO Council's scope of authority, then the EU can appeal the decision.

IV. Conclusion

As the Chairman for the Coalition for a Global Standard on Aviation Noise, former Virginia Governor, Gerald Baliles, said, "[i]t]he infamous hushkit dispute can be a footnote in history, or it can be a template for future international aviation relations. It all depends on whether we use this opportunity to settle the issues.

\textsuperscript{108} Id. at 46.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 61.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 65.
\textsuperscript{114} Id. at 70.
The ICAO process represents our best chance to do this and I believe that the chance must be seized.”¹¹⁵ The ICAO is the international organization that is charged with establishing international standards for the aviation industry. Without international standards the international aviation industry would collapse. Aviation’s unique benefit to the people of the world is its ability to seamlessly travel to anywhere in a short period of time. Without international standards seamless world travel would disappear. Unilateral and isolationist regulations, like EC Regulation No. 925/1999, must not be allowed to disrupt the seamless travel the world has come to expect. As Louise Maillett, the FAA Deputy Assistant Administrator, put it, “there is a strong temptation for governments to look for quick fixes outside of the international process. These unilateral actions open the door for balkanization of international civil aviation standards and regulations, and could destroy the very stability that has allowed the industry to thrive . . . .”¹¹⁶

The ICAO must be the organization to maintain a cohesive policy in an industry that must transcend boundaries to fully realize its potential. The U.S. has attempted to negotiate in good faith with the EU, without any progress. Any attempt to settle this dispute in a European court would only cause delay without a definitive solution to the underlying issues in this dispute. The U.S. properly chose to take this dispute to the one organization that can definitively settle this dispute and still maintain the universal standards that are required for all nations’ aviation industries to prosper.

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¹¹⁵ Graeme Osborn, The ‘Hushkit War’ Between Europe and the USA is No Nearer Compromise, FLIGHT INT’L, Dec. 12, 2000 at 45.
¹¹⁶ Id.