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REGIONAL OPEN SKIES AGREEMENTS: LAW AND PRACTICE

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A Thesis submitted to the Faculty of
Graduate Studies and Research
in partial fulfilment of the requirements of the degree of
Master of Laws

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ABSTRACT

This thesis presents an analytic review of the different definitions of "Open Skies Treaty". It mainly introduces American, Canadian and European views of Open Skies. We also propose our definition of Open Skies in a North American context including our NAFTA partner, Mexico.

Then, the thesis conducts a detailed study of the law and practice pertaining to regional Open Skies Agreements in Europe, Latin America, Australasia and in the Asia/Pacific region.

Afterwards, an analysis of the main provisions of the North American Free Trade Agreement is made with reference to air transport. Follows, an overview of the state of the Canadian air transport industry and policy.

More importantly, a complete analysis of the New Air Transport Agreement Between Canada and the United States implementing an Open Skies regime as for 1995 is made in Chapter V.

Finally, a critical analysis of this Open Skies Agreement is made and perspectives are given as to the future inclusion of Mexico, Chile and, later on, of all of Latin America.

RESUME

Ce mémoire présente une revue approfondie des nombreuses définitions du concept d' "Accord de ciel ouvert". Les visions américaines, canadiennes et européennes du concept de "ciel ouvert" y sont principalement traitées.

Puis, une étude détaillée du droit et de la pratique en matière d'accords régionaux de "ciel ouvert" est faite dans le cadre, entre-autres, de l'Europe, de l'Amérique latine, de l'Océanie et de la région Asie/Pacifique.

Par la suite, le mémoire analyse les principales dispositions de l'Accord de Libre-Echange Nord-Américain en ce qui a trait au transport aérien. Un aperçu de l'état de l'industrie du transport aérien au Canada ainsi que de la politique canadienne dans ce domaine suivent.

Plus important encore, le chapitre V est entièrement consacré à l'analyse du Nouvel Accord Bilatéral sur le Transport Aérien entre le Canada et les Etats-Unis qui institue un régime de "ciel ouvert" avec effet immédiat entre les deux pays dès 1995.

Enfin, critique est faite de cet Accord et les perspectives de la future inclusion du Mexique, du Chili et, éventuellement de toute l'Amérique latine sont abordées.

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INTRODUCTION

World's trend today is to Free Trade Agreements between neighbouring countries in order to maximize trade and to minimize governmental impediments to a free market place. This has been happening in many parts of the world, namely in Europe (European Community), in Latin America (Mercosur, Andean Pact), in North America (North American Free Trade Agreement hereinafter NAFTA), in Asia (Association of South East Asian Nations, hereinafter ASEAN) and in Oceania (Closer Economic Relations Trade Agreement between Australia and New Zealand hereinafter CER).

In this respect, it is strongly believed that air transportation between such countries must follow the commercial flow and provide much needed transportation services to the business and leisure travellers as well as cargo services in the most efficient way and at conditions set by the market forces and protected by antitrust law.

In fact, air transport has proven to be among the most important infrastructure industries of the twentieth century.[1] It is an integral part of the infrastructure essential to commerce, communications and national

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[1] **B. Stockfish, "Opening Closed Skies: the Prospects for Further Liberalization of Trade in International Air Transport Services" (1992) 57 Journal of Air Law and Commerce 599.**

Thus, the principle of sovereignty of a state over the airspace above its territory codified in the Chicago Convention[7] of 1944 has led to a system where the exchange of traffic rights between states is done on a bilateral basis via a Bilateral Air Transport Agreement. Generally, the governments involved have adopted a protectionist view based on reciprocity, equality of opportunity, equality of advantages and on strict national ownership criteria. And as O'Toole observes, yet, ironically, the airline industry, which has played such a key part in making the world smaller, remains one of the last bastions of national ownership.[8]

The coming into force of the NAFTA Agreement on January 1, 1994 for Canada, United States and Mexico will enhance the commercial exchanges and the air traffic between the three partners in such a way that the existing Bilateral Air Transport Agreements [hereinafter BATA] that are of a very restrictive nature have already became obsolete and burdensome in order to respond to consumers needs for transportation.

Considering that fact, this thesis will come to the conclusion that Canada, United States and Mexico should conclude an Open Skies Treaty with a phased-in implementation, that consecutive cabotage should be allowed, that access to the four slot-constrained airports in the United

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[7]**Convention on International Civil Aviation, 7 December 1944, Chicago, 15 UNTS 295, art.1 [hereinafter *Chicago Convention*].**

[8]**K. O'Toole, "Global Goals" (6-12 January 1993) Flight International 23.**

States[9] be ensured to both Canadian and Mexican airlines and that rules on foreign ownership of airlines should be relaxed in the three countries. Such Treaty would include both scheduled and non-scheduled air transport and the carriage of passengers, mail and/or cargo.

In fact, the Canadian Minister of Transport Doug Young made a public statement[9] to the effect that a framework Agreement to set a new round of negotiations on Open Skies between Canada and United States had been signed on December 22, 1994. Effectively, on February 24 1995, Canada and United States signed an Open Skies Agreement that entered into force immediately thus replacing the 1966 Agreement. This Agreement will liberalise to a great extent cross-border air services between the two countries.[10]

This paper intends to present a comprehensive study of the possibility for the NAFTA partners to conclude an Open Skies Treaty and will focus on the carriage of passengers on a scheduled basis. First of all, it will define the concept of Open Skies in general, it will then address the worldwide liberalization of air transport via regional groupings, more specifically in Europe, Latin America, Oceania and Asia. Afterwards, this

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[9]Namely: Chicago O'Hare, Washington National and New York's Kennedy and La Guardia. See P.S. Dempsey, "Airline Deregulation in the United States: Competition, Concentration, and Market Darwinism"(1992) vol.XVII-I Annals of Air and Space Law 199 at 207.

[10]G. Gauthier, "Cieux ouverts: c'est réglé, Plus d'obstacle à un accord Canada-E.-U. sur le transport aérien" La Presse (23 December 1994) B1.

paper will describe the North American Free Trade Area by summarizing the NAFTA Agreement and by giving the general background of the Canadian air transport industry and policy .

Then, the new air transport Agreement between Canada and United States will be analysed. Thereafter, a critic of the Agreement will be done and an overview of its perspectives in the future will be given followed by the conclusion.

II OPEN SKIES TREATY

A Definitions

1. Scope of the Regulation of Air Transport

In order to acknowledge the seriousness of the hurdles encountered through negotiations for an Open Skies Treaty, the scope of the regulation of air transport must be defined:

> *"What is regulated*
> *Routes, including the matter of entry, are the most fundamental elements of regulation. Each country must first decide whether to allow foreign aircraft to operate in its airspace, and between what points it will allow operations. [usually the airlines allowed to operate on specific routes are designated by their national government]*

> *Capacity is also subject to regulation. Capacity is generally reckoned as the frequency of operation of the flights (or , the number of times a flight is operated over a given period, for example twice a week), times the number of seats installed or, the cargo carrying capability of the aircraft used. [...]*
>
> *Fares and rates are subject to regulation. [...]*
>
> *Traffic is subject to regulation. This concerns how much and what type of passengers or cargo an airline is to be allowed to carry."* [11]

Considering the fact that an Open Skies regime can be viewed as Free Trade in services of air transportation, this section will now examine different definitions of this concept in order to suggest the best suitable model for North America.

2. New Air Transport Agreement Canada-United States[12]

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[11] **R. De Murias,** *The Economic Regulation of International Air Transport* (Jefferson: McFarland & Company, 1989) at 2-3.

[12] ***Air Transport Agreement Between the Government of Canada and the Government of the United States of America,*** **signed in Ottawa on February 24, 1995 and entered into force the same day,** see Annex II for the integral text of the Agreement.

First, a recent agreement was reached on a framework for the resumption of formal negotiations for a new air services arrangement between Canada and United States and was announced on December 22, 1994. On February 24, 1995, the final agreement was signed by both governments. This new Bilateral Air Transport Agreement institutes an Open Skies regime between the two neighbouring countries.

It is important to note, however, that Canada and United States intended to liberalise air transport between the two countries since 1985![13] As a matter of fact, a Special Committe was struck in November 1990 to hold public hearings across Canada and to travel to Washington, D.C., in order to canvass the views of communities, provinces, the aviation industry, labour groups, the business community, the tourism industry, and the shipping and travelling public on the proposed Canada-U.S. air transport services negotiations.[14] The Committee's mandate was to assist the government in developing its negotiating strategy by providing broad objectives and guiding principles to ensure that the interests of Canada are best served.[15]

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[13]See: J.K. Gordon, "Canadian-U.S. Bilateral Talks Hinge on Cabotage Agreement" (December 2 1985) Aviation & Space Technology at 45.

[14]***Open Skies, Meeting the Challenge: Report of the Special Committee on Canada-U.S.A.. Air Transport Services*, 1991, summary of observations and recommendations at 6.**

[15]Idem.

Also, with the deregulation of the Canadian airline industry and the conclusion of the Free Trade Agreement with the U.S., in 1988, there was an increasing interest in both countries to reopen negotiations.[16] As a result, the two governments announced that negotiations to establish a new bilateral air transport agreement would begin in early 1991.[17]

One of the most important aspect that resorted from that report was the fact that the 1966 Bilateral Air Transport agreement between Canada and the United States and the modifications brought later on to its route schedules were updated and too restrictive in their nature to serve efficiently the needs of the Canadian customers thus rendering the *status quo* unacceptable.

As Airports of Montreal's Chairman of the Administrative Board Arthur Earle observes, the current air transport agreement [1966] cannot meet existing requirements and furthermore, the Free Trade Agreement cannot have the expected results without the support of a new open skies policy.[18] For example, as pointed out by the United States Airports for Better International Air Service (USA-BIAS),

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[16]Idem.

[17]Idem.

[18]**Testimony of Mr. Arthur Earle, 12 December 1990,** Ibid. **at 14:9.**

there is not even a direct service between the two countries'capitals–Ottawa and Washington.[19]

Notwithstanding the fact that formal negotiations to explore the prospect of creating an open regime were announced to take place in early 1991 as we mentioned earlier,[20] all attempts by both countries to liberalise substantially the air services agreement, have resulted in failure[21] until the signing of the Open Skies Agreement in 1995.

In view of the importance of this agreement in the North American context of NAFTA, a thorough review of the Agreement and of its implications is done in chapter V of this thesis.

3. U.S. Approach to Open Skies

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[19]**B. Campbell** (President of the Campbell Aviation Group) quoted by: **R. Richards, D. Jones, "Flying to Canada may soon cost less" USA Today (February 14, 1995) B9.**

[20]***Joint Statement by U.S. Secretary of Transportation Sam Skinner and Canadian Minister of Transport Doug Lewis*, in: Transport Canada, *Canada United States Air Transport Agreement Background Information*, CATC (90) 477, October 1990.**

[21]**G. Petsikas, "Opens Skies: North America" (1992) vol.XVII-I Annals of Air and Space Law 283.**

We will now examine the American view of Open skies. The Department of Transportation of the United States' government [hereinafter DOT] has adopted, in 1978, an aviation policy that promotes Open skies in its negotiations of BATAs with other countries.

Gomez-Ibanez and Morgan state that the renewed U.S. interest in an "open skies"policy resulted not simply from tradition, but also from a belief that restrictive aviation agreements harm air travellers and the economy in general.[22] They add that by controlling fares, in-flight services, and capacity, restrictive agreements reduce competitive pressures for carriers to improve efficiency or to offer more attractive services and fares.[23]

In fact, the development of an official U.S. open skies policy has led the effort to improve relations in international air commerce.[24] During the spring and summer of 1992, DOT formulated its definition of open skies in the Final Order and promulgated a new Department initiative to negotiate open skies agreements with European

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[22]**J.A. Gomez-Ibanez & I.P. Morgan,** "Deregulating International Markets: The Examples of Aviation and Ocean Shipping"(1984) vol.2 Yale Journal on Regulation at 113.

[23]Idem.

[24]**T.D. Grant,** "Foreign Takeovers of United States Airlines: Free Trade Process, Problems, and Progress"(Winter 1994) vol.31, no.1 Harvard Journal on Legislation 63 at 79.

countries.[25] DOT had first issued an "Order Requesting Comments" on open skies.[26] In this Order, the Secretary of Transportation Andrew H. Card, Jr. is quoted to the effect that his open skies initiative was designed to stimulate interest in creating an even more market-oriented international aviation environment. He also adds that the initiative is designed to establish a framework which will allow both U.S. and foreign carriers the greatest flexibility to conduct their business without undue government intervention, benefitting the travelling and shipping public to an extent that is not possible under traditional bilateral arrangements.

The Order, served upon all certificated air carriers, all foreign air carriers, and interested U.S. agencies and industry groups, enumerated eleven basic elements that DOT would tentatively include in its open skies definition and those elements were also included in the Final Order:

> *(1) Open entry on all routes;*
>
> *(2) Unrestricted capacity and frequency on all routes;*
>
> *(3) Unrestricted route and traffic rights, that is, the right to operate service between any point*

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[25] ***Defining "Open Skies"*; Final Order, DOT Order 92-8-13, Docket No. 48, 130 at 1, (August 5, 1992).**

[26] ***Defining "Open Skies"*; Order Requesting Comments, issued by Jeffrey N. Shane, Assistant Secretary for Policy and International Affairs, Fed. Reg. 19,323 (Dep't of Transport 1992).**

in the United States and any point in the European country, including no restrictions as to intermediate and beyond points, change of gauge, routing flexibility , coterminalization, or the right to carry Fifth Freedom Traffic [traffic beyond the other party to the BATA]

(4) Double-disapproval pricing in Third and Fourth Freedom markets, [governments of both parties to the BATA must disapprove the fare in order to strike it down] and price leadership in third country markets to the extent that the Third and Fourth Freedom carriers in those markets have it [Third Freedom being the right to disembark passengers in the other party's territory and Fourth Freedom , the right to take passengers back to the territory of the nationality of the airline];

(5) Liberal charter arrangement (the least restrictive charter regulations of the two governments would apply, regardless of the origin of the flight);

(6) Liberal cargo regime (criteria as comprehensive as those defined for the combination carriers);

(7) Conversion and remittance arrangement (carriers would be able to convert earnings and remit them promptly to their homeland in hard currency without restriction);

(8) Open code-sharing opportunities [27] *;*

(9) Self-handling provisions (right of a carrier to perform/control its airport functions going to support its operations); the ability to self-handle is a crucial element in an airline's presentation of its product to the public, and the ability to self-handle guards against monopolistic and discriminatory practices at airports.

(10) Procompetitive provisions on commercial opportunities, user charges, fair competition and intermodal rights; and

(11)Explicit commitment for nondiscriminatory operation of and access for computer reservation systems.; we have held repeatedly that nondiscriminatory CRS operation and access is essential to a fair and equal opportunity to compete. "[28]

The final open skies definition is virtually identical to the text which was proposed in 1992 and the Final Order did not address the national ownership/control criteria and the prohibition of cabotage because DOT considers that these matters are governed by statute, that

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[27]Grant defines "code-sharing" as "the practice of providing passage under the name of a single airline and through the ticketing and airfare arrangements of that airline, even though passengers must switch airlines *en route*." in **T.D. Grant**, Supra note 24 at 80, see footnote 48.

[28]***Defining "Open Skies"*** **; Final Order**, Supra note 25 at 3 .

For him, *open skies* [...] means that everything is permitted, unless it is expressly forbidden [;] *Open skies* means freedom of safe flight, freedom of air traffic carriage, and freedom to do business, while this freedom does not apply where or when flight is forbidden, to carriage that is forbidden, and to business deals and practices which are forbidden.[32]

Wassenbergh would formulate *open skies* as follows:

> *(a) Any designated air carrier of a Party shall be entitled to operate and offer to the public any kind of air service at any frequency with any kind of aircraft in any configuration on any route at any cost-related price to, from, via or within the territory of the other Party or Parties, in any manner it chooses, subject only to internationally agreed and standardized safety, security, and environmental requirements.*
>
> *and:*
>
> *(b) The carriage of any traffic by any air service or on any air service in combination with any other mode or modes of transportation to, from, via and within the territory of the other Party or Parties shall be freely permitted to designated air carriers of a Party, on condition that the contract of carriage includes the*

---

[32] **H.A. Wassenbergh**, *Principles and Practices in Air Transport Regulation* (Paris: ITA, 1993) at 63.

internationally agreed and standardized provisions.

(c) Any designated air carrier of a Party shall receive national treatment and full doing-business rights in the territory of the other Party or parties.

(d) A designated air carrier of a Party shall be considered as a carrier holding a license issued by that Party in accordance with internationally agreed and standarized criteria, and having its registered office in the territory of that Party.

and, finally:

(e) All commercial operations of designated air carriers shall be subject to internationally agreed and standardized rules of healthy competition."[33]

5. One North American Perspective on Open Skies

The definition of open skies was also addressed by Petsikas for whom, in such a system:

"[...] there would no longer be any restrictions on the points in country A which could be served from any point in country B by the airline of country B and, of course, vice versa.

---

[33] Idem at 63-64.

In brief, route schedules would become obsolete. As well, it would likely mean that tariff and capacity regimes would be extensively, if not totally, deregulated.

National laws and regulations with regard to technical and operational standards, as well as non-scheduled services would be harmonized. National rules regarding ownership and control of airlines would inevitably be relaxed, if not altogether abolished. Finally, cabotage which is, to a limited extent, being proposed by Canada, and which remains a very controversial issue, would probably be realized.

[...] then Canadian and American air carriers will probably be replaced by "North American" air carriers, owned and operated by North American interests, and serving a single North American market. In such a context, the controversial nature of cabotage will clearly lose much of its significance. "[34]

6. Best Suitable Model of Open Skies for North America

After an extensive review of the literature on open skies, we have come to the conclusion that the best suitable model for

---

[34]G. Petsikas, Supra note 21.

Canada, United States and Mexico aimed at regulating scheduled air transportation of passengers should include the following elements.

First, the agreement should grant immediate and unlimited access for designated Canadian and Mexican air carriers and the right to operate from any point to any point in North America with unrestricted capacity and frequency on all routes.

On the other hand, it should grant limited access for designated American air carriers to the following major cities: Toronto, Vancouver, Montreal, Mexico City, Guadalajara and Monterrey and this, only for the first two years of the agreement.

The American air carriers would thus be allowed to initiate a maximum of two new daily services on routes including one of the aforementioned cities in order to enable the Canadian and Mexican air carriers to adapt and react to this new enhanced-competition environment and to conclude strategic alliances with their counterparts to the agreement.

This access would be limited only by the application of international standards and harmonized regulations on safety, security, environment and technical norms .

The designated airlines of the Parties would also enjoy full doing business rights throughout North America namely: the right to perform their own ground handling services or to obtain them from

other providers, currency conversion and remittance of their local earnings, employment of North American personnel, sales and marketing of international air transport[35].

Concerning the carriage of cabotage traffic by the other Parties to the agreement, it is advocated that consecutive cabotage rights should be granted to each of the Parties.

Consecutive cabotage could be defined as the right for an air carrier of country A to carry traffic to country B, to make a stop in country B to disembark traffic, to take passengers at that stop and continue the journey to another city in country B. For example, Aeromexico flying the route Mexico City-Washington-New York would have the right to carry local traffic between Washington and New York.

In fact, it is argued that this type of cabotage would induce a more efficient utilization of the capacity of the aircrafts and provide a wider range of different flight schedules thus serving better the interests of the consumers. It is also argued that this type of cabotage would be more acceptable for public opinion and labour groups in the United States, the latters being vigorously against the granting of cabotage rights to foreign airlines.

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[35] ***Treatment of "Doing Business" Matters***, **International Civil Aviation Organization [hereinafter ICAO] Working Paper 14 (17 May 1994), AT Conf./4-WP/14, World-Wide Air Transport Conference on International Air Transport Regulation: Present and Future, Montreal at 1 .**

Moreover, the fact that these rights would be granted to the airlines of trade partners of NAFTA, with reciprocity for U.S. carriers and the fact that Canadian and Mexican airlines are now privatized should ease up the negotiations on this sensitive issue.

We would also propose a new criteria of ownership and control stating that a North American air carrier must be owned at a majority level by North American citizens in order to benefit from the agreement meaning that foreign citizens can own up to 49% of the equity of a North American carrier but that control must remain in the hands of North American citizens. It should also be incorporated either in United States, Canada or Mexico and have its principal place of business in North America.

Furthermore, the right of establishment in North America shall be granted to all designated North American air carriers by the Parties. Those carriers must abide to all laws and regulations that are imposed by the Party of the territory chosen on a non-discriminatory basis between national and North American airlines.

On fares and rates setting, we would propose a double-disapproval regime applying to Third and Fourth Freedom markets where the airlines set rates freely in connection with the conditions of the market place and where the governments of both Parties must disagree with the fare set by one of the designated airlines in order for this fare to be rejected.

Concerning the Fifth Freedom market (traffic beyond North America), the fares and rates should be set on the basis of country of origin pricing meaning that only the country from which the flight originates need to approve the fare or rate in order for it to be effective.

The criteria used to evaluate the fare or rate should be found in Antitrust Law provisions that would be accepted by the Parties as applying to this agreement. In that sense, it should be a fare or a rate set in accordance with the costs relating to the transportation provided. In effect, predatory pricing and price dumping should be forbidden.

Predatory pricing can be defined as the situation where a dominant firm sets its prices so low for a sufficient period of time that its competitors leave the market and others are deterred from entering; this implies that the predator as well as its victims has incurred significant losses and that the predator has the expectation that these losses will be made up by future gains and by exercise of market power.[36] It can also be defined as the introduction by a carrier into a market of an excessively low price which is likely to be perceived as specifically designed, targeted and intended to keep out a new entrant carrier or to drive out a weaker incumbent.[37]

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[36]**OECD**, *Predatory Pricing* (Paris: OECD, 1989) at 9, 81.

[37]***The Nature, Purposes and Special Kinds of Safeguards Required to Ensure Fair Competition*, ICAO, Working Paper 10 (19 April 1994), AT Conf./4-WP/10, World-Wide Air Transport**

Generally, price dumping refers to price discrimination between national markets such as the sale in the United States of a product at a price less than is charged for the product in the producer's home market.[38] Applied to air transport, price dumping can be defined as the introduction by a carrier into a market of an excessively low price (not necessarily with malicious intent) which is likely to have significant adverse impacts on a competing carrier or carriers .[39]

Another aspect of the agreement should take into account the fact that air transport in the United States is congested especially in four key airports namely, as we have seen, Chicago O'Hare, Washington National and New York's La Guardia and Kennedy. In fact, the traffic is so intense that their slots have been restrained meaning that even if the Parties have the right to land , they might not be able to get a slot at these airports in order to exercise this right.

So, a Canadian or Mexican airline willing to land there must buy a slot from one of the American carriers which owns it and only one slot at peak time can be worth up to 1 million U.S. dollars. Considering that American carriers are not facing a similar situation

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Conference on International Air Transport Regulation: Present and Future, Montreal, at 2.

[38]**J. E. Garten, "New Challenges in the World Economy The Antidumping Law and U.S. Trade Policy" (1994) vol.28 no.3 Journal of World Trade 129 at 136.**

[39]**ICAO,** Supra note 37 at 2.

neither in Canada or in Mexico, a readjustment is necessary. Therefore, the United States should, in the agreement, reserve a reasonable number of slots to Canadian and Mexican air carriers in order for them to have a real opportunity to compete on these important markets.

With respect to capacity, airlines should be free to fix their own capacity in accordance with market requirements. Again, Antitrust Law would play a paramount role in imposing sanctions upon airlines for predatory over-capacity and capacity dumping.

Predatory over-capacity could be defined as the fact, for an airline, to flood a route with an over-capacity not justified by market demand with the intent to drive its competitors out of the market on this route and to obtain, afterwards, a biggest share of the market power. ICAO Secretariat defines it as the introduction by a carrier into a market of capacity which is likely to be perceived as specifically designed, targeted and intended to keep out a new entrant carrier or to drive out a weaker incumbent.[40]

Capacity dumping would be the introduction into a market of capacity far in excess of anticipated demand (not necessarily with malicious intent) which is likely to have significant adverse impacts upon a competing carrier or carriers.[41]

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[40]ICAO. Supra note 37 at 3.

[41]ICAO. Idem.

The disputes arising from predatory pricing, price dumping, predatory over-capacity, capacity dumping, airlines'mergers and from all anti-competitive behaviors should be settled on common unified Antitrust Law provisions by an arbitral tribunal composed of independant experts of the three Parties to the agreement.

On the other hand, these common Antitrust provisions should allow cooperation between the designated airlines and with foreign airlines as well namely for code-sharing agreements, interlining, mergers, alliances including equity investments or not, and computer reservation systems agreements [hereinafter CRSs] .

A Code of Conduct on the use of CRSs must also be part of those provisions as well as a general commitment of the Parties to compete fairly. In order to ensure the fairness of competition, governments of the Parties should address the issues of fuel taxes, aircraft financing and general tax burden of airlines to create a level playing field where the air carriers would be placed in similar conditions whether doing business in either one of the countries Party to the agreement.

The dispute settlement procedure of the arbitral tribunal would resolve such disputes in less than forty-five days. It should be allowed to impose a temporary capacity freeze during that time and also to award compensatory damages to the victim of such behaviors for proven damages.

Concerning the carriage of Fifth Freedom traffic namely the carriage of traffic beyond Canada to Europe and Asia and beyond Mexico to Central and South America, it should not be limited on a capacity basis and the negotiation of Fifth Freedom rights with third countries should be pursued by the Parties on a trilateral basis and in the best interest of Canada, United States and Mexico and include scheduled, charter and cargo services.

Common immigration and customs procedure should be implemented with a green/red light system for all citizens of Canada, United States and Mexico that would accelerate and facilitate these procedures.

Finally, we would also suggest free access to North America for designated charter airlines whether carrying only cargo or a combination of passengers/cargo and for scheduled all-cargo services of designated airlines of the Parties, subject to the same harmonized regulations on safety, security, environment and technical norms as for scheduled services of passengers.

III World-Wide Liberalization of Air Transport Services Through Regionalization

When related to international air service trade, the liberal policy of a state means elimination–on a basis of reciprocity–of constraints pertaining to: the free access of foreign airlines to serve its "own" or "common" air transport market; the establishment of scheduled

and non-scheduled air services; the determination of their capacity, tariffs and other conditions of carriage; and sales activities, the transfer of excess revenues, and other "doing business" issues.[42]

According to Wassenbergh, the main reason of the liberalization of international air transport is that it is more likely to produce the following beneficial effects:

> *- encouraging new airline initiatives and general progress in civil aviation*
>
> *- an overall increase in international air traffic;*
>
> *and*
>
> *- sound economic development of international air transport involving optimization–through self-regulation–of the whole international air transport system, including road patterns, schedules, capacities, as well as service and price level and choice, at least on major routes.* [43]

On the other hand, regionalism may be defined as a grouping of two or more states whose goal is the formation of a distinct political and/or negotiating entity, and a regional arrangement as a voluntary

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[42]**M. Zylicz,** *International Air Transport Law* (Dordecht: Martinus Nijhoff Publishers, 1992) at 35.

[43]**H.A. Wassenbergh** quoted in: **M. Zylicz,** Idem, at 36.

association of sovereign states that have developed fairly elaborate organizational tools to forge between them bonds of unity.[44]

For Al-Ghamdi, regionalism is based on the assumption that universalism is still premature and too ambitious, while nationalism is outdated and dangerous. He then adds that since the time is not yet ripe for order-building on a global scale, regionalism is useful as an essential stepping-stone.[45]

In fact, regional groupings in the field of international air transport services have been formed all over the world in order, for like-minded nations, to reinforce their power of negotiation with other regional groupings and to enhance the flow of commercial exchanges between the countries member of the regional grouping that often encompasses more than the air transport industry namely general Free Trade agreements.

The following chapter will take a look to the most important regional groupings for North America in the field of air transport. Firstly in Europe, then in Latin America, in Australia and New Zealand and, finally, in Asia.

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[44]S.A.F. Al-Ghamdi, "Towards Globalization in the 21st Century" (1994) Monograph Series No.1 Annals of Air and Space Law Chicago Conference Anniversary 1944-1994 at 34.

[45]S.A.F. Al-Ghamdi, Idem.

A Europe[46]

This section will address the new liberalized regulatory regime for air transport now in place in the European Community. In fact, the most important development for liberalization of air transport in the European Community [hereinafter EC] was the passage of the Single European Act of 1987[47] and, in preparation for the institution of the Single European Market on January 1, 1993, the passage in [three] phases of [progressive] liberalizing measures[48] concerning international air transport within the Community.

The third package of liberalization measures was agreed to by the Community's Council of Ministers in June of 1992.[49] It applies both to international and domestic traffic, to scheduled and non-scheduled flights in the Community and without any distinction between passenger, cargo or mail carriage. It sets up a common licensing policy, grants free market access with temporary limitations on cabotage rights and freedom to fix fares for all Community Air Carriers .

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[46]This section is principally based on the author's term paper *Cabotage Within the European Union: the New Rules of the Game*, IASL, McGill University, April 1994.

[47]Single European Act, O.J. Legislation (1987) No L169 at 1.

[48]B. Stockfish, Supra note 1 at 621.

[49]S.A.D. Hall, "The EC Third Package" (1993-94) Air Finance Annual at 102.

1. Licensing Rules

The harmonized licensing rules are laid out in Council Regulation 2407/92[50]. In order to be granted an operating license in the EC, a Community Air Carrier [hereinafter CAC(s)] must have its principal place of business or its registered office located in the EC Member State granting the license and its main occupation must be air transport only or in combination with other commercial operations of aircraft (art.4(1)).

Furthermore, the CAC shall be majority-owned by nationals of Member States and effectively controlled by them (art.4(2)); "effective control" being defined as the possibility to exercise influence on the right of the air carrier to use its assets or on the composition, voting or decisions of its bodies (board of directors) or on the operation of the business itself (art.2(g)).

There are also insurance requirements (art.7) and financial requirements (art.5) that must be met by the CACs. To ensure safety, a CAC must obtain an air operator's certificate granted on common criteria by the Joint Aviation Authorities. Such criteria still have to be included in a Council Regulation and until this is done, national requirements apply (art.9).

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[50]of July 23, 1992.

In brief, licenses will continue to be granted by individual EC Member States, but in accordance with liberal, Community-wide and non-discriminatory criteria which favour new entry into the Community airline industry.[51] The purpose of this Regulation is to establish a common system for the issuing by Member States of operating licenses to air carriers established in the Community on a non-discriminatory basis.[52]

In fact, the notion of Community Air Carrier is a central concept of the European Integrated Air Market and is of major importance equally in intra-EC and extra-EC relations since discrimination on grounds of nationality is prohibited under article 7(1) of the Rome Treaty instituting the European Community.[53]

In order to give full effect to this principle, the carriers in the EC must be entitled to operate for traffic within all Member States under the same conditions as national carriers.[54] So, Member States will

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[51] **P.P.C. Haanappel**, "Recent European Air Transport Developments" (1992) vol.XVII-I Annals of Air and Space Law at 221.

[52] **S.A.D. Hall**, Supra note 49 at 103.

[53] **A. Loewenstein**, *European Air Law* (Baden-Baden: Nomos Verlagsgesellschaft, 1991) at 131.

[54] **A. Loewenstein**, Idem at 132, 133.

no longer be able to discriminate between carriers by issuing licenses on a preferential basis.[55]

The notion of CAC is also of the uttermost importance considering the fact that the Council Regulations grant free market access for all intra-Community routes to the CACs as we will see in the next paragraph.

2. Market Access Rules

The rules are laid out in Council Regulation 2408/92[56]. Under article 2(b), a "Community Air Carrier" is defined as an air carrier with a valid operating license granted by a Member State in accordance with the Regulation on the licensing of air carriers. "Traffic Right" is defined as the right of an air carrier to carry passengers, cargo and/or mail on an air service between two Community airports.

The core of the liberalization of air transport in the EC is found in article 3(1) which states that CACs shall be permitted to exercise traffic rights on routes within the Community. Considering the fact that Member States have not surrendered their sovereignty over their airspace, the exercise of those traffic rights means that CACs are permitted to operate stand alone Fifth Freedom rights (namely a Fifth Freedom right

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[55]S.A.D. Hall, Supra note 49 at 103.

[56]O.J. (August 24, 1992) No. L 240 at 8.

not related to a Third or Fourth Freedom right and often referred to as Seventh Freedom right) throughout the Community without any restriction.

For example, by using these rights, British Airways can freely offer a flight between Amsterdam and Rome without having to depart the journey from London thus competing directiy with KLM Airlines and Alitalia on this route. As De Coninck points it out, full liberalization of Fifth Freedom rights will allow non-residents carriers to enter the hubs of other carriers and compete with the latter at their home base.[57]

On the other hand, these traffic rights do not include, for the moment, the carriage of domestic traffic within the same Member State or what is referred to as "cabotage traffic". For example, the carriage, by the Spanish flag carrier Iberia, of passengers between Paris and Lyon, two cities located in the French territory.

In fact, until April 1, 1997 the Member States have no obligation under this Regulation to grant cabotage rights in their territory to CACs licensed by other Member States. Nevertheless, they now have the obligation to authorize "consecutive cabotage" carriage into their territory for all CACs licensed in any of the Member States.

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[57]F. De Coninck, *European Air Law* (Paris: ITA, 1992) at 129.

Consecutive cabotage may be defined as the exercise of traffic rights on a service constituting an extension of a service from or as a preliminary of a service to the State of registration (or of licensing) of the carrier such as the service, for example, from Athens to Rome and then to Milan by the Greek registered air carrier Olympic Airways.

However, the second sentence of article 3(2) limits the capacity of the CAC offering a consecutive cabotage air service to a maximum of 50% of the seasonal capacity of this CAC on the international segment of which the consecutive cabotage is the extension. Thus, for a flight Athens-Rome-Milan if the seasonal capacity of Olympic Airways for its service from Athens to Rome is 20 000 seats, then Olympic Airways is allowed to offer a limited capacity of 10 000 seats on the Rome-Milan segment.

The full liberalization of traffic rights including stand-alone cabotage (e.g. Lufthansa operating a flight from Paris to Marseille only) will take place on April 1, 1997.

According to Nuutinen, this transitory period (1993-1997) is the result of a compromise between liberal Member States that proposed immediate access to full cabotage rights namely United Kingdom, Netherlands, Ireland and Denmark, and the protectionist Member States that were insisting on a transition period of up to six years namely France and the southern European states; this compromise being

clearly in favour of the latter states.[58] The main reason being that the grant of cabotage rights to air carriers registered in another Member State is an important concession in the matter of the territorial exercise of national sovereignty.[59]

Member States are granted the power to regulate the access to routes within their territory for air carriers licensed by them but they may do so without discrimination on grounds of nationality, of ownership and of air carrier identity and with respect of the Community rules including the competition rules (art.3(4)).

They also retain the right to regulate the distribution of traffic between the airports within an airport system without discrimination on grounds of nationality or identity of the air carrier (art. 8).

Moreover, the Regulation introduces two safeguard provisions restricting the principle of free market access. Firstly, article 4 states that a Member State, after consultation with other Member States involved and after having informed the Commission and the air carriers operating on this route, can impose a public service obligation to an airport in its territory for any route considered vital for the economic development of the region where the airport is located to the extent

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[58]H. Nuutinen, "The Third Package-Final Version" (July/August 1992) The Avmark Aviation Economist at 2.

[59]J. Naveau, *Droit aérien européen* (Paris:ITA, 1992) at 79.

necessary to ensure the adequate provision of scheduled air services satisfying fixed standards of continuity, regularity, capacity and pricing.

Secondly, a Member State can impose conditions on, refuse or limit the exercise of traffic rights in case of serious congestion and/or environmental problems especially when other modes of transport can provide satisfactory levels of service. This action must be non-discriminatory, time-limited and must not affect the objectives of the Regulation, distort competition or be more restrictive than necessary. The Member State wishing to undertake such action must inform the other Member States and the Commission three months in advance to justify its action (art.9).

The fact that the two safeguard provisions namely the public service obligation and the limitation of traffic rights for environmental problems or congestion could be used by protectionist Member States to protect their air carriers since the difficulty of proving the discriminatory effects of such measures and the time delay necessary for the procedures before the Commission to scrutinize the acts of the Member States should not be under-estimated.

Furthermore, in the case of environmental or serious congestion problems, it may be too easy for Member States to rely on other modes of transport competing with air transport since no common guidelines exist enabling States to determine the level of intermodal competition.[60]

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[60]F. De Coninck, Supra note 57 at 83.

3. Fares Rules

The rules are set out in Council Regulation 2409/92[61]. As for the licensing and market access Regulations, the fares Regulation apply only to CACs and to air services performed wholly within the Community (art.1(1)).

The preamble of the Regulation states that air fares should normally be determined freely by market forces but that it is appropriate to complement price freedom with adequate safeguards.

"Air fare" is defined as the price, in ecus or local currency, of the carriage of passengers and of their baggage that is paid to the air carrier (art.2). A " basic fare" means the lowest fully flexible fare available, on a one way and return basis, which is offered for sale at least to the same extent as that of any other fully flexible fare offered on the same air service.

The essence of the Regulation is found in article 5 which states that CACs shall freely set air fares. Even though Member States can require on a non-discriminatory basis that CACs file the fares with them, such filing cannot be required to be submitted more than

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[61] O.J. (August 24, 1992) No. L 240 at 15.

twenty-four hours in advance and in case of matching with another air fare, prior notification is sufficient. Until full liberalization of cabotage in 1997, Member States can require a period of up to one month to fill the fares if only one air carrier or a joint venture of two carriers licensed by it operate on a domestic route.

As for non-scheduled air services, article 3 states that charter fares and seat and cargo rates charged by CACs shall be set by free agreement between the parties to the contract of carriage.

Pursuant to article 6, a Member State can, on a non-discriminatory basis and after consultation with the Member States affected, withdraw a basic fare excessively high or stop further fare decreases on a route if they result in widespread losses for the air carriers. In case of disagreement, the other Member States affected can require consultations from the Commission to review the situation.

The fares Regulation does not apply to air services performed under a public service obligation (art.1(2)) or to non-CACs on intra-EU routes (art.1(2a)).

Therefore, the third package of fares Regulation introduces a pricing regime that is kind of a double disapproval system where the pricing is free but with safeguard clauses against basic air fares excessively high or excessively low.

Another essential part of European law with respect to cabotage is the freedom of establishment enshined in articles 52 to 58 of the Rome Treaty of 1957.[62]

4. Right of establishment

The right of establishment is very important in the context of the EC because, in theory, it allows CACs to circumvent the time-limitations imposed on stand-alone cabotage rights. It is also of great importance in the general context of an open skies agreement since it can be more efficient for the airline of a Party to set up a subsidiary in another Party's territory in order to operate air services in that territory.

First, the right of establishment is defined as the right, for every national of a Member State, to establish itself or to set up agencies, branches or subsidiaries in the territory of another Member State.[63] It also includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings formed in accordance with the law of a Member State (Art.52) and having their registered office, central administration or principal place of business

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[62]**Treaty establishing the European Economic Community**, 298 UNTS 14, Rome 1957 [hereinafter Rome Treaty]; as amended by the Single European Act of 1987.

[63]**Rome Treaty**, Article 52.

within the Community.[64] Those companies or firms shall be treated in the same way as natural persons who are nationals of Member States (art.58). Of course, as Balfour points it out, the freedom to provide services is a residuary freedom of the right of establishment.[65]

In effect, the legal status of this right was clarified by two cases which stated that air transport was subject to the general provisions of the Rome Treaty including the right of establishment.[66] So, as soon as an air carrier fulfills the conditions to obtain a CAC's license under the licensing Regulation, the CAC can establish itself or its subsidiary in another Member State.

Despite the fact that CACs possess the right of establishment in the whole EC, it is illusory to think that they can circumvent the cabotage restrictions since Member States retain, until 1997, their right to assign their domestic traffic rights and they will certainly do it in favour of their own air carriers. In order, for a CAC licensed in one Member State, to have its share of the stand-alone

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[64]**Rome Treaty**, Article 58.

[65]**J. Balfour**, "Freedom to Provide Air Transport Services in the EEC" (1992) 51 European Transport Law Review at 43.

[66]**EC Commission v. France [1974] E.C.J. case 167/73 and Reyner'case [1974] E.C.J. case 2/74.**

cabotage traffic of another Member State, it must buy an equity stake in an air carrier of that Member State, as pointed out by Balfour.[67]

5. Competition Rules

The twin goals of the Community, as described by Peter Sutherland, former EC Commissioner for Competition, are "the completion of a genuine, barrier-free internal market and the restoration and enhancement of the competitiveness of European industry."[68]

In fact, competition was intended to play an essential role in achieving the objectives of the EC.[69] In order to diminish barriers to the free flow of commerce, the drafters included Articles 85 and 86, which prohibited anticompetitive activities.[70] Furthermore, the Commission has subsequently declared that competition is the best

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[67] **J. Balfour**, "EEC Air Transport-the Scene in 1993-" (May 1993) vol.10 No.12 LLoyd's Aviation Law at 5.

[68] **P. Sutherland**, "The Competition Policy of the European Community" 30 (1985) St-Louis University Law Journal at 154 in: **P.S Dempsey**, "European Aviation Regulation: Flying Through the Liberalization Labyrinth" (Summer 1992) vol.XV No.2 Boston College International & Comparative Law Review at 325 [hereinafter P.S. Dempsey, "The Liberalization Labyrinth"] .

[69] **P.S. Dempsey** Supra note 2 in: **P.S. Dempsey**, Ibid. at 327.

[70] **P.S. Dempsey**, "The Liberalisation Labyrinth", Idem.

motivator of economic activity and is essential for the improvement of both living standards and employment prospects.[71]

Article 85 of the Rome Treaty states that all agreements between undertakings, decisions by associations of undertakings and concerted practices that affect trade between the Member States and that have the object or the effect of preventing, restricting or distorting competition within the common market are prohibited.

Particularly, the direct or indirect fixing of purchase/selling prices, the control of production, of markets, of technical development or of investment, the sharing of markets or of sources of supply, the act to apply different conditions to equivalent transactions with other trading parties in order to place them in a competitive disadvantage and the conclusion of contracts subject to the acceptance of supplementary obligations not related, by their nature or by commercial usage, to the subject of such contracts are prohibited.

According to paragraph 3 of Article 85, specific exceptions to these prohibitions can be made if the agreements between the undertakings contribute to improving of the production or of the distribution of goods or of technical cooperation or economic progress while allowing consumers a fair share of the resulting benefit but without

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[71] **P.S.R.F. Mathijsen,** *A Guide to European Community Law* , (4th ed. 1985) at 167 in: **P.S. Dempsey**, "The Liberalisation Labyrinth", Supra note 68 at 327.

affording these undertakings to eliminate competition in respect of a substantial part of the products.

Moreover, two EC regulations have been promulgated to implement Article 85(3).[72] They permit "consultations" between airlines to prepare joint tariff proposals subject to the approval of the aeronautical authorities of Member States provided that participation to the consultations is voluntary, open to any carrier operating on the route, that the resulting tariff is not binding , does not discriminate between passenger son the basis of their nationality and finally, that discussions do not include capacity or agent remuneration issues.

Article 86 states that any abuse of a dominant position by one or more undertakings within the common market or in a substantial part of it is prohibited if it may affect trade between Member States. Such abuse can consist of the same acts enunciated in Article 85 but no exemptions can be made under this article. It is important to note however that dominance in itself is not unlawful; it is the abuse of that dominance which is prohibited.[73]

According to Dempsey, "dominant position" indicates a position of economic strength allowing the possessor to behave to an

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[72] **Council Regulation 3976/87, O.J.(1987) No L374 at 9; Commission Regulation 2671/88, O.J. (1988) L239 at 9.**

[73] **R.S. Doganis, "Effectiveness of the Competition Rules within the Single Market" (June 1994) vol.19 No.3 Air and Space Law at 131.**

appreciable extent independently of its competitors, customers and ultimately of the consumers.[74]

Before 1986, uncertainty existed as to whether Articles 85 and 86 could be applied to air transport. For example, the wording of Article 84 stating that the articles of this title apply to transport by rail, road and inland waterway but that the Council has to decide, acting by a qualified majority, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport excludes clearly air transport from the application of these provisions but not from the application of the other provisions of the Treaty.

In April 1986, the European Court of Justice rendered a decision that is now referred to as the Nouvelles-Frontières case[75] from the name of the French travel agency sued because it was selling tickets at fares not approved by the French government. The Court was especially concerned about the applicability of the Rome Treaty competition rules to price-fixing agreements by French airlines.[76] The Court came to the conclusion that the absence of specific language within the Rome Treaty made air transport subject to the general rules of the Treaty, including the

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[74] P.S. Dempsey, *Law and Foreign Policy* Supra note 2 at 248 in: P.S. Dempsey, "The Liberalisation Labyrinth" Supra note 68 at 331.

[75] **Ministère public v. Asjes, [1986] Court of Justice of the European Communities, joined cases 209 to 213/84 at 1425.**[hereinafter Nouvelles Frontières] .

[76] Idem at 1459.

competition rules because where the Treaty intended to remove certain activities from the ambit of the competition rules, it mades an express derogation to that effect as in Article 42 for production and trade of agricultural products .[77]

The second important decision of the European Court of Justice in that field was the Ahmed Saeed case[78] in 1989. The facts can be briefly stated by saying that two Frankfurt travel agents obtained from airlines or travel agents established in another State airline tickets made out in the currency of that State. Although the starting point for the journey mentioned in those tickets was situated in that State, passengers who bought the tickets actually boarded their flight at a German airport where the scheduled flight made a stopover thus violating German law, their actions also constituted unfair competition to airlines respecting the approved tariffs .[79]

The Court held that Article 85 was directly applicable to intra-Community tariff agreements between airlines, even in the absence of implementing legislation by Member States (art.88) or the Commission (art.89) and that Article 86 was also directly applicable to air

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[77]Idem at 1465.

[78]**Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V., [1989] Court of Justice of the European Communities, case 66/86, at 803.**[hereinafter Ahmed Saeed] .

[79]Idem at 839-840.

transport and not only to intra-Community routes but to routes to and from the Community, even in the absence of implementing regulations.[80]

6. Code of Conduct for Computerised Reservation Systems

The main reasons underlying the creation of a Code of Conduct for computerised reservation systems [hereinafter CRSs] were the protection of consumers and of air carriers.[81] Developed in 1989 and revised in 1993, the Code ensures non-discrimination and equal rights of access to the services of the CRSs for air carriers and travel agents and for consumers, it prescribes a neutral and comprehensive display.[82]

The Code of Conduct is enshrined in Council Regulation 2299/89[83]. The regulation applies to CRSs, those containing

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[80] Idem at 855.

[81] ***The Gradual Development of a Regional Arrangement***, **ICAO, Working Paper 59 presented by the European Union (17 October 1994), AT Conf/4-WP/59, World-Wide Air Transport Conference on International Air Transport Regulation: Present and Future, Montreal at 4.**

[82] Idem.

[83] **O.J. (July 29, 1989) No. L 220 at 1 as amended by Council Regulation 3089/93, O.J. (November 11, 1993) No. L 278.**

air transport products, that are offered for use and/or used in the territory of the Community irrespective of the nationality of the system vendor, of the source of the information used or the location of the central data processing unit and of the geographical location of the airports between which the air carriage takes place (art.1).

Article 3 states the important principle that the system vendor (the CRS provider) must allow any air carrier the opportunity to participate in its distribution facilities on an equal and non-discriminatory basis within the available capacity of the system (par.2).

It also imposes to the system vendor not to attach unreasonable conditions to any contract with a participating air carrier and not to require the acceptance of supplementary conditions that have no connection with participation in its CRS and to apply the same conditions for the same level of service (par.3(a)).

Moreover, the system vendor must not make it a condition that the contract be exclusive and the participating carrier must be able to terminate the contract on given notice not exceeding six months and not expiring before the first year of the agreement (par.3(b,c)).

Article 3a imposes important obligations to the parent carrier. Firstly, "parent carrier" is defined in article 2(i) as a carrier owning or controlling , alone or jointly, a CRS or another air carrier. Thus, the parent carrier must not discriminate against a competing CRS by refusing

to provide the same information on schedules, fares and availability relating to its own air services as that which it provides to its own CRS.

Furthermore, the parent carrier cannot refuse to accept or to confirm with equal timeliness a reservation made through a competing CRS for any of its air transport products if the bookings were done in conformity with its fares and conditions.

Following article 4, the air carriers participating in a CRS must ensure that the data they submit to a CRS are accurate, non-misleading, transparent and no less comprehensive than for any other CRS.

On the other hand, to ensure consumer protection, the displays generated by a CRS must be clear and non-discriminatory (art.5(1a)). The ranking of flight options shall be as set out in the Annex (art.5(1d), namely:

> (i) all non-stop direct flights between the city-pairs concerned.
>
> (ii) other direct flights, not involving a change of aircraft, between the city-pairs concerned.
>
> (iii) connecting flights (flights involving a change of aircraft must be treated and displayed as connecting flights with one line per aircraft segment).
>
> (Annex)

In the event that the system vendor must also provide information on fares, the display has to be neutral and non-discriminatory and must contain at least the fares provided for all flights of participating carriers shown in the principal display (art.5 (3)).

Moreover, the system vendor cannot require a suscriber to sign an exclusive contract nor prevent him directly or indirectly from suscribing to or using another system (art.9).

Article 10 is one of the major provisions included in the Regulation to ensure the protection of the participating air carriers. It states that the system vendor must charge a non-discriminatory fee that is reasonably structured and related to the cost of the service provided: this cost being the same for the same level of service.

In order to enforce the provisions of the Regulation, the Commission can, acting on its own initiative or on receipt of a complaint, initiate procedures to terminate the infringement of the provisions. The complaints can be submitted by Member States or by natural or legal persons claiming a legitimate interest (art.11).

In carrying out its duties, the Commission possesses wide powers of investigation (art.13), of requesting information and documents from Member States and from undertakings within a time-limit of one month (art.12). The Commission is also empowered to impose fines up to ECU 50 000 to undertaking which, intentionally or negligently, do not provide the information within the time-limit,

provide incorrect information, refuse to submit to an investigation or produce incomplete books (art.16(1)).

If the Commission comes to the conclusion, following its investigation, that an undertaking has infringed the Regulation, the Commission may decide to impose fines on system vendors, participating carriers and/or suscribers up to 10% of the annual turnover for the relevant activity of the undertaking concerned. The seriousness and the duration of the infringement are taken into consideration in order to fix the fines (art.16(2)).

A review of the decision taken by the Commission can be done by the European Court of Justice if a fine was imposed, The Court may either cancel, reduce or increase the fine (art.17).

As a matter of fact, the Commission has taken action against individual airlines.[84] For instance, in November 1988, Sabena was fined ECU 100 000 for having infringed Article 86 by refusing London European Airways access to its computer reservation system. In February 1992, Aer Lingus was fined ECU 750 000 for refusing to accept British Midland tickets on the Dublin-London route and it was also required to revive the interline agreement with British Midland.[85]

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[84] **R.S. Doganis,** Supra note 73 at 132.

[85] Idem.

This Code of Conduct on the use of CRSs is crucial in a liberalised regime of open skies. The enhancement of competition and its fierceness in such a system makes it essential to regulate the excessive anti-competitive behaviours of the air carriers. The prohibition of discriminatory practices leads to the creation of a level playing field in which the airlines can compete on a fair basis considering the fact that CRSs have become the key of the distribution of air services internationally.

On the other hand, the fact that the procedures are taken before the Commission means that the delay between the institution of the procedures and the decision can be long especially if the decision of the Commission is reviewed by the European Court of Justice. It should also be made possible, to the Commission, to order the defendant to execute, in nature, its obligation: for example, to give access to its CRS. Concerning the fine, it should be made proportionate to the damages suffered by the petitioner.

7. Common Rules for Slot Allocation

The common rules for the allocation of slots of Community airports are set out in Council Regulation 95/93[86]. The preamble of the Regulation notes that there is a growing imbalance between the expansion of the air transport system in Europe and the

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[86] O.J. (22 January 1993) No. L14.

availability of adequate airport infrastructure to meet that demand. As a result, there is an increasing number of congested airports in the Community. Consequently, the allocation of slots at congested airports should be based on neutral, transparent and non-discriminatory rules.

Hence Community policy is to facilitate competition and encourage entrance into the market and that existing system makes provisions for grandfather rights, there shoud also be provisions to allow new entrants into the Community market (preamble).

The scope of the Regulation is found in article 1 which states that the Regulation applies to the allocation of slots at Community airports.

For the purpose of the Regulation, the term "slot" is defined as the scheduled time of arrival or departure available or allocated to an aircraft movement on a specific date at an airport coordinated under the terms of this Regulation (art.2(a)). A "new entrant" is: (i) an air carrier requesting slots at an airport on any day and having been allocated fewer than four slots at that airport on that day or (ii) an air carrier requesting slots for a non-stop service between two Community airports where, at most, two other air carriers operate a direct service between these airports on that day or having been allocated fewer than four slots at that airport on that day for that non-stop service (art.2(b)).

Concerning airports, a distinction is made between coordinated airports and fully coordinated airports. A "coordinated

airport" being an airport where a coordinator has been appointed to facilitate the operations of air carriers operating or intending to operate at that airport (art.2(g)). A "fully coordinated airport" means a coordinated airport where, in order to land or take off, during the periods for which it is fully coordinated, it is necessary for an air carrier to have a slot allocated by a coordinator (art.2(g)).

Under article 3(2), a Member State can provide for any airport to be designated as coordinated if the principles of transparency, neutrality and non-discrimination are met. In the case that air carriers representing half of the operations at an airport consider the capacity of the airport to be insufficient for actual or planned operations at certain periods or that new entrants encounter serious problems in securing slots, the Member State must ensure that a thorough capacity analysis is carried out as soon as possible with the purpose of determining possibilities to increase the capacity in the short term through infrastructure or operational changes (art.3(3)).

If , after consultation with the air carriers using regularly the airport, the analysis does not indicate possibilities of resolving the serious problems in the short term, the Member State must ensure that the airport be designated as fully designated for the periods during which capacity problems occur (art.3(4)).

The designation of the coordinator of a coordinated or fully coordinated airport is made by the Member State responsible for this airport after consultation with the air carriers using the airport regularly,

their representative organisations and the airport authorities (art.4(1)). Of course, the coordinator must act in a neutral, non-discriminatory and transparent way (art.4(3)). He is responsible for the allocation of slots and he has to monitor the use of slots (art.4(5,6)).

The Member State must also set up a coordination committee in every fully coordinated airport to assist the coordinator in a consultative capacity. Air carriers using regularly the facilities can participate in that committee. The most important fonction of this committee is to advise on the complaints on the allocation of slots (art.4(1) and art.8(7)).

The process of slot allocation is found at article 8. An air carrier that has operated a slot cleared by the coordinator entitles the air carrier to claim the same slot in the next equivalent scheduling period (art.8(1a)). Preference is given to commercial air services and in particular to scheduled services and programmed non-scheduled services in the case where all slots requests cannot be accommodated (art.8(1b)).

Furthermore, a new opportunity is created by permitting air carriers to exchange slots freely between themselves or to transfer a slot from one route or type of service to another by mutual agreement or as a result of a takeover provided this is done in a transparent way and that feasibility is confirmed by the coordinator (art.8(4)). However, the slots allocated to new entrants between two Community airports cannot be exchanged nor transferred for a period of two seasons (art.8(5)).

As mentioned earlier, complaints pertaining to slot allocation must be submitted to the coordination committee which can make proposals to resolve the problems to the coordinator (art.8(7)). Then, if the problems cannot be resolved, the Member State may provide for mediation by a third party such as an air carriers' representative organisation (art.8(8)).

A Member State can always reserve slots at a fully coordinated airport for domestic scheduled services on routes vital for the economic development of a region if these slots were already used on that route when the present Regulation entered into force, if only one carrier operates this route and if no other mode of transport can provide adequate service (art.9(1a)). The Member State can also reserve slots for routes where a public service obligation was imposed (art.9(1b)).

In order to allocate slots, article 10 states that a pool must be set up for each coordinated period containing newly created slots, unused slots and slots that have been given up by a carrier during, or by the end of, the season or slots which otherwise become available (art.10(1)).

In addition, all slots not utilized by an air carrier must be placed in the appropriate slot pool except if the non-utilization is due to the grounding of an aircraft type or to the closure of an airport or airspace or other similar cases of same gravity (art.10(2)).

For an air carrier to benefit from the use of the same slot for the next equivalent period, it must demonstrate that it had been operating the slot for at least 80% of the time during the period for which the slot had been allocated (art.10(3)); if not, the slot is placed in the pool unless the air carrier proves that he is in one of the situations enumerated in paragraph 5 (art.10(5)).

In order to meet one of the objectives of the Regulation, namely to allow new entrants in the Community market, fifty percent of the slots placed in that pool must be allocated to new entrants applicants except if their requests are fewer than this number (art.10(6)).

On the other hand, a safeguard mechanism is included in article 11 to prevent distorted competition. A CAC cannot exchange slots freely with another CAC for the purpose of introducing additional frequencies on a route between a fully coordinated airport within the Community and an airport in another Member State if another CAC licensed by another Member State has not obtained slots that can be reasonably used to provide additional frequencies on the route within two hours before or after the ones he requested from the coordinator.

Pertaining to the allocation of slots at airports to air carriers of a third country, article 12 states that in the case where the third country does not provide the CACs a treatment comparable to the one granted by the Member States to the third country's air carriers or where the third country does not grant *de facto* national treatment to CACs or

where the third country grants a more favourable treatment to carriers of other third countries than to CACs, then the application of this Regulation can be suspended in respect of that third country.

Briefly, it can be said that the principles underlying the common rules for the allocation of slots at Community airports are very important in the context of an opens skies regime. As a matter of fact, the rules encompass the two most crucial aspects namely, grandfather rights protecting the existing CACs and provisions to allow new entrants in the Community market. Furthermore, the fact that existing CACs can exchange, on a free basis, their slots brings flexibility to the system permitting these air carriers to adapt to the market and to be more competitive.

Concerning the allocation of slots at fully coordinated airport, if the core rule of neutrality, transparency and non-discrimination is respected, than the system should work in a fair way. However, problems could occur if Member States adopt a protectionist attitude under article 9(1) and reserve more slots than they really need to, at fully coordinated airports for routes considered vital to the economic development of a region in their territory if only one carrier is serving the route or for routes where they have imposed a public service obligation. The problem being the difficulty to prove the real intention or purpose behind the decision taken by the Member State.

It is also considered redundant to allow a Member State to reserve slots for routes vital to economic development (at certain

conditions) and for routes under a public service obligation since they both imply the same considerations and tend towards the same goal.

Moreover, as for the treatment of complaints pertaining to slot allocation, in the event where the problems are not resolved by the coordination committee, the efficiency of the procedure consisting, for the Member State, in providing mediation by an air carriers' representative organisation or by another third party can be criticised; in part because a competent third party might not be easy to find and in part because the whole procedure will surely take long before it reaches a final decision meaning that this decision might come too late.

On the other hand, article 12 enshrines the principles of reciprocity and equality of opportunity in the relations between the Community and third countries regarding slot allocation at congested airports. This provision seems very restrictive and protectionist in an open skies regime advocating total freedom for air carriers only subject to competition provisions but it must also be taken into account the fact that effective access to third countries airports and to Community airports is the only way to exercise that freedom of operation and it should be granted without discrimination, neutrally and transparently.

Nevertheless, as Schmid points it out, the question still remains as to whether third countries will accept the Community as a negotiating party [for Bilateral Air Transport Agreements] and if they do, than they might build up their own negotiating blocks as well and we

wounder whether this would be in the best interests of the Member States.[87]

8. Common External Aviation Policy

Generally, the EC's external relations are a subject matter on which the Treaty of Rome is not very clear.[88] Article 3(e) of the Rome Treaty did include among the activities the adoption of a common policy in the sphere of transport.[89] However, according to Article 84(2) of the Rome Treaty, it is for the Council to determine whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport and that as long as the Council has not adopted any such provisions, there could be some doubt as to the applicability of the Rome Treaty to aviation.[90]

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[87]**R. Schmid**, *European Air Law* , (Deventer: Kluwer Law and Taxation Publishers, 1993) at 85.

[88]**P.P.C. Haanappel**, "The External Aviation Relations of the European Economic Community and of EEC Member States into the Twenty-first Century" (1992) Air Law at 69.

[89]**Dr. C.O. Lenz**, "The Contribution of the European Court of Justice to the Common Air Transport Policy" in: **P.D. Dagtoglou**, *Air Transport and the European Community Recent Developments* , European Air Law Association Papers 1, (Deventer: Kluwer Law and Taxation Publishers, 1989) at 19.

[90]**C.O. Lenz**, Idem.

In fact, a significant bone of contention within the Community's institutions at the moment is the claim by the Commission that it should have responsibility for negotiating air transport agreements between Member States and third countries.[91] Member States are unwilling to concede this authority except on a case-by-case basis in specific circumstances.[92] Furthermore, as Close points it out, the Commission's aim to assert exclusive competence on air service agreements is tempered by the recognition that its services do not at present possess the necessary resources and technical and administrative skill to exercise the claimed exclusive competence.[93] Consequently, the issue was recently brought before the European Court of Justice.

B. Latin America

1. Andean Pact

The second most important development of an open skies system has taken place in Latin America between the five nations already constituting the free trade agreement: *PACTO ANDINO*

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[91]**S.A.D. Hall,** Supra note 49 at 104.

[92]Idem.

[93]**G.L. Close,** "External Competence for Air Policy in the Third Phase -Trade Policy or Transport Policy ?" in: ***European Air Law Association***, volume 3 (Deventer: Kluwer Law and Taxation Publishers, 1990) at 32.

[hereinafter Andean Pact] namely, Colombia, Venezuela, Ecuador, Peru and Bolivia.

The five nations have a population of 92 million (the combined equivalent of Italy and Spain); a gross domestic product of $125 billion (close to Mexico's $135 billion); and total foreign trade activity of $41.5 billion (roughly half of Spain's).[94] If it were a single country, the Andean region would rank third in the western hemisphere, after the U.S. and Brazil, in terms of population; a close fifth after the U.S., Canada, Brazil and Mexico in gross domestic product; and would share third position with Brazil and Mexico in foreign trade.[95]

The Andean airlines carry more than 8 million domestic passengers, and they share with U.S., European and other Latin American flag carriers in the other markets: 2 million passengers to and from the U.S., 500 000 to Europe, and 300 000 within the region.[96]

Considering the fact that we agree with Vasquez Rocha[97] when he states that the Cartagena Agreement is, up to now, a

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[94]**R.C. Booth**, "Open Skies Over the Andes" (September 1991) Airline Business at 81.

[95]Idem.

[96]Ibid. at 82.

[97]**E. Vasquez Rocha**, "La cambiante estructura de la industria aérea latinoamericana" (November-December 1993) AITAL boletin informativo at 16.

mere superposition of the authentic open skies treaty signed in 1991 between Colombia and Venezuela, we will then take a look first to the content of this BATA.

a) Bilateral Air Transport Agreement Colombia-Venezuela

The BATA between Colombia and Venezuela was signed on May 8, 1991 and entered into force on July 7, 1991.[98] It establishes a real open skies regime between the two countries. The preamble states the objectives and the reasons underlying the agreement. The first goal is to foster the development of air transport in order to enhance the economic expansion of both countries and in a more global aspect, to carry on with international cooperation in this field.

The Parties also confirm their intention to apply the principles and the provisions of the Chicago Convention which both ratified . Finally, the Parties wish to organise themselves on the basis of free access to their respective markets in order to achieve effective integration between themselves in the field of international air transport.

The different freedoms exchanged are enumerated in article 2o. First, a Party has the right to overfly the territory of the other

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[98] **Acuerdo sobre transporte aereo entre la Republica de Venezuela y la Republica de Colombia**, (1991) ICAO Registration No.5682.

party without landing. Second, a Party has the right to stop for non-commercial purposes in the territory of the other contracting Party. Third, a Party can embark and disembark passengers, cargo and mail as international traffic between the Parties' territory (Third and Fourth Freedom). More importantly, the Parties can embark and disembark passengers, cargo and mail from the Parties' territories to the territory of a third country, not party to the agreement (Fifth Freedom).

Paragraph 2 states that the designated airlines can exploit those rights without limitations neither on the Freedoms of the air nor on frequencies, capacity, routes or flight schedules provided that the airlines satisfy to the technical norms and to the security requirements necessary to operate.

Accordingly, when an air carrier has been designated by a Party and has obtained an operating license, the Party must give the air carrier, within thirty days, the permit to initiate a new international service (art.3o(1,2,3)). Nevertheless, each Party to the agreement retains the right to disapprove the designation of an air carrier by the other Party or revoke its operating license if it is not satisfied that the national ownership and control criteria has been respected (art.3o(4)). A Party can also revoke, suspend or limit an operating license if the air carrier has not respected its laws and regulations or has not complied with the provisions of this agreement or with the obligations imposed on it by the agreement (art.4o).

The Parties must also impose the same taxes both to national carriers and to the other Party's air carriers (art.5o). Similarly, fuel, motor oils, spare parts, etc. must be exempted from any taxes of both Parties to the agreement (art.6o).

Concerning the airworthiness certificates, the pilots' licenses and fitness certificates, must be accepted as valid by both Parties no matter which Party had granted them (art.7o).

The tariffs of designated air carriers will be established by taking into account the following elements: costs of exploitation, reasonable profit and the technical and economical characteristics of the different routes (art.9o(1)). Paragraph 2 adds that until an agreement to establish a common tariff policy is reached, designated airlines must comply with the regulations of each of the contracting State for the flights originating in its territory meaning that the principle of country of origin pricing will apply.

Designated airlines of a Party are allowed to maintain and employ their own personnel to provide their services at the airports and in the cities of the other Party's territory where those airlines expect to continue to maintain their own representation (art.10o).

The agreement refers also to the fact that modifications of the agreement might be necessary. In that case, aeronautical authorities of each contracting Party must exchange their views in order to achieve a

close cooperation and comprehension of all questions pertaining to the application and to the interpretation of this agreement (art.11o).

As to dispute settlement, article 12o states that if any divergence relating to the interpretation or to the application of the agreement shall occcur, it should be the subject of direct consultations between the aeronautical authorities of each Party within a maximum of sixty days. If no agreement is reached, the dispute should be settled through diplomatic channels (art.12o).

The possible conclusion of an open skies treaty between the Andean Pact countries was considered as article 13o deals with the situation where a multilateral agreement would be signed afterwards. It states that the present agreement should then be modified to adapt to the provisions of such a multilateral treaty. It also states that until the entry into force of the multilateral agreement and in case of divergence with the present agreement, the latter should prevail (art.13o).

A special treatment will be applied to passengers in transit in the territory of any of the contracting State: they will be submitted to simplified control procedures (art.15o).

Article 16o is considered to be a model clause in terms of aviation security. It states that in conformity with the rights and obligations imposed upon the contracting Parties by International Law, the Parties agree that their mutual obligation to protect the security of

civil aviation against acts of unlawful interference constitute an integral part of the present agreement.

More specifically, the Parties will act in accordance with the provisions of the 1963 Tokyo Convention on offences and certain other acts committed on board aircraft, of the 1970 Hague Convention for the suppression of unlawful seizure of aircraft and of the 1971 Montreal Convention for the suppression of unlawful acts against the safety of civil aviation.

The contracting Parties undertake to provide each other with all necessary help to prevent hijacking of civil aircraft and all other illicit acts against the security of civil aircraft or of airports and of air traffic control installations (art.16o(b)). The Parties will also comply with the Annexes to the Chicago Convention and will require that the air carriers licensed by them, the air carriers that have their head office or permanent residence in their territories and the operators of airports located in their territories comply with the Annexes regarding aviation security.

Furthermore, each Party must ensure that all the adequate measures are taken in its territory to protect the aircraft and to inspect passengers, crew, personal belongings, luggage, cargo, supplies before and after the embarking or disembarking. Each Party must also be ready to accept that the other Party requires the adoption of special measures to face a particular threat (art. 16o(d)).

Pertaining to the remittance and conversion of earnings, designated airlines from both Parties have the right to convert and remit the part of earnings exceeding their expenses in the other Party's territory following the regulations in force in each of the countries (art.17o).

Finally, the licenses to operate charter flights will be granted automatically by the aeronautical authorities of both Parties and flights can be operated on the routes that are not served by any scheduled services or, if they are, in a way such that it does not unduly affect the sheduled services (art. 18o).

This BATA constitutes a real open skies treaty between two neighbouring nations that have decided to exchange Third and Fourth Freedom rights and furthermore specifically the Fifth Freedom rights. Some aspects of the provisions of this BATA lack of precision. In effect, the tariffs' provision stated in article 9o does not contain any definition of "costs of exploitation". As we know, in the airline industry, this concept can be very hard to agree on whether we consider the marginal cost or the total costs since the cost for an airline to carry a supplementary passenger can be very low.

Also, the provision mentions that tariffs should be set taking into account a "reasonable profit". A reasonable profit in the airline industry nowadays can be of less than one percent when in other industries a reasonable profit means a return of at least five percent or

more. So, common guidelines that would apply to the airline industry would be needed such as the ones found in competition law.

On the other hand, the agreement does not liberalise ownership and control criteria between the contracting Parties to permit the other Party to own a substantial part of the Party's air carrier.

The dispute settlement procedure found in article 12o can also be criticised since a delay of sixty days is given to the aeronautical authorities in order to reach an agreement which can be considered as too long to be efficient for the airlines concerned and in the situation where the dispute has to be settled by the diplomatic channel, it could take so much time that the solution might be useless.

On the positive side, clearly are the provisions 15o and 16o. Provision 15o establishes a special expeditious treatment for the passengers in transit in order to facilitate their travelling and to minimise the delays.

Article 16o is very important since it crystallises the obligations of both countries under the three Conventions against aviation terrorism which they ratified .

b) Effects of the Open Skies Regime Between Colombia and Venezuela

Generally, both countries have benefitted greatly from the opening of their skies. According to the representative of Colombia at ICAO, Dr. Lopez Castrillon[99], there is now a higher frequency of flights between the two countries. As he mentions it, the airlines of Colombia and of Venezuela can now fly between the two territories as if it were a domestic market. In fact, Venezuela is the secong largest trade partner of Colombia after the United States and since the liberalised air transport industry was able to follow the commercial flow between Colombia and Venezuela, their air transport market has tripled during the last two years.[100]

Before the signing of the BATA, Venezuela had only one national airline but now, there are at least five of them (Servivensa, Valenciana, Viasa, Avensa and Suliana).[101] Consequently, there are now three to four flights a day between the capital cities of the contracting Parties namely Bogota and Caracas.[102] Thus, the weekly services in the Caracas-Bogota city-pair increased from six to twenty-four, of which a daily

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[99]**Dr. Juan Carlos Lopez Castrillon**, from the notes taken during an interview with the author on October 7, 1994 at ICAO, Montreal.

[100]**J.C. Lopez Castrillon**, Idem.

[101]**J.C. Lopez Castrillon**, Idem.

[102]**J.C. Lopez Castrillon**, Idem.

flight is operated jointly by Avensa/Servivensa (Venezuela) and Avianca (Colombia).[103]

In the Colombian market place, national carrier Avianca and sister airline SAM now face greater competition from the smaller colombian air carriers Aces and Intercontinental.[104]

The other effects were that Avensa is now ground handled by Avianca in Bogota and shares a check-in counter there and provides the reciprocal services for Avianca back in Caracas.[105] The airlines also share revenues and costs in the route, willing to expand jointly within the Andean Pact market, if political circumstances allow.[106]

If we now take a look at the latest available statistics from the International Civil Aviation Organisation [ICAO], we see that there was an increase in the revenue passengers carried between Bogota (Colombia) and Caracas (Venezuela) when we compare the year 1989 (two years before the signing of the BATA) and 1992 (one year after the entry into force of the BATA). As for 1989, the revenue passengers carried by all

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[103]E. Pereira Lima, "Avianca: Adelante !", (June 1992) Air Transport World at 51.

[104]E. Pereira Lima, Ibid. at 50.

[105]E. Pereira Lima, Ibid. at 51.

[106]E. Pereira Lima, Idem.

air carriers from Bogota to Caracas were of 77 114 and from Caracas to Bogota were 54 346 for a total of 131 460.[107]

On the other hand, the revenue passengers carried by all airlines in 1992 from Bogota to Caracas were of 143 493 and from Caracas to Bogota, of 134 828 for a total of 278 321.[108] Thus, these statistics show a total increase of 212% in the revenue passengers carried between the two cities one year after the entry into force of the BATA.

As to the number of passengers carried, there were 28 708 passengers carried from Bogota to Caracas in 1990 and 28 253 passengers carried from Bogota to Caracas for a total of 56 961.[109] In 1992, 29 966 passengers were carried from Bogota to Colombia and 29 864 from Caracas to Bogota for a total of 59 830 representing a 5% increase in two years.[110]

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[107] ***Traffic by flight stage***, **Digest of statistics No. 375, International Civil Aviation Organisation, (1989) Series TF-No. 104.**

[108] ***Traffic by flight stage***, **Digest of statistics No. 405, International Civil Aviation Organisation, (1992) Series TF-No. 107.**

[109] ***On-flight origin and destination***, **Digest of statistics No. 384, International Civil Aviation Organisation, (1990) Series OFOD-No. 56.**

[110] ***On-flight origin and destination***, **Digest of statistics No. 408, International Civil Aviation Organisation, (1992) Series OFOD-No. 63.**

Consequently, we can say that the entry into force of such a liberal BATA between Colombia and Venezuela followed by the liberalisation of trade via the Andean Pact agreement has increased the volume of air traffic between them in order to adjust to the commercial flow thus we can foresee the same evolution for the Andean Pact countries but at a slower pace for Peru and Ecuador since, as Pereira mentions it, they fear that their airlines are not in condition to work on equal terms with the airlines of Colombia and Venezuela.[111]

c) The Cartagena Agreement

The Cartagena agreement was first signed by five nations namely Colombia, Venezuela, Ecuador, Peru and Bolivia in May 1969, in Caracas. The Cartagena agreement recently established a free-trade zone between the five Andean Pact countries and via Decision 297[112] opened the skies thus creating, as Booth points it out, a single airline market with a land area of 4.7 million square km (about half the size of Canada) stretching over the Andes, deserts and jungles, from the Atlantic and Caribbean coasts to the Pacific.[113]

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[111] **E. Pereira Lima.** Supra note 103 .

[112] **Gaceta Oficial del Acuerdo de Cartagena, June 12, 1991.**

[113] **R.C. Booth.** Supra note 94 at 80.

According to Sepulveda (adviser to the Andean Pact), this pioneering move, the first of its kind outside the United States, will both revolutionise the air transport industry in the Andean Pact region, and will create vastly improved frequency and pricing options for air travel within the area, which will benefit the consumers and the economies of the nations involved.[114]

In the "Report on Agenda Item 3" of the 1994 ICAO World-Wide Air Transport Conference, the Andean Group of States (WP/58) reaffirmed that multilateralism was justified within a process of economic integration and was the practice of the Andean Group of States within the sub-region, as was bilateralism with respect to other States.[115] The Andean Group of States (WP/58) also described their sub-regional air policy and reaffirmed their preference for a multilateral regime limited to the sub-regional level.[116]

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[114]Ibid at 81.

[115]***Report on Agenda Item 3 ; Future Regulatory Process and Structure***, **ICAO, AT Conf/4-WP/103 (6 December 1994), World-Wide Air Transport Conference on International Air Transport Regulation: Present and Future, Montreal, at 3-1.**

[116]***Report on Agenda Item 2.2 ; Future Regulatory Content-Market Access***, **ICAO, AT Conf/4-WP/98 (5 December 1994), World-Wide Air Transport on International Air Transport Regulation: Present and Future, Montreal, at 2.2-1.**

In the same way, sixteen Latin American and Caribbean States (WP/90) believed that progressive process of integration and economic co-operation, of which the Andean Pact was an example, was a starting point for multilateralism which makes increasing levels of flexibility feasible.[117]

Decision 297 of the Andean Pact[118] : Integration of Air Transport in the Andean Sub-Region liberalises immediately Third and Fourth Freedom, Fifth Freedom rights. The preamble observes that there is a general tendency towards the opening of the economies that is trying, among many things, to expose the system of production to the harshness of competition and to induce higher levels of competitivity by carrying out policies and actions aimed at improving, extending and modernising the capacity of the infrastructure and the performance of transportation services and communications which insufficienty and high costs impede the fast and reliable linkage between the production centers and the consumer centers.

Another objective stated in the preamble is to realise the gathering of all the national air transport authorities in order to promote bilateral and multilateral agreements to improve the sub-regional air transport services and of cooperation for the joint use of the

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[117]***Report on Agenda Item 3***, Supra note 115.

[118]Decision 297 was signed in May 1991 and entered into force on December 31, 1991; Supra note 112.

capacity of the infrastructure and equipment, and the adoption of joint positions against third parties.

It is also mentioned that in the Act of La Paz, the presidents of the countries of the sub-region decided to adopt an open skies policy in the Andes and recommended to the Junta of the Cartagena agreement to make a proposition to be analysed in the next Presidential Council meeting on the initiatives of Venezuela and Colombia in that respect.

The definitions applicable to Decision 297 are stated in article 1. "Country of origin" is defined as the territory of the country from which the air carrier embarking passengers, cargo and mail holds its nationality and from which the tariffs of the air carriage are fixed. The "Operating Certificate" is the document granted by the aeronautical authority of a Member State giving the permission to an air carrier to realise a specific air transport service.

The scope of application of the Decision covers all scheduled and non scheduled international air transport services of passengers, cargo and mail between the respective territories of the Member States and between those territories and third countries (art.2).

Member States grant each other unconditionally the First and Second Freedom of the air (art.4) more specifically the right of overflight and of landing for non-traffic purposes. They also grant each

other the Third, Fourth and Fifth Freedom of the air for scheduled flights of passengers, cargo and mail in the Andean sub-region (art.5).

Pertaining to non scheduled cargo flights realised in the sub-region by Andean Pact air carriers, the Member States adopt a regime of complete freedom (art.6).

In addition to the provisions of the present Decision and in conformity with the stated "Andean Air Transport Policy", Member States must modify , if necessary, the operation licences, the bilateral agreements and all other administrative documents into force between themselves in order to direct them towards a free exchange of sub-regional commercial air transport rights carried out in the interest of the community and where healthy competition is ensured as well as the quality and efficiency of international air transport service (art.7).

The application of the principle of multiple designation is approved by the Member States for scheduled air transport services of passengers, cargo and mail, a uniform regulation having to be adopted by the Andean Committee of Aeronautical Authorities within ninety days to guarantee free access to the market (art.9).

Automatic approval, by national competent authorities, of requests from national air carriers of Member States to perform charter flights in the sub-region is implemented by article 10 under certain conditions. The air carrier requesting the autorisation must present its operating licence and its insurance contract. The approval is

automatic if no established scheduled services exist between the two points. If sheduled services exist, the exploitation of the non scheduled service must not put at risk the economic stability of the existent scheduled services. In the case where a serie of charter flights is requested, those flights must be "all-include packages" (hotel, car rental, etc.) and be realised on a two-way route with fixed schedule of departure and arrival.

On the other hand, Member States must, before December 31, 1992, subject to bilateral or multilateral negotiations on the basis of equity and satisfactory compensatory formulas, grant themselves Fifth Freedom rights for scheduled flights and determine at which conditions charter flights of passengers can be operated, between the sub-region and third countries (art.12) namely Sixth Freedom rights.

Each Member State must inform the others of the names of its designated air carriers operating intra-regionally and extra-regionally as well as the commercial air transport rights they will exercise (art.17). Member States must also communicate to each other all the national provisions into force in their country pertaining to the obtention of route authorisations, frequencies, routes and schedules for scheduled air services and of authorisations for charter flights.

Furthermore, the Commission of the Cartagena agreement must adopt provisions aimed at preventing or correcting distorsions generated by unfair competition in air transport services (art. 19) within 180 days of the entry into force of this Decision.

In matter of price-fixing, the principle of country of origin pricing applies (art.20).

Thus, it is worth noting that even though Decision 297 does not focus directly on treatment of bilateral air agreements with countries outside the region, there can be little doubt that airlines and governments have not lost sight of the potential strengthening of their otherwise weakened and fragmented bargaining position against the US and European mega-carriers.[119]

Decision 360[120] modified Decision 297. The preamble states that this modification was necessary considering the interpretation Member States have given to article 5 of Decision 297 in which Member States exchanged the Third, Fourth and Fifth Freedom of the air for regular flights of passengers, cargo and mail. The interpretation by Member States led to limitations and to restrictions of the application of this article that have affected the functioning of the air transport system especially for the all-cargo flights.

Also, the Andean Committee of aeronautical authorities considers important to define better "regular flights" and "non-regular flights" in order to make these definitions compatible with ICAO criteria.

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[119]**R.C. Booth.** Supra note 94 at 81.

[120]**Gaceta Oficial del Acuerdo de Cartagena, June 10, 1994.**

"Regular flight" is now defined as a flight that is operated subject to routes, schedules pre-determined and that are offered to the public through a systematic serie of flights; all conditions must be met in order for the flight to be defined as regular. "Non-regular flight" is defined as a flight that is operated without being subject to the elements defining a regular flight.[121]

The second article modifies article 5 of Decision 297 so that it states that Member States grant each other Third, Fourth and Fifth Freedom rights for regular combination flights of passengers, cargo and mail or for regular all-passengers or all-cargo flights that are operated within the sub-region.

Finally, article 3 modifies article 12 of Decision 297 that now reads as follow: Member States adopt a regime of freedom for non-regular cargo flights of their national air carriers which do not constitute a systematic serie of flights between the same origin and destination, that are operated between the sub-region and third countries.

Decision 320[122] followed closely Decision 297 and is entitled: Multiple Designation in Air Transport of the Andean Sub-

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[121]"Regular flight"was originally defined in Decision 297 as being a flight operated subject to a pre-determined route and schedule and "Non-regular flight" as a flight operated without being subject to a pre-determined route nor schedule (art.1).

[122]Gaceta Oficial del Acuerdo de Cartagena, June 19, 1991.

Region. The preamble refers to article 9 of Decision 297 by which the Andean Pact countries agreed to the principle of multiple designation of air carriers engaged in scheduled services for passengers, cargo and mail . It also mentions the fact that the Andean Committee of aeronautical authorities will adopt the regulations required to apply the principle of multiple designation and to guarantee, in all cases, the free access to the market.

Article 1 states the principle of multiple designation: Member States can designate one or more national air carrier in possession of an operation licence in order to perform scheduled international air transport services of passengers, cargo and mail on any route within the Andean sub-region, guaranteing the free access to the market and without any kind of discrimination.

"National air carrier" being defined, in paragraph 2, as an air carrier that was legally constituted in the Member State that designates it.

The treatment of the requests for designation by the national airlines and their attribution is left to the competent authority of each Member State (art.2). Once the competent authority offers the designation to a national air carrier, it then fixes all the details of operation within a maximum delay of thirty days (art.3) and it must inform all the competent authorities of the other Member States of the

name of the designated air carrier, the routes it will operate, the frequencies and the type of aircraft that will be used (art.4).

Thereafter, the competent authority of a Member State which receives such a designation by another Member State, must permit immediately the performance of said services on the routes and with the frequencies that were authorized by the designator Member State within a maximum of thirty days of the reception of the notification. Modifications of the schedules requested due to technical reasons have to be negotiated with the designated airline (art.5).

On the other hand, the fact that an air carrier was designated to operate scheduled services does not preclude it from operating charter flights of passengers, cargo and mail if it meets the criteria of article 10 in Decision 297 (art.6).

Pertaining to the settlement of disputes under this Decision, the national competent authorities of Member States can initiate direct consultations between themselves in order to resolve the problems and this, notwithstanding the provisions of the Treaty creating the Court of Justice of the Cartagena agreement (art.7).

Last June, Decision 361[123] came to modify Decision 320. The preamble states that the modification was necessary considering the fact that the air carriers designated by Member States (art.1, Decision 320)

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[123] **Gaceta Oficial del Acuerdo de Cartagena, June 10, 1994 at 2.2.**

have identified the requisites required by the competent national authorities in order to allow the operations of air transportation in their respective territories and considering the fact that the Andean Committee of aeronautical authorities has pointed out the importance to harmonize the requisites that must be complied with by the airlines designated to operate in the sub-region.

Article 1 modifies article 5 of Decision 320 by enumerating the requisites that the designated air carrier of one Member State must comply with and present, prior to the notification of its designation to the other Member State, in order for the latter to permit the operation of the services on the routes and to the frequencies autorized by the designative Member State within a delay of thity days of the reception of the notification.

These requisites are: an authentic copy of the operating licence granted by the designative authority in conformity with the legislation of the other Member State (the one receiving the notification); to accredite the legal representation and to comply with the requisites of commercial inscription or domicile, always in conformity with the juridical order of the Member State receiving the notification; certification of insurance policies in line with the internationally accepted requirements for air transport; and, accreditation of the payment of the fees related to the granting of the operating licence that are established by the Member State receiving the notification. Modifications to the schedules are still permitted if they are related to technical reasons.

Article 2 adds to article 7 of Decision 320, the possibility for Member States to require, in their legislation, that designated airlines present certificates on lack of reports or on legal proceedings on drug trafficking and subversion as established in their national legislation.

Considering the whole scheme of Decisions 297, 320, 360 and 361 that constitute the Andean open skies agreement and their goal of integrating completely the air transport system between Member States, Decision 320 on multiple designation should have included provisions on a new criteria of substantial ownership and effective control of airlines.

In fact, instead of refering to the criteria applied in each of the Member State, an effort of harmonisation and liberalisation should have been done in order to reach a common criteria and in order to allow multinational ownership of airlines by nationals of all Member States of the Andean Pact up to 50% + effective control and up to 49% of foreign ownership by third parties.

Nevertheless, the Andean Pact Open Skies package is innovative since it was introduced on a short period of time, without any phase-in (except for Sixth Freedom rights), as in the case in the European Union, and should allow the air transport industry to react quickly to the needs of the travelling public induced by the freeing of trade between the Andean countries. It also constitutes, with the European Union, one of the most advanced form of regional multilateralism in the area of

international air transport services since it will include a common air policy and the common negotiation of Fifth and Sixth freedom rights.

The other main economic agreement that was concluded in Latin America is the MERCOSUR (Common Market of the South) Agreement.

2. Mercosur

MERCOSUR was established by the Treaty of Asuncion[124] (Paraguay), signed on March 26, 1991 and complemented by the Ouro Preto Protocol. The neighbouring countries parties to this agreement are: Argentina, Brazil, Paraguay and Uruguay. This customs union agreement entered into force on January 1, 1995. The Parties now dispose of six months to discuss of the possibility to include Chile and Bolivia to Mercosur. Their final declaration states that they intend to end such negotiations by June 30, 1995.[125]

Mercosur's market comprehends 200 million of consumers and as such, is considered the fourth most important free trade area after the European Union, Nafta and SEA (South East Asia).[126]

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[124]**Treaty Establishing a Common Market, March 26, 1991, 30 I.L.M. 1041.**

[125]**"Le quatrième espace commercial au monde est né" La Presse (January 1, 1995) B1.**

[126]Idem.

A list of 9000 products was established 85% of which will move freely from one country to the other, the other 15% will be subject to a uniform tax. A Common External Tariff of up to 20% will be applied to all the products imported from third countries to the agreement.[127]

According to O'Keefe, what is likely to occur by mid-decade is a Mercosur free trade zone (eliminating all tariffs and quantitative restrictions on trade between Member States). He also adds that many of the necessary steps for establishing such a free trade zone have already been taken, and the positive results that this process has already engendered ensure that progress in that area will continue: thus, between 1990 and 1992, total Argentine-Brazilian bilateral trade, which accounts for 85% of intra-Mercosur trade, went from $2.1 billion to $4.7 billion and the prevision for 1993 is of $6 billion.[128]

Unfortunately, the whole area of services including air transport services between Mercosur countries was not included in the Treaty of Asuncion since it is only the first step towards economic integration via a customs union. The next step should be a free trade

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[127]Idem.

[128]T.A. O'Keefe, "An Analysis of the Mercosur Economic Integration Project from a Legal Perspective" (Summer 1994) vol.28 No.2 The International Lawyer 440.

agreement and, maybe, the liberalisation of air transport between Member States as it was done in the Andean Pact countries because, as mentioned earlier in this paper, air transport services should be free to follow the commercial flow and adapt to the needs of the travellers in the Mercosur area. Eventually, a fusion between the Andean Pact and Mercosur could be possible in order to achieve a South American free trade area and, later on, add the Central American states and create a Latin American free trade zone for goods and services.

3. Central American Countries and Panama

Another interesting agreement was proposed in Latin America heading towards the liberalisation of air transport services between Central America and Panama and the United States. In fact, already some time ago, the U.S. Department of State has proposed to Central American countries and to Panama to negotiate an open skies agreement.

The preamble of this informal proposition[129] states that the United States propose to negotiate a multilateral agreement with Central America and Panama that would create an unprecedented open aviation market between the parties. This proposition reiterates the commitment of the United States to expand the Central American

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[129]"Propuesta de cielos abiertos de los Estados Unidos con América central y Panama" Ano 2 No.7 (Junc-August 1992) AITAL Boletin informativo 10.

economy through a continuous liberalisation of aviation that promotes regional commerce and tourism.

This agreement also intends to grant a better access to the United States market for Central America than the one granted by the traditional bilateral air transport agreements and to bring more benefits to the carriers, the communities, the merchants and the travellers from Central America as well as from the United States.

The principal characteristics of this agreement would include the following. First, it would grant unlimited route rights including Fifth Freedom rights; both parties would grant to each other, without any restriction, entry points, intermediary, coterminal points and points beyond. The airlines of either country in Central America or Panama can carry traffic to and from the United States from any point in Central America and Panama.

Secondly, the airlines would benefit from unlimited frequencies meaning that they can serve a market as many times as they wish to do it. The principle of multiple designation would apply and any of the parties could designate as many air carriers that it wishes to enter the market. Pertaining to tariffs, the principle of double disapproval would be applied.

On the other hand, there would be provisions to ensure a liberal charter regime and a liberal cargo regime for all-cargo flights and combinations flights namely, the most liberal provisions

would apply independently from the origin or destination of the flights. Also, self ground handling would be permitted.

Moreover, the agreement would contain provisions on currency conversion and remittance of earnings, code-sharing, computer reservation systems, legal incorporation and on air transport security.

Initially, the United States would make that proposition to Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama. Even though the proposition is accepted by the seven countries altogether, it come into effect if a lesser number of countries adopt the necessary measures to follow their commitment. There would also be a clause for the eventual adhesion of Mexico and of South American countries under the same conditions.

Through this agreement, United States would exchange rights with the Central American countries and Panama. Central America and Panama could do the same between themselves if they decide to. When the new multilateral agreement will come into force, it will replace the existing bilateral air transport agreements. Even though the new multilateral agreement should favour a better cooperation between the Central American countries, it would not require the same degree of liberalisation between themselves as the one that will exist between Central America and Panama and the United States.

Pertaining to substantial ownership and effective control of the airlines, the agreement would contain provisions similar as

the ones stated in other bilateral agreements the United States have with other countries and would aim at protecting the interests of the participants to this new multilateral market of aviation.

As such, the substantial ownership and effective control of a Central American airline could be exercised by citizens of another Central American country but not from a country outside Central America or Panama if it wants to continue benefitting from the agreement except if a written exemption to that effect exists in the agreement.

Considering this new multilateral framework, the United States also propose that Central American countries and Panama establish a regional aeronautical authority that will fix the standards to carry on business and to enhance the commercial practices in the region and also to allocate the counter space at airports, to revise the customs process and the route modifications.

Finally, United States would like to know the position of the Central American countries about this proposition and obtain their support in this respect. United States think that it is an idea that will benefit air transport in our countries and that will also be helpful to our economies and to our people.

This proposition could complement very well the establishment of a North American Open Skies Area for air transport and could become the base for negotiations between the two blocks namely,

the Central American countries and the NAFTA countries and then with the Andean Pact countries and Mercosur countries in order to achieve, one day, an American Open Skies Area of Air Transport as the Enterprise for the Americas Initiative created by President Bush is aimed at establishing such a hemispheric Free Trade Area namely, in Bush's words: "... a free trade zone stretching from the port of Anchorage to the Tierra del Fuego".[130]

C. Australia and New Zealand

In terms of geography, the fact that Australia and New Zealand constitute an isolated continent of great area has rendered the air transport system vital to these countries and has developed it very well in spite of their small population: the busiest Australian route, between the two largest cities of Sydney and Melbourne, each with a population of about 3 million, is traveled by 3.4 million passengers a year, nearly as many as between Paris and London.[131]

In 1983, Australia and New Zealand concluded the Australian-New Zealand Closer Economic Relations-Trade Agreement.[132]

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[130]**P.H. Smith**, "The politics of Integration: Concepts and Themes" in: *The Challenge of Integration: Europe and the Americas* (Coral Gables: University of Miami, 1993) at 9.

[131]**O. de Marolles, A. Lenoir**, *The Deregulation of Air Transport in Australia*, (Paris: ITA, 1993) at 95.

[132]**Australia-New Zealand Closer Economic Relations-Trade Agreement 1983**, done at Canberra, (28 March 1983) and entered into

This Treaty established a free-trade area without closing off closer economic relations in other areas possibly leading to a customs or full economic union. Initially, the aim is to create a single Australia-New Zealand market for goods.

The preamble of this agreement states that Australia and New Zealand have a longstanding and close historic, political, economic and geographic relationship. It also recognises that the further development of this relationship will be served by the expansion of trade and the strenghtening anf fostering of links and co-operation in such fields as investment, marketing, movement of people, tourism and *transport* .

The preamble adds that a closer economic relationship will lead to a more effective use of resources and an increased capacity to contribute to the development of the region through closer economic and trading links with other countries, particularly those of the South pacific and South East asia.

The intention to expand the agreement beyond trade is reflected in article 22 of the 1983 agreement which provides for a review, in 1988, to consider matters ranging from *transport* , common technical standards, cooperation between industries, taxation, harmonization of

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force, January 1, 1983; reproduced in: vol.XXII No.5 (September 1983) I.L.M. at 945.

laws, investment and migration. So, pursuant to this provision, Australia and New Zealand entered into an agreement in 1988 to accelerate the implementation of free trade.[133]

In the field of air transport, the open skies initiative was announced by Australian Prime Minister Kealing in the 1992 One Nation Package.[134] On the other hand, in 1992, the International Air Services Commission Act came into effect.[135] The purpose of the legislation is to enhance international air services by fostering greater economic efficiency in the airline industry , and increased competition between Australian carriers; increased responsiveness by airlines to the need of consumers, including an increased range of choices and benefits; promotion of Australian trade and tourism; and the maintenance of Australian carriers capable of competing effectively with airlines of foreign countries.[136]

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[133] **Protocol to the Australia-New Zealand Closer Economic Relations Trade Agreement on Acceleration of Free Trade in Goods: (Australia) Department of Foreign Affairs and Trade Treaty Series: No.18 of 1988**, entered into force August 18, 1988; quoted in: **R. P. Kewalram**, "The Australia-New Zealand Closer Economic Relations Trade Agreement" (October 1993) vol.27 No.5Journal of World Trade at 113.

[134] **"New Zealand jolts Evans into an apology" The Australian (13 February 1995) at 8.**

[135] **P. Singh**, "Some Significant Development in Australia's International Aviation" (1993) vol.XIX No.2 Air and Space Law at 71.

[136] Idem.

Following this, arrangements were made in 1992 to create a single Australasian air market by 1994.[137] The purpose of the Single Aviation Market is, in the medium term, effectively to remove the aviation border between Australia and New Zealand.[138] As of 1 November 1994, there was to be no constraint on airlines based in either country operating freely to, from and within the territory of each country; trans Tasman services were to be completely deregulated and international beyond rights were to be exchanged and incrementally introduced in the medium term.[139]

As a matter of fact, there are actually no restrictions on the number of airlines or services that can be operated between the two countries and discussions are being held on new passenger facilitation arrangements to make travel across the Tasman easier and faster.[140] As a result, the airlines of both countries now have extensive international on-flights rights: Air New Zealand is using these to operate flights beyond

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[137]Ibid. at 74.

[138]**P. Harbison**, "Aviation Multilateralism in the Asia Pacific Region: Regulatory and Industry Pressures for Change" (June 1994) vol.XIX No.3 Air and Space Law at 144.

[139]Idem.

[140]Information was kindly provided by the Australian Department of Transport in Canberra and transmitted to the author by Mrs. Atcock of the Australian Delegation to ICAO.

Australia to several Asian countries and the U.S., while Qantas is flying beyond New Zealand to Tahiti and the U.S..[141]

Unfortunately, in October 1994, the Australian government decided not to proceed with domestic access, or with on-flights rights additional to those agreed in 1992.[142] This decision was taken against the background of the relative benefits that the airlines of the two countries were deriving from the arrangements, the success of the Australian government's policies in promoting competition in Australia's domestic and international markets, the entry of a second Australian carrier on to Australian routes and the impending sale of Qantas but all other aspects of the 1992 understandings remain in place.[142a] The biggest impact of these understandings would have been to allow Air New Zealand into Australia's domestic market.[143]

In fact, New Zealand had expected to enter the Australian domestic flight market in November 1994.[144] Furthermore, international beyond rights are thoroughly important in the Australasian

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[141]**The Australian**, Supra note 134.

[142]**Australian Delegation**; see also: **The Australian**, Supra note 134.

[142a]**The Australian**, Supra note 134.

[143]Idem.

[144]**C. Kermond, "Ministers make up after New Zealand flights row" The Age (11 February 1995) at 8.**

market since Australia's international passenger traffic that amounted to 8.5 million in 1990 is expected to reach 18 million by the year 2000 and nearly 35 million by the year 2010 with Japanese travellers contributing hugely to that increase.[145]

As pointed out by Knibb, thus, the Single Aviation market is an outgrowth of the Closer Economic Relations accord between Australia and New Zealand.[146] Each government had already granted the other's flag carrier the right to fly beyond its own borders to the U.S. but the Single Aviation Market expanded these beyond rights to other destinations and Air New Zealand took advantage of it.[147]

As such, among the world's top 50 airlines, Air New Zealand is one of only seven reporting profits without relying on aircraft sales and with net profits amounting to US $250 million for the last five years, the carrier has clearly benefited from privatisation and from recent liberalisation of air services with Australia.[148]

As a result of the 1985 deregulation of domestic air transport that occurred in New Zealand, Ansett New Zealand was able, as

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[145]**P. Somerville**, "Australia International Intrigues and Domestic Disasters"(June/July 1993) The Avmark Aviation Economist at 3.

[146]**D. Knibb**, "Less is more" (February 1994) Airline Business at 53.

[147]Idem.

[148]Ibid. at 52.

a foreign company namely, 100% Australian-owned, to operate domestically in New Zealand but international services to other countries from New Zealand are not possible yet until the definition of ownership becomes Australasian ownership in the bilateral agreements with third countries.[149] On the other hand, Air New Zealand (New Zealand ownership including an Australian stake of 20 % owned by Qantas) was supposed to begin to establish its own domestic network in Australia from the entry into force of the Single Aviation Market on November 1, 1994[150] but it is still not possible as we have seen *supra* .

In the longer term, common customs, immigration and quarantine borders are likely to materialise from developing Closer Economic Relations policies, allowing passengers between New Zealand and Australia to be processed as domestic travellers.[151]

Considering the close geographic, economic, commercial and cultural links between Australia and New Zealand, it is believed that, if the Australian government pursues the liberalisation policy it advocated in 1992, the cooperation between themselves in the area of air transport will go even further and reach the point where international air rights will be negotiated on a common basis by the

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[149] P. Phelan, "Ties Across the Tasman"(January 6-12, 1993) Flight International at 35.

[150] Idem.

[151] Ibid. at 34.

International Air Services Commission on the behalf of Australasia which will act as an integrated economic block in negotiations with other blocks such as the European Union, NAFTA, the Andean Pact or ASEAN and, in that sense, provisions on Australasian ownership would also have to be included in the bilateral air transport agreements with third countries.

D. Asia/Pacific

The Asia/Pacific region covers one fifth of the world's total area and has a population of 2,580 million, or over half the world's total.[152] With an expected annual growth rate of passenger-kilometres of 8.5%, both for scheduled services and international scheduled services, from 1992 to 2003, the Asia/Pacific region will be the fastest growing region of the world in the field of air transport.[153] In 1992, the Asia/Pacific region accounted for 20% of world TKA .[154] As a group, the airlines of the region have been relatively profitable because the rapid growth of the past

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[152]J. Guérin, *The Place of ASEAN in International Air Transport*, (Paris: ITA Studies & Reports, vol.1, 1986) at 4.

[153]ICAO News Release of October 1994, PIO 10/94, data drawn from: "Outlook for Air Transport to the Year 2003", AT Conf/4 (15 November 1994), World-Wide Air Transport Conference on International Air Transport Regulation: Present and Future, Montreal.

[154]M. Samuel, C. Findlay, P. Forsyth, "International Aviation Problems and Responses: An Asian Pacific Perspective" (1994) vol.XIX No.2 Air and Space Law at 169.

decade has helped profitability in that there has not been an overhang of excess capacity depressing profits.[155]

According to the Vice President, Research Center, of Japan Air Lines, Mr. Nagata, the high growth rate is attributed to several factors: increased disposable income, more leisure time, developing trade and tourism, the liberalization of travel regulations and aviation policies, the growing importance of ethnic ties between countries and the potential offered by a large population base.[156] By 2010, the international travel to, from and within the Asia/Pacific Region will represent 51 percent of the world total, or 375 million travellers.[157]

On the other hand, while the broad picture of aviation in the region is one of growth and better than average profitability, this masks big differences between airlines, the markets they serve, patterns of costs and traffic and the regulatory policies of countries.[158] According to Samuel, Finlay and Forsyth, some of the most important differences can be identified as follow:

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[155]Idem.

[156]K. Nagata, "A Time of Change in the Asia/Pacific Region" (March 1994) No.2 IATA Review at 13.

[157]Idem.

[158]M. Samuel, C. Finlay, P. Forsyth, Supra note 154.

In fact, multilateralism has not, to date, been a feature of aviation in the Asia Pacific Region for various reasons but stem from the massive geographical separation and the inevitable cultural, economic and commercial differences.[160]

1. Association of South East Asian nations

The same can be said about the Association of South East Asian Nations [hereinafter ASEAN]. ASEAN was set up in Bangkok in 1967 and has six Member countries: Indonesia, Malaysia, the Philippines, Singapore, Thailand and Brunei.[161] At first sight, as Guérin points it out, it is quite a heterogeneous group because of cultural and historical differences that are sometimes compounded by the hard feelings about past conflicts (as the Malaysia-Singapore dispute leading to separation in 1965).[162]

Nonetheless, in January 1992, the six Member States of ASEAN endorsed a plan to establish a free trade area within 15 years[163] thus agreeing to form the AFTA, the Asean Free Trade Association, by the

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[160] **P. Harbison,** Supra note 138.

[161] **J. Guérin,** Supra note 152 at 6.

[162] Idem.

[163] **H. Nuutinen,** "The Tortuous Path to Plurilateralism" (May 1992) The Avmark Aviation Economist at 18.

end of the year 2007.[164] Even though the mechanism to negotiate as a block already exists, as the timescale for trade liberalisation suggests, the group seems far too fragmented at present to agree on a common aviation policy.[165]

Heterogeneity is also the main feature of the group of five flag airlines in which recent carriers (Singapore Airlines, Thai Airways International) are in the company of older, mature operators like Philippines Airlines or Garuda but all five airlines achieved very high traffic growth rates in the 1970s that were well above the world average; the result being that the most energic of them (Singapore Airlines and Thai) now appear as formidable competitors to established European or United States airlines.[166]

Recently, Indonesia, Malaysia and Thailand announced that they will set up the region's first multilateral aviation pact in a move intended to test the waters in initiating greater aviation freedoms in the Growth Triangle.[167] Full ratification of the pact is expected to be at least six months away.[168] Each Member country has

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[164]H.A. Wassenbergh, Supra note 32 at 16.

[165]H. Nuutinen, Supra note 163.

[166]J. Guérin, Supra note 152.

[167]I. Muqbil, "Three Points to Open Asia"(December 1994) Airline Business at 18.

[168]Idem.

designated three cities to which two airlines from each country can offer unlimited frequencies, using any type of aircraft; only Third and Fourth Freedom rights would be available initially and Fifth Freedom rights would be added later, cabotage prohibition being left untouched by the agreement.[169]

Hence no multilateral agreement to liberalize air services exists between the six Member States of ASEAN such as an open skies regime, the Member States have tried to increase the level of co-operation betwenn themselves. As a matter of fact, ASEAN airlines namely, Garuda Indonesia, Malaysia Airlines, Philippine Airlines, Royal Brunei Airlines, Singapore and Thai Airlines, have agreed to restore their commercial profile and their competitivity by co-operating in the commercial sector and in the pooling of resources for buyings, sales, marketing and strategy.[170]

2. Orient Airlines Association

Although the role of ASEAN has grown substantially over the past twenty years, communications between capital cities have been relatively limited.[171] According to Harbison, the situation is

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[169]Idem.

[170]"Aperçu de l'année 1992 dans l'aviation civile internationale" (July/August 1993) vol.48 No.6 Journal OACI at 20.

[171]P. Harbison, Supra note 138 at 138.

changing and, by a combination of response to outside threat and a recognition of the opportunities from co-operation, a greater cohesion is developing: the emerging role of the Organisation of Orient Airlines [hereinafter OAA] is a useful barometer to this change.[172]

The OAA has 15 member airlines comprising: Air Niugini, Cathay Pacific, Japan Air Lines, Korean Airlines, Malaysian Airlines (MAS), Philippine Airlines, Qantas, Royal Bruneï, Singapore Airlines and Thai Airways.[173] In keeping with recent trends, the OAA took a number of aeropolitical initiatives during 1993.[174]

More important was the adoption by the Assembly of Presidents, in September 1993, of a policy report adding an aeropolitical function to the already existing commercial and technical activities; it was also agreed that OAA membership should include airlines of the People's Republic of China.[175]

Accordingly, organisations in the Asia/Pacific Region such as ASEAN and OAA–and, other groups such as PATA, the Pacific Asia Travel Association–have promoted the idea of a collective voice to

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[172]Idem.

[173]J. Guérin, Supra note 152 at 31.

[174]K. Nagata, Supra note 156 at 15.

[175]Idem.

ensure maximum benefits from the aviation system but we are a long way from any serious multilateral review of the major aviation and tourism issues ahead.[176]

In fact, we agree with Harbison that while powerful trading blocks such as the European Union and NAFTA are evolving, the Asia Pacific travel market is booming and that without a multilateral aviation forum, countries in this region will continue to be subjected to a fragmented, unco-ordinated aviation system and to a series of divisive bilateral negotiations with countries outside the region.[177]

So it will be interesting to follow the evolution of this new pact signed between three ASEAN countries that are also members of the OAA and to see if the liberalization of air transport between Indonesia, Thailand and Malaysia will induce the same liberalization between the ASEAN nations and, eventually, between the members of the OAA.

IV North American Free Trade Area

The North American Free Trade Area was created following the entry into force of the North American Free Trade Agreement on January 1, 1994. In order to size up the geographic and

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[176]**P. Harbison** Supra note 138 at 144.

[177]Idem.

commercial importance of the North American Free Trade Area, we have to consider some statistics. The Area encompasses a total population of 354 million people and, with a combined output of about US $6 trillion, Canada, Mexico and the U.S. are a larger potential market than the 12 Nations European Community, which in 1992 will unite 324 million people, producing US $4 trillion annually.[178]

Also, it must not be forgotten that Canada is the largest U.S. trading partner, and Mexico is its third largest and that beyond the trade statistics, it is important to look at investment flows and trade in services, which represent about 66% of the U.S. GNP (gross national product).[179] Moreover, as Broadman points it out, as in the global marketplace generally, international trade and investment in the services sectors–a diverse set of industries, such as financial services, telecommunications, and transportation– are increasingly prominent features of commerce in the North American region.[180]

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[178] **R. Rodriguez Baracio** in: **N. Lacasse, L. Perret,** ***Faire affaires au Mexique: les défis du libre-échange (Aspects juridiques et commerciaux),*** (Montreal: Wilson & Lafleur, 1993) at 144.

[179] **R. Zoellick,** "The Uruguay Round, NAFTA, Asia Pacific Economic Cooperation Initiatives and the European Communities" in: ***Proceedings of the Annual Meeting–ASIL(American Society of International Law),*** (Annual 1993) at 342.

[180] **H. G. Broadman,** "International Trade and Investment in Services: A Comparative Analysis of the NAFTA" (Fall 1993) vol.27 No.3 The International Lawyer at 623.

A. North American Free Trade Agreement

In June 1991, Canada began negotiations with Mexico and the United States to set up the North American Free Trade Agreement [hereinafter NAFTA] which came into force on January 1, 1994 thus creating the world's largest free trade area with a current flow of trade and investment among the three partners of approximately $500 billion a year.[181]

Essentially, the NAFTA knocks down the majority of current tariffs and import licences on all manufactured goods, provides greater market access for service industries, permits more mobility for professional and business travellers, and allows freer entry to an integrated North American market of 360 million consumers.[182]

The preamble of NAFTA[183] states that the governments of Canada, of the United Mexican States and of the United States of America resolved, among other things, to strengthen the special bonds of friendship and cooperation among them, to create an expanded and secure market for the goods and services produced in their territories,

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[181] ***The North American Free Trade Agreement–at a Glance***, **Document published by the Canadian government, 1993 at 1.**

[182] Idem.

[183] **North American Free Trade Agreement, Final Text 1B17 (17 December 1992), Free Trade Law Reports, Special Report No.39, Extra Edition: CCH INTERNATIONAL at XV.**

to enhance the competitiveness of their firms in global markets and, also to create new employment opportunities and improve working conditions and living standards in their respective territories.

The objectives of the agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are stated in article 101. The most important are: to eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; to promote conditions of fair competition in the free trade area; to increase substantially investment opportunities in the territories of the parties and finally, to establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

Chapter 3 accomplishes NAFTA's central objective for trade in goods between the U.S. and Mexico: elimination of import duties on goods that originate within North America; duties will be removed in 1994 on key categories of goods, including computers and most automobiles and the duties on other products will be phased out over 5, 10, and 15 year intervals.[184] The duty-reduction regime put in place between Canada and the U.S. by the 1988 CFTA (U.S.-Canada Free Trade Agreement) will continue as scheduled until completion in 1999.[185]

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[184]**Paul, Hastings, Janofsky & Walker,** ***North American Free Trade Agreement Summary and Analysis,*** **(Washington: Matthew Bender, 1992-1993) at 5.**

[185]Idem.

NAFTA confirms that each signatory will confer national treatment to the goods of the other Parties namely treatment at least equal to that accorded to similar domestically-produced goods, subject to specified exemptions (chapter 3).

Article 309 eliminates non-tariff import and export restrictions, most notably import licences and quotas but a number of industries are broadly exempted from this provision, however, including autos and auto parts, agriculture, textiles, and energy.

Unfortunately, it must be noted, as we will see in this section, that air transportation is totally excluded from the provisions of NAFTA aiming at liberalising the services between the three Parties.

First, chapter 11 grants national treatment (art.1102) and most-favored-nation treatment (art.1103) to investors of the three Parties. Paragraph 4 of article 1102 states that, for greater certainty, it means that no Party may impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals or to require an investor to dispose of an investment by reason of its nationality.

Mexico made a reservation to National Treatment (art.1102) in the field of investment stating that investors of another Party or their investments may only own, directly or indirectly, up to 25% of the

voting interest in an enterprise established in the territory of Mexico that provides commercial air services on Mexican-registered aircraft. The chairman and at least two-thirds of managing officers must be Mexicans. Moreover, only Mexican-registered aircraft may provide domestic commercial services, scheduled international commercial services and non-scheduled international commercial services (see Annex 1 at I-M-56).

A similar reservation was made by the United States stating that only air carriers that are "citizens of the United States" may operate aircraft in domestic air service (cabotage) and provide international scheduled and non-scheduled air service as U.S. air carriers. The definition of "citizen of the United States" is found in the Federal Aviation Act of 1958 as being a U.S. corporation owned and controlled at least at 75% by U.S. citizens (see Annex 1 at I-U-13,14). Total foreign equity investment could reach up to 49% with a maximum of 25% being voting stock without constituting, by itself, an indicator of foreign control.

Canada also makes a reservation as to the application of articles 1102, 1103, 1107 on investment to air transport and requires a 75% Canadian ownership and control of airlines (Annex 2 at II-C-9,10).

Chapter 12 of NAFTA pertains to cross-border trade in Services. This chapter does not apply to air services, including domestic and international air transportation services, whether scheduled or non-scheduled, and related services in support of air services, other than aircraft repair and maintenance services during which an aircraft is

withdrawn from service and specialty air services (art.1201(2b)) namely, aerial mapping, aerial surveying, fire fighting etc. (see art.1213).

As a matter of fact, chapter 12 provides for national treatment (art.1202) and for most-favored-Nation Treatment (art. 1203) for all service providers of the parties by each Party. In Annexes 1 and 2, the three Parties make reservations on the application of chapter 12 even to aircraft repair and maintenance and to air specialty services.

The application of article 1210 to air transport would have been very interesting since it provides for licencing and certification measures based on objective and transparent criteria such as the competence and the ability to provide a service. Furthermore, paragraph 3 states that each Party shall eliminate, within two years of entry into force of this agreement, any citizenship or permanent residency requirement maintained for the licencing or certification of professional service providers of another Party.

The only mode of transport that was totally liberalised by NAFTA was land transportation (chapter 18). As a matter of fact, within six years, trucks and buses can criss-cross the North American continent with virtually no border restrictions but domestic hauls will still be protected.[186] This accomplishment is significant inasmuch as over 85% of U.S. trade with Canada and Mexico moves by land

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[186] ***The North American Free Trade Agreement – at a Glance*** , Supra note 181 at 15.

transportation.[187] As to maritime transportation, Canadian and Mexican firms will have access to each other's international maritime shipping markets but the United States will not benefit from this provision.[188]

Another important chapter of NAFTA for an eventual liberalisation of air transport would be chapter 15 on Competition and Antitrust. The parties lay out general commitments to familiar antitrust objectives: to apply their domestic competition rules to prevent anti-competitive business practices (Mexico just passed a legislation on antitrust in 1991 in order to comply with its obligations under NAFTA[189]) and to cooperate and coordinate in enforcing those rules (art.1501).[190]

Article 1504 establishes a trilateral Working Group on Trade and Competition which is to evaluate issues concerning the relationship between competition laws and policies and trade in the North American zone and to make recommendations within five years.

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[187]**H. G. Broadman,** Supra note 180 at 641.

[188]**The North American Free Trade Agreement–at a Glance,** Supra note 181 at 15.

[189]**Ley Federal de Competencia Economica, entered into force on June 22, 1993** for an analysis of this legislation see: **Canadian Bar Association,** "NAFTA Spawns New Mexican Competion Law" (1994) vol.1 No.1 Canadian International Lawyer 41

[190]**Paul, Hastings, Janofsky & Walker,** Supra note 184 at 73.

Eventually, it is believed that the liberal state of mind of the three Parties will gain other sectors in the services area such as air transportation. As pointed out by Moyano, the adoption of trade liberalisation as one of the fundamentals of the economic program of the actual Mexican government and NAFTA negotiations should serve as an opportunity to discuss of the wiseness of adopting an Open Skies policy and of including it in NAFTA.[191]

The three following sections on the air transport industry and policy of Canada, United States and Mexico do not intend to give a complete view both historically and recently of air transport but rather aim at presenting recent background elements that would be relevant to conclude an Open Skies treaty between the three partners.

B. Air Transport in Canada

As the second largest nation in the world (3 851 809 sq. miles), Canada occupies the northern half of the North American continent with the exception of Alaska and Greenland.[192] As such, air transport is very important to its economic development since it is more time-efficient

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[191]**C. Moyano Bonilla**, "Mexico y la politica de cielos abiertos" (October, November, December 1991) No.3 AITAL Boletin informativo at 10.

[192]**Centre for Research of Air and Space Law**, *Legal, Economic and Socio-Political Implications of Canadian Air Transport*, (Montreal: C.R.A.S., 1980) at 2.

than land transportation and, in the Northern part of Canada, it is often the unique mode of transportation to serve remote communities due to the non-existence of route infrastructures.

1. Canadian Air Transport Policy

First, it must be acknowledged that the power to regulate aeronautics was not expressely stated in the Constitution of Canada (article 91 of the Constitutional Act of 1867) and that it was attributed to the Federal government as a residuary power (art.91(10) by the Supreme Court of Canada in *Johannesson and Johannesson* v. *The Rural Municipality of West St.Paul* [193] . The *ratio decidendi* is partly stated by Honourable justice Rinfret:

> "... *I entertain no doubt that the decision of the Judicial Committee is in its pith and substance that the whole field of aerial transportation comes under the jurisdiction of the Dominion Parliament. In the language of their Lordships at p.77: aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion. In those circumstances, it would not matter that Parliament may not have occupied the field ... In the circumstances, the Dominion Legislation occupies the field, or at least so much of it as would*

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[193] **[1952] 1 S.C.R. 292.**

> *eliminate any provincial legislation, and, more particularly, that here in question."*[194] ;

and is completed by Honourable Justice Kerwin:

> *"If, therefore, the subject of aeronautics goes beyond local or provincial concern because it has attained such dimensions as to affect the body politic of Canada, it falls under the "peace, order and good Government" clause of s.91 of the B.N.A. Act [British North American Act] since aeronautics is not a subject matter confined to the provinces by s.92."*[195]

On the other hand, Mexico and the United States are important for Canada on an aeropolitical point of view for the reasons stated hereinafter. Mexico is important for Canada in the fields of tourism, trade and business; Mexico also constitutes the link with Central America and beyond and it represents potential developments for the Canadian industry in Mexico.[196]

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[194]Ibid. at 303, 314.

[195]Ibid. at 311.

[196]**Centre for Research of Air and Space Law.** Supra note 192 at 599.

Canada's new international air transportation policy was announced by the Minister of Transport Doug Young on December 20, 1994.[202] Two major initiatives have been taken by the governement namely, the government has adopted a National Airports Policy initiating a community-based management model that will take government out of day-to-day operations but will keep it responsible for ensuring safety and security. Secondly, the government is moving toward commercialization of the air navigation system and supports an approach of a "not for profit" organisation. (p.2)

The Canadian government states that its strategy must be responsive to the legitimate aspirations of the airports' community-based authorities and exporting community and create an environment that provides them with greater access to international markets.

Its strategy also recognizes the importance and vitality of Canadian air carriers and will provide growth opportunities in international markets for them all. Thirdly, the government's goal is to protect the interests of travellers, shippers and taxpayers as well as those of the airlines and their employees.

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[202] All the following informations were gathered from: **Transport Canada, News Release No. 172/94 (December 20, 1994).**

The policy of the government will ensure consumers benefit from increased price and service competition and also that consumer protection measures are in place.(p.4)

Canada's international air transportation policy was stated in December 1994.[203] It is clearly stated that this policy does not apply toward a new air agreement with the United States and, as we have seen at the beginning of this paper, an open skies agreement was signed with the U.S. on February 24, 1995.

In order to promote industry growth and competitiveness, the government has adopted a "Use It or Lose It" rule to allocate scheduled passenger service opportunities. This rule is effective immediately and allows any Canadian carrier to apply to the Minister of Transport for designation to operate in countries where the currently designated carrier is either not operating or is under-utilizing the designation.

A designation is deemed to be under-utilized if the incumbent carrier is operating direct service less than twice weekly on a year-round basis with its own equipment; or, if it is not operating with its own equipment on a significant portion of the itinerary and if it is not operating at a daily or near daily frequency of service during peak periods.

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[203]**Transport Canada, *Canada's International Air Transportation Policy*, TP 12276, December 1994.**

There exists also a list of 37 countries eligible for assignment to new carriers.

If there is more than one applicant for an unserved or underserved route, the Minister will select the successful applicant on the basis of the best service proposal and on the technical and commercial ability to provide the services, based on its own track record. This applicant will be able to keep the designation for two years so long as it is not under-utilized. The Minister may also name a back-up carrier. (p.4)

Pertaining to the allocation of Fifth Freedom Rights, considering the fact that, in negotiations, Canada often acquires fifth freedom rights which are sometimes not fully taken up by the first carrier designated to operate, second designated carriers may apply for such unused rights (this measure being effective immediately).

The same situation existing for unused intransit rights, all Canadian designated carriers will be permitted to make use of available intransit rights so that carriers may carry passengers through an intermediate point to their destination.(pp.5,6)

In order to respond to community aspirations, in the case where no air agreement exists and no Canadian carrier is interested in the market, a foreign country may apply for one of its carriers to commence a total of twice-weekly service from the foreign country to one or more points in Canada of its choices, with the exception of Toronto. The Canadian government will approve the application provided that the

Canadian community or communities that would gain service are supportive and that the foreign carrier would pick up traffic en route to or from Canada (no Fifth Freedom Rights) but exceptions to this restriction can be made on a case-by-case basis. Intransit rights would be permitted.(p.6)

For new Canadian international charter entrants, and to protect consumers' interests, the Minister of Transport will ask the National Transportation Agency to ensure that those new carriers will meet minimum financial requirements before being given a licence and to ensure that they cannot sell transportation services before they have obtained a licence to operate air services.(p.7)

Furthermore, in the interests of consumer protection, computer reservation systems operating in Canada will be governed by new regulations to be promulgated in the *Aeronautics Act* . These regulations will ensure that participating carriers provide complete, accurate, non-misleading information, a neutral display and grant travel agents the right to choose one such display to appear automatically when a transaction is started, will allow charter operators to display air transport services not associated with ground packages alongside scheduled services and, will prohibit carriers from requiring a travel agent to use a particular system as a condition for the receipt of any benefit or commission for the sale of its air services. The regulations will also give the Minister of Transport the ability to ensure Canadian carriers receive equivalent treatment in a computer reservation system in a foreign country when they compete against the national carrier.(p.8)

Pertaining to the Open Skies policy that the Canadian government adopted officially with the United States crystallised by the signature of the open skies agreement on February 24, 1995, a complete review is made infra in chapter V. As a matter of fact, such an agreement was highly predictable even though it took many years to conclude taking into account that ninety-five percent of the Canadian population lives within a half hour's flying time of the U.S. border, and that the countries are each other's best customers.[204]

On the domestic service side, regulatory reform of the Canadian air industry gathered momentum with policy changes announced in early 1984.[205] Since 1988, the airline industry in Canada has been entirely deregulated, with a few exceptions relating to safety and foreign control.[206] The Federal government has, however, retained some regulation of air services in the North in order to ensure essential services to and from these distant but under populated markets.[207]

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[204]**P. J. Ross, "Canadian Airline Economics–a New Reality Emerges" in: *World Infrastructure 1994* , (London: Sterling Publications, 1994) at 142.**

[205]**National Transportation Act Review Commission, *Competition in Transportation Policy and Legislation in Review*, (Ottawa: Canada Communication Group Publishing, 1993) volume 1, at 31.**

[206]**O. Madore, J. Shaw, Supra note 200 at 10.**

[207]Idem.

Deregulation of the air transport industry was provided for in the National Transportation Act, 1987[208]. Article 3 states the new national transportation policy namely that a safe, economic, efficient and adequate network of viable and effective transportation services (...) and making the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers (...) and to maintain the economic well-being and growth of Canada under conditions ensuring (...) that competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services (...) and that transportation is recognized as a key to regional economic development and commercial viability of transportation links is balanced with regional economic development (...).

Article 6 establishes the National Transportation Agency [hereinafter NTA] consisting of nine members detaining the Canadian citizenship or permanent residency and appointed by the Governor in Council.

As we will see, the National Transportation Act, 1987 introduces a complete deregulation of air transportation in the Southern Part of Canada but it retains the Northern part regulated.

In order to operate a domestic service in Canada, one only has to hold a domestic licence; hold a Canadian aviation document

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[208]R.S.C. 1985, c.28 (3rd Supp.).

and have prescribed liability insurance coverage (art.71(1)).The conditions to be granted such a domestic licence by the NTA are to be Canadian, to hold a Canadian aviation document and to have prescribed insurance liability coverage (art.72(1)). Thus, it is more a fit and willing test than a public convenience and necessity test as in the precedent legislation.

"Canadian" is defined at article 67(b) as meaning a Canadian citizen or a permanent resident (re Immigration Act), a government in Canada or an agent or any other person or entity that is controlled in fact by Canadians and of which at least seventy-five per cent of the voting interests are owned and controlled by Canadians.

On the other hand, in order to operate a domestic service between points or to or from the designated area (northern Part), the person must hold a domestic licence issued under subsection 72(2), hold a Canadian aviation document and have prescribed liability insurance coverage.

A domestic licence to operate in the designated area can be issued by the NTA at the same conditions as the domestic licence for the Southern Part namely a fit and willing test but an objection to the granting of the licence can be made by an interested community, person or entity. Where such an objection is made, the NTA must be satisfied that the issuance would not lead to a significant decrease or instability in the level of domestic service provided within or to or from the designated area in order to issue the licence (art.72(2)).

and competitive transportation service. No sections provide for decreases in the fares.

On the other hand, to operate sheduled international service, a person must hold a sheduled international licence, a Canadian aviation document and have prescribed liability insurance coverage (art.87). The Minister can designate any Canadian carrier as being eligible to hold a scheduled international licence (art.89(1)). A non-Canadian airline can be eligible to such a licence if it has been designated by a foreign government to operate an air service under the terms of an agreement concluded with the government of Canada (art.89(2)). The same conditions apply *mutadis mutandis* to non-scheduled international service (arts.93-94).

2. Canadian Air Transport Industry

It is common knowledge that the airline industry worlwide has just come through the most difficult period in its history.[210] Collectively, the airlines incurred losses of over 15 billion dollars (U.S.) between 1990 and 1994 on their international scheduled services alone and the Canadian airline industry fared no better hence the two major carriers (Air Canada and Canadian Airlines International [hereinafter

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[210]**Transport Canada, *Canada's International Air Transportation Policy*, Statement by the Minister of Transport, December 20, 1994 at 1.**

deregulated environment.[216] The airline was privatized in October 1988, with 45% of its shares sold to the public; the remainder of the shares were sold in July 1989.[217]

Air Canada is a Canadian-based international air carrier providing scheduled and charter air transportation for passengers and for cargo.[218] The Corporation is Canada's largest air carrier in terms of operating revenues.[219] The airline's passenger route network offers direct scheduled services to 25 North American cities; through its domestic Regional Airlines, another 50 Canadian communities and 5 cities in the United States are linked to the Air Canada network.[220] Air Canada serves 24 cities in Europe, the Caribbean, New Delhi (India), Osaka (Japan) and Seoul (North Korea) and serves a total of 51 destinations worldwide.[221]

Historically, Air Canada was attributed the eastern part of Canada with the Atlantic routes on Europe and CAI the western part

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[216] **J. Christopher, *Canadian Airline Industry*, (Ottawa: Library of Parliament, 1993), Research Branch, at 7.**

[217] Ibid. at 8.

[218] **Air Canada, *Annual Information Form*, May, 9 1994 at 8.**

[219] Idem.

[220] Idem.

[221] Idem.

with the Asian routes but now the government has changed this policy and the two carriers can apply and operate on any route in Canada.

In fact, Air Canada's strategy for prosperity in the 1990s will be to increase its market presence, particularly in the fast-growing markets of Japan and Southeast Asia.[222] Thus, the airline has decided to use its rights on Manila, Philippines to offer daily service to that city from December 1995 as an extension of the leg Toronto/Vancouver-Seoul and later on the airline expect to offer a direct flight between Vancouver and Manila.[223] Moreover, Air Canada will serve, as of November 1995, Hô Chi Minh-city (Vietnam), Dubaï (United Arab Emirates) and Frankfurt on a three days /week frequency on the route Montreal-Frankfurt- Dubaï-Hô Chi Min.[224]

On the other hand, according to Hollis Harris, President and CEO of Air Canada, Air Canada is on course for renewed profitability and for the first time in memory, the airline is competitive with the major US airlines on a unit-cost basis.[225] Air Canada is positioning itself for future growth with the objective of achieving the market position, critical mass, alliance partner network and

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[222]O. Madore, J. Shaw, Supra note 200 at 11.

[223]Air Canada, Press Release, *Air Canada continue de tisser son réseau Canada-Asie* (1 March 1995) at 1.

[224]Ibid. at 2.

[225]Air Canada, *1993 Annual Report*, at 2.

Moreover, a number of joint servicing agreements have been negotiated.[232] Continental is providing ground handling for Air Canada at six major US airports; Air Canada is serving as General Sales Agent for Continental in France and performing ground handling for Continental Cargo in London, England; in Canada, Air Canada represents Continental in a number of capacities, including reservations and ticketing; airframe and engine maintenance work for Continental will generate $51 million in contract revenues by December 31, 1994.[233]

On February 22, 1995, Hollis L. Harris has announced, for the first year since 1989, net earnings of $129 million for 1994 of which $79 million were the result of the sale of Gemini CRS and for once of few times in the history of the Corporation, the Fourth Quarter was profitable with net earnings of $4 million.[234] Hollis Harris forecasts profits at least up to the year 2000.[235] The airline also recorded the best punctuality level

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[232]Ibid. at 11.

[233]Ibid. at 13.

[234]**Air Canada, Press Release, *Air Canada confirme son retour à la rentabilité par un bénéfice net de 129 millions de dollars* (22 February 1995) at 1.**

[235]**"Le président d'Air Canada promet des profits jusqu'à l'an 2000" La Presse (23 February 1995) C1.**

for North America with an 89% rate of on-time arrival.[236] Furthermore, with the new open skies regime between Canada and the United States, Air Canada is well positioned to take advantage of this new regime since it will take delivery of 24 Regional Jets in the next two years in order to serve the new markets.[237]

As a matter of fact, according to its CEO Holly Harris, Air Canada has been preparing itself for the liberalisation of air transport between Canada and the U.S. since the last three years[238] and welcomes the entry into force of the new agreement.[239] The airline recently announced that it had initiated four daily flights between Toronto and Atlanta on March 6, 1995 and it will add two daily frequencies as of April 1995.[240] The airline also stated that it will launch 20 new transborder

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[236] Air Canada, Press Release, ***Air Canada ravit la première place pour la ponctualité et pour le transport aérien à destination du Canada*** (6 March 1995).

[237] B. Mooney quoting Air Canada's Vice President Corporate Communications: Sandy Morrison, "Air Canada est bien placée pour profiter de la nouvelle entente Canada-Etats-Unis" Les Affaires (14 January 1995) at 38.

[238] Air Canada, Press Release, ***Le vol d'Atlanta ouvre la voie à l'expansion transfrontalière*** (6 March 1995).

[239] Air Canada, Press Release, ***Air Canada salue l'accord de libéralisation canado-américain Air Canada annonce l'expansion de son réseau transfrontière*** (24 February 1995) at 1.

[240] Air Canada, Supra note 238 .

services over the next eighteen months, thus widening its network from Orlando to Honolulu.[241] For example, Air Canada will initiate new daily services on the following routes: Ottawa-Washington, Montreal-Washington, Toronto-Washington, Toronto-New York (La Guardia).[242]

Other projected routes would include: Halifax-Chicago, Montreal-Cleveland, Montreal-Atlanta, Montreal-Orlando, Quebec-Newark, Toronto-Denver, Toronto-Phoenix, Toronto-Detroit, Ottawa-Chicago, Ottawa-Cleveland, Ottawa-Boston, Calgary-Seattle, Calgary-Houston, Calgary-Denver,Winnipeg-Denver, Vancouver-Los Angeles, Vancouver-Denver, Vancouver-Phoenix and Vancouver-San Francisco.[243] Air Canada will also offer a new flight Toronto-Tel Aviv and serve, in conjunction with his partner British Midland, the route Toronto-Montreal-Brussels.[244]

The second air carrier part of the Canadian airline industry's duopoly is Canadian Airlines International Ltd. (CAI) that is owned by PWA Corporation which is a broadly-held Canadian holding

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[241]Idem.

[242]Air Canada, Supra note 239.

[243]Idem.

[244]Air Canada, Press Release, *Air Canada prévoit un programme d'exploitation aérienne record sur son réseau international en 1995* (2 February 1995) at 2.

company with investments primarily in the airline industry.[245] CAI provides international and domestic scheduled and charter air transportation for passengers and cargo to 145 destinations over five continents.[246]

On the financial side, 1993 financial results were qualified as once again unacceptable by PWA's President and CEO Rhys T. Eyton.[247] In fact, PWA's 1993 loss, before $112.3 million in restructuring expenses, totalled $179.5 million on consolidated revenues of $291,8 million.[248]

In November 1992, PWA launched a major Restructuring Plan that included three elements: i) a debt restructuring that converts $666 million of obligations into equity with a further $74 million in debt being converted into zero-coupon convertible notes, ii) an Employee Investment Plan that converts $200 million in contributions into entitlements for common shares over a four-year period, and iii) a $246 million investment in CAI by AMR Corporation (parent company of American Airlines, Inc.).[249] The goal of the Restructuring Plan was to

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[245] **PWA Corporation, *1993 Annual Report*, at 1.**

[246] Idem.

[247] Idem; the new President and CEO of PWA is, since May 1994, Mr. Kevin Jenkins.

[248] Idem.

[249] Ibid. at 8.

signing, by Air Canada and Gemini, of a Memorandum of Understanding allowing the transfer, on February 15, 1994.[254]

As of November 1994, the computer system of CAI is integrated to AMR Corporation's Sabre computer reservation system in exchange of $160 million annually during the next 20 years for a total amount of $3.2 billion.[255] The transfer of systems to AMR should produce a net saving of $20 million to CAI .[256]

The financial results of CAI were announced on February 23, 1995.[257] PWA Corporation has improved its financial results by $254 million in 1994 in comparison with 1993. The Corporation has made a net loss of $37.8 million in 1994 (comparatively to $291,8 in 1993) representing $26.2 million more than the predictions due to foreign currency exchanges and to higher interests rates. PWA Corporation made an operating profit of $70.9 million, which is $8.8 million higher than the one predicted and which represents the first operating profit of the Corporation since 1988.[258]

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[254]Idem.

[255]M. Jannard, La Presse (28 April 1994) C1.

[256]M. Odell, "Canadian Catch-Up" (August 1994) Airline Business at 27.

[257]CAI, Press Release (23 February, 1995).

[258]Idem.

V Open Skies Treaty Between Canada and United States

The first Canada-U.S. commercial air agreement was signed in 1949 and provided for an exchange of routes between cities near the border and for equitable access to the transborder traffic by the carriers of the two countries.[263a] In 1966, a new Air Agreement[264] was signed which expanded the scheduled air services between the two countries. Specific routes were allocated to the designated airlines of each country (Schedule 1 and 2).

The 1966 Air Agreement was modified by an exchange of note in 1974.[265] This exchange of notes specifies point-to-point routes available to designated air carriers of both countries[266] and substituted

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263a ***Open Skies: Meeting the Challenge Report of the Special Committee on Canada-U.S.A. Air Transport Services***, Supra note 14 at 5.

264 ***Air Transport Services***, **Agreement Between the UNITED STATES OF AMERICA and CANADA, TIAS 5972,** signed at Ottawa and entered into force on January 17, 1966 with exchange of notes, ICAO Reg. No.1915.

265 ***Air Transport Services***, **Agreement Between the UNITED STATES OF AMERICA and CANADA Amending the Agreement of January 17, 1966, TIAS 7824,** Effected by Exchange of Notes, signed at Ottawa and entered into force on May 8, 1974, ICAO Reg. No.2485.

266 ***Open Skies: Meeting the Challenge Report of the Special Committee on Canada-U.S.A. Air Transport Services***, Supra note 14 at 5.

schedules 1 and 2 of the 1966 Agreement by new schedules 1 and 2 (par.1). The new schedules expanded the number of routes between the two countries from 21 to 45 for American carriers (schedule 1) and from 14 to 28 for Canadian carriers (schedule 2). Other routes were also added in 1981[267], 1984[268]. Also, an Agreement was signed which provided for the establishment of preclearance facilities at certain airports in both countries.[269] Under this arrangement, transborder passengers in Canada can be cleared by U.S. immigration and customs officials before departure; existing preclearance facilities are established at Montreal, Toronto,

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[267] ***Exchange of Notes Between the Government of Canada and the Government of the United States of America Amending the Air Transport Agreement Between the Two Countries of January 17, 1966, as Subsequently Amended by Exchange of Notes of May 8, 1974***, signed at Ottawa on August 10, 1981 and entered into force on August 28, 1981, ICAO Reg. No.3213; added the Ottawa-New York route to both schedules.

[268] ***Agreements Between the UNITED STATES OF AMERICA and CANADA Amending the Agreement of January 17, 1966, as Amended*** , **TIAS 11016**, Effected by Exchange of Letters, signed at Washington on May 4, 1984, ICAO Reg. No.3405; give an interpretation of "additional traffic stop" in article III of the Air Transport Agreement of 1966 as amended and adds the following Caribbean route: San Juan-Toronto-Montreal in both schedules.

[269] ***Open Skies: Meeting the Challenge Report of the Special Committee on Canada-U.S.A. Air Transport Services***, Supra note 14 at 5.

Winnipeg, Edmonton, Calgary and Vancouver but none exits in the U.S..[270]

Another exchange of notes was done in 1984[271] which provided for automatic approval by the other contracting party for additional air services of a regional, local and commuter nature between the two countries upon approval of the application of the carrier for such services by a contracting party (arts.1-2-5). In order for the approval to be automatic, the carrier must use an aircraft of no more than 60 passengers and that has a maximum payload capacity of no more than 18 000 pounds, it must serve city-pairs not named in the 1966 Agreement, not served by an airline of the other contracting party and of which at least one city has a population of less than 500 000 in Canada or less than 1 000 000 in the U.S. and a maximum transborder sector length to and from points in Canada of 400 miles or 600 miles (see art.5(d)).

A final exchange of notes was performed on May 28, 1991[272] to add the following new routes: a point in the U.S.(with the exception of

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[270]Idem.

[271]***Exchange of Notes Between the Government of Canada and the Governement of the United States of America Providing for a New Air Agreement on Regional, Local and Commuter Services Replacing that of 1966***, signed at Ottawa and entered into force on August 21, 1984, ICAO Reg. No.3218.

[272]***Exchange of Notes between the Government of CANADA and the Government of the UNITED STATES OF AMERICA to further amend the Air Transport Agreement signed January 17, 1966 as***

New York and Miami) -Montreal (Mirabel Airport), San Jose-Vancouver both routes were added for the carriers of the two countries and the Montreal-Toronto-San Francisco-Los Angeles and the Edmonton-Calgary-San Francisco-Los Angeles routes were added to the schedules of the Canadian carriers.

Further liberalisation of air transport services between Canada and United State was needed following the entry into force of the NAFTA and was finally achieved in February 1995 by the entry into force of a new air transport agreement.

A. Analysis of the Treaty

The new Air Transport Agreement between Canada and United States[273] entered into force on February 24, 1995 (art.24). It supersedes the 1966 Air Agreement as amended; the Nonscheduled Air Services Agreement with annexes and exchanges of notes, done at Ottawa May 8, 1974; the Agreement Concerning Regional, Local and Commuter Services, effected by exchange of notes at Montreal August 21, 1984, as amended; the Agreement on Aviation Security, done at Ottawa

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amended by an Exchange of Notes signed May 8, 1974, TS 1991/14, signed at Ottawa on December 13, 1990 and entered into force on May 28, 1991, ICAO Reg. No.3770.

[273] ***Air Transport Agreement between the Government of Canada and the Government of the United States of America***, signed at Ottawa on February 24, 1995 and entered into force the same day; See Annex II for the integral text of the Agreement.

November 21, 1986; and the Agreement Relating to Air Navigation, effected by exchange of notes at Washington July 28, 1938 (art.24).

In the preamble of the Agreement, both governments recognize that the geographic situation of the two countries, including the location of their main centers of population, and the close relationship between their two peoples create a situation unique in international civil aviation for the Parties and state that this Agreement must reflect the special relationship between the two countries.

They also recognize the importance of efficient air services for trade, tourism and investment flows and mention their desire to enhance access by their respective cities to the transborder air transportation system and to conclude an agreement that will promote transborder commercial air services to the fullest possible extent (preamble).

Another goal pursued by the Agreement is to make it possible for the airlines to offer the traveling public a variety of service options at the lowest prices that are not discriminatory and do not represent abuse of a dominant position, and to encourage individual airlines to develop and implement innovative and competitive prices (preamble).

The definitions applicable to the Agreement are found at article 23. Thus, it is important to note that "Aeronautical Authorities" are defined as: the Department of Transportation of the United States and,

for Canada, as the Minister of Transport and the National Transportation Agency.

At article 1, both Parties grant each other the right to fly across its territory without landing (Right of overflight), the right to make stops in its territory for non-traffic purposes (Right of technical landing) and the other rights specified in the Agreement.

Article 2 introduces the principle of multiple designation by granting each Parrty the right to designate as many airlines as it wishes to perform international air services and to withdraw such designations (par.1).

The Party receiving the designation of the other Party must grant the authorization to operate with minimum procedural delay provided that the designated airline meet the criteria of substantial ownership and effective control, the conditions prescribed under the regulations applying to the operation of international air transportation of the Party considering the application and provided that the designating Party meets the standards stated in articles 13 (safety) and 14 (Aviation Security) (art.2(2).

Once the authorization is granted, it can be revoked, suspended or limited if the designated airline no longer meet the three element mentioned *supra* in article 2(2) and also if the airline fails to maintain its qualifications as required by the aeronautical authorities or

fails to comply with the laws and regulations referred to in article 12 (art.3).

Article 4 provides for fair competition rules but its scope of application is limited by the transition period found in Annex V as it will be analised later on in this chapter. The Parties must, under paragraph 1, allow a fair and equal opportunity to compete in international air transportation to the designated airlines of both Parties.

As such, the Parties are not allowed to limit unilaterally the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated airlines of the other Party. Exception is made for customs and other government inspection services, for technical, operational, or environmental reasons provided they are uniform and non-discriminatory under article 15 of the Chicago Convention (art.4(2)).

Furthermore, neither Party has the right to impose to the other Party's designated airlines a first-refusal requirement, uplift ratio, no-objection fee or other requirements with respect to capacity, frequency or traffic that would be inconsistent with the purposes of the Agreement (art.4(3)).

Pertaining to pricing, the Parties agree that the prices should be set by market forces and that governmental intervention via the aeronautical authorities should be limited to the prevention of unreasonably discriminatory prices or practices; to the protection of

consumers from unreasonably high or restrictive prices due to the abuse of a dominant position; to protection of airlines from artificially low prices of competitors supported by governmental subsidies and to the protection of airlines from artificially low prices intended to eliminate competition (predatory pricing) (art.5).

Designated airlines are not, under article 5(2), required to file their prices for air services provided between the territories of both Parties (unless a mutual agreement to that effect is reached between the Parties under paragraph 3); nevertheless, they must provide immediate access to information on historical, existing and proposed prices to the aeronautical authorities of both Parties.

Paragraph 3 of the same article implements a double-disapproval regime for pricing meaning that if one Party is dissatisfied with a price it must notify the other Party of the fact and if both Parties agree that such a price is inconsistent with the purposes of the Agreement, they must apply the provisions of the Agreement. The price continue to be in effect if no mutual agreement can be reached.

By contrast, filing of prices may be required for air transportation between the territories of both Parties and third countries in accordance with the regulations of the Parties provided that these rules are applied without discrimination to the designated airlines. The meeting of scheduled prices charged in the marketplace must be allowed by the Parties if it does not undercut the price for international scheduled

air transport of the Third and Fourth Freedom airlines in that market (art.5(4)).

The word "meet" is defined at article 23 as meaning the right to continue or institute, on a timely basis, using such expedited procedures as may be necessary, an identical or similar price or such price through a combination of prices, on a direct, interline, or intraline basis, notwithstanding differences in conditions including, but not limited to, those relating to airports, routing, distance, timing, connections, aircraft type, aircraft configuration, or change of aircraft.

On the other hand, tariffs that constitute general terms and conditions of carriage broadly applicable to all air transportation and which are not directly related to the fare, rate or charge are subject to national laws and either Party may require their notification of filing (art.6).

Article 7 grants to all designated airlines the right to perform its own ground-handling in the territory of the other Party or select competing agents for that service. Where self-handling is precluded for considerations of airport safety and operational constraints arising from physical limitations, ground services must be available to all airlines on an equal basis.

The Parties are granted the right to impose user charges for air navigation services/air traffic control if those charges are just and

reasonable and imposed on similarly terms to all airlines performing international services (art.8A).

Such charges can also be imposed for airport, aviation security, and related facilities and services at the same conditions (art.8B(1-2)). The existing charges cannot be challenged and found inconsistent with the principles of this Agreement except if they are proved to be unjust, unreasonable and unjustly discriminatory (art.8B(3)). Notice of all changes to user charges must be given prior to their modification and each Party must encourage the review of the reasonableness of the user charges in accordance with this article (art.8(C)).

As for customs duties and charges, article 9 exempts, on the basis of reciprocity between the Parties, the aircraft of the designated airlines, their regular equipment (fully described at paragraph 2), the products sold in-flight and all items used in connection with the operation of international air transportation of any taxes, fees, customs duties or import restrictions.

Article 10 deals with the doing-business rights. It grants to the designated airlines the right to establish offices in the territory of the other Party for the promotion and sale of air transportation, to maintain the staff required for the provision of air transportation and to sell air transportation directly in the other Party territory (art.10(1-2-3)). Conversion and remittance of earnings as well as payment in local currency are permitted without any restriction.

In addition, cooperative marketing arrangements or operational ones such as blocked-space, code-sharing or leasing arrangements between designated airlines of both Parties are allowed provided that all the airlines hold the underlying route rights and meet the requirements normally applied to such arangements (art.10(6)) and subject to the limitations of the transition period found at Annex V.

Pertaining to the use of Computer Reservation Systems [hereinafter CRS], article 11 acknowledges the fact that both Parties already have national laws relating to the operations of, and to non-discriminatory access to, CRS; designated airlines should be entitled to inform the public of their services in a fair and impartial manner through the CRS operating in each territory. Thus, both Parties accept that the other Party's national laws and regulations will apply to the CRS offering services in this territory.

Likewise, each Party's designated airlines undertake to comply with the laws and regulations of the other Party relating to the operation and navigation of aircraft, to the admission to or departure from its territory (e.g. immigration, aviation security, customs, etc.) while entering, within or leaving the territory of the other Party (art.12).

Article 13 deals with safety issues. The Parties must recognize as valid, for the purpose of operating the air transport services provided for in this Agreement, all certificates of airworthiness, of competency and licenses issued by the other Party and that are still in force provided they meet the minimum standards established by the Chicago

Convention. Nevertheless, a Party may refuse to do so for the purpose of flight above its own territory if the certificates were granted to its own nationals by the other Party.

Aviation security is provided for in article 14. It reaffirms the intention of the Parties to comply with their obligations regarding aviation security under the Convention on International Civil Aviation (Chicago 1944); the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo 1963); the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague 1970) and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal 1971).

The Parties undertake to provide each other all necessary assistance to prevent acts of unlawful seizure of civil aircraft and other unlawful acts against the safety of such aircraft, their passengers and crew, airports and air navigation facilities, and any other threat to the security of civil aviation (art.14(2)) and in the event such an incident would occur, they undertake to facilitate the communications and to take other appropriate measures intended to terminate rapidly and safely such threat (art.14(5)); failure to perform those obligations by one Party entitles the other to withhold, revoke or limit the operating authorisations of an operator of aircraft to operate air transport services under the Agreement fifteen days after requesting consultations with the Party or before in case of emergency (art.14(6)).

In addition to acting in conformity with the aviation security standards and the recommended practices established by ICAO, the Parties should require that operators of aircraft of their registry, operators having their principal place of business in their territory and operators of international airports in their territory act in conformity with such aviation security provisions (art.14(3)).

Accordingly, each Party also agrees that its operators of aircraft may be required to to comply with the other's Party aviation security provisions for entrance into, departure from or within the territory of the other Party (art.14(4)).

At article 16, the Parties endeavour to agree on the interpretation and application of the Agreement through cooperation, exchange of information and consultations to arrive at a mutually satisfactory solution of any matter that might affect its operation.

Either Party also has the possibility to request consultations regarding any aspect of the Agreement and is not limited only to matters affecting the interpretation or the application of the Agreement. If the matter is considered to be urgent by the requesting Party, consultations must commence within fifteen days of the delivery of the request and in all other cases, in the next thirty days (art.16(2)).

In the case where the Parties fail to resolve a matter via consultations within thirty days of the commencement of the consultations or of the delivery of the request for consultations for urgent

matter, either Party can request a High Level Meeting [hereinafter HLM] (art.16(6).

A HML is constituted by the Secretary of State and/or the Secretary of Transportation of the United States and of the Secretary of State for External Affairs and/or the Minister of Transport of Canada; it may also include representatives of the Department of State and/or of the Department of Transportation of the United States as well as representatives of the Department of External Affairs and/or of the Department of Transport of Canada (art.16(7)). The HLM must convene, unless otherwise agreed to, within twenty days of the delivery of the request and it must endeavour to resolve the dispute promptly (art.16(11)).

The HLM considers any matter that affects the operation of the Agreement and resolves disputes arising from its interpretation or application (art.16(8)). In order to perform these duties, the HLM may establish *ad hoc* or standing committees, working groups or expert groups; seek the advice of non-governmental groups; take action to carry out its purposes (art.16(9)); call on technical advisers; have recourse to conciliation, mediation or make recommendations and assist the Parties to reach a mutually satisfactory resolution of the dispute (art.16(12)).

The resolution of disputes is provided for in Part A of article 17. This provision applies only when a Party considers that there

has been a violation of the Agreement and it does not apply to individual prices charged by the designated airlines of both Parties (art.17(1)).

Either Party can request, in writing, the establishment of an arbitral panel for what it considers to be a violation of the Agreement (see par.1) if no HLM has been convened or if the HLM has convened but the matter was not resolved within forty days of the delivery of its request or any agreed period (art.17(2)).

The panel established under article 17 has to make its report public unless it contains information considered to be confidential by its provider (art.17(4)).

The members of the panel must hold expertise or experience in law, in matters covered by this Agreement or in the resolution of disputes arising under international agreements; they must be chosen strictly on an objective basis, on reliability and sound judgment; they must be independent from any Party and they must follow a code of conduct to be established by the Parties within ninety days of the entry into force of the Agreement (art.17(5)).

Arbitration is performed by three panelists of which each Party must name one of its citizens and the third one being appointed by agreement of both Parties within twenty days of the delivery of the request. In the case where one Party fails to name its panelist or where no agreement is reached in designating the third panelist, any Party may request the President of the Council of the International Civil

Aviation Organization to appoint the panelist(s) provided he is not a citizen of one of the Parties (art.17(7)).

On the other hand, the panel is responsible for the establishment of its own procedures but the procedures must ensure at least one oral hearing before the panel as well as the opportunity tc present written submissions and rebuttal arguments and they should ensure that the delays specified at paragraphs 9(c) and 10 are respected for the submissions of the Parties (art.17(9-10)).

More importantly, the panel must present an initial report containing findings of fact, its determination as to whether there has been a violation of the Agreement within ninety days after the last panelist is selected; the panel must also make its recommendations for resolution of the dispute within twenty days of the request for the establishment of a panel upon request of both Parties (art.17(13)).

In the eventuality where comments are made by the Parties on the initial report in the allocated period (art.17(15)), the panel must consider them and, at its discretion, may either request the views of either Party, reconsider its report, make any further examination that it considers appropriate and, finally, the panel must presents its final report within thirty days of presentation of the initial report unless otherwise agreed (art.17(16-17)); the final report having to be published fifteen days after its transmission to the Parties (art.17(18)).

Part B of article 17 provides for the implementation of paanel reports. In the event where a Party has been found to have violated the Agreement by the panel report, this Party must either cure the violation or reach an agreement on the resolution of the dispute (art.17(1)).

If the faulting Party does not cure the violation or reach an agreement within thirty days of the reception of the final report, the complaining Party may suspend the application of benefits of equivalent effect arising under this Agreement until it is done if it is considered effective by the complaining Party (art.17(3-4)). This provision does not preclude the complaining Party from suspending the application of proportionate benefits in accordance with principles of international law.

Part C of article 17 states that the panel must use its best efforts to maintain its expenditures at a reasonable level and that the remuneration of the panelists and their assistants including their expenses are borne euqally by both Parties (art.17(1-2-3)).

On the other hand, if a Party desires to modify a provision of the Agreement, it may request consultations with the other Party that must begin within sixty days from the date of the request and if a modification is agreed to following the consultations, it must be effected by agreement between the two governments (art.19).

Another important aspect is treated in article 20 which states that if a general multilateral air transport services convention comes into force for both Parties, its provisions will prevail over the ones of the present Agreement but this aspect could also be examined through the process of consultations under article 16.

Finally, article 21 allows any Party to terminate the Agreement by giving written notice to the other Party, through diplomatic channels, and by sending it simultaneously to the International Civil Aviation Organization. The Agreement being terminated at midnight immediately before the first anniversary of the date of the receipt of the notice by the other Party unless the notice has been withdrawn before that day.

Five Annexes are also an integral part of the Agreement. The essence of the Agreement is found in Section 1 of Annex 1 which grants to all designated airlines of both Parties, the unlimited right to perform passenger/combination scheduled international air transportation to and from any point in the territory of Canada to and from any point in the territory of the United States with no restrictions as to capacity, frequency, and aircraft size, subject to uniform and non-discriminatory regulations not inconsistent with article 15 of the Chicago Convention. Airlines may also combine two or more points in the territory of the other Party in a through service carrying no local passengers or cargo between points in the territory of the other Party (interdiction of cabotage). Annex V, though, limits the rights of American

air carriers during the phasing-in period of the Agreement as we will see at the end of that section.

All-cargo services are freed in the same way but American air carriers will be limited, during the first year of the Agreement, in serving the cities of Toronto, Montreal and Vancouver (see section 3 of Annex V). Also, for airlines of both Parties, the combination of points in the other Party's territory cannot be done on any same plane scheduled all-cargo courier service operated with aircraft having a maximum takeoff weight greater than 35 000 pounds (section 2, Annex 1).

Limited Fifth Freedom rights are granted in section 3. Thus, one airline designated by Canada can fly the route Canada-Honolulu-Australasia and beyond; it is important to note that no point beyond Australasia can be served in either direction if a point in Australasia is not served in both directions (s.3(1)). In addition, Canada can designate as many airlines it wishes to serve the route Canada-San Juan and beyond (s.3(2)). United States are allowed to designate one airline to serve the route United States-Gander-Europe and beyond (s.3(3)).

Moreover, Intransit rights are granted to designated airlines of both Parties, in addition or in conjunction with the other rights granted by the Agreement to serve points in the territory of the other Party with full traffic rights, designated airlines may operate to any other point in third countries without possessing traffic rights between that point and the territory of the other Party (s.4).

In exercising the rights granted by the Agreement, designated airlines of both Parties are free to operate flights in both directions, to combine different flight numbers within one aircraft operation, to carry their own stop-over traffic, to omit stops at any point and to transfer traffic from any of their aircraft to any of their other aircraft, at any point on the routes without limitation as to change in type or numbers of aircraft operated or geographic limitations provided that the service begins or ends in the territory of the designator Party (s.5).

Annex II provides slots and access to three U.S. congested airports for Canadian air carriers. The United States undertook to establish a base level of free slots for Canada at New York LaGuardia Airport of 42 slots in the summer and winter seasons, and a base at Chicago O'Hare of 36 slots for the summer season and of 36 slots in the winter season. Additional slots to those held by Canadian airlines as of December 22, 1994 will also be made available by the United States at times of the day suitable for transborder air service (s.1(2)).

The base slots are subject to normal non-discriminatory U.S. regulations such as withdrawal under the "use it or lose it" rules (except during the transition period (Annex V, s.5) but not for the purpose of providing a U.S. or foreign airline with slots for international services or for providing slots for new entrants (s.1(3)). The Canadian airlines are allowed to sell and trade base slots (s.3(5)).

Nevertheless, during the three year transition period, they are obliged to lease or sell such slots only to other Canadian airlines but they can trade these slots for slots at other times with U.S. or Canadian airlines to adjust arrival and departure times to meet transborder service needs (Annex V, s.5).

Section 2 pertains to the access to Washington National Airport. Designated airlines of both Parties may operate nonstop air services to and from Washington National Airport provided that Canadian airlines acquire the necessary slots and use a minimum of them. Other conditions are also stated in paragraph 1.

Nevertheless, designated airlines of the United States are not allowed to inaugurate non-stop services between Washington National Airport and any point in Canada until a Canadian airline inaugurates such a non-stop service from Canada. After the inauguration of one non-stop service by a Canadian airline, United States airlines may operate any non-stop services between Washington National Airport and any point in Canada (s.2(2)). Canadian airlines are allowed to operate non-stop air services to Washington National Airport within ninety days of the entry into force of the Agreement (s.2(3)).

Charter air transportation is provided for in Annex III. A liberal regime also applies to charter airlines. Designated airlines of both Parties have the right to carry international charter traffic of passengers and cargo, separately or in combination, between any point in the territory of the designator Party and any point in the territory of the other Party.

Combination of points in the territory of the other Party is not allowed for all-cargo charters for courier services operated with aircraft having a maximum takeoff weight greater than 35 000 pounds (A).

Designated airlines have also the right to operate charter services between any point in the territory of the other Party and any point in a third country provided that such traffic is carried via the territory of the designator Party and that the airline makes a stopover in that territory for at least two consecutive nights (B).

The existing designations of airlines of both Parties are deemed to be designated airlines under the Agreement except for United States' airlines' new scheduled air services to and from Montreal(Dorval), Toronto(Pearson) or Vancouver(International) during the phase-in period (s.1).

In the same way, existing licences that were issued by the aeronautical authorities of both countries are deemed to authorize designated airlines to performs air services under the Agreement pending issuance of an appropriate licence (s.2).

Annex V implements a transition phase for the application of the Agreement. Designated airlines of the United States are entitled, during the transition phase, to exercise all rights that were available immediately prior to the entry into force of the present Agreement (s.1) and additional rights provided by section 2(A) including

the following new route rights: Nashville-Toronto, Portland-Vancouver and Pittsburgh-Montreal.

The rights of United States' designated airlines operating passenger/combination air services between the United States and Montreal, or Vancouver are limited during the first two years of the Agreement and during the first three years for services to and from Toronto. Six airlines using different airline codes may be designated by the United States for up to two daily frequencies by each airline from any point in the U.S. (to be selected by the United States) to and from Montreal (s.2(A)(4)) upon the entry into force of the Agreement and six more airlines can be designated one year afterwards (s.2(B)(1)). The same limitations apply for Vancouver (s.2(A)(5), (B)(2)).

The frequencies authorized for the United States on Montreal and Vancouver after one year can be used to increase daily frequencies in any market up to a maximum of four daily frequencies except for service to Toronto (S.2(B)(4)). No more limitations are imposed from the second anniversary of the Agreement and thereof (s.2(C)(2)).

For Toronto, the United States can designate only two airlines using different airline codes for up to two daily frequencies upon the entry into force of the Agreement (s.2(A)(6)); two more airlines can be designated one year afterwards (s.2(B)(3)) and four more airlines can be designated the second year of the entry into force of the Agreement (s.2(C)(1)). No more limitations apply from the third anniversary of the Agreement.

At any time during the transition period, United States' airlines have the possibility, in respect of any new service from Toronto to a point in the U.S., to increase its frequencies to match the number of large-aircraft (more than 60 passengers) frequencies operated by a Canadian airline if no Canadian airline operated this route with large aircraft at the time the Agreement entered into force (s.2(E)(1)).

A transition phase applies also to all-cargo services only during the first year of the entry into force of the Agreement. Designated airlines of the United States are allowed to initiate new scheduled or non-scheduled all-cargo service to/from Montreal Toronto and Vancouver but are limited to aircraft of 75 000 pounds maximum takeoff weight (s.3(A)).

Limitations to the aggregate number of code-share frequencies on which connecting code-share passengers may be carried between Montreal, Toronto or Vancouver and any U.S. gateway point exist during the transition period. Upon entry into force of the Agreement, designated airlines of both Parties can operate up to four code-share frequencies at Toronto and up to twelve at each of Montreal and Vancouver (s.4(2a)). The same numbers can be added one year after the Agreement (s.4(2b)). Another 8 code-share frequencies at Toronto can be added in the second year of the entry into force of the Agreement.

No more limitations apply in the second year of the Agreement for Montreal and Vancouver and in the third year for Toronto

(s.4(2c,d)). Additional frequencies may be operated by designated airlines on a reciprocal basis (see s.4(2e) but with restrictions for services to Toronto (s.4(2f)).

On the other hand, the long-standing exception from the requirement for underlying rights in the case of regional small aircraft operator based in one country and which uses the designator code of a major airline based in the same country and with which it is commercially affiliated will continue to apply (s.4(4)).

B. Critical Analysis of the Treaty and Perspectives

A thorough review of the 1995 Air Transport Agreement between Canada and United States [hereinafter "the Agreement"] indicates that elements of a comprehensive Open Skies regime are not included in the Agreement.

Firstly, carriage of cabotage traffic in the other Party's territory is still forbidden for both Parties under the Agreement. Secondly, there is no liberalisation of foreign ownership and control criteria in order to allow North American ownership of airlines (up to 49%) in conjunction with majority (51%) national ownership and effective control.

Thirdly, the integration of commercial exchanges and of international air transportation between Canada and United States do not include the future establishment of common customs and

immigration controls leaving it instead to the *status quo* namely existing preclearance facilities used only by American airlines in Canada but not the other way around. We would suggest facilitated immigration and customs controls for all Canadian and American citizens via the establishment of red light/green light procedures as in the European Union.

Fourthly, there exist no provision in the Agreement on the posssibility to include other partners into this Open Skies regime. Also, Fifth Freedom rights are exchanged on limited routes only when they should not be limited. Furthermore, nothing in the Agreement provides for future joint negotiations of such rights with third countries. In this sense, the Agreement does not strengthen the negotiating position of both countries to that of an economic bloc against other economic blocs such as the European Union.

Also, pertaining to the qualifications of the arbitral panelists, it should be a requirement, in order to perform such duties, that the person have expertise or experience in the field of international air transport first. Moreover, the delays of the dispute settlement procedure are not that expeditious and it would have been better to shorten up the delays by keeping only one procedure, the arbitral tribunal, as the first and main dispute settlement procedure since it is doubtful that the Parties will agree, by themselves, on a solution.[274]

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[274]For example, Chile and United States have concluded an open skies agreement in 1989 and a dispute has recently arised since Chile has found United states guilty of capacity-dumping on the Miami-Santiago before the

Another critic that can be brought is the fact that the report of the arbitral panel is public except when it countains confidential information in the view of the person providing the information (art.17(A)(4)). It is believed that the rule should be that the report is public and that some information can be kept confidential only in exceptional circumstances.

The positive aspects of the Agreement are that it implements a fast and effective dispute settlement process through the creation of an arbitral tribunal. Furthermore, article 14 reiterates the obligations of the Parties as to aviation security under international law and is almost identical to the provision found for the first time in the Andean Pact; this kind of clause will probably become a model clause to all regional open skies agreements.

One of the first perspective following the entry into force of such an Open Skies Agreement between commercial partners would be to include the other NAFTA's partner namely Mexico in this

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Chilean Anti-Monopolies Commission. United States only recognize their national laws and juridiction in that matter. Chilean airlines have harshly critizised the incapacity to act quickly of their government on such a grave matter endangering their survivance. On this topic, see: **P. Constance**, "U.S. Threatens Sanctions in Chile ", (November 22 1993) Aviation Week & Space Technology 83; **M.Jennings**, "Chill Winds", (November 1993) Airline Business 59; **E. Vasquez Rocha**, Supra note 97 at 18; "Chile considera proyecto de ley que modificaria la actual ley sobre "cielos abiertos"", (July-August 1992) No.7 AITAL Boletin informativo 5;

Agreement.[275] It is firmly believed that the negotiating power of a North American bloc of aviation and integrated economy would be of a tremendous strength against other regional blocs namely the European Union, ASEAN, and the Andean Pact.

Considering the fact that the airlines doing business in Canada, United States and Mexico do not benefit from a level playing field when operating air transport services. Thus, harmonisation of taxes on fuel, user charges, of fiscal rules pertaining to the financing of aircraft would be needed.

On the other hand, a transition period would be necessary for American airlines before they can operate freely in Mexico as to allow Mexican airlines to be able to face this increase in competition. Safeguards such as common provisions on a code of conduct for CRSs; common provisions to ensure fair competition, to set an arbitral tribunal that could settle disputes arising from the Agreement in a fast way, and fair and equitable rules on slot allocation.

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[275] In fact, as of 1991, the United States signed a new air transport agreement with Mexico to liberalise the air transport between the two countries, see: ***Agreements Between the United States of America and Mexico***, **TIAS 11950, signed at Washington on November 21, 1991 and entered into force on September 1, 1992**; the air transport agreement between Canada and Mexico dates back to 1961 and reflects a restrictive approach, see: ***Air Transport Agreement Between the Government of Canada and the Government of the United Mexican States***, **T.S. 1964 No.4, signed on December 21, 1961 and entered into force definitively February 21, 1964.**

In a longer term, the inclusion of Chile and, later on of all Latin American countries, in a continental Free Trade Agreement that would include free skies for air transportation is anticipated since it is believed that this would bring a better allocation of resources, benefit to the consumers and increase the level of cooperation between Member States in the field of air transport.

CONCLUSION

The review of regional open skies regime in Europe, Latin America, Australasia, Asia and, recently, in North America and the positions that were adopted at the 1994 ICAO Conference on Air Transport in Montreal bring us to the conclusion that the liberalisation of international air transport services will not be achieved on a world-wide basis through multilateral agreements like the General Agreement on Tariffs and Trade but through liberalisation of air transport at the same time as the freeing of commercial exchanges and through cooperation in that field between neighbouring like-minded countries as in the case of NAFTA, the European Union and the Andean Pact.

In the long term, we would see this happening on a continental scale with economic blocs such as the Americas, Europe, Middle-East, Africa and Asia/Pacific negotiating between themselves Fifth Freedom rights, cabotage rights on behalf of their Member States.

Considering the fact that this kind of regional groupings that integrate their commercial exchanges and air transportation will lead to a better allocation of their resources, to the building a stronger multinational airline industry, to increase competition on a global scale and that, in the end, it will benefit to the consumers, the African States, the Arab States should also unite themselves in order to be competitive and stronger. The trend in international civil aviation today is to global markets, global competition, mega-carriers, multinational cross-ownership and the States cannot gain by going back to nationalism and restrictives practices because it will not stop or prevent the evolution of air transportation which "has become an essential part of global commerce"[276].

The danger could be, as Bisignani notes, that national protectionism will simply have been replaced by regional protectionism.[277] In order to avoid this, regional grouping should be viewed as an intermediate step to world-wide liberalisation of air transport but considering the different levels of development of States, we doubt that the dream of Professor Wassenbergh is about to come true:

> *"A world without frontiers in the air, airlines without "nationality" as the legal basis of their*

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[276]G. Baliles, former Governor of Virginia, *Bilateralism v. Multilateralism*, (November/December 1994); presentation given before the International Air Transport Association 50th Annual Meeting in Mexico City at 3.

[277]G. Bisignani, CEO of Alitalia Airlines quoted in: K.O'Toole, Supra note 8 at 25.

operations, open markets to allow free, sound and sensible competition and constructive inter-airline cooperation, these are the major conditions to arrive at an international air transport regulation which ensures the best possible product for the public and a healthy environment for the airline industry."[278]

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[278] H.A. Wassenbergh, "Anatomy of Airline Regulation" in: ***Conferencia Latinoamericana Transporte Aereo Internacional y Actividades en el Espacio Ultraterrestre*** (Mexico D.F.: Universidad Nacional Autonoma de Mexico, 1988) at 353.

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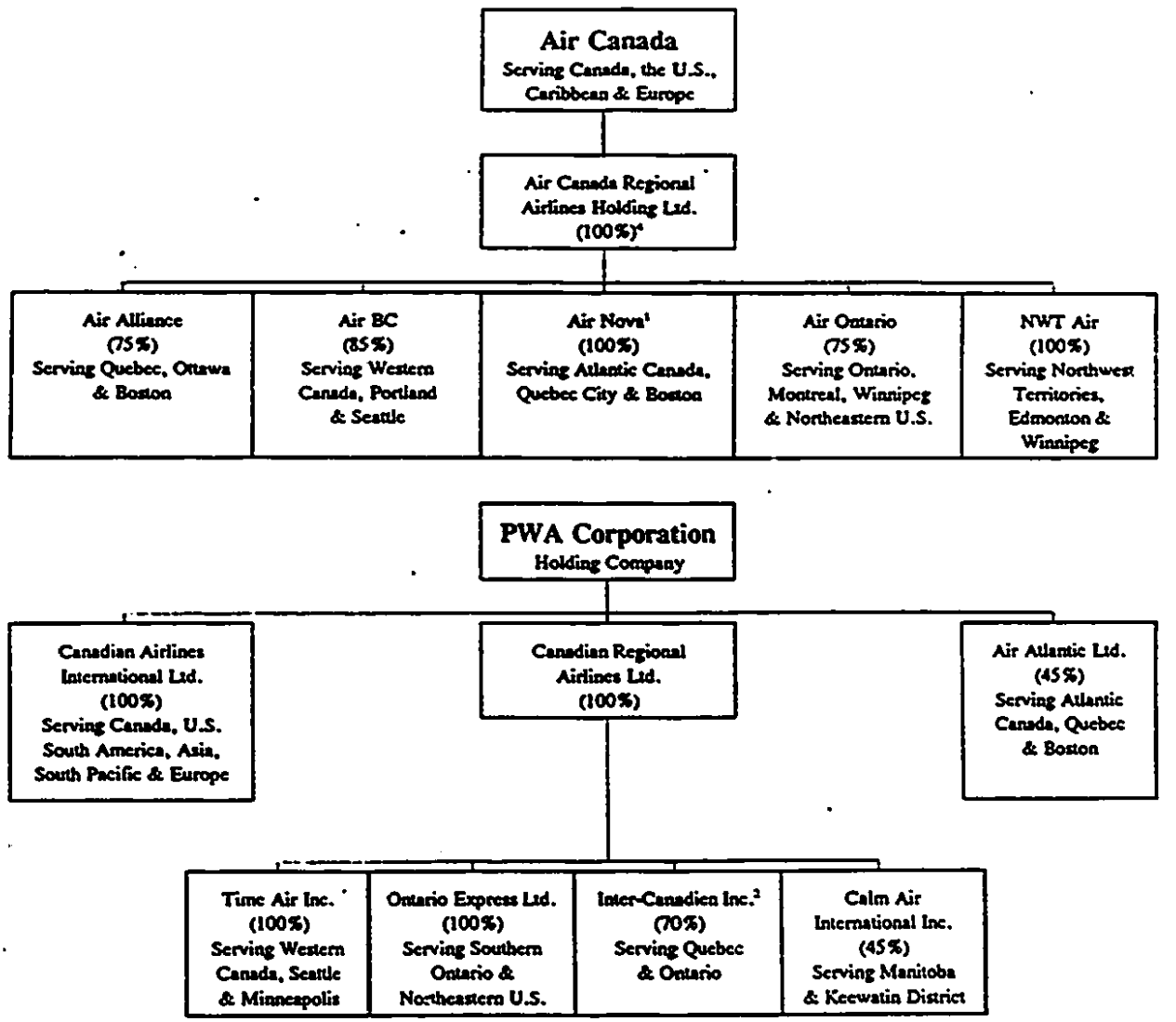
ANNEX I

MAJOR CANADIAN AIRLINE "FAMILIES"[3]
(as of April 1992)



1 Originally purchased 49% of Air Nova in 1986, the remainder in 1991.

2 Intair was initially formed in September 1987 as Inter-Canadien Inc., merging Quebecair, Nordair Metro and Quebec Aviation, and serving as a connector to Canadian Airlines International Ltd. The name was changed when Intair became independent in October 1989.

3 "Families" include only airlines operating scheduled flights; both companies own other companies.

4 (%) means percentage of airline owned by major carrier.

Source: Westac Monitor, May 1992, p. 5.

Source: O.Madore, D.J.Shaw, The Canadian Airline Industry: Its Structure, Performance and Prospects, (Ottawa: Library of Parliament, 1993) Background Paper BP-329E.

ANNEX II

AIR TRANSPORT AGREEMENT

BETWEEN

THE GOVERNMENT OF CANADA

AND

THE GOVERNMENT OF THE
UNITED STATES OF AMERICA

ACCORD RELATIF AU TRANSPORT AÉRIEN

ENTRE

LE GOUVERNEMENT DU CANADA

ET

LE GOUVERNEMENT DES ÉTATS-UNIS
D'AMÉRIQUE

INDEX

AIR TRANSPORT AGREEMENT
BETWEEN
THE GOVERNMENT OF CANADA
AND
THE GOVERNMENT OF THE UNITED STATES OF AMERICA

THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA (hereinafter "the Parties");

RECOGNIZING that the geographic situation of the two countries, including the location of their main centers of population, and the close relationship between their two peoples create a situation unique in international civil aviation for the Parties;

DESIRING to enhance access by their respective cities to the transborder air transportation system;

RECOGNIZING the importance of efficient air services for trade, tourism and investment flows;

DESIRING to conclude an agreement for the purpose of promoting transborder commercial air services to the fullest possible extent;

DESIRING to promote a liberal international aviation system;

DESIRING to promote fair and equal opportunities for airlines to compete in the marketplace with minimum government regulation;

DESIRING to make it possible for the airlines to offer the traveling and shipping public a variety of service options at the lowest prices that are not discriminatory and do not represent abuse of a dominant position, and wishing to encourage individual airlines to develop and implement innovative and competitive prices;

DESIRING to ensure the highest degree of safety and security in international air transport and to maintain public confidence in the safety of civil aviation; and

BEING PARTIES to the Convention on International Civil Aviation, done at Chicago on December 7, 1944;

DETERMINED that this Agreement shall reflect the special relationship between the two countries, consistent with general international obligations;

HAVE AGREED AS FOLLOWS:

ARTICLE 1

Grant of Rights

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

   (a) the right to fly across its territory without landing;

   (b) the right to make stops in its territory for non-traffic purposes; and

   (c) the rights otherwise specified in this Agreement.

2. Nothing in this Article shall be deemed to confer on the airline or airlines of one Party the rights to take on board, in the territory of the other Party, passengers, their baggage, cargo, or mail carried for compensation and destined for another point in the territory of that other Party.

ARTICLE 2

Designation and Authorization

1. Each Party shall have the right to designate as many airlines as it wishes to conduct international air transportation in accordance with this Agreement and to withdraw or alter such designations. Such designations shall be transmitted to the other Party in writing through diplomatic channels or by such other mechanisms as may be agreed between the Parties.

2. On receipt of such a designation and on application from the designated airline, in the form and manner prescribed for operating authorizations and technical permissions, the other Party shall grant appropriate authorizations and permissions with minimum procedural delay, provided:

   (a) substantial ownership and effective control of that airline are vested in the Party designating the airline, nationals of that Party, or both;

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

   (c) the Party designating the airline is maintaining and administering the standards set forth in Articles 13 (Safety) and 14 (Aviation Security).

ARTICLE 3

Revocation of Authorization

1. Either Party may revoke, suspend, limit or condition, the operating authorizations or technical permissions of an airline designated by the other Party where:

   (a) such airline fails to maintain its qualifications as required by the aeronautical authorities of that Party under the laws and regulations normally applied by those authorities;

   (b) substantial ownership and effective control of that airline are not vested in the other Party, the other Party's nationals, or both;

(a) prevention of unreasonably discriminatory prices or practices;

(b) protection of consumers from prices that are unreasonably high or restrictive because of the abuse of a dominant position;

(c) protection of airlines from prices to the extent that they are artificially low because of direct or indirect governmental subsidy or support; and

(d) protection of airlines from prices that are artificially low, where evidence exists as to an intent of eliminating competition.

2. Prices for air transportation between the territories of the Parties shall not be required to be filed, unless such filing shall be required for the purposes of implementing a mutual agreement reached under paragraph 3 of this Article. Such prices shall be permitted to come into and remain in effect unless the aeronautical authorities of both Parties agree otherwise. The designated airlines of the Parties shall continue to provide immediate access, on request, to information on historical, existing and proposed prices to the aeronautical authorities of the Parties in a manner and format acceptable to the aeronautical authorities.

3. If the aeronautical authorities of one Party are dissatisfied with an existing or proposed price for air transportation between the territories of the Parties, either on their own motion or in response to a complaint, they shall so notify the aeronautical authorities of the other Party and the airline offering the price. The aeronautical authorities receiving the notice of dissatisfaction shall acknowledge the notice, including an indication of their agreement or disagreement with it, within 10 working days of receipt of the notice. The aeronautical authorities shall cooperate in securing information necessary for the consideration of a price on which a notice of dissatisfaction has been given. If the aeronautical authorities of both Parties agree that such an existing or proposed price is inconsistent with the principles of this Article, they shall put that agreement into effect. Without such mutual agreement, the price may go into effect or continue in effect.

4. Prices for international air transportation between the territories of the Parties and third countries may be required to be filed in accordance with the regulations of the respective Parties. Each Party shall apply its rules and policies on prices between its territory and third countries without discrimination to the airlines of both Parties. In any event, each Party shall allow any airline of one Party to meet any scheduled price including combinations of scheduled prices charged in the marketplace for transportation between the territory of the other Party and a third country provided that the resulting price does not undercut the prices for international scheduled air transportation of the third and fourth freedom airlines in that market. Charterers or airlines operating international charter air transportation, however, may meet any price, including combinations of prices, of either scheduled or charter services.

5. The aeronautical authorities of either Party may request technical discussions on prices at any time. Unless the aeronautical authorities agree otherwise, technical discussions shall take place no later than 10 working days following the receipt of a request. If the aeronautical authorities are unable to resolve the issue, either Party may then request consultations between Parties. Such consultations shall take place no later than 10 working days following the receipt of a request, unless otherwise agreed.

ARTICLE 6

Tariffs

1. The Parties acknowledge that the general terms and conditions of carriage which are broadly applicable to all air transportation and are not directly related to the fare, rate or charge shall be subject to national laws and regulations. Either Party may require notification to or filing with its aeronautical authorities of any such terms and conditions. If one Party's aeronautical authorities take action to disapprove any such term or condition they shall inform the other Party's aeronautical authorities promptly.

2. The designated airlines shall make full information on prices and the general terms and conditions of carriage available to the general public.

ARTICLE 7

Airport Access

1. Each designated airline shall have the right to perform its own ground-handling in the territory of the other Party ("self-handling") or, at its option, select among competing agents for such services in whole or in part. These rights shall be subject only to physical constraints resulting from considerations of airport safety and operational constraints arising from such physical limitations. Where such considerations preclude self-handling, ground services shall be available on an equal basis to all airlines; charges shall be based on the costs of services provided, including a reasonable rate of return/profit; and such services shall be comparable to the kind and quality of services as if self-handling were possible.

2. Both Parties shall give sympathetic consideration to representations by the other as to problems which may arise in connection with access to airport facilities by their respective airlines, and shall endeavor to persuade relevant airport authorities to work with affected airlines to find constructive solutions to such problems.

ARTICLE 8

User Charges

A. **User Charges for Air Navigation Services/Air Traffic Control**

User charges that may be imposed by the competent charging authorities or bodies of each Party on the airlines of the other Party for the use of air navigation and air traffic control services shall be just and reasonable; provided that any such charges shall be assessed on the airlines of the other Party on terms not less favorable than the most favorable terms available to any other airline in providing similar international air transportation.

B. User Charges for Airport, Aviation Security, and related Facilities and Services

1. User charges that may be imposed by the competent charging authorities or bodies of each Party on the airlines of the other Party shall be just, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users. In any event, any such user charges shall be assessed on the airlines of the other Party on terms not less favorable than the most favorable terms available to any other airline in providing similar international air transportation at the time the charges are assessed.

2. User charges imposed on the airlines of the other Party may reflect, but shall not exceed, the full cost to the competent charging authorities or bodies of providing the appropriate airport, aviation security, and related facilities and services and may provide for a reasonable return on assets, after depreciation. Facilities and services for which charges are made shall be provided on an efficient and economic basis.

3. Recognizing that existing user charges (including their level and structure) have not been found to be inconsistent with the principles described in paragraphs 1 and 2 of this Part, the Parties shall not challenge existing user charges (including their level and structure) imposed by an airport in the territory of the other Party that were in effect for airport, aviation security, and related facilities and services on the date of signature of this Agreement, provided such charges are just, reasonable and not unjustly discriminatory.

C. General

1. Reasonable notice shall be given prior to changes in user charges.

2. Each Party shall encourage consultations between the competent charging authorities or bodies in its territory and the airlines or their representative bodies using the services and facilities, and shall encourage the competent charging authorities or bodies and the airlines or their representative bodies to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles of this Article.

3. Neither Party shall be held, in dispute resolution procedures pursuant to Article 17, to be in breach of a provision of this Article, unless:

   (i) it fails to undertake a review of the charge or practice that is the subject of complaint by the other Party within a reasonable amount of time; or

   (ii) following such a review it fails to take all steps within its power to remedy any charge or practice that is inconsistent with this Article.

ARTICLE 9

Customs Duties and Charges

1. On arriving in the territory of one Party, aircraft operated in international air transportation by the designated airlines of the other Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts (including engines), aircraft stores (including but not limited to such items as food, beverages and liquor, tobacco and other products destined for sale to or use by passengers in limited quantities during flight), and other items intended for or used solely in connection with the operation or servicing of aircraft engaged in international air transportation shall be exempt, on the basis of reciprocity, from all import restrictions, property taxes and capital levies, customs duties, excise taxes, and similar fees and charges that are (1) imposed by the national authorities, and (2) not based on the cost of services provided, provided that such equipment and supplies remain on board the aircraft.

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

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

   (b) ground equipment and spare parts (including engines) introduced into the territory of a Party for the servicing, maintenance, or repair of aircraft of an airline of the other Party used in international air transportation;

   (c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of an airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board; and

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

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

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

5. Baggage and cargo in direct transit across the territory of either Party shall be exempt from customs duties.

ARTICLE 10

Commercial Opportunities

1. The airlines of each Party shall have the right to establish offices in the territory of the other Party for the promotion and sale of air transportation.

2. The designated airlines of each Party shall be entitled, in accordance with the laws and regulations of the other Party relating to entry, residence, and employment, to bring in and maintain in the territory of the other Party managerial, sales, commercial, technical, operational, and specialist staff required for the provision of air transportation.

3. The airlines of each Party may engage in the sale of air transportation in the territory of the other Party directly and, at the airline's discretion, through its agents, except as may be specifically provided by the charter regulations of the country in which the charter originates that relate to the protection of passenger funds, and passenger cancellation and refund rights. Each airline shall have the right to sell such transportation, and any person shall be free to purchase such transportation, in the currency of that territory or in freely convertible currencies.

4. Each airline shall have the right to convert and remit to its country, on demand, funds obtained in the normal course of its operations. Conversion and remittance shall be permitted promptly without restrictions or taxation in respect thereof at the market rate of exchange applicable to current transactions and remittance on the date the carrier makes the initial application for remittance, and shall not be subject to any charges except normal service charges collected by banks for such transactions.

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

6. Cooperative Arrangements

   (a) In operating or holding out the authorized services on the agreed routes, any designated airline of one Party may enter into cooperative marketing or operational arrangements such as blocked-space, code-sharing or leasing arrangements, with an airline or airlines of either Party provided that all airlines in such arrangements 1) hold the underlying route rights and 2) meet the requirements normally applied to such arrangements, including any necessary authorizations.[1] [2]

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[1]/ During the phase-in period described in Annex V, cooperative arrangements involving service to Toronto (Pearson International Airport), Montreal (Dorval Airport) and Vancouver (Vancouver International Airport) shall be subject to the limitations set forth in Section 4 of that Annex.

[2]/ For charter operations, leasing arrangements shall be approved as described in this paragraph, while other applications shall be given favorable consideration, subject to the laws and regulations normally applied.

(b) Applications seeking authority to enter into cooperative marketing or operational arrangements with airlines of third countries shall be considered subject to the laws and regulations normally applied, and at the discretion of the authorities of each country.

ARTICLE 11

Computer Reservation Systems

1. In recognition that each Party has national laws and regulations relating to operations of, and non-discriminatory access to, computer reservation systems in its territory, the airlines of both Parties, consistent with Article 4 (Fair Competition), shall be entitled to inform the public of their services in a fair and impartial manner through the computer reservation systems operating in each territory.

2. Where one Party considers that its airlines are not receiving non-discriminatory treatment from a computer reservation system in the territory of the other Party, that Party may request consultations with the other Party to seek a resolution of the problem consistent with paragraph 1 of this Article.

3. Recognizing that, consistent with Article 4 (Fair Competition), all computer reservation systems owned in whole or in part by airlines of each Party have achieved effective access in the territory of the other Party, each Party accepts that computer reservation systems offering services in the territory of the other Party are subject to the national laws and regulations of that Party regarding such systems and their services, and subject to compliance with such laws and regulations.

ARTICLE 12

Application of Laws

1. While entering, within, or leaving the territory of one Party, its laws and regulations relating to the operation and navigation of aircraft shall be complied with by the other Party's airlines.

2. While entering, within, or leaving the territory of one Party, its laws and regulations relating to the admission to or departure from its territory of passengers, crew or cargo on aircraft (including regulations relating to entry, clearance, aviation security, immigration, passports, customs and quarantine or, in the case of mail, postal regulations) shall be complied with by, or on behalf of, such passengers, crew or cargo of the other Party's airlines.

3. In the application of its customs, immigration, quarantine and similar regulations, neither Party shall give preference to its own or any other airline over an airline of the other Party engaged in similar international air transportation.

ARTICLE 13

Safety

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

2. Either Party or the aeronautical authorities of either Party may request technical discussions concerning the safety standards maintained and administered by the other Party relating to aeronautical facilities, aircrews, aircraft, and operation of the designated airlines. If, following such technical discussions, one Party finds that the other Party does not effectively maintain and administer safety standards and requirements in these areas that at least equal the minimum standards that may be established pursuant to the Convention, the other Party shall be notified of such findings and the steps considered necessary to conform with these minimum standards, and the other Party shall take appropriate corrective action. Each Party reserves the right in accordance with Article 3 to withhold, revoke, or limit the operating authorization or technical permission of an airline or airlines designated by the other Party in the event the other Party does not take such appropriate corrective action within a reasonable time.

ARTICLE 14

Aviation Security

1. The Parties reaffirm that their obligations to each other to provide for the security of civil aviation against acts of unlawful interference (including in particular their obligations under the Convention of International Civil Aviation, done at Chicago on December 7, 1944; the Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Tokyo on September 14, 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on December 16, 1970; and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on September 23, 1971; and any other multilateral agreement governing aviation security binding upon the Parties) form an integral part of this Agreement.

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

3. The Parties shall act in conformity with the aviation security standards and, so far as they are applied by them, the recommended practices established by the International Civil Aviation Organization, and designated as Annexes to the Convention on International Civil Aviation, and shall require that operators of aircraft of their registry, operators who have their principal place of business or permanent residence in their territory, and the operators of international airports in their territory act in conformity with such aviation security provisions. Each Party shall give advance information to the other of its intention to notify ICAO of any differences to the ICAO standards.

4. Each Party agrees that its operators of aircraft may be required to observe the aviation security provisions required by the other Party for entrance into, departure from, or while within, the territory of that other Party. Each Party shall ensure that effective measures are taken within its territory to protect aircraft, to inspect passengers and their carry-on items, and to carry out appropriate checks on crew, cargo (including baggage) and aircraft stores prior to and during boarding or loading. Each Party shall also act favorably upon any request from the other Party for reasonable special security measures to meet a particular threat.

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

6. When a Party has reasonable grounds to believe that the other Party has departed from the provisions of this Article, the first Party may request immediate consultations with the other Party. Failure by the Parties to reach a satisfactory resolution of the matter within 15 days from the date of receipt of such request shall constitute grounds for withholding, revoking, limiting or imposing conditions on the operating authorizations or technical permissions of an operator of aircraft of the other Party to operate air transport services authorized by this Agreement. When justified by an emergency, a Party may take interim action prior to the expiry of 15 days.

7. Each Party shall also give sympathetic consideration to a request from the other Party to enter into reciprocal administrative arrangements whereby the aeronautical authorities of one Party could make in the territory of the other Party their own assessment of the security measures being carried out by aircraft operators in respect of flights destined to the territory of the first Party.

ARTICLE 15

Statistics

The aeronautical authorities of both Parties shall continue the program which has been inaugurated of joint preparation of agreed true origin and destination statistics for air passenger traffic over the routes operated pursuant to this Agreement.

ARTICLE 16

Consultations and High Level Meetings

1. The Parties shall at all times endeavour to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation, exchange of information and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

2. Either Party may request consultations regarding any aspect of the Agreement, including, but not limited to, any actual or proposed measure or any matter that it considers affects the interpretation or application of the Agreement. On matters which the requesting Party deems and states to be urgent, such consultations shall commence within 15 days of the date of delivery of the request, unless otherwise agreed between the Parties. In all other cases consultations shall commence at the earliest possible date, but not later than 30 days from the date of receipt of the request for consultations, unless otherwise agreed by the Parties.

3. The Parties shall make every attempt to arrive as expeditiously as possible at a mutually satisfactory resolution of any matter through consultations. To the extent one Party has requested consultations regarding an actual or proposed measure of a State, Provincial, or local government or authority of the other Party, which the requesting Party believes to be inconsistent with the Agreement, such other Party shall bring the requesting Party's views to the attention of the relevant governmental unit or authority.

4. The Parties shall exchange sufficient information to enable a full examination of how the actual or proposed measure or other matter affects, or might affect, the operation of the Agreement.

5. Each Party shall treat any confidential or proprietary information exchanged in the course of consultations on the same basis as the Party providing the information treats it.

6. If the Parties fail to resolve a matter pursuant to the provisions on consultations within:

   (a) 30 days of the commencement of consultations,

   (b) 30 days of delivery of a request for consultations in matters deemed and stated to be urgent by the requesting Party, or

   (c) such other period as they may agree,

   either Party may request in writing a High Level Meeting (hereinafter referred to as an "HLM"), as set out below.

7. An HLM, which may include representatives of, for the United States, the Department of State and/or the Department of Transportation and, for Canada, the Department of External Affairs and/or the Department of Transport, shall be held at the request of either Party. At the request of either Party the HLM shall be between, for the United States, the Secretary of State and/or the Secretary of Transportation and, for Canada, the Secretary of State for External Affairs and/or the Minister of Transport, or their designees.

8. The purpose of an HLM shall be to:

   (a) consider any matter that may affect the operation of this Agreement; and

   (b) resolve disputes that may arise regarding its interpretation or application.

9. An HLM may:

   (a) establish, and delegate responsibilities to, ad hoc or standing committees, working groups or expert groups;

   (b) seek the advice of non-governmental persons or groups; and

   (c) take other action to carry out its purposes.

10. If an HLM is requested pursuant to this Article, the requesting Party shall state in the request the measure or other matter complained of and indicate the provisions of this Agreement that it considers relevant.

11. Unless it is mutually agreed by the Parties that an HLM will not be convened or should be delayed, an HLM requested pursuant to this Article shall convene within 20 days of delivery of the request and shall endeavour to resolve the dispute promptly.

12. An HLM may:

(a) call on such technical advisers or create such working groups or expert groups as it deems necessary,

(b) have recourse to good offices, conciliation, mediation or such other similar procedures, or

(c) make recommendations,

as may assist the Parties to reach a mutually satisfactory resolution of the dispute.

ARTICLE 17

Resolution of Disputes

Part A - Panel Proceedings

1. The dispute settlement provisions of this Article shall apply when a Party considers that there has been a violation of the Agreement except that this Article shall not apply to individual prices charged by the airlines designated by either Party.

2. If an HLM has convened pursuant to Article 16 and the matter has not been resolved within:

(a) 40 days after the delivery of the request for an HLM, or

(b) such other period as the Parties may agree; or

if it is mutually agreed by the Parties, pursuant to paragraph 11 of Article 16, that an HLM should not be convened, then either Party may request in writing the establishment of an arbitral panel with respect to the matters referred to in paragraph 1 of Part A of this Article which have been discussed at the HLM, or if an HLM has not been convened, which have been the subject of consultations.

3. Unless otherwise agreed by the Parties, the panel shall be established and perform its functions in a manner consistent with the provisions of this Article.

4. The panel shall make its final report public, except to the extent the report contains information considered proprietary or confidential by the person or Party who provided the information, in which case such information shall be treated on the same basis as the person or Party who provided the information treats it.

5. Panel members shall:

(a) have expertise or experience in law, matters covered by this Agreement, or the resolution of disputes arising under international agreements, and shall be chosen strictly on the basis of objectivity, reliability and sound judgment;

(b) be independent of, and not be affiliated with or take instructions from, any Party; and

(c) follow a code of conduct to be established by the Parties within 90 days following the entry into force of this Agreement.

6. All panelists shall meet the qualifications set out in paragraph 5 of part A of this Article. Individuals may not serve as panelists for a dispute in which they have participated

7. Arbitration shall be by a panel of three panelists to be constituted as follows:

(a) Within 20 days after the receipt of a request for arbitration, each Party shall name one of its citizens or permanent residents as a panelist. Within 20 days after these two panelists have been named, they shall by agreement appoint a third panelist, who shall not be a citizen or permanent resident of either country, and who shall act as President of the panel.

(b) If either Party fails to name a panelist, or if a third panelist is not appointed in accordance with subparagraph (a) of this paragraph, either Party may request the President of the Council of the International Civil Aviation Organization to appoint the necessary panelist or panelists within 20 days. If the President of the Council is a citizen of one of the Parties, the most senior Vice-President who is not disqualified on that ground shall make the appointment.

8. If a Party believes that a panelist should not serve because the panelist is in violation of the code of conduct, the Parties shall consult and if they agree, the panelist shall be removed and a new panelist shall be selected in accordance with this Article.

9. Unless otherwise provided in this Agreement or the Parties otherwise agree:

(a) the panel shall establish its own procedures;

(b) the procedures shall ensure at least one oral hearing before the panel as well as the opportunity to present written submissions and rebuttal arguments;

(c) subject to paragraph 10 of Part A of Article 17, the Parties shall deliver their initial submissions simultaneously no later than 20 days after the last panelist is selected, and their rebuttal submissions simultaneously no later than 15 days after receipt by both Parties of the initial submissions. The submissions shall each be delivered to the members of the panel and to the other Party.

10. Unless the Parties otherwise agree within 20 days from the date of delivery of the request for the establishment of a panel, within 40 days from the date of the delivery of the request for the establishment of a panel, or within 5 days after the last panelist has been selected, whichever is later, each Party shall submit to the panel its views as to the question or questions on which it believes the panel should make its ruling. Based upon the Parties' submissions pursuant to this paragraph, the panel shall, within 15 days after the last panelist has been selected, reach a decision as to the question or questions to be decided. If it considers necessary, the panel may require additional

information from the Parties prior to reaching a decision as to the question or questions to be decided. If a panel is requested to make a decision pursuant to this paragraph the time for the initial submissions by the Parties shall be 15 days from the date of such decision by the panel. If the Parties so agree, the panel may, if it considers necessary, extend the period of time within which it is required to reach a decision under this paragraph.

11. On request of a Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the Parties so agree and subject to such terms and conditions as the Parties may agree.

12. Unless the Parties otherwise agree, the panel shall base its report on the submissions and arguments of the Parties and on any information before it pursuant to paragraph 11, Part A of this Article.

13. Unless the Parties otherwise agree, the panel shall, within 90 days after the last panelist is selected, present to the Parties an initial report containing:

    (a) findings of fact;

    (b) its determination as to whether there has been a violation of this Agreement; and

    (c) if both Parties so request within 20 days of the request for the establishment of a panel, its recommendations, if any, for resolution of the dispute.

14. Panelists may furnish separate opinions on matters not unanimously agreed.

15. A Party may submit written comments to the panel on its initial report within 14 days of presentation of the report, and shall serve those comments on the other Party. The other Party may reply to the comments within 5 days.

16. In such an event, and after considering such written comments, the panel, on its own initiative or on the request of either Party, may:

    (a) request the views of either Party;

    (b) reconsider its report; and

    (c) make any further examination that it considers appropriate.

17. The panel shall present to the Parties a final report, including any separate opinions on matters not unanimously agreed, within 30 days of presentation of the initial report, unless the Parties otherwise agree.

18. Unless the Parties agree otherwise, the final report of the panel shall be published 15 days after it is transmitted to the Parties.

Part B - Implementation of Panel Reports

1. If in its final report a panel has determined that there has been a violation of this Agreement, the Party complained against shall either cure the violation or the Parties shall reach agreement on the resolution of the dispute, which normally shall conform with the determinations and recommendations, if any, of the panel.

2. Where resolution of the dispute involves a State, Provincial, or local government or authority, the Parties shall use their best efforts, consistent with national law, to give full effect to such resolution.

3. If in its final report a panel has determined that there has been a violation of this Agreement and the Party complained against has not cured the violation or reached agreement with the complaining Party on a mutually satisfactory resolution pursuant to paragraph 1 within 30 days of receiving the final report, such complaining Party may suspend the application of benefits of equivalent effect arising under this Agreement until such time as they have reached agreement on a resolution of the dispute. However, nothing in this paragraph shall be construed as limiting the right of either Party to suspend the application of proportionate benefits in accordance with principles of international law.

4. In considering what benefits to suspend pursuant to paragraph 3 of Part B of this Article:

   (a) a complaining Party should first seek to suspend benefits similar to those affected by the measure or other matter that the panel has found to violate this Agreement; and

   (b) a complaining Party that considers it is not practicable or effective to suspend benefits similar to those affected may suspend benefits that are not similar.

Part C - Remuneration and Payment of Expenses

1. The panel shall use its best efforts to maintain its expenditures at a reasonable level and shall consult with the Parties before incurring any extraordinary expenses.

2. The remuneration of panelists and their assistants, their travel and lodging expenses, and all general expenses of panels shall be borne equally by the Parties.

3. Each panelist shall keep a record and render a final account of the person's time and expenses, and the panel shall keep a record and render a final account of all general expenses.

ARTICLE 18

Index and Titles

The Index and titles used in this Agreement are for reference purposes only.

ARTICLE 19

Amendment of Agreement

If either Party considers it desirable to modify any provision of this Agreement, it may request consultations with the other Party. Such consultations, which may be through discussion (including discussion between aeronautical authorities) or by correspondence, shall begin within a period of sixty (60) days from the date of the request. Any modification agreed pursuant to such consultations shall be effected by agreement between the two Governments.

ARTICLE 20

Multilateral Conventions

If a general multilateral air transport services convention comes into force in respect of both Parties, in the event of inconsistencies, the provisions of that multilateral convention shall prevail. Consultations in accordance with Article 16 of this Agreement may be held to determine if, and in what manner, this Agreement should be amended to bring it into conformity with the provisions of the multilateral convention.

ARTICLE 21

Termination

Either Party may, at any time, give notice in writing through diplomatic channels to the other Party of its decision to terminate this Agreement. Such notice shall be sent simultaneously to the International Civil Aviation Organization. This Agreement shall terminate at midnight (at the place of receipt of the notice to the other Party) immediately before the first anniversary of the date of receipt of the notice by the other Party, unless the notice is withdrawn by agreement of the Parties before the end of this period. In the absence of acknowledgement of receipt by the other Party, the notice shall be deemed to have been received fourteen (14) days after the receipt of the notice by the International Civil Aviation Organization.

ARTICLE 22

Registration with ICAO

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

ARTICLE 23

Definitions

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

"Aeronautical Authorities" means, in the case of the United States, the Department of Transportation, and in the case of Canada, the Minister of Transport and the National Transportation Agency, or in both cases, any person or agency authorized to perform the functions exercised at present by those authorities;

"Agreement" means this Agreement, its Annexes, and any amendments thereto;

"Air transportation" means any operation performed by aircraft for the public carriage of passengers, baggage, cargo, and mail, separately or in combination, for remuneration or hire;

"Airline" means any air transport enterprise offering or operating air transportation;

"Convention" means the Convention on International Civil Aviation, done at Chicago on December 7, 1944, and includes:

(1) any amendment that has entered into force under Article 94(a) of the Convention and has been ratified by both Parties; and

(2) any Annex or any amendment thereto adopted under Article 90 of the Convention, insofar as such Annex or amendment is at any given time effective for both Parties;

"Courier service" means the transportation of cargo on an expedited basis, priced to include door-to-door pick-up and delivery.

"Designated airline" means an airline designated and authorized in accordance with the terms of this Agreement;

"Gateway" means, in respect of providing international air transportation pursuant to this Agreement, the point of last departure in the territory of one Party and/or the point of first arrival in the territory of the other Party;

"International air transportation" means air transportation that passes through the airspace over the territory of more than one State;

"Meet," as used in Article 5 (Pricing), means the right to continue or institute, on a timely basis, using such expedited procedures as may be necessary, an identical or similar price or such price through a combination of prices, on a direct, interline, or intraline basis, notwithstanding differences in conditions including, but not limited to, those relating to airports, routing, distance, timing, connections, aircraft type, aircraft configuration, or change of aircraft.

"Price" means any fare, rate or charge (including discounts, frequent flyer plans or other benefits affecting the cost of air transportation) for the carriage of passengers (and their baggage) and/or cargo (excluding mail), or the charter of aircraft charged by airlines, including their agents, and the conditions governing the availability of such fare, rate or charge but excluding general terms and conditions of carriage which are broadly applicable to all air transportation and are not directly related to the fare, rate or charge;

"Territory" means the land areas under the sovereignty, jurisdiction, protection, or trusteeship of a Party, and the territorial waters adjacent thereto; and

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

ARTICLE 24

Entry into Force

1. This Agreement shall enter into force on the date of signature.

2. This Agreement shall supersede the Air Transport Agreement, done at Ottawa January 17, 1966, with exchange of notes, as amended; the Nonscheduled Air Services Agreement, with annexes and exchanges of notes, done at Ottawa May 8, 1974; the Agreement Concerning Regional, Local and Commuter Services, effected by exchange of notes at Montreal August 21, 1984, as amended; the Agreement on Aviation Security, done at Ottawa November 21, 1986; and the Agreement Relating to Air Navigation, effected by exchange of notes at Washington July 28, 1938.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

EN FOI DE QUOI, les soussignés, dûment autorisés par leur gouvernement respectif, ont signé le présent Accord.

DONE at Ottawa, in duplicate, this 24th day of February, 1995, in the English and French languages, each text being equally authentic.

FAIT à Ottawa, en double exemplaire, ce 24e jour de février 1995, en anglais et en français, chaque texte faisant également foi.

FOR THE GOVERNMENT OF CANADA

POUR LE GOUVERNEMENT DU CANADA

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

POUR LE GOUVERNEMENT DES ÉTATS-UNIS D'AMÉRIQUE

Annex I

Scheduled Air Transportation

Section 1

Passenger/Combination Route Authorities

Designated airlines of Canada and designated airlines of the United States have the unlimited right to perform passenger/combination scheduled international air transportation to and from any point in the territory of Canada to and from any point in the territory of the United States with no restrictions as to capacity, frequency, and aircraft size, subject to uniform and non-discriminatory regulations not inconsistent with Article 15 of the Chicago Convention. Airlines may, at their option, combine two or more points in the territory of the other Party in a through service carrying no local passengers or cargo between points in the territory of the other Party.[1]

Section 2

All-Cargo Services

Designated airlines of Canada and designated airlines of the United States shall have the right to perform all-cargo scheduled international air transportation to and from any point in the territory of Canada to and from any point in the territory of the United States with no restrictions as to aircraft weight group, package size, capacity or frequency, subject to uniform and non-discriminatory regulations not inconsistent with Article 15 of the Chicago Convention,[2] and subject to the following limitation:

> Points in the territory of the other Party shall not be combined on any same plane scheduled all-cargo courier service operated with aircraft having a maximum certificated takeoff weight greater than 35,000 pounds. However, any all-cargo co-terminalizing authorities in existence as of the date of entry into force of this Agreement shall remain in effect.[3]

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[1]/ During the phase-in period described in Annex V, passenger/combination services operated by airlines of the United States shall be subject to the limitations on operations to/from Toronto (Pearson International Airport), Montreal (Dorval), and Vancouver (Vancouver International Airport) set forth in Section 2 of that Annex. Services to Washington National Airport shall be subject to the limitations set out in Annex II, Section 2.

[2]/ During the first year of the phase-in period described in Annex V, all-cargo services operated by airlines of the United States shall be subject to the limitations on operations to/from Toronto, Montreal, and Vancouver set forth in Section 3 of that Annex.

[3]/ The Parties shall meet within three years to consider whether co-terminalizing of all-cargo courier services might be permitted and, if so, under what conditions.

Section 3

Fifth Freedom Services

No airline may exercise fifth freedom rights, except on the following routes and with the limitations indicated:

1. For one airline designated by Canada:

   Canada-Honolulu-Australasia and beyond. Notwithstanding subparagraph (d) of Section 5 of this Annex, no point beyond Australasia may be served, in either direction, if a point in Australasia is not served in both directions on the route.

2. For any number of airlines designated by Canada:

   Canada-San Juan and beyond.

3. For one airline designated by the United States:

   United States-Gander-Europe and beyond.

Section 4

Blind Sector (Intransit) Rights

In addition to, and/or in conjunction with the exercise of, the rights granted in this Agreement to serve points in the territory of the other Party with full traffic rights, designated airlines of Canada and the United States may operate to any other point or points in third countries, without traffic rights between points in the territory of the other Party and such other points in third countries.

Section 5

Route Flexibility/Change of Aircraft

Each designated airline may, on any or all flights and at its option:

(a) operate flights in either or both directions;

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

(c) carry its own stop-over traffic;

(d) omit stops at any point or points; and

(e) transfer traffic from any of its aircraft to any of its other aircraft, at any point on the routes without limitation as to change in type or numbers of aircraft operated;

without directional or geographic limitation and without loss of any right to carry traffic otherwise permissible under this Agreement; provided that the service begins or terminates in the territory of the Party designating that airline. That is, the flight number assigned to services between the United States and Canada may not be the same as that assigned to flights behind the territory of the Party designating the airline performing the service.

Section 6

Intermodal Services

1. Airlines of both Parties shall be permitted, without economic regulatory restriction, to employ in connection with international air transportation, or as a substitute for international air transportation, any surface transport for cargo to or from any points in the territories of the Parties or in third countries, including transport to and from all airports with customs facilities, and including, where applicable, the right to transport cargo in bond under applicable laws and regulations.

2. The movement of air cargo by surface transport shall be subject to nondiscriminatory laws and regulations normally applied. Air cargo, whether moving by surface or by air, shall have access to airport customs processing and facilities during hours of operation normally provided and where services are available.

3. Airlines may elect to perform their own surface transportation or to provide it through arrangements with other surface carriers, including surface transportation operated by other airlines and indirect providers of cargo air transportation. Such intermodal cargo services may be offered at a single, through price for the air and surface transportation combined, provided that shippers are not misled as to the facts concerning such transportation.

4. With respect to the employment of surface transport for air cargo as outlined in paragraph 1, nothing in this article shall be deemed to confer on the airline or airlines of one Party any new or additional rights, to take on board, in the territory of the other Party, air traffic destined for another point in the territory of that other Party.

Annex II

Slots and Access to Washington National Airport

Section 1

Slots at Chicago O'Hare and New York LaGuardia Airports

1. Except as otherwise provided in this Annex and in Section 5 of Annex V, Canadian and United States airlines shall be subject to the same system for slot allocation at United States high density airports as are U.S. airlines for domestic services.

2. The United States shall establish a base level of free slots for Canada at New York LaGuardia Airport of 42 slots in the summer and winter seasons, and a base at Chicago O'Hare Airport of 36 slots for the summer season and 32 slots in the winter season. With respect to slots made available by the United States additional to those held by Canadian airlines as of December 22, 1994, the United States will endeavor to provide such slots at times of the day suitable for transborder air service. Should Canadian airlines purchase slots at New York LaGuardia Airport and/or Chicago O'Hare Airport between December 22, 1994 and the entry into force of this Agreement, those slots shall be added to the base level for that airport. Slots received by a Canadian airline other than by purchase between December 22, 1994 and the entry into force of this Agreement, shall not increase the base level of slots, but instead shall be included within the base level of slots to be made available by the U.S. Government.

3. Base slots shall be subject to normal non-discriminatory U.S. regulations including withdrawal under the "use it or lose it" rules. Canadian base slots shall not, however, be subject to withdrawal for the purpose of providing a U.S. or foreign airline with slots for international services or to provide slots for "new entrants".

4. Any slot needs of Canadian airlines above the base levels shall be acquired through the prevailing system for slot allocation applicable to U.S. domestic operations. Slot holdings so acquired shall be subject to normal non-discriminatory U.S. regulations including "use it or lose it".

5. Canadian airlines may monetize slot holdings and, subject to the constraints described in Annex V, Section 5, during the transitional phase, may freely buy, sell and trade slots. The sale or other disposal of a slot which forms part of the base level shall permanently modify the base so that neither the airline nor the Government of Canada shall have a claim to any other time slot to restore the base. However, slots acquired above the base level and later disposed of shall not modify the base.

6. Any United States airline authorized to provide transborder services from O'Hare or LaGuardia may make unconditioned use of any existing or new slot holdings at its disposal to operate such services, consistent with United States regulations.

Section 2

Access to Washington National Airport

1. Nonstop air services under this Agreement may be provided by designated airlines of the United States and Canada to and from Washington National Airport, subject to the following:

   a) the prevailing perimeter rule;

   b) United States customs and immigration pre-clearance being available at the Canadian point of departure;

   c) the acquisition by Canadian airlines of the necessary slots at Washington National Airport under the prevailing rules for slot acquisition and minimum slot use applicable to United States airlines; and

   d) other uniform and non-discriminatory regulations consistent with Article 15 of the Convention.

2. United States airlines may not inaugurate non-stop service between Washington National Airport and any point in Canada unless and until a Canadian airline inaugurates a non-stop service from any point in Canada to Washington National Airport. Following the inauguration of any non-stop service by any Canadian airline between any point in Canada and Washington National Airport, United States airlines may operate any non-stop services between Washington National Airport and any point in Canada.[1]

3. Designated Canadian airlines shall be permitted to operate non-stop air services to Washington National Airport in accordance with the conditions laid out in paragraph 1 of this Section no later than ninety (90) days after the date of signature of this Agreement.

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[1]/ Subject to the phase-in limitations set forth in Annex V, Section 2, on Passenger/Combination Route Authorities. It is understood that isolated charter operations shall not constitute service within the meaning of this paragraph.

Annex III

Charter Air Transportation

Designated airlines of each Party shall, in accordance with the rules of the country of origin of the charter, have the right to carry international charter traffic of passengers and cargo, separately or in combination:

(a) Between any point or points in the territory of the Party that has designated the airline and any point or points in the territory of the other Party, except that, in the case of all-cargo charters for courier services operated with aircraft having a maximum certificated take-off weight greater than 35,000 pounds, points in the territory of the other Party shall not be combined on any same plane service[1] [2]; and

(b) Between any point or points in the territory of the other Party and any point or points in a third country or countries, provided that such traffic is carried via the territory of the Party that has designated the airline and makes a stopover in that territory for at least two consecutive nights.

In the performance of services covered by this Annex, designated airlines of each Party shall also have the right:

(1) to make stopovers at any points whether within or outside of the territory of either Party;

(2) to carry transit traffic through the other Party's territory; and

(3) to combine on the same aircraft traffic originating in one Party's territory with traffic that originated in the other Party's territory.

Each Party shall on the basis of comity and reciprocity consider applications by airlines of the other Party to carry traffic not covered by this Annex.

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[1]/ Any all-cargo co-terminalizing authorities in existence as of the date of entry into force of this Agreement shall remain in effect.

[2]/ The Parties shall meet within three years to consider whether co-terminalizing of all-cargo courier services might be permitted and, if so, under what conditions.

Annex IV

Continuation of Designations and Authorizations

Section 1

Designations

Any airline of Canada or the United States holding a current designation from its respective government under the 1966 Air Transport Agreement, as amended, or the 1974 Nonscheduled Air Services Agreement, or endorsed under the 1984 Agreement Concerning Regional, Local and Commuter Services (and in the case of endorsements for discretionary authority under the 1984 Agreement, licensed by the other Party for those discretionary services), or holding authorizations from both aeronautical authorities pursuant to the 1966 Exchange of Notes No. 273 and No. L-12 on all-cargo services, shall be deemed to be an airline designated to conduct international air transportation pursuant to this Agreement, except for United States' airlines' new scheduled air services to and from Montreal (Dorval, ~~hereinafter "Montreal"~~), Toronto (Pearson International Airport, hereinafter "~~Toronto~~"), and Vancouver (Vancouver International Airport, ~~hereinafter "Vancouver"~~) during their respective phase-in periods specified in Annex V (Transition Phase) or the Agreement.

Section 2

Licence Authorizations

Canada:

For purposes of Canadian licensing requirements, any airline of the United States or Canada holding a valid licence issued by the National Transportation Agency of Canada on the date of entry into force of this Agreement for the operation of scheduled or nonscheduled air services shall, pending issuance of an appropriate licence under this Agreement, continue to have all the authorities provided in the said licence and be deemed to have therein the authority to operate scheduled or nonscheduled international air transportation respectively to and from points in Canada and the United States as provided in this Agreement, including Annex V (Transition Phase) of the Agreement, except for United States airlines' new scheduled air services to and from Montreal, Toronto, and Vancouver during their respective phase-in periods specified in Annex V (Transition Phase) of the Agreement.

United States:

Any license issued to an airline of Canada or the United States by the U.S. Department of Transportation shall continue in effect under otherwise-applicable terms and conditions of that license pending application for and issuance of an appropriate license under this Agreement.

Annex V

Transition Phase

Section 1

General

The transition phase shall begin on the date this Agreement enters into force and shall end one year from that date in respect of all-cargo services, two years from that date in respect of passenger/combination services at Montreal and Vancouver and three years from that date in respect of passenger/combination services at Toronto. During the transition phase only, the provisions of this Annex shall apply as set forth below.

During the transition phase, the United States shall be entitled to exercise all rights (including, but not limited to rights related to routing, designations and frequencies) that were available immediately prior to the entry into force of this Agreement pursuant to the 1966 Air Transport Agreement between the United States and Canada, with Exchange of Notes related to all-cargo services, as amended, ("the 1966 Agreement"); the 1974 Nonscheduled Air Service Agreement, with annexes and exchange of notes ("the 1974 Agreement"); and the 1984 agreement on Regional, Local and Commuter Services ("the RLCS Agreement"). In addition, United States airlines shall retain any authority to serve any points in Canada (including but not limited to authorities related to routing, designations and frequencies) that existed on the date of entry into force of this Agreement, whether or not such service was conducted pursuant to any of the above-mentioned agreements.

Section 2

Passenger/Combination Route Authorities of United States Designated Airlines

Notwithstanding the provisions of Annex I, Section 1, during the transition phase, the following shall apply to United States airline service between the United States and Toronto, Montreal and Vancouver.

A. In addition to the rights set forth in Section 1 above, effective immediately upon entry into force of this Agreement:

(1) All co-terminal route authorities that were available to the United States (pursuant to the 1966 Agreement) immediately prior to the entry into force of the Agreement may be split into separate routes and redesignated to the same or different airlines.

(2) The United States may designate an airline to serve each of the following new routes: Nashville-Toronto, Portland-Vancouver and Pittsburgh-Montreal (to provide independent authorities for the United States airline services operated as intermediate stops on Routes D.2., B.4., and F.1. of the 1966 Agreement as of December 22, 1994.)

(3) The United States designated airline for Route D.2. of Schedule I of the 1966 Agreement shall no longer be required to make an intermediate stop at Toronto as a condition of service to Montreal.

(4) The United States may designate six airlines using different airline codes for up to two frequencies per day by each airline on passenger/combination services from any points in the United States (in markets existing as of the entry into force of this Agreement or in new markets) to be selected by the United States to and from Montreal.

(5) The United States may designate six airlines using different airline codes for up to two frequencies per day by each airline on passenger/combination services from any points in the United States (in markets existing as of the entry into force of this Agreement or in new markets) to be selected by the United States to and from Vancouver.

(6) The United States may designate two airlines using different airline codes for up to two frequencies per day by each airline on passenger/combination services from any points in the United States (in markets existing as of the entry into force of this Agreement or in new markets) to be selected by the United States to and from Toronto.

B. In addition to the rights in Part A above, with effect from the first anniversary of the entry into force of this Agreement:

(1) The United States may designate six United States airlines using different airline codes for up to two frequencies per day by each airline on passenger/combination services from any points in the United States (in markets existing as of the entry into force of this Agreement or in new markets) to be selected by the United States to and from Montreal.

(2) The United States may designate six United States airlines using different airline codes for up to two frequencies per day by each airline on passenger/combination services from any points in the United States (in markets existing as of the entry into force of this Agreement or in new markets) to be selected by the United States to and from Vancouver.

(3) The United States may designate two United States airlines using different airline codes for up to two frequencies per day by each airline on passenger/combination services from any points in the United States (in markets existing as of the entry into force of this Agreement or in new markets) to be selected by the United States to and from Toronto.

(4) Frequencies authorized for the United States in paragraphs (1) and (2) above may be used to increase daily frequencies in any market selected for service in the first year to a maximum of four daily frequencies per airline. Frequencies authorized for the United States in (3) above (Toronto) may not be used to increase daily frequencies of airlines selected for service to Toronto in the first year.

C. In addition to the rights in Part B above, with effect from the second anniversary of the entry into force of this Agreement:

(1) The United States may designate four United States airlines using different airline codes for up to two frequencies per day by each airline on passenger/combination services from any points in the United States (in markets existing as of the entry into force of this Agreement or in new markets) to be selected by the United States to and from Toronto.

(2) United States airlines may operate passenger/combination services to and from any points in the United States to and from Montreal and to and from any points in the United States to and from Vancouver with no restrictions as to capacity, frequency and aircraft size, subject to non-discriminatory regulations not inconsistent with Article 15 of the Chicago Convention. Airlines may, at their option, combine two or more points in Canada on a through service carrying no local passengers or cargo between Canadian points.

(3) Frequencies authorized for the United States in (1) above (Toronto) may be used to increase daily frequencies for any airline selected for Toronto in the first two years, up to a maximum of four daily frequencies per airline, per market.

D. The United States may change any of its designations or selections in Parts A, B and C above of airlines or markets at any time, provided such changes conform to the limitations provided in this section.

E. During the transition phase, the following shall apply with respect to the provisions of Parts A, B and C above:

1. In respect of any new service from Toronto to a United States point to which a Canadian airline did not operate large aircraft at the time this Agreement entered into force, a United States airline, in the exercise of route authority under this Annex, may increase its frequencies to match the number of large-aircraft frequencies operated by a Canadian airline on the city pair, provided that the United States airline is operating at least two frequencies in that city-pair.

2. If a Canadian airline that did not have authority to serve a city-pair with large aircraft inaugurates service for that city-pair with large aircraft, a United States airline that is, at the time this Agreement enters into force, serving that city-pair under restrictions precluding the utilization of large aircraft or limiting aircraft size may operate large aircraft and may match the number of frequencies operated by the Canadian airline using such aircraft.

"Large" aircraft means an aircraft type certified as capable of carrying more than 60 passengers.

F. Without prejudice to operations at Washington National Airport by all United States airlines holding authority at Washington immediately prior to the entry into force of this Agreement, at such time as a Canadian airline commences non-stop service to Washington National Airport, where any United States airline, or its affiliate, holds authority to operate between Baltimore and Toronto, with large or small aircraft, that airline may commence service with large aircraft from Washington National Airport to Toronto. Upon institution of Washington National-Toronto non-stop service by a U.S. airline pursuant to this paragraph, such inauguration shall constitute, and be consistent with, one of the U.S. route entitlements for year two or year three of the transition phase described in this Annex, as follows: If a Canadian airline commences non-stop service to Washington National Airport during the first year of the transition phase, inauguration of such service by the United States airline pursuant to this paragraph shall constitute a United States route entitlement for year two. Should non-stop service by a Canadian airline be initiated in year two of the transition phase, inauguration of such service by the United States airline pursuant to this paragraph shall constitute a United States route entitlement for year three.

2. The limitations in this Section apply to the aggregate number of code-share frequencies on which connecting code-share passengers may be carried between Toronto, Montreal or Vancouver and any U.S. gateway point. Connecting code-share passengers are those originating at/destined to a point behind/beyond the U.S. gateway and flow via that gateway to/from Toronto, Montreal or Vancouver, where the passenger's ticket on any sector of that journey lists an airline of one Party, but the aircraft is being operated by an airline of the other Party.

(a) With effect immediately upon entry into force of this Agreement, Canadian or U.S. airlines may operate up to four code-share frequencies at Toronto and up to twelve code-share frequencies at each of Montreal and Vancouver.

(b) With effect from the first anniversary of entry into force of this Agreement, Canadian or U.S. airlines may operate up to four additional code-share frequencies at Toronto and up to twelve additional code-share frequencies at each of Montreal and Vancouver.

(c) With effect from the second anniversary of entry into force of this Agreement, Canadian or U.S. airlines may operate up to eight additional code-share frequencies at Toronto and there shall be no limitations on the number of code-share frequencies at Montreal and Vancouver.

(d) With effect from the third anniversary of entry into force of this Agreement, there shall be no limitations on the number of code-share frequencies at Toronto.

(e) For each frequency operated by a U.S. airline resulting from the operation of paragraphs (1) and (2) of Section 2, Part A and paragraph (2) of Section 2, Part E of this Annex, a Canadian or U.S. airline may operate an additional code-share frequency provided it is operated to and from the same Canadian gateway as the new U.S. carrier service. If a new U.S. route entitlement is advanced pursuant to Section 2, Part F of this Annex, the same number of code-share frequencies may be advanced. The Canadian code-share frequency entitlement under this sub-paragraph shall not be diminished by the reduction of a U.S. carrier's frequencies which have been in operation for more than one month.[2]

(f) The transborder frequencies on which such connecting code-share passengers may be carried to or from Toronto shall also be subject to the same limitation on the use of second year Toronto frequencies to increase first year frequencies, and the limitation at Toronto to four frequencies per airline, per market in year three, as applies to United States airline service authorized pursuant to this Annex.

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[2]Similarly, the U.S. frequency entitlements pursuant to the matching provisions of Section 2, Part E of this Annex shall not be diminished by a reduction of a Canadian carrier's large aircraft frequencies which have been in operation for more than one month.

(g) Canadian aeronautical authorities may award to Canadian airlines code-share frequencies for which this paragraph provides entitlement. Any one Canadian airline may be awarded no more than half of the available code-share frequencies (except when the number of frequencies is an odd number in which case one airline may operate an additional frequency) in a given year at each of Montreal, Toronto and Vancouver during the applicable year of the transition phase.

3. The provisions of this Annex do not limit the rights of United States and Canadian airlines, in accordance with paragraph 6 of Article 10, to code-share for traffic carried solely on the transborder segments. Further, the provisions of this Annex do not limit the rights of Canadian and United States airlines to code-share on connecting services in Canada or to/from a third country behind/beyond Toronto, Montreal and Vancouver provided that both airlines have the underlying route rights and any necessary authorizations.

4. The long-standing exception from the requirement for underlying rights in the case of a regional small aircraft operator based in one country which, as a standard practice, uses the designator code of a major airline based in the same country and with which it is commercially affiliated, including circumstances where the major airline does not have the underlying route right, shall continue to apply.

Section 5

<u>Use of Base Level Slots During Transition Phase</u>

1. With respect to the base level of slots for Canada at New York LaGuardia Airport and Chicago O'Hare Airport as outlined in Annex II, during the three year transition phase described in Section 1 of this Annex, Canadian airlines may lease or sell such slots only to other Canadian airlines. These base slots may, however, be traded with any United States or Canadian airline for slots at other times at O'Hare Airport or LaGuardia Airport to adjust arrival and departure times to meet transborder service needs. The buying, selling, leasing or trading of slots by Canadian airlines in accordance with this provision will not affect the base level of slots for Canada.

2. Notwithstanding Annex II, Section 1 of this Agreement, the base level of slots for Canada shall not be subject to withdrawal under the "use it or lose it" rules during the three year transition period.