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THE ECONOMIC REGULATION OF AIR TRANSPORT:

FROM THE CHICAGO CONVENTION TO GATS

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ABSTRACTS

The economic regulation of air transport is a field that was, in large part, left out from the Chicago Convention of 1944 drafted at the Chicago Conference, due to a lack of agreement amongst the participants. Since then, ICAO has made numerous unsuccessful attempts to fill this void. With the inclusion of air transport services in the General Agreement on Trade in Services of 1993, the subject has once again come to the forefront of the aviation liberalization efforts.

This thesis describes the economic regulation of air transport since 1944 as set out in the Chicago Convention, its consequences and the liberalization efforts that have since been proposed. The principles of the General Agreement on Tariffs and Trade (GATT) are presented as is the debate concerning their application to air transport services. The final text of the General Agreement on Trade in Services (GATS) and the Annex on air transport services is analyzed and its implications for the future regulation of air transport services are discussed. Finally, the question of the appropriate forum for the future regulation of such services is also examined.

En raison des divergences d'opinions parmi les participants, la Convention de Chicago de 1944 rédigée par la Conférence de Chicago ne traite pas à fond le sujet de la réglementation du transport aérien. L'OACI a depuis entamé plusieurs démarches, sans succès, pour combler cette lacune. Depuis l'inclusion des services aériens dans le champ d'application de l'Accord général sur le commerce des services de 1993, le sujet a encore une fois susciter des appels pour la libéralisation du domaine du transport aérien.

Cette thèse comporte, en premier lieu, une description de la réglementation du transport aérien tel que prescrit par la Convention de Chicago, ses conséquences et, en deuxième lieu, les propositions devancées pour la libéralisation multilatérale du domaine aérien. Les principes de base de l'Accord général des tarifs douaniers et du commerce (GATT) sont présentés ainsi que le débat concernant leur application aux services du transport aérien. Le texte final de l'Accord général sur le commerce des services (GATS) et l'Annexe sur les services aériens sont analysés pour en déterminer ensuite les répercussions probables qui en découlent pour la réglementation future du transport aérien. Enfin, la question du forum approprié pour la réglementation future des services aériens est examinée.

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INTRODUCTION

In November 1944, representatives of 52 States met in Chicago to negotiate the post-war regulatory arrangements in the air transport world.[1] They emerged from the Chicago Conference of 1944 with a new framework for air transport relations worldwide. Fifty years later, the changes taking place in the global environment have required a review of the system they had elaborated.

This paper will seek to address and present the economic regulation which governs air transport and the possible future developments in this area.

Part I will examine the historical background of the present state of air transport relations: from the Chicago Conference and the system which was established to the ensuing structure of bilateral exchange of air transport rights which resulted. This part will also identify some of the advantages and the disadvantages associated with the bilateral system, the promotion of the multilateral dream of liberalization and the regional efforts at liberalization which have emerged in many parts of the world.

With major developments taking place in the area of international trade regulations and strong proposals to include air transport services in the trade in services liberalization attempts, Part II will examine the discussion following the regulation of trade in services,

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1 J. Gunther, "Multilateralism in International Air Transport - The Concept and the Quest" in *Annals of Air and Space Law*, Vol. XIX, Part I, ICASL, McGill University, Montreal, 1994, p. 262. For a historical perspective of the Conference, see Hon. L. Welch Pogue, "The International Civil Aviation Conference (1944) and Its Sequel the Anglo-American Bermuda Air Transport Agreement (1946)" in *Annals of Air and Space Law*, Vol. XIX, Part I, ICASL, McGill University, Montreal, 1994, p. 1 and Paul T. David, "A Review of the Work at the Chicago Conference (From a Secretariat Point of View)" in *Annals of Air and Space Law*, Vol. XIX, Part I, ICASL, McGill University, Montreal, 1994, p. 55. There were 52 nations represented at the Conference as well as the Ministers of Denmark and Thailand which were present in their own personal capacity.

beginning with a presentation of the important events leading up to 1995 and, subsequently, critically analyzing the trade regulation system (known as the GATT system) under which it has been proposed that services in general, and air transport services in particular, should be regulated.

The objective of Part III is to present one of the systems which has now acquired certain specific areas of air transport services under its jurisdiction but which may, in the future, pursue its liberalization objectives in the air transport field as a whole. The principles and the scope of this new framework will be described and the consequences of their application to air transport will be examined.

Finally, in Part IV, the efforts and actions taken by the International Civil Aviation Organization in the field of economic regulation of air transport will be discussed as well as possible conflicts of jurisdiction which may arise with other international organizations. The issue of under which international organization's jurisdiction air transport liberalization objectives should be pursued will also be addressed.

The future of the economic regulation of air transport, as will be presented in this paper, is far from decided and the push towards the liberalization of this field is driven by many States' frustrations over the current system regulating air transport and the trend of liberalization which is sweeping across all areas of trade relations worldwide.

PART I - The Historical Background of the Economic Regulation of International Air Transport since the Chicago Conference of 1944

The basic tools meant to govern air transport relations worldwide were established at the Chicago Conference in 1944. In the next fifty years, these basic tools would reveal not only their strengths but also their weaknesses. These weaknesses would lead to attempts at establishing a new, alternative system.

A - The commercial regulation of air transport since 1944

At the Chicago Conference of 1944, participating States agreed and presented to the world a number of new instruments which were to govern all air transport relations. The cornerstone of this new system was to be the Chicago Convention of 1944[2].

The Chicago Convention was meant to govern not only the technical aspects of international civil aviation but also the basic features of the international commercial regulation of air transport.[3] It is often said that the Chicago Conference accomplished little in the commercial field as opposed to the technical field, yet, at the origin of this result were

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2 *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, ICAO Doc. 7300/6, 1944 CTS 36. The Convention entered into force on April 4th, 1947 and is presently adhered to, in 1995, by 183 States. A plethora of books have studied and analyzed the Chicago Convention. Some of these are: B. Cheng, *The Law of International Transport*, Stevens and Sons, London, 1962; E. Du Pontavice, Dutheil de la Rochère, J. and Miller, G., *Traité de droit aérien*, Librairie générale de droit et de jurisprudence, Paris, 1989; J. Naveau, *Droit du transport aérien international*, Bruylant, Brussels, 1980.

3 P.P.C. Haanappel, "Multilateralism and Economic Bloc Forming in International Air Transport" in *Annals of Air and Space Law*, Vol. XIX, Part I, ICASL, McGill University, Montreal, 1994, p. 279.

probably the different views present on the matter at the Conference.

Although a single multilateral agreement for the commercial regulation of international air transport was the aim of the participants of the Chicago Conference, this goal was only partially achieved because of a lack of agreement on basic economic philosophies: one group led by the Americans, which emerged from the war victorious and wealthy, favoured a maximum application of free market principles to international air transport, whereas another group led by the United Kingdom, which had emerged from the war victorious but poor, favoured a system of government involvement in the regulation of international air transport.[4] It was a struggle between a protectionist policy of government intervention and an expansionist policy of no government intervention and minimal control. An attempt was made to bridge this ideological divide so as to draft some multilateral rules, formulas and organize arrangements to govern basic market access, such as routes, operational and traffic rights, capacity and tariffs, but the philosophical differences between the two approaches proved to be too great.[5]

Although some articles of the Chicago Convention are of relevance to the economic regulation of international air transport, two articles of the Chicago Convention, specifically Articles 5 and 6, are the outcome of a certain compromise between the two aforementioned groups.

Article 6 is the centerpiece of the few commercially-oriented articles which were

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4 Pogue, *supra* note 1, p. 17. For a detailed account of these views, see United States Department of State, *Proceedings of the International Civil Aviation Conference, Chicago, Illinois, Nov. 1 - Dec. 7, 1944*, Vol. I & II (Washington, D.C.: U.S. Government Printing Office, 1948).

5 Gunther, *supra* note 1, p. 263.

elaborated in the Convention. It gives national authorities control over market access for scheduled services and it states that no scheduled international air service may be operated over or into the territory of a foreign country without the special permission or the authorisation of such country, granted by any sort of agreement.[6]

Article 5 gives de facto the same control as Article 6 for non-scheduled services to national authorities. It sets out a more liberal rule for international non-scheduled (charter) air services, allowing, in fact, a multilateral exchange between contracting Parties to the Chicago Convention for the so-called first and second freedoms of the air: the right to overfly foreign territory and to make stops in foreign territory for technical purposes. It also exchanges multilaterally the remaining three freedoms of international carriage of passengers, mail and freight.[7] However, following the closing words of the article, each State may impose such regulations, conditions or limitations it may consider fit, and so the de facto control of national authorities ensues as States use the last paragraph of the article to limit the multilateral exchange to only the first two freedoms.[8]

The outcome of these two principles is that domestic services can be totally deregulated or liberalized by national legislation while international air services remain the subject of agreements between States which can be liberal or protectionist, with the respective government involvement this entails.[9]

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6 Michael Milde, "The Chicago Convention - Are Major Amendments Necessary or Desirable 50 Years later?" in *Annals of Air and Space Law*, Vol. XIX, Part I, ICASL, McGill University, Montreal, 1994, p. 421.

7 Haanappel, *supra* note 3, p. 282-283.

8 Gunther, *supra* note 1, p. 263.

9 Haanappel, *supra* note 3, p. 286.

A few other articles of the Chicago Convention also deal with specific aspects of the economic regulation. The parties did agree to a provision concerning cabotage: Article 7 states that:

> "Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State."

This broad definition of cabotage can be explained by the historical backdrop at that time: World War II was still raging on, nationalist concerns still prevailed over international concerns and the argument was made that air transportation must remain under domestic control to guarantee adequate protection of national interests.[10] Also, because the commercial aviation industry was still in its infancy, governments felt that extensive cabotage rights were necessary to insulate carriers from competition and assuring their continuing financial viability.[11] However, while the first sentence of Article 7 is quite straightforward, the second sentence of the article has led to substantial debate pertaining to its scope and meaning. Two interpretations are set forth: the first, referred to as the strict interpretation, argues that the phrase "on an exclusive basis" signals that cabotage privileges can only be granted on a non-exclusive basis, creating an absolute prohibition against discriminatory grants, whereas, the second approach, referred to as the flexible approach, places emphasis

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10 J.R. Platt, "The Creation of a Community Cabotage Area in the E.U. and its implications for the U.S. Bilateral Aviation System" in *Air and Space Law*, Vol. XVII, No. 4/5, 1992, p. 186.

11 *Ibid.*

on the word "specifically" and argues that cabotage rights can be granted on an exclusive basis where it is not stipulated that they are exclusive, without third States having the right to demand similar privileges.[12] Both these interpretations are still under debate today and the implications are quite serious depending on the approach that is followed.

Other articles of the Chicago Convention also touch upon economic regulatory concerns. Article 15, on airport and similar charges, states that:

> "Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigations facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation."

Article 68 provides that each State may designate the route to be followed within its territory by any international air service and the airports which such service may use.

Articles 17 to 21 deal with nationality and registration of aircraft. An aircraft will have the nationality of the State in which it is registered (Article 17) without, however, being able to register in more than one State (Article 18).

Articles 23 and 24 sets out the rules on customs and immigration while Articles 77 to 79 state that nothing in the Convention prevents States from participating in joint operating organizations and pooled services. Finally, Article 96 sets forth various definitions of

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12 *Ibid.* A lot of ink has been spilled writing on the subject of cabotage, its consequences and the correct interpretation of Article 7 of the Chicago Convention. See D.R. Lewis, "Air Cabotage: Historical and Modern-day Perspective" in *Journal of Air Law and Commerce*, Vol. 45, 1980, p. 1059; J.R. Chesen, "The many questions of air cabotage" in *ICAO Journal*, 1990, p.44; P. Mendes de Leon, *Cabotage in Air Transport Regulation*, Martinus Nijhoff, Dordrecht, 1990; W.M. Sheenan, "Air Cabotage and the Chicago Convention" in *Harv. L. Rev.*, Vol. 63, 1950, p. 1157.

importance, including the definition of air service, international air service, airline and stop for non-traffic purposes.

However, some states still wishing to follow a greater degree of liberalization in their air transport services could do so by adhering to two other instruments drafted at the Chicago Conference, the International Air Services Transit Agreement[13] and the International Air Transport Agreement[14].

These agreements offered two distinct ways to grant air traffic rights. IASTA exchanges the first two freedoms of the air for scheduled international air services, meaning the privilege to fly across a contracting State's territory without landing and the privilege to land for non-traffic purposes.[15] Today, 100 nations adhere to IASTA granting among themselves overflight rights for international air services so that they no longer have to be negotiated on a nation-to-nation, case-by-case basis, but are exchanged automatically. Some States that have not adhered to the Agreement have done so because of reasons of political, military, or national security nature or for commercial or restrictive policy reasons. Some States may even use overflight rights as commercial or political bargaining tools in individual negotiations with other States.[16]

IATA, on the other hand, exchanges multilaterally, all five freedoms of the air for

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13 *International Air Services Transit Agreement*, 7 December 1944, ICAO Doc. 2187. (hereinafter IASTA).

14 *International Air Transport Agreement*, 7 December 1944, U.S. Dept. of State Publication No. 2282. (hereinafter IATA).

15 For a discussion on some of the details of the agreement see C. Lyle, "Revisiting Regulation" in *Airline Business*, April 1994, p. 32.

16 Haanappel, *supra* note 3, p. 287-288. Some of the largest territorial land masses are, in fact, outside IASTA: Brazil, Canada, China, Indonesia and Russia.

scheduled international air services, that is: the privilege to fly across each contracting State's territory without landing, the privilege to land for non-traffic purposes, the privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses, and, finally, the privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory. It is, one author contends, "first and foremost, an expression of American free market policies at the time of the Chicago Conference" [17]. This broad exchange of commercial rights for international air transport has no rules on prices or capacity to be offered by airlines. This Agreement did not prove as successful as IASTA: only 11 States adhered to it and most States even negotiated bilateral agreements, which are still in force, with even more restrictive rules. In fact, even the U.S. withdrew from the Agreement in 1946-1947, as did several other signatories, when it became apparent that it would not receive widespread support.[18]

These two separate additional instruments were drafted at the Chicago Conference in hope of retrieving some of the ground for multilateral exchange of commercial rights which were lost from the Chicago Convention itself.

The participants of the Conference also drafted a model agreement, the Standard Form Agreement for Provisional Air Routes, known as the "Chicago Standard Form", as it was already clear that many States would only want to exchange traffic rights for scheduled

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17 *Id.*, p. 288.

18 C. Lyle, " Revisiting Regulation" in *Airline Business*, April 1994, p. 32.

air services on a bilateral basis.[19] The agreement also opened the possibility for the exchange of all five freedoms of the air for scheduled international air services, still under the reserve of an agreed upon route schedule or annex, on a case-by-case basis by the two governments involved. The agreement is of a liberal nature as it does not contain any provisions on airline capacity or pricing, therefore implicitly leaving these matters to airline management decisions.[20]

Two important organizations were also created as a result of the Chicago Convention. First, an intergovernmental organization was set up, known as the International Civil Aviation Organization (hereinafter ICAO), to provide a forum for the Contracting Parties to continue discussion of any matter relating to civil aviation and to the Chicago Convention. The intention was that ICAO would mainly deal with the technical, legal and operational matters related to civil aviation, such as standardization of equipment, liability of air carriers and air traffic control procedures.[21]

The second important organization that was created by airline executives in 1945 in Havana, following the adoption of the Chicago Convention, was the International Air Transport Association (hereinafter IATA), which was meant to be an inter-airline organization to establish international air rates or tariffs.[22] IATA's main objective was twofold: to coordinate or set international fares and to establish a clearinghouse to balance

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19 Pogue, *supra* note 1, p. 27.

20 *Ibid.*

21 Platt, *supra* note 10, p. 185. For a description of ICAO and its decision-making procedures, see T. Buergenthal, *Law-making in the International Civil Aviation Organisation*, Syracuse University Press, N.Y., 1969. ICAO's role in the economic regulation of air transport, discussed further *infra*.

22 *Ibid.*

interairline accountings.[23]

Unfortunately, the failure to agree upon a multilateral framework for the granting of air traffic rights led states to seek other, more acceptable, alternatives which would allow them, in their eyes, to protect their national interests and their sovereignty.

B - Present-day concerns: Bilateralism vs. Multilateralism

The framework set up by the participants of the Chicago Conference offered States several options to choose from for their international air transport relations. However, in 1946, one bilateral negotiation seemed to shape the future of these relations worldwide.

It was the United States and the United Kingdom that would set the trend with their bilateral agreement, known as the Bermuda Agreement[24], in February 1946, an agreement identified today as the most important step towards bilateralism as it would become the model for some 3 000 modern-day bilaterals. Each bilateral agreement has today become a self contained treaty, whether restrictive and protectionist or open and liberal, that deals with the air transport arrangements between two States.[25]

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23 *Id.*, p. 186.

24 *Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between their Respective Territories*, Signed in Bermuda on 11 February 1946, 3 UNTS 253; 1946 UKTS 3; TIAS 1507, 60 Stat. 1499 [The *Bermuda I* Agreement]. See also Pogue, *supra* note 1, p. 40.

25 A. Mencik von Zebinsky, "The General Agreement on Trade in Services: Its Implications for Air Transport" in *Annals of Air and Space Law*, Vol. XVIII, Part I, ICASL, McGill University, Montreal, 1993,

As new sovereign countries proliferated, during the late 1950s and 1960s, so the bilateral system flourished since many of these new countries developed national airlines, all seeking to participate in and share the growth of air traffic.[26] Meanwhile, the existing countries and their airlines sought to protect their interests in light of the upsurge of the new competitors.[27]

Why did States so readily follow the bilateral model of exchange of air traffic rights? Although the failure at the Chicago Conference to agree upon a multilateral model of agreement would seem like the obvious answer, a number of factors may have brought about this development. As one author writes:

> "It is a misunderstanding, and unfortunately a fairly widespread one, to believe that the Chicago Conference and other international legal instruments described [...], forced or obliged States into 'bilateralism'. With the exceptions of pricing and, above all, capacity regulation, the [...] system is a complete system, with a fairly broad choice of regulatory regimes, and with which the nations of this world could have chosen to live by. That nations opted for more detailed, case by case, bilateral regulation of economic aspects of international air transport, is possibly created by Art. 6 of the Chicago Convention, but certainly not an obligation or a necessity."[28]

Even following the failure of multilateralism in 1944, and the upsurge of the bilateral system, sufficient impetus did exist for several more attempts by the ICAO, and its predecessor the PICAO, to draft a multilateral framework on market access, capacity and pricing in 1946 and 1947. These multilateral rules came to be known as the "missing

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p. 392.

26 P. Harbison, "Aviation Multilateralism in the Asia Pacific Region: Regulatory and Industry Pressures for Change" in *Air and Space Law*, Vol. XIX, No. 3, 1994, p. 140.

27 *Ibid.*

28 Haanappel, *supra* note 3, p. 291.

chapters" of the Chicago Convention.[29] The main concern was to find a formula that would permit and facilitate the development of long-haul multi-stop international operations, while protecting the local carrier's access to their contiguous markets. In 1946, during the PICAO Assembly, a declaration was adopted stating that "a multilateral agreement on commercial rights constitutes the only solution compatible with the character of the Organization"[30]. Although a last attempt was made in Geneva in 1947, it seemed that several factors worked against this ideal of the Organization from becoming a reality. For one, the concept of the five freedoms of the air was still a new and abstract concept with limitations which made legal drafting very difficult; also, PICAO in 1946, and then ICAO in 1947, were fully preoccupied with institution building with administrative arrangements, priorities and practices to elaborate.[31] Bilateralism had also, by that time, asserted its credentials as it proved to be the most practical vehicule available for protecting national interests while allowing two States, such as the United States and the United Kingdom, to find common ground on the regulation of their air transport services.[32]

And so the stage for the future regulation of air transport services was set for the next fifty years. Yet, the dream of multilateralism never seemed to die and its proponents, in the past few years and in light of recent international developments, have once again referred to this system as a possible replacement to what many see as the outdated, restrictive and stagnant system of bilateralism.

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29 Gunther, *supra* note 1, p. 263.

30 *Id.*, p. 264.

31 *Ibid.*

32 *Id.*, p. 265.

The bilateral system, upon study, is a system with both advantages and disadvantages. At the beginning, it was a system able to fill the void left by the failure of a multilateral agreement and provided the legal basis necessary for the world's international air transportation system. The foundation of the bilateral system is the principle of complete and exclusive national sovereignty and, allied to it, is the political notion of an economic philosophy of full and equal opportunity.[33] As this sovereignty also implied that a country's air traffic was its "right", and that every country was, therefore, entitled to the economic benefits of exploiting this right, most bilaterals secured this entitlement by imposing airline ownership and control requirements which, in effect forced most countries to have their own airlines.[34] Bilaterals have been able to apply fair and equal opportunity for the airlines of negotiating States as they have allowed for a high degree of protection for national airlines of all nations, protecting in fact some of the weaker airlines against foreign competitors.[35]

This regulatory framework created by bilateralism meant that international air transport was treated as a special industry among service industries, able to serve and protect national interests and control the pace and the direction of international air transport links as well as being flexible enough to adapt to market and commercial needs.[36] The flexibility of the bilateral system, its supporters contend, is proved also by its ability to encompass the

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33 A. Mascarenhas, ICAO Doc. WATC-1.16, p.1. The principle of state sovereignty, the cornerstone of international civil aviation principles through most of history, is declared in Article 1 of the Chicago Convention and even before that, it was the first article in its predecessor, the Paris Convention of 1919.

34 *Ibid.*

35 R.I.R. Abeyratne, "The Economic Relevance of the Chicago Convention - A retrospective study" in *Annals of Air and Space Law*, Vol. XIX, Part II, ICASL, McGill University, Montreal, 1994, p. 20.

36 Gunther, *supra* note 1, p. 266.

whole spectrum of alternatives from very conservative to very liberal agreements and allowing countries to change their aviation relationship to fit changed circumstances.[37] In these ways, bilateralism is relatively safe and predictable.

However, serious shortcomings of the system have also been identified by those who contest the special nature of the air transport industry. Bilateralism is perceived as a power, rather than rule-oriented, approach to reaching agreement ruled by subjectivity with results that are not necessarily rational or objective.[38] It is a costly resource-consuming process for national authorities which fails to meet the aspirations not only of airlines willing to undertake risks, but also the needs of others directly affected by the air transport system, such as airports, communities, tourist industries and regional development needs, by imposing regulatory limitations on growth and opportunity.[39] It has also been accused of being inflexible, not always able to adapt to changing market and political systems.[40]

Sovereignty being the main issue at the heart of the bilateral system, and since this concept embraces a whole range of territorial and nationality issues which are difficult to pinpoint and vary considerably from the subjective viewpoints of States, it results in one common element: the reluctance to allow instrusions into national territorial limits or into the airspace immediately above for whatever reason.[41] There also results a strong commitment in many cases to controlling activities which have significant flow-on impacts on the domestic

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37 Mascarenhas, *supra* note 33, p. 2.

38 Gunther, *supra* note 1, p. 266.

39 *Ibid.* See also Abeyratne, *supra* note 35, p. 21.

40 Abeyratne, *supra* note 35, p. 21.

41 Harbison, *supra* note 26, p. 138.

economy and, frequently, the need exists to maintain a competitive and effective domestic airline system with bilateralism offering a higher level of control. This system can probably no longer be isolated from international airline networks and may potentially be undermined where the same national airlines operate both domestically and internationally.[42]

Other criticisms focus on the resulting compromise of the bilateral system which is usually based upon the lowest common denominator, thus reducing opportunity to a level that the more restrictive party is willing to accept.[43] The bartering system of exchanging airline rights is accused of being inherently biased against growth, as it tends to reduce the availability of new service opportunities to the level acceptable to the least competitive airline, and the most protectionist stage, usually meaning nationally-owned airlines.[44] The most pernicious legacy of bilateralism might be the idea that airlines are State assets and are full citizens of only one country and aliens elsewhere in the rest of the world, and that the routes they fly are somehow the gift of States, to be given grudgingly and only in return for some reciprocal trade-off.[45] The rejection of this view hits at the heart of the "special" nature of the industry and goes so far as to suggest that the rules that govern trade generally should be

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42 *Id.*, p. 139. In his March 9, 1994, speech to the International Aviation Club of Washington (reproduced in the American Bar Association, Forum on Air and Space Law, *Navigating Through Turbulence*, Washington, June 2-3, 1994), p.2, Ronald W. Allen, Chairman, President and Chief Executive Officer of Delta Airlines, Inc., comments on the bilateral system as follows: "...[that] system is incapable of creating a highly competitive global air transport industry. Instead of fostering greater competition and efficiencies, bilateralism has, overall, led to greater regulation. Perpetuating this system will deny airlines -- and our customers -- the proven benefits of market oriented competition. It will shield foreign carriers from the need to restructure, privatize, reduce costs, and effectively compete."

43 H. Nuutinen, "The tortuous path to plurilaterism" in *The Avmark Aviation Economist*, Vol. 9, No. 4, May 1992, p. 14.

44 G. Lipman, "Multilateral Liberalisation - The Travel and Tourism Dimension" in *Air and Space Law*, Vol. XIX, No. 3, 1994, p. 153.

45 *Ibid.*

applied to trade in international air services and government's role should be limited to safety, security and assuring a competitive environment.

As well, as new structural changes are taking place in the airline industry, particularly in the area of transnationalisation of ownership and globalization in general, bilateralism does not seem able to deal with these new realities. As most States who are bilateral partners require in their air services agreements that airlines must be "substantially owned and controlled" by citizens of bilateral partner States, these provisions impose significant restrictions on cross-border investments in airlines with the use of direct investment to obtain expanded access to foreign markets being limited.[46]

It is, in short, its critics state, a cumbersome and time-consuming structure, which at times prevents air links in the absence of a suitable quid pro quo for the national airline, and may lead to a fragmented route structure which is less efficient from the global point of view.[47] As one commentator explains: "...the system's ethos of growth within restraints can no longer accomodate efficiently the growing globalisation of markets, and their increasing interdependance"[48]. The limitations of the bilateral system have been exacerbated by the new global economic world which is characterized by economic and political volatility rendering it difficult for airlines to function efficiently without full commercial freedom.[49] As one author notes "the whole process of bilateralism has been characterised by conflict and uneven,

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46 *Ibid.*

47 Mascarenhas, *supra* note 33, p. 2.

48 Lipman, *supra* note 44, p. 152.

49 *Id.*, p. 153.

irrational growth"[50].

Since the system is, as mentioned, also determined by constraints on ownership of, and investment in, airlines and controls on market access, capacity and price, it has become inconsistent with the general industrial trade liberalization approaches that other economic sectors are following.[51] The inability of the bilateral system to change first surfaced when, in the late 1980s and early 1990s, U.S. airlines, faced with short-term cash needs, began to sell a variety of international routes rights to the Pacific, Latin America and Europe and in each case a weak airline, unable or unwilling to expand and develop its markets, was replaced by a stronger competitor, after extensive inter-government negotiations cleared the way.[52]

The recently new practice of codesharing between airlines, often within a wider marketing and/or equity alliance, has faced certain difficulties within the bilateral system. Code-sharing was originally a device for airlines to gain higher positioning on computer reservation system screens, but it has evolved as a direct response to the limitations imposed by bilateralism on market expansion, although in more and more bilateral negotiations, the need to restrict codesharing rights is becoming the central negotiating issue.[53]

The world's two biggest airline markets, the U.S. and Europe, set up their own think tanks to study and evaluate the bilateral system. Both study groups came almost to the same

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50 Harbison, *supra* note 26, p. 139.

51 Lipman, *supra* note 44, p. 153.

52 *Ibid.*

53 *Id.*, p. 154. Code-sharing means that an air carrier, by agreement, uses its two letter designator code, assigned to individual airlines by IATA, on flights operated by another carrier. For an analysis of the commercial, consumer and competition aspects of code-sharing, see J.E.C. de Groot, "Code-Sharing: United States' policies and the lessons for Europe" in *Air and Space Law*, Vol. XIX, No. 2, 1994, pp. 62-74.

conclusions.

In 1993, the U.S. "National Commission to ensure a strong competitive airline industry" condemned the bilateral system accusing it of no longer being growth-oriented enough, no longer adequately able to enhance or protect U.S. interest, and resulting in more rigid and protectionist relationships, effectively turning bilateral negotiations into an exercise in zero-sum market division.[54] Europe's "Comité des Sages" seconded the U.S. group's views in its own 1994 report, stating that bilateral negotiations are affected by considerable government influence which is usually based on a protectionist approach to economic issues and that the negotiations have either become too rigid and too unmanageable and ignore the realities of the Single European Aviation Market.[55]

Yet,over the past five decades, bilateralism did facilitate an orderly growth in the air transport service sector and this past does counter some of the criticism to a certain extent. However, it is the argument that bilateralism is unable to answer the future and its challenges which leads the push for a renewed attempt at multilateralism.

Indeed, mulitaleralism is often touted as the proposed path to the liberalization of air services agreements as it is seen as timely, in this period of rapid transnationalisation of

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54 *Ibid.*

55 *Id.*, p. 155. See also P. Malanik, "The Report of the European 'Comité des Sages' " in *Air and Space Law*, Vol. XIX, No. 2, 1994, pp. 75-80. Members of the Comité were: Herman de Croo, Chairman, Senator, former Belgian Minister of Transport; H.H. the Aga Khan, Majority Shareholder of Meridiana; Peter Bouw, President of KLM; Bjarne Hansen, President of Maersk Air; Geoffrey Lipman, President of the World Travel and Tourism Council; Henri Martre, Member of the Board and former Executive Chairman of Aérospatiale; Joao-Maria Oliveira-Martins, former Portuguese Minister of Transport; Gonzalo Pascul, Chairman of Spanair; Manfred Schölch, Vice Chairman of the Executive Board of Frankfurt Airport; Guillermo Serrano, Chairman of the Board of Amadeus; René Valladon, Chairman of the Joint Civil Aviation Council (Union 'Force Ouvrière'); Jürgen Weber, Chairman of the Executive Board of Lufthansa.

ownership and globalisation in the service industries.[56] Among its perceived advantages are its ability to better serve the fiscal interests of airports, the possibility of giving the consumers a wider choice of products, allowing for a more rationally and economically driven approach.[57] The multilateral system has the benefit of being a rule, rather than power, oriented approach and would be a more conducive framework for meeting the entrepreneurial needs of airlines and the service needs of other community and vested interests.[58]

The success of multilateralism would depend on its ability to deliver expanded market access and allow signatory states the freedom of ownership and control and the rights of establishment throughout the designated area.[59] The progressive elimination of state subsidies and ownership would be an objective of any multilateral agreement willing to develop fair competition rules.[60]

In fact, some of the practical aspects of a move towards multilateralism, which takes into account some of the negative features of the bilateral system, particularly by addressing the de facto constraint of nationality and territoriality, are provided by industry pressures and market factors, such as cross-border ownerships and control and code-sharing.[61]

However, this possible solution to present-day air transport regulatory problems does present some serious imperfections. There is a perceived danger that multilateral agreements

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56 Abeyratne, *supra* note 35, p. 21.

57 *Ibid.* See also Gunther, *supra* note 1, p. 267.

58 Gunther, *supra* note 1, p. 267.

59 D. Kasper quoted in "Multilateral age approaches" in *Airline Business*, February 1994, p. 47.

60 *Ibid.*

61 Harbison, *supra* note 26, p. 139.

could tend towards the lowest common denominator thereby reducing its scope and effectiveness and rendering it relatively inflexible.[62] Also, numerous past attempts to design such a system failed to answer the concerns for the protection or even survival of national carriers. The absence of certain national carriers could mean the multilateral system will be unable to ensure fully adequate air service links for all concerned States.[63] To many countries, the multilateral experiment must be approached cautiously, not completely replacing the bilateral system, but perhaps co-existing with it for a time. This view lends itself to the existence of certain other systems in the air transport relations which exists today: the advent of two systems known as regionalism and supranationalism.

Despite the fact that bilateralism remains the principal rule in international air transport since 1946, and that the ICAO Assembly in 1953 reached the conclusion, after many failed attempts, that there were no prospects for achieving a multilateral agreement, a certain number of multilaterals did emerge. These multilateral agreements were limited in geographical scope to certain areas of the world and, traditionally, such regional agreements were divided in two groups: either agreements codifiying existing bilateral practices or agreements codifiying liberalization where bilateral or unilateral State practices were deemed too restrictive.[64] Regional multilateralism is sometimes categorized as plurilateral and although the form has genuine internal multilateral aspects, externally, it serves to reinforce the strength of that collection of plurilateral States in third party bilateral negotiations.[65]

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62 Gunther, *supra* note 1, p. 267.

63 Abeyratne, *supra* note 35, p. 21.

64 Haanappel, *supra* note 3, p. 293.

65 Harbison, *supra* note 26, p. 141.

Regional groups of states adopt common air transport regulatory arrangements in order to meet broader economic objectives such as economic integration, greater trade links, economic and social development, expansion and improvement of air services within their combined territory, the promotion or defense of their interests when negotiating with third parties, or a response to challenges presented by another group.[66] Some examples of such agreements include AFCAC, the European Civil Aviation Conference (ECAC), the Latin American Civil Aviation Conference (LACAC) and the Andean Pact.[67] The Andean Pact, for example, has the objective of an open skies aviation policy for the region and has an innovative definition of substantial ownership and effective control allowing an airline to be controlled by the nationals of one or more Andean states.[68] Similar movements are also visible in Central America where there are efforts to develop a common air policy.[69] What defines and separates these regional groupings from multilateralism however is that the latter is global in reach and cuts across geographic and political boundaries making it more difficult to find common ground between all the participants.[70]

Another ongoing new experiment in a special form of multilateral exchange of air

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66 H. Nuutinen, "The tortuous path to plurilateralism" in *The Avmark Aviation Economist*, Vol. 9, No. 4, May 1992, p. 17.

67 Gunther, *supra* note 1, p. 262. See also J.R. Chesen, "1994 and beyond: Worlwide Air Transport Conference Plans for the Future" in *ICAO Journal*, Sept. 1994, p. 59.

68 R. Katz, "New directions?" in *Airline Business*, June 1992, p. 38.

69 *Ibid.*

70 Gunther, *supra* note 1, p. 262. At the American Bar Association, Forum on Air and Space Law, *supra* note 42, p. 3, Lorne S. Clarke, Director of IATA, explained that: "I define post-Bermuda system 'multilateral' air agreements as accords between groups of sovereign states, or between such a group and one or more States acting independently i.e. excluding solely intra-economic community or regional arrangements such as the European Union or even NAFTA."

transport services is the supranational system proposed and followed by the European Union, made up so far of 16 States. Since January 1, 1993, the E.U. countries have had a single internal air transport policy and market, multilateralism effectively replacing bilateralism at least as far as air services between their respective territories are concerned.[71] This common air transport policy only covers air transport within the E.U., both between member countries and within member countries and it is characterized by liberalization: a liberal air carrier licensing policy, an open market access system, a largely free pricing regime, and competition rules which seek to create a level playing field between the E.U. air carriers, both State-owned and private, yet permitting some traditional forms of international cooperation.[72] This arrangement is not really deemed multilateral but rather supranational as member States have surrendered a considerable part of their sovereignty to common E.U. institutions whereas, in traditional multilateral systems, participating States do not surrender their sovereignty beyond what is specifically agreed upon between them and ratified by them.[73] Also, between the Members of the E.U., multinational air carriers can be established since any of the air carriers designated or licensed/certificated air carriers can also operate scheduled air services to States which are not members of the E.U., although the old national substantial ownership and effective control requirement must be complied with, unless a new operating authority is

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71 Haanappel, *supra* note 3, p. 295. See also the following books covering the subject of the EU air transport policy: J. Balfour, *Air Law and the EC*, Butterworth, London, 1990; F. De Coninck, *European Air Law, New Skies for Europe*, Institut de Transport Aérien, Paris, 1994; P. Haanapel et al., *EEC Air Transport Policy and Regulation and their Implications for North America*, Kluwer Law and Taxation, Boston, 1989; A. Lowenstein, *European Air Law: Toward a New System of International Air Transport Regulation*, Nomos, Baden-Baden, 1991; J. Naveau, *Droit aérien: les nouvelles règles du jeu*, Institut de Transport Aérien, Paris, 1992.

72 *Id.*, p. 296.

73 *Id.*, p. 295.

obtained.[74]

Although the E.U. common air transport policy only covers air transport intra-Europe, several proposals have been made by the E.U. Commission for concrete external air transport relations with countries outside Europe, but none of these proposals were approved or adopted by the Council of Ministers.[75] It remains to be seen then what the future holds in terms of the E.U.'s air transport relations and how the present debate about air transport services will affect their outcome.

Therefore, States, despite or perhaps because of the Chicago Convention, did find several means to regulate the commercial air transport relations between themselves, be it a bilateral system, a regional organization or a supranational arrangement. Although bilateral air transport agreements are the traditional route, more and more like-minded states are willing to forge a new alliance among themselves allowing for a more liberalized regulation of their air transport relations. Despite these developments, more and more critics concluded that all these different forms of air transport regulations were outdated and inefficient and calls for a renewed multilateral effort were still heard. Most looked to ICAO as the organization to jumpstart and promote this project among its member States, relying on its mandate on all matters relating to civil aviation. Yet it was another international organization

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74 H.A. Wassenbergh, "World Trends in Air Transport Policies (Approaching the 21st century)" in *Air and Space Law*, Vol. XIX, No. 3, 1994, p. 176. At the American Bar Association, Forum on Air and Space Law, *supra* note 42, p.1, Dr. Konstantinos Adamantopoulos comments that: "... of increasing importance is also the policy of the European Commission regarding State aids to national carriers. Such aids usually distort competition and trade in the air transport sector within the European Community and, therefore, are prohibited in principle. However, the European Commission has traditionally taken a flexible approach when examining the legality of such State aids and, so far, accepted virtually all State aids to air carriers under certain conditions. A stricter policy in this area is urgently needed."

75 Haanappel, *supra* note 3, p. 299.

that, to some surprise, announced its own ambitious blueprint for the liberalization of international trade in services, a blueprint which would include air transport services worldwide.

PART II - The Regulation of Trade in Services and the Air Transport Sector

The General Agreement on Tariffs and Trade[76], created in 1948, is the principle international agreement regulating the trade in goods between all nations. Until recently, this institution did not deal with trade in services but as this latter trade sector began to gain more and more importance worldwide, it became a trade component that the GATT could no longer ignore or leave behind unregulated and when a new round of trade negotiations, known as the Uruguay Round, was launched this new issue was on the negotiating table awaiting debate.

A - The Uruguay Round Negotiations on Trade in Services

The idea of extending a multilateral negotiations procedure to trade in services was primarily discussed during the GATT Tokyo Round (1973-1979), and considered by the Ministerial Meeting in 1982.[77] It was to be a very difficult and time-consuming process with

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76 30 October 1947, 55 UNTS 187, (1947) CTS 27, 61 Stat. (5) A3, TIAS No. 1700. (hereinafter GATT). For a description of the GATT trade negotiations and procedures, see F. Capotorti et al., *Supranational Organisations*, Encyclopedia of Public International Law, Oxford, 1993; W.J. Davey, *Overview of the General Agreement on Tariffs and Trade*, Oceana Publications, New York, 1988.

77 M. Kakabadse, "Trade in Services in the Uruguay Round" in *Georgia J. Int'l. Comp. L.*, Vol. 19, No. 2, 1989, p. 384.

many impasses and compromises.

In spite of divergent views from some states concerned about the exchange of concessions between goods and services, the trade Ministers and representatives of 74 countries meeting at Punta del Este in Uruguay decided to launch the Uruguay Round of Multilateral Trade Negotiations on goods and services on September 20, 1986.[78] The final text of that meeting, known as the Punta del Este Declaration[79], was the first official document to include new issues such as trade in services.

The Declaration was a compromise between developing and developed countries and indicated the trend toward an expanded scope for the GATT negotiations.[80] The wide scope of the agreement was made possible by a "twin-track" approach, as Part I of the Declaration adopted by the Ministers as Contracting Parties launched the multilateral negotiations on trade in goods under the GATT auspices, whereas Part II, adopted by the Ministers as representatives of their own governments launched the multilateral negotiations on trade in services on a separate parallel track outside the legal framework of GATT.[81] Developed countries, therefore, were assured that the multilateral trade negotiations would be dealt

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78 Mencik von Zebinsky, *supra* note 25, p. 369.

79 *Ministerial Declaration on the Uruguay Round*, 33d. supp. B.I.S.D. (1987) 19ff. (hereinafter Punta del Este Declaration).

80 Mencik von Zebinsky, *supra* note 25, p. 370. See also D. Nayyar, "Some reflections on the Uruguay Round and Trade in Services" in *J. World Tr. L.*, Vol. 22, No. 5, Oct. 1988, p. 35 who writes: "The United States sought the inclusion of services as an integral part of the proposed new round of multilateral trade negotiations under the auspices of GATT. This demand was strongly endorsed by the major industrialized countries, which perceived a close identity of interests, and was supported by most nations of the industrialized world. Some developing countries consistently opposed this demand as it seemed to them a situation of all give and no take."

81 Nayyar, *supra* note 80, p. 35.

within a single political undertaking and the developing countries were assured that the negotiations on trade in services would proceed as a distinct process outside the legal framework of GATT, albeit still applying its procedures and practices.[82] The Declaration proposed to negotiate a multilateral framework of principles and rules for trade in services by applying the concept of progressive liberalization, seen not as an objective but rather as one of the conditions of the negotiations to promote transparency, economic growth of all countries and the development of developing countries.[83] In fact, developing countries were given special consideration as the Declaration set out to respect the policy objectives of their national laws and regulations applicable to services, basically stating that any trade agreements on services will have to leave countries enough flexibility to pursue domestic policy objectives.[84] All the options concerning the legal and institutional framework of an international agreement on services were to be decided upon by a Ministerial decision. The Declaration states to this effect that: "The Ministers...shall decide regarding the international implementation of the respective results".

In the past, other forums had emerged, as a possible alternative to GATT, for the negotiations on trade in services. Some countries have even negotiated bilateral or multilateral trade in services agreements: one such example is the U.S., Canada and, since 1994, Mexico free trade agreement in which they pursue a policy to liberalize conditions for investment and adopted binding rules on a broad range of services.[85] Other international

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82 *Ibid.* See also, Mencik von Zebinsky, *supra* note 25, p. 370.

83 Kakabadse, *supra* note 77, p. 385.

84 *Ibid.*

85 Mencik von Zebinsky, *supra* note 25, p. 366.

organizations, such as the European Union, the Organization for Economic Co-operation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD) have also been active in the area of trade in services studying possible liberalization structures.[86]

However, once the Punta del Este Declaration created the Group of Negotiations on Services (hereinafter GNS) to carry out the objectives of the agreement, this group soon had an effective monopoly on the pertinent discussions revolving around trade in services worldwide.

The aim of the negotiations was to establish a multilateral framework of principles and rules for trade in services with a view to expand such trade under conditions of transparency and progressive liberalization and as a means to promote economic growth of all the trading partners and the development of developing countries.[87] This goal was to be achieved while still respecting the national policy objectives and laws and taking into account the work of relevant international organizations.[88]

The Director of the GNS Division of GATT, Mr. Gary Sampson, stated that his group's objective was "to establish a contract of trade in services - a so-called General Agreement on Trade in Services - GATS - which would expand trade in services through

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86 *Id.*, p. 366. See also W. J. Drake and K. Nicolaidis, "Ideas, interests and institutionalization: trade in services and the Uruguay Round" in *International Organizations*, Special Issue, "Knowledge, Power and International Policy Coordination", ed. Peter M. Haas, Vol. 46, No. 1, Winter 1992, pp. 44-45.

87 M. Zylicz, *International Air Transport Law*, Utrecht Studies in Air and Space Law, Martinus Nijhoff, Vol. 12, 1992, p. 172.

88 *Ibid.* The GNS numbered 105 participants, either Contracting Parties or in the process of becoming Contracting Parties. See ICAO, General Assembly, 27th Session, Economic Commission, Trade in Services, A27-Wp/60 EC/12 (10 July 1989) p. 3.

provisions securing more transparent trading conditions and progressively higher levels of trade liberalization"[89]. The GNS was meant to report to the supervisory body for the Uruguay Round negotations known as the Trade Negotiations Committee (TNC). Since the TNC however was a GATT mechanism under the Uruguay Round and therefore the GNS negotiations were, by being reported to it, in fact held inside the GATT framework, the distinction in the Punta del Este Declaration between trade in goods and trade in services becomes somewhat blurred if not altogether irrelevant.[90]

The GNS began its work to develop a multilateral agreement identifying the sectors it might cover, and then considering possible sectoral arrangements. One author notes that "the work of the group was rather slow and consensus was not easily achieved"[91]. Nevertheless, halfway through the Uruguay Round, at the Montreal meeting convened in 1988 to review the negotiations' progress, it was agreed that the GNS would endeavour to assemble agreed upon views on principles and rules into a draft framework and provide a list of sectors that would be covered by those international rules.[92] The GNS was also to start a "testing process" on the application of those principles to six selected sectors, among them transport (which included air transport), to enable the GNS to finetune the concepts, principles and rules of the draft of a multilateral agreement without deciding which sectors

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89 G. Sampson, ICAO Doc. WATC-3.31, p. 1.

90 Mencik von Zebinsky, *supra* note 25, p. 371.

91 Zylicz, *supra* note 87, p. 172. For a detailed chronological description of the group's work, see Drake and Nicolaidis, *supra* note 86.

92 B. Asher, "Multilateral trade negotiations on trade in services: Concepts, goals and issues" in *Georgia J. Int.Comp. L.*, Vol. 19, 1989, pp. 388-389. These sectors were: communications, construction, distribution, education, finance, health, hotel and restaurants, insurance, domestic services, recreation, intangible asset sales, transport and business services.

would be included and which would be excluded.[93]

One major stumbling block in these discussions at the Uruguay Round was the inability to come to an agreement upon a definition of services, the discussion dividing, once again, developing countries and developed countries. As GATT does not contain a definition of "goods", a definition for services had to be proposed by economists.[94] One such economist, D. Riddle, defined services as "economic activities that provide time, place and form utility while bringing about a change in or for the recipient of the services"[95]. Therefore, the definition would not be based on how services differ from goods but it would still recognize that many services are co-produced by the providers of this service and his client.[96] Difficulties in defining services also arise from the many interactions between goods and services and the complications that entail from this practice.

As a result of these preoccupations, the GNS agreed upon a wide definition of services in order to answer the reality that nothing intrinsic distinguishes trade and non-trade services and that, although the sales of services require a transaction between at least two persons, technology makes it perfectly feasible for this transaction to occur without the movement of either the provider or the consumer.[97] In fact, international trade is considered

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93 Mencik von Zebinsky, *supra* note 25, p. 372.

94 *Id.*, p. 360.

95 D. Riddle, *Service-led growth: the Role of Services sector in World Development*, Praeger, New York, 1986, p. 6. For different elements of this definition, see M. Gibbs and M. Mashayekhi, "Elements of a multilateral framework for Trade in services" in *North Car. J. Int'l L. & Comm.*, Vol. 14, No. 1, Winter 1989, pp. 11-12.

96 Mencik von Zebinsky, *supra* note 25, p. 361.

97 P. Nicolaides, *Liberalizing service trade, strategies for success*, Royal Institute of International Affairs, London, 1989, p. 9. See also Mencik von Zebinsky, *supra* note 25, p. 361.

to take place if a firm, a producer, and the consumers involved are of different nationalities, regardless of the location.[98]

Yet, one major stumbling block for services that the GNS had to address was the possible regulatory barriers implemented by government and market regulations. Problems arise in identifying such barriers, classifying them and distinguishing between barriers that are protectionist and others that result from a legitimate social, economic or political national objectives.[99]

In May 1990, the GNS agreed to establish a series of Working Parties to draft an Annex stating the modalities of the application of the articles of the agreement to the various sectors. In the Working Party on Air Transport it was agreed that no provisions of the future multilateral agreement would apply to traffic rights (so-called "hard rights"), opinions still being divided about the application of the agreement to "doing business" activities ("soft rights"), and a few participants promoting the effective exclusion of air transport from the scope of the multilateral agreement.[100] The extent to which the doing business activities were to be subjected to multilateral liberalization remained a major point of contention: proponents of the application of GATS principles to a limited set of doing business activities argued that such an approach would have a number of advantages of intuitive appeal, arguing that an agreement of limited scope would be a small, but significant, step in the direction of

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98 Mencik von Zebinsky, *supra* note 25, p. 362. See also R.J. Krommenacher, "Multilateral services negotiations: from interest-lateralism to reasoned multilateralism in the context of the servicization of the economy" in *The New GATT Round of Multilateral Trade Negotiations*, E. Petersmann and M. Hilf, eds., Kluwer, The Netherlands, 1988, p. 455.

99 *Id.*, p. 363. See also Nicolaides, *supra* note 97, pp. 41-42 and Nayyar, *supra* note 80, p. 43.

100 Sampson, *supra* note 89, p. 3.

multilateral liberalization.[101] Also, they pointed out that it could become a source of continuing pressure to progressively liberalize the air transport sector in a transparent, predictable and orderly manner, as well as offer solutions to specific problems of "doing business" that might prove superior to existing bilateral solutions to such problems.[102] Finally, such an agreement, it was hoped, might develop a self generating dynamic for air transport liberalization and provide an instrument with which to reach agreement on a progressively wider set of issues relating to trade in aviation services.[103]

Another group, however, opposing the "partial multilateralization" of the air transport sector and favouring the effective exclusion of the air transport sector from the scope of GATS, argued that the distinction drawn between hard and soft rights (or any other terms) would cause serious conceptual and negotiating difficulties, would not provide an acceptable basis upon which to launch a process of progressive liberalization in the sector, and might well run the risk of disrupting the existing bilateral regime, a central component of which relates to dispute settlement.[104]

By December 1991, when Arthur Dunkel, the Director General of the GATT, presented a complete package draft agreement for the Uruguay Round to the negotiating parties, he submitted it on a 'take it or leave it' basis, meaning no single provision of the Draft could be considered effective until the entire package was agreed upon.[105] It also became

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101 *Id.*, p. 4.

102 *Ibid.*

103 *Ibid.*

104 *Ibid.*

105 Platt, *supra* note 10, p. 194.

clear that one group had won the debate as the draft included a sectoral annex on air transport services detailing how the general agreement would be applicable to soft rights.

The E.U. favoured the approach because as one commentator observed "its great commercial weight will enable it more easily to obtain concessions from third countries on traffic rights"[106]. In fact, the E.U. position, presented in the form of a GATS draft, followed by a proposed annex on air transport services, had always been in favour of covering the sector by the general framework but with some escape clauses.[107]

Support for the GATS system also came from the U.S. as a large percentage of that country's GNP now comes from the provision of services as opposed to the production of goods.[108] In fact, so important had this new sector of trade in the U.S. become that one author notes that "even though the U.S. is the primary beneficiary of the present bilateral air transport regime, its negotiators have let it be known that they were prepared to include even air transport in order to obtain a GATT service provision"[109]. However, the U.S. did circulate a communication to the GNS presenting its weighed comments on the possible implications of adopting GATT concepts to the transportation sector and even submitted a formal draft agreement on trade in services providing for the possible exclusion of certain services from the scope. Within the air transport working group, the U.S. delegation, as well as the Japanese delegation, had shown great reserve regarding the possible inclusion of aviation into

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106 G.L. Close, "External competence for air policy in the third phase - trade policy or transport policy?" in *Air Law*, Vol. XV, No. 5/6, 1990, pp. 295. See also, Platt, *supra* note 10, p. 194.

107 Zylicz, *supra* note 87, p. 176.

108 P.V. Mifsud, "New proposals for new directions: 1992 and the GATT approach to air transport services" in *Air Law*, Vol. XII, No. 4/5, 1988, p. 165.

109 *Ibid.*

GATS.[110]

Several reasons fuelled this reticence on the part of the U.S. For one thing, the automatic or unconditional application of the GATT principle, the most favoured nation treatment, would extend equal access to all nations without regard to comparable access for the American airlines abroad, depriving U.S. negotiators of essential flexibility to deal with a complex mix of often invisible trade barriers and for tailoring packages of economic rights that offset the mix of restraints in each foreign market.[111] Also, the concern of market equivalence was very real: no other country in the world is as much a sought-after market as the U.S. and, therefore, no other country's market could probably balance off the U.S. having to open their own market to so many foreign competitors.[112]

Eventually, even though there had been heavy criticism on the proposed inclusion of aviation in the GATS system by some American organizations, such as the American airlines organization (ATA), the U.S. had to include aviation in the GATS discussion in order to achieve its goals in other areas.[113]

One note of interest on the expectations affecting the GNS negotiations: although, as mentioned earlier, at the time of the drafting of the Punta del Este Declaration in 1986, a compromise was sought between the positions of the developed countries, supporting a multilateral liberalization of trade in services, and developing countries, concerned with the

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110 Zylicz, *supra* note 87, p. 175. For a disussion of the U.S. position and their interests, see D. Kasper, *Deregulation and Globalization*, Ballinger Publishing Company, Massachussets, 1988.

111 *Id.*, p. 176. The GATT principle of most favoured nation clause will be discussed further *infra*.

112 *Ibid.*

113 *Ibid.* See also, Platt, *supra* note 10, p. 194.

protection of their sovereignty and their fledging national industries, gradually, by the end of the negotiation, this situation changed. The developed countries, although still supporting the concept of multilateral liberalization, became disillusioned and their proposals tended to limit the scope of the system, whereas the developing countries, although still insisting on special or preferential protective provisions, abated their opposition perhaps expecting the possible facilitation of unskilled labour transfers or other benefits from increased access to major markets.[114]

At the time the draft was published by the GATT, consensus arose to recognize the particularities of the air transport sector, but difficulties surfaced on how to establish the relationship between the future GATS, ICAO, and IATA.[115]

It was, however, widely agreed that nothing in the application of the trade in services agreement should interfere with the existing standards and practices, including those of ICAO, relating to non-discriminatory implementation of technical aviation standards on safety, security and the protection of the environment.[116] Although, the question of how to establish the relationship between a future GATS and existing international disciplines and arrangements (with ICAO and IATA, principally), was not resolved, it was hoped is would preferably be one of complimentarity.[117]

One author did note "that ICAO had not been invited to participate on a regular basis in the GNS work, except for responding to a GNS questionnaire and for sporadic attendance

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114 *Id*, p. 176.

115 Sampson, *supra* note 89, p. 4.

116 *Ibid.*

117 Zylicz, *supra* note 87, p. 178.

at plenary working group meetings", and he continues that "Apparently the role of aviation experts was deliberately limited by GATT to eliminate any sectoral approaches"[118].

In the 1991 Draft Agreement it became clear that the framework that was to be applied to trade in services was none other than the GATT framework. Although this "umbrella agreement", as it was called, raised some concerns and conflicting opinions, once the Draft agreement was unveiled, discussion soon intensified on the implications of the application of GATT principles on the sector of trade in services. A brief overview of these principles to be applied to air transport services and the criticism of such an application helps to understand the reactions surrounding the Uruguay Round.

B - The GATT framework and its possible application to air transport

The GATT relies on a number of concepts and, in order to understand the debate on the inclusion of air services in the GATT framework at the time of the Uruguay Round, it is important to identify and define these principles.

The fundamental cornerstone principle of the GATT system is the most favoured nation clause (hereinafter the MFN clause). This clause requires that any concession extended to one country must be extended unconditionally to all other GATT Contracting Parties.[119]

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118 *Ibid.* The relationship between GATS and ICAO is discussed further *infra*.

119 Kasper, *supra* note 110, p. 100.

The basic premise is that all Contracting Parties are entitled to the same treatment as that accorded to the most favoured nation with the relevant benefits, privileges and concessions automatically and unconditionally extended to all signatory states. As these benefits and concessions would be negotiated multilaterally, they would produce an overall balance.[120] The MFN concept was rejected at the Chicago Conference in 1944, but a number of provisions of the Chicago Convention do retain the non-discrimination principle: Article 7, for instance, whereby cabotage rights may not be specifically granted on an exclusive basis to any other state or airline of any other state, nor may be obtained as an exclusive privilege from any other state.[121]

The main objective of GATT is progressive liberalization. This principle relates to the gradual improvement in market access and to the elimination of barriers by means of the GATT negotiation process and the MFN treatment.[122] Contracting Parties must agree and abide by a schedule of commitments, a schedule which plans the reduction of certain trade barriers over a certain period of time. According to the Punta del Este Declaration, this objective must be subject to the recognition of national policies and development needs of the signatory states. Progressive liberalization is not mentioned as an objective of the Chicago Convention, although some regional efforts, for example in Europe and in South America, for a multilateral agreement to liberalize commercial rights are in place.[123]

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120 Zylicz, *supra* note 87, p. 174.

121 H.A. Wassenbergh, *The Greater Europe*, Speech delivered at the Aviation Symposium, London, November 14-15, 1990. (unpublished).

122 T.H.E. Stahl, "Liberalizing International Trade in Services: The Case for Sidestepping the GATT" in *Yale J. of Int'l L.*, Vol. 19, No. 2, Summer 1994, pp. 413-414.

123 Zylicz, *supra* note 87, p. 173.

The principle of transparency strives to ensure the availability and accessibility of information regarding relevant national laws, regulations and administrative guidelines, as well as international agreements, in order to identify trade barriers, to eventually eliminate them and to discourage the appearance of new trade barriers.[124] More specifically, the obligation is for public notification of the use of subsidies, the publication of the laws, regulations, judicial and administrative rulings and government agreements, the maintenance of judicial, arbitral, administrative proceedings and tribunals to promptly review and correct any detrimental administrative action. The Chicago Convention also promotes the transparency and dissemination of information in a number of its articles, most notably Article 15, according to which any and all applicable national airport charges should be published and communicated to ICAO, and Article 38, where any departure from the international standards and procedures ICAO sets must be immediately notified to ICAO.

One of the GATT's main concerns is market access to foreign suppliers of goods and services, which results in the right of establishment for providers of the service and the right of access to distribution systems for foreign producers. One of the means of achieving this objective is by applying the principle of national treatment whereby foreign services and suppliers receive the same treatment as comparable domestic services and suppliers.[125] National treatment seeks to achieve the elimination or prevention of recourses to measures that restrict and distort trade so as to afford protection to domestic production. It impinges directly on domestic policies and limits the freedom of governments to use or adapt such

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124 Kasper, *supra* note 110, p. 94.

125 *Id.*, p. 100.

policies that accord a treatment less favourable to foreign suppliers than to domestic suppliers.[126] The principle of non-discriminatory treatment is also followed in a number of the Chicago Convention provisions in relation to prohibited areas (Article 9) and to airport and other charges (Article 15).

The GATT system also includes certain protective emergency mechanisms, called safeguards and exceptions, whereby a party can impose restrictions or suspend concessions if the volume of imported products causes serious injury to competing domestic producers.[127] These temporary escape clauses are meant to safeguard overriding national interests, to protect the markets in developing countries or to be applied for national security reasons.[128] The Chicago Convention also includes safeguard-type or exception-type provisions: as stated in Article 89, pertaining to the cases of war and national emergency or, as described in Article 9, the designation of prohibited areas, as well as possible departures from international standards and recommended practices or procedures as elaborated in Article 38.

Another important element of the GATT framework is its elaborate dispute settlement process which has been recognized as an appropriate and effective forum for resolving international trade disputes, despite being a lengthy and time-consuming procedure.

Also, one of the GATT's firm commitments is to increase the participation of developing countries in trade in services by way of special or preferential treatment.[129] Such

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126 M.G. Clark, *The GATT Uruguay Round Negotiation Relating to Services* in The Institute for Research on Public Policy, Halifax, 1988, p. 15.

127 Zylicz, *supra* note 87, p. 174.

128 *Ibid.*

129 *Ibid.*

treatment for developing countries was not granted in the Chicago Convention although ICAO can provide some technical assistance activities, as set out in Article 74 of the Convention, to help developing countries meet technical and operational standards, to improve their international airport and air navigation facilities and to reduce the problems of scarce human and financial resources. However, no such treatment is available to developing countries in the commercial field nor in the present bilateral system of agreements.

When the Punta del Este Declaration stated the eventual inclusion of the field of trade in services within the GATT system, the air transport services sector was put on notice. The application of the GATT principles to air transport services would obviously entail serious consequences that would most likely change the way the air transport world had done business so far. Some of the GATT principles might bring about positive results while others, many thought, would entail negative consequences.

By far, the most disputed principle of the GATT system and its application to air transport services was the MFN clause. The application of the MFN clause, some contended, would cause substantial political and economic problems because of the prospect of extending equal access to all nations without regard for comparable access to markets abroad.[130] The MFN clause could deprive air service negotiators enough of their essential flexibility as the trade barriers in air services vary in form and impact across markets. More importantly, it has been argued that the MFN treatment could force even liberalized nations to discriminate when granting traffic rights in order to counteract the severe restraints some of their carriers would

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130 Kasper, *supra* note 110, p. 95.

encounter in foreign markets.[131] In fact, the competitive importance of comparable market access in industries characterized by significant economies and other economies of scope could leave the air services industry particularly vulnerable to manipulation by protectionist governments if the MFN clause would apply.[132]

The MFN clause seems to pose two dangers: it would necessitate a more extensive analysis of the costs and benefits of any given set of concessions, where each party would have to estimate the impact of granting to all airlines the best concessions, and it could encourage the phenomenon of free-riders, those who would take advantage of the concessions given to the most-favoured nation without giving anything up themselves.[133] This means an extensive analysis in order to grant the best concessions to all parties which could slow down the negotiating process and even render an uncertain value to an agreement, particularly for politically powerful industry interests. The expected value of concessions would problably be discounted for nations whose markets are protected and for those who have a poor record of compliance in order to deal with the problem of free-riders.

The GATT relies on a multisectoral negotiating process to resolve externalities and free-riders problems by ensuring a balance of concessions: the expectation is that each Party will have sufficient potential gains in some sectors to compensate for free-riders in other sectors to reach a balance of overall benefits via an expanding scope of negotiations.[134] GATT supporters contend that externalities are benefits, not costs, however, this idea of free-

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131 *Id.*, p. 96.

132 *Ibid.*

133 *Id.*, p. 98.

134 *Id.*, p. 99.

rider losses in one sector being offset by net benefits in another is, according to critics, a very imprecise approach and encourages a nation to liberalize only to the minimum extent necessary to induce liberalization in other nations.[135]

Following this analysis, the application of an unconditional MFN clause in air traffic rights could, according to one commentator, be a threat to the regulatory structure of international air transport and even impede liberalization, by allowing market access, without regard to whether equivalent access was available in all markets, by making the negotiated elimination of non-tariff barriers more difficult, and by rendering a bias in the system in favour of those able to exert unfair competitive pressures.[136]

Basically, an unconditional MFN clause would generalize all markets by opening concessions without requiring other beneficiaries to accept market liberalization conditions, thereby tending to benefit protectionist nations by rewarding them with the same rights as those willing to liberalize access to their own markets.[137] To curtail this situation, one could imagine perhaps extending the MFN treatment only to those nations willing to abide by it, making it in fact a conditional MFN concession.

Given the disparity of the air transport markets, it is not reasonable, critics argue, to expect a state to be required to grant to all member-states the same degree of access regardless of whether the state's airline had access to other markets.[138] States with small

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135 *Ibid.*

136 D. Buckingham in "Panelists differ on Application of trade concepts to air services" in *ICAO Journal*, Vol. 47, No. 6, June 1992, p. 13.

137 *Ibid.*

138 B. Stockfish, "Opening Skies: The prospects for further liberalization of trade in international air transport services" in *JALC*, Vol. 57, No. 3, Spring 1992, p. 641.

markets would await concessions from the larger markets with no incentive to liberalize themselves; states with larger markets would be adverse to extending concessions until they undertook the daunting task of ascertaining the net benefits allowing greater access to all member-states.[139]

Presently, benefits, privileges and concessions for international air services are exchanged bilaterally on a reciprocal basis, with the parties seeking a bilateral and sectoral, rather than a multilateral and overall, balance. One author argues that the extension of an unconditional MFN clause to the matters regulated by bilateral agreements would entail a completely different approach and one that would be difficult to implement, due to certain accepted thinking patterns accustomed to in the bilateral negotiation process.[140]

Although the national treatment principle is not considered as controversial a concept as the MFN clause, because of certain perceived benefits, it too has raised some thorny legal and practical problems for many observers.

National treatment was perceived as beneficial should it be limited to doing-business issues, as it could potentially deal with a significant number of non-tariff barriers that impede air liberalization. However, if it should extend to key economic rights, such as routes, the risk is that it would unbalance the present-day restrictive domestic situation whereby an airline owned and controlled by foreigners is not allowed to serve domestic air service markets in most countries.[141] Legislative changes would be required to implement a national treatment

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139 *Ibid.*

140 Zylicz, *supra* note 87, p. 173.

141 Kasper, *supra* note 110, p. 101.

requirement for domestic air services and this would raise major bargaining on economic and political issues as governments have already rejected proposals to expand direct access by foreign airlines or that foreign airlines be permitted to acquire national airlines because of protectionism and national concerns.[142]

National treatment could be qualified as too sweeping or too limited to be applied to economic rights. Too broad because it would force nations with deregulated domestic markets to open their markets to free-riders with restrictive domestic regulatory market systems and because it would discourage more liberal nations from deregulating their domestic markets; or too limited because of its ability to deal effectively with the problem of entry barriers and restrictive domestic regulations imposed by illiberal nations.[143]

The controversy surrounding the application of both the MFN clause and the national treatment clause to air transport services seemed to revolve around their application to either soft rights, meaning ancillary commercial activities, or hard rights, meaning traffic rights such as routes, capacity, market access and fares. Limiting the application of these principles to issues such as ticket sales, marketing and access to airports and other facilities or supplies to alleviate discriminatory measures by other protectionist states, as opposed to applying them to substantive economic rights, was often regarded as an acceptable proposition.[144] The prospect of limiting the application of the national treatment and the MFN clauses to soft rights, such as groundhandling, the use of CRSs and business conditions, in a possible

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142 *Ibid.*

143 *Id.*, p. 104.

144 *Id.*, p. 104. See also K.B. Creedy, "Should Air Transport be in or out of GATT?" in *Interavia Aerospace Review*, No. 9, September 1990, p. 717.

subagreement, was considered one of the best scenarios for the inclusion of air transport services in the negotiations. However, even this proposal was considered quite sensitive as many airlines and governments see soft and hard rights as inextricably linked: the only way, according to some states, to negotiate hard rights is to raise "doing business" issues, as an important bargaining chip.[145] Soft rights as a bargaining chip allow certain countries important leverage to get more than they otherwise would from negotiations.

Another GATT principle, the principle of transparency, which is considered a necessary element of an open and predictable trading environment, is viewed as a compatible practice with the field of air transport, where such information is generally available, at least as far as basic aviation laws and regulations are concerned.[146] A problem does arise however in view of the fact that not all agreements are duly registered with ICAO and that some bilateral agreements are supplemented or modified by unpublished and confidential documents such as Memoranda of Understanding.[147] These Memoranda often contain the most important elements of the bilateral agreement as they modify many of the provisions or offer the true bargaining concerns of the parties.

GATT's dispute settlement procedure has often been cited as a major advantage for applying the GATT system to the services sector as it is touted as speedy, efficient and thorough. However, although GATT is recognized as an appropriate forum for resolving international trade disputes and that its existing dispute resolution services do provide a basis

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145 Creedy, *supra* note 144, p. 717.

146 Zylicz, *supra* note 87, p. 173.

147 *Ibid.*

for GATT to attain significant liberalization of trade of goods, this dispute settlement mechanism is neither timely nor efficient.[148] Presently, the system is plagued by delays in forming the appropriate panels, in long panel deliberations and in ineffective remedies. This makes it quite an unattractive alternative to bilateral agreements dispute settlement procedures. Most problems with the bilateral agreements are actually resolved at the carrier-government level or informally between governments, usually by way of consultation and then, if necessary, by arbitration. The system has led though to few arbitral proceedings because of the important time element, which has encouraged dispute resolution at the government level.[149] The time element is essential to the rapid resolution of disputes because of the many possible inconvenience to travellers, the vulnerability of the airline operation and the political visibility of such a situation.

However, since the air transport services sector already has well-developed means for resolving disputes in the present-day bilateral agreement system, if the GATT dispute resolution process does not offer the same, if not better, advantages, then it will not be a persuasive argument for the application of the GATT structure to the sector.

Concerns about the GATT procedure of dispute resolutions are many. The dispute settlement procedure will undoubtedly play a critical role in whether the agreement is reached and whether, ultimately, trade is liberalized. The slower this procedure is , the less likely the

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148 Kasper, *supra* note 110, p. 108. For a description of the procedural steps of the GATT dispute settlement process, see L.S. Klaiman, "Applying GATT Dispute Settlement Procedures to a Trade in Services Agreement: Proceed with Caution" in *J. of Int'l Bus. Law*, University of Pennsylvania, Vol. 11, No. 1, Winter 1989, pp. 657-662. The dispute settlement procedure under GATT is a quasi-judicial process whose objective is not to ensure compliance with the law but to arrive at understandings and mutually acceptable settlements between disputing parties.

149 *Id.*, p. 105.

agreement will be adhered to; the more effective it is, that is the speedier it is, the likelier the chances that the agreement will be honoured.[150] By specifically seeking to reduce the rewards for cheating, the remedial and dispute resolution procedures could increase the value of agreements, particularly for rule-abiding nations and they could contribute to the perceived fairness of the agreement as a whole.

The proposed GATT-based umbrella structure for air transport services could prove advantageous for developing countries for a number of reasons. As the objective is to gradually remove the non-tariff barriers now imposed on international air transport and, where necessary and justified, replace them by some form of transparent temporary tariff barriers, developing countries may welcome the change from a bilateral system to a multilateral one which would give them the unilateral authority to promote their own interests.[151] Also, these countries could benefit a great deal from the MFN and national treatment obligations, which would allow them a greater and more favourable access to those developed countries' markets that have so far proven to be impossible to reach due to the developing countries' lack of negotiating power and the non-existence of comparable market access on their side. Concerns do arise nevertheless for developing countries with national airlines, as they may not be strong and efficient enough to compete with other airlines that would enter their domestic routes.

On a more general level, some essential benefits with the inclusion of air transport services within GATT have been identified.

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150 *Id.*, p. 106.

151 H. A. Wassenbergh, "The application of international trade principles to air transport" in *Air Law*, Vol. XII, No. 2, 1987, p. 86.

By negotiating tariff-binding item by item as contained in a schedule for each GATT contracting party, the obligation on such party is to avoid applying a tariff in excess of the bound rate contained in its schedule.[152] This method of tariff binding could even encourage a greater willingness to risk trade liberalizing concessions. A broad prohibition on the use of quotas (quantative restrictions) with a few exceptions, for balance of payment purposes, will certainly be favourable to liberalization as could the obligation permitting but channeling the use of anti-dumping and countervailing duties, to offset dumping margins and subsidies.[153] As well, an obligation in the GATT system does exist constraining the type of subsidies which can be used to benefit goods or services which are exported or compete with imports. The difficulty with this last obligation and its application within the air transport sector is the present-day vulnerable financial position of so many government-owned airlines who depend on government subsidies to survive and whose governments are not willing, for reasons of prestige, national security and others, to let them disappear.

Indeed, much of the opposition to the GATT liberalization principles derives from nationally-vested interests in services, including entrenched regulators, and nationalized or monopolistic or even oligopolistic businesses.[154] Less-developed countries are concerned with whether they can compete within the services industries and more developed countries are concerned about developing countries' most prevalent service, cheap labour.[155]

Furthermore, GATT's request and offer procedure of setting tariff-reducing schedules

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152 Mifsud, *supra* note 108, p. 165.

153 *Ibid.*

154 *Id.*, p. 166.

155 *Ibid.*

does run the danger of settling for the lowest common denominator, where a party, to offset the effects of the MFN clause and other GATT obligations, will never negotiate past a certain level of commitments in order to protect its market.[156] This situation also stems from the fact that the idea of a level playing field is not applicable to the aviation industry, where certain markets are considered much more important and attractive than others.

Many roadblocks and obstacles were indeed identified in trying to liberalize air transport services within a GATT framework. The vested self-interests of governments who own national airlines, the inability to see the needs of the aviation industry's customers, the necessity to strip the aviation world of its special status, the balance of benefits theory of reciprocity and present-day sovereignty and ownership rules.[157] This translates into a lack of true global market perspective which impedes any discussion of application of liberalizing principles. By de-emphasizing the concept of nationality and sovereignty though, it was argued by some, the protection of the domestic industry which is the main motive behind restrictive policies of non-tariff or tariff barriers, within the GATT framework, could be practiced and justified through the use of light tariff barriers to protect vital national industries in the national public interest but only on a temporary and non-discriminatory basis, being lifted once they have achieved their objective.[158] This would then at least start the process towards lifting all trade barriers.

In summary, the idea of applying the GATT structure and its principles to air transport

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156 Kasper, *supra* note 110, p. 13.

157 P. Kramer, "Conference: Beyond Bilaterals, New directions in Global Air Transport Negotiations" in *Zeitschrift fur Luft-und Wettraumrecht*, No. 40, 1991, p. 292.

158 Wassenbergh, *supra* note 151, p. 90-91.

services did offer certain promising results, such as time-efficient procedures, open skies regime and minimum government interventions. However, on the whole, many were apprehensive about the possible consequences of such an application to national airlines, to dispute resolutions and the predicted danger involved of imposing liberalization without the necessary conditions having been implemented beforehand.

Several states also voiced their opinions to the GNS concerning the possibility of an annex on air transport services being subject to GATT principles. These opinions touched upon a variety of subjects. Some delegations (such as the E.U., Singapore) stated that the application of the MFN clause was the most problematic and some delegations proposed its partial application excluding the hard rights while others favoured a MFN clause derogation for the entire air transport sector and against any partition of air transport rights.[159] Some delegations noted possible difficulties with the application of other general obligations contained in the multilateral framework, even if the MFN clause derogation was to apply to the entire sector, and yet felt that derogations from those general obligations would lead to a serious questioning of the entire GATS objectives.[160] Most delegates did not see a need to annotate the GATS provisions concerning market access and national treatment as these were specific commitments to be negotiated by the parties although a few delegates felt that such annotations would be needed to ensure that a transition to a multilateral regime would occur through consensus.[161] It was generally accepted that the application of GATS should not

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159 Zylicz, *supra* note 87, p. 177.

160 *Ibid.*

161 *Ibid.*

interfere with domestic regulations, relating to the non-discriminatory implementation of technical aviation standards, including those standards adopted by ICAO, and one group even suggested, on the subject of the increased participation by developing countries, that a co-ordinated effort be made between the GATS action and the Technical Assistance Programme of ICAO, stressing also the critical importance for developing countries of access to information and reservation networks.[162] Cabotage proved to be, as usual, a highly sensitive issue: some delegations expressed concern about cabotage in the context of economic integration (such as U.S. cabotage vs E.U. cabotage), some supported a derogation from the MFN principle for cabotage, and others even stated that cabotage was adequately dealt with by the provisions of the Chicago Convention.[163] No support was garnered for annotations concerning subsidies and establishment or acquisitions issues as most delegations viewed that the matters should be addressed outside of GATS.[164]

On December 15,1993, the GATT unveiled a new agreement after years of negotiating amid talk of breakdowns and impasses. Along with this new instrument, the Contracting Parties also adopted the General Agreement on Trade in Services[165] (hereinafter GATS), the work of the GNS group, an agreement which had been ready since 1992 in the form of a draft. Air transport services were the subject of a sectoral annex. Finally, the world

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162 *Ibid.*

163 *Ibid.*

164 *Ibid.*

165 *Agreement Establishing the World Trade Organization, General Agreement on Trade in Services, Annex 1B* in 33 *I.L.M.* 13 (1994) 1.

was to see just how and how much the present way of dealing with trade in services, including air transport services, was to be modified.

PART III - The General Agreement on Trade in Services and the Annex on Air Transport Services

When GATS was unveiled in its final form on December 15th 1993, its content did not come as such a surprise. Already by 1992, the Director of the GNS, Mr. Gary Sampson, was presenting and explaining the text at an ICAO Colloquium and the final text barely differed from the Draft text presented in 1991.[166] The basic provisions of GATS were to be applicable to specific service trade areas. The Annex on air transport services meant that certain air transport services would, if states adhered to the Agreement, also be under the auspices of GATS. An overview of the GATS principles and the Annex on air transport services will be described below. This new development will have several important consequences and, therefore, their resulting application will also be examined.

A - The GATS principles and the Annex on Air Transport Services

The objective of GATS is to establish a contract which would expand trade in services through provisions securing more transparent trading conditions and progressively increasing

166 Sampson, *supra* note 89, p. 1.

the level of trade liberalization.[167] In order to achieve this result, the agreement puts forth a number of principles and obligations.

The Services Agreement rests on three pillars. The first is a Framework Agreement containing basic obligations which apply to all member countries; the second concerns national schedules of commitments containing specific further national commitments which will be the subject of a continuing process of liberalization; and the third is a number of annexes addressing the special situations of individual services sectors.[168]

Briefly, the basic principles GATS adheres to include a standstill commitment, whereby once a Contracting State adheres to GATS it cannot increase its trade barriers, a subsequent rollback commitment of a Contracting State's tariffs, the national treatment clause, the MFN treatment clause, the prohibition of non-tariff barriers, the principle of transparency and the dispute settlement mechanism. Each one of these elements and its obligations is explained in the agreement.

Part I of the basic agreement defines its scope in Article 1: the agreement will deal with services supplied from the territory of one party to the territory of another; services supplied in the territory of one party to the consumers of any other (for example, tourism); services provided through the presence of service providing entities of one party in the territory of any other (for example, banking); and services provided by nationals of one party

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167 *Ibid.*

168 *GATT Press Summary*, December 14, 1993.

in the territory of any other (for example construction projects or consultancies).[169]

Part II of the agreement sets out the general obligations and disciplines. This part of the first pillar contains two main sets of provisions. The first is the general obligation to be applied to all service sectors by all parties to the agreement in accordance with the sectoral annexes. This general obligation was already known by 1991, as the basic assumption under the general services framework was that in principle no services sector should be excluded from the application of its rules. The second set contains specific provisions to be applied by each party in accordance with liberal commitments negotiated bilaterally and set out in national schedules. The most important of the general obligations, the MFN clause, is a commitment to liberalize trade by way of concessions granted to any country which must then be granted on a non-discriminatory basis to all parties to the agreement. Article II states that each party "shall accord immediately and unconditionally to services and service providers of any other Party, treatment no less favourable than it accords to like services and services providers of any other country". However, it is recognized that the MFN treatment may not be possible for every service activity and, therefore, the agreement does allow parties to indicate specific MFN exemptions.[170] The conditions for such exemptions are included as an annex and provide for reviews after five years and a normal limitation of 10 years on their duration.

The MFN clause in GATS is a little different from the one included in the GATT: when dealing with services, GATS looks to reduce barriers, but when dealing with goods,

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169 *Ibid.*

170 *Ibid.* See also Sampson, *supra* note 89, p. 2.

GATT looks for concessions. The wording of Article II is a little different as "treatment no less favourable" resembles more the language of a national treatment clause than of a MFN clause. The agreement also provides for two other exceptions: in Article II (3) where any state confers or accords advantages to adjacent countries and, in Article XIII which stipulates the government procurement exception.

The transparency requirements, as stated in Article III, include the publication of all relevant laws and regulations and provide for the facilitation for the increased participation of developing states in world services trade by way of negotiated commitments on access to technology, improvements in access to distribution channels and information networks and the liberalization of market access in sectors and modes of supply of export interest. The provisions covering this economic integration are quite analogous to those in Article XXIV of the GATT, which requires arrangements to have the "substantial sectoral coverage" and to provide for the absence or the substantial elimination of all discrimination between the parties.

However, as it is domestic regulations, and not border measures, which influence trade in services the most, some of the provisions do require that all such measures of general application should be administered in a reasonably objective and an impartial manner and, furthermore, as set forth in Article VI, parties are required to establish the means for prompt review of administrative decisions relating to the supply of services.[171]

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171 *GATT Press Summary*, December 14, 1993. Article VI reads, in part:
"1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.
2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative

Article IV states that the "increasing participation of developing countries in world trade shall be facilitated through negotiated specific commitments". The objective, as explained in Article IV, is to improve their access to distribution channels and information networks, liberalize their market access and facilitate the availability of services technology.

The agreement also contains, in Article VII, the obligation to recognize requirements for the purpose of securing authorizations, licenses or certification in the services area. It encourages recognition requirements achieved through harmonization and internationally-agreed criteria. Furthermore, provisions state that parties are required to ensure that monopolies and exclusive service providers do not abuse their positions, incorporating in fact one of the basic criteria of many national anti-trust laws use, specifically the concept of abuse of a dominant position. Restrictive business practices, states Article IX, should be subject to consultation between parties with a view to their eventual elimination.

While parties are normally obliged to restrict international transfers and payments for current transactions relating to commitments under the agreement, there are safeguards in place, in Article X, allowing limited restrictions in the event of balance-of-payments difficulties. However, where such restrictions are imposed, they would be subject to certain conditions as they must be non-discriminatory, they must avoid unnecessary commercial damage to other parties and they must be temporary.[172]

The agreement contains general exceptions and security exceptions provisions in Article XIV and XIV bis. These are similar to Articles XX and XXI of the GATT.[173] Article

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decisions affecting trade in services..."

172 *Ibid.*

173 Mencik von Zebinsky, *supra* note 25, p. 377.

XV also provides for negotiations with a view to the development of disciplines on trade-distorting subsidies in the services areas.

Part III contains the provisions for market access and national treatment which are not general obligations but are commitments made in national schedules. Article XVI stipulates that in the case of market access each party "shall accord services and services providers of other parties treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule". The intention of the market access provision is to progressively eliminate the following types of measures: limitations on numbers of services providers, on the total value of service transactions or on the total number of services operators or people employed.[174] Restrictions on the kind of legal entity or joint venture as well, through which a service is provided or any foreign capital limitations relating to maximum levels of foreign participation, are to be progressively eliminated.

The national treatment provision, in Article XVII, like the provision in the GATT, stipulates the obligation to treat foreign service suppliers and domestic service suppliers in the same manner. Specifically, the national treatment clause deals with equitable, and not equal, treatment, which is a precedent condition to market access.[175] However, it does provide the possibility of different treatment being accorded to the service providers of other parties to that accorded to domestic services providers only if in such cases the conditions of competition should not, as a result, be modified in favour of the domestic services providers.[176]

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174 *GATT Press Summary*, December 14, 1993 and Sampson, *supra* note 89, pp. 2-3.

175 J. Gunther, Speech delivered at McGill University, Institute of Air and Space Law, Montreal, March 25th, 1994. (unpublished).

Part IV of the agreement establishes the basis for progressive liberalization through successive rounds of negotiations and the development of national schedules. These will be formal and binding concessions and parties are expected to be constantly trying to remove barriers and to continue negotiating to do so.[177] It is seen as a contractual process which does take note of developing countries and their unique problems as it allows to negotiate the appropriate pace of the removal of barriers. After a period of three years, the agreement does permit parties, as set out in Article XXI, to withdraw or modify commitments made in their schedules through negotiations with interested parties agreeing on compensatory adjustments. Where agreement, the article explains, cannot be reached, compensation would be decided by arbitration.

Part V of the agreement contains the institutional provisions which include, in Article XXII, consultation and dispute settlements and the establishment of the Council for Trade in Services and the Dispute Settlement Body (DBS). Article XXVI calls for the Council to «make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies».

The second pillar of GATS is the sectoral annexes. Their aim is to clarify, interpret and qualify the application of articles of the agreement in the light of sectoral peculiarities.[178] According to Article XXXV, the sectoral annexes form an integral part of the agreement. A brief overview will explain which service sectors are dealt with and how they are dealt with.

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176 Sampson, *supra* note 89, p. 3.

177 Gunther, *supra* note 175.

178 *GATT Press Summary*, December 14, 1993, and Sampson, *supra* note 89, p. 3.

The first of the annexes to the agreement concerns the movement of labour. It permits parties to negotiate specific commitments applying to the movement of people providing services under the agreement and it requires that people covered by a specific commitment shall be allowed to provide the service in accordance with the terms of commitment.[179] Nevertheless, the agreement would not apply to measures affecting employment, citizenship, residence or employment on a permanent basis.

The Annex on financial services (primarily banking and insurance) announces the right of parties, notwithstanding other provisions, to take prudential measures, including for the protection of investors, deposit holders and policy holders, and to ensure the integrity and stability of the financial system. A further understanding on financial services would allow those services through a different method. With respect to market access, the agreement contains more detailed obligations on, among other things, monopoly rights, cross-border trade (certain insurance policies and financial data processing and transfer), the right to establish or expand a commercial presence, and the temporary entry of personnel.[180]

The third sectoral Annex deals with telecommunications and relates to measures which affect access to and use of public telecommunications services and networks. In particular, the annex requires that such access be accorded to another party, on reasonable and non-discriminatory terms, to permit the supply of a service included in its schedule.[181] Conditions attached to the use of public networks should be no more than necessary to safeguard the

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179 *Ibid.* See also Sampson, *supra* note 89, p. 3.

180 *GATT Press Summary*, December 14, 1993.

181 *Ibid.*

public service responsibilities of their operators, to protect technical integrity of the network and to ensure that foreign service suppliers do not supply services unless permitted to do so through specific commitment.[182]

Finally, the last sectoral Annex deals with air transport services. The Annex on air transport services applies to trade measures affecting all air transport services including ancillary services. The first three paragraphs define the scope of the air transport services affected: it excludes from the agreement's coverage traffic rights, usually granted in bilateral air service agreements conferring landing rights, and directly related activities which might affect the negotiation of traffic rights.[183]

Nevertheless, the Annex, in Article 3, does state that measures affecting aircraft repair and maintenance services; the selling and marketing of air transport services; and finally, computer reservation systems (CRS) services are subject to the general obligations under the GATS, meaning that such conditions as market access and national treatment commitments have to be negotiated by governments.

Article 4 states that dispute settlement procedures under the GATS are not applied to traffic rights and directly related activities, and are only applied to air transport services disputes after procedures specified in bilateral and other multilateral regimes have been exhausted, indicating that dispute resolution procedures in bilateral agreements and the Chicago Convention would have to be exhausted before the GATS dispute settlement procedure kicks in.

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182 *Ibid.*

183 Sampson, *supra* note 89, p. 5.

Article 5 states that the Council for Trade in Services would review the operation of the Annex at least every five years.

Finally, the third pillar of the agreement are the commitments on the part of all Signatories to liberalize trade in services and consists of the Schedules of Commitments outlining each state's commitments as required by Article XX. These commitments are being negotiated and the schedule shall be annexed to the GATS and form an integral part of the agreement.[184]

The possibility of an annex on air transport services within the GATS caused a great deal of debate and controversy. However, upon study, it seems the scope and the application of GATS principle were severely limited leading one perhaps to wonder if its possible impact was not exaggerated.

B - The application of the GATS framework to air transport services

Although the Annex on air transport services does not seem, at first glance, to contain much substance, important observations and questions do arise from the application of the GATS system to the trade of air transport services.

To begin with, contrary to the Chicago Convention bilateral system, reciprocity is not required in the GATS system but rather an overall, as opposed to a sectorial balance, is

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184 Zebinsky, *supra* note 25, p. 381.

sought.[185] This approach then has a number of important consequences for the air transport sector.

First, some commentators contend that the application of the GATS MFN concept to the aviation field will not result in better trade, but would simply mean that you have to treat everyone the same, no matter if this treatment is good or poor.[186] A MFN clause alone, without a national treatment provision will mean that nothing prevents domestic products from being treated more favourably than foreign goods. Jeffrey Shane commented that such a scenario would mean "a multilateral agreement predicated on MFN would engender excessive caution on the part of governments otherwise inclined to be generous in extending market access opportunities to like-minded trading partners"[187]. As the existing and potential discrimination towards foreign carriers was meant to be taken care of by market access and national treatment provisions, in the GATS system as presented, they are to be granted only on a specific basis after bilateral negotiations and as the MFN clause takes effect it would force countries to grant these negotiated commitments to the rest of the parties to the Agreement.[188] Since the Annex, in Article 1, also exempts traffic rights from the Agreement, the MFN clause, therefore, does not apply to them. One author notes: "the current bilateral system would be untouched unless specific commitments are made"[189].

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185 M. Zylicz, "Key Problems of the Future International Air Transport Regime" in *Air and Space Law*, Vol. XIX, No. 3, 1994, p. 186.

186 Platt, *supra* note 10, p. 195.

187 J. Shane, ICAO Doc. WATC-1.15, p. 3.

188 Platt, *supra* note 10, p. 196.

189 *Ibid.*

Another possible consequence of the application of the GATS system as a whole to aviation, is that according to the GATS national treatment and market access provisions, commitments by countries are not mandatory unless undertaken by a country. Since market access involves the development of a market equally open to foreign as well as domestic suppliers, except in cases of national security or exceptional balances of payments problems, leaving this area to separate negotiations means government impositions of restrictions to market access could be highly pervasive and touch upon the sensitive topic of foreign ownership and control.[190] Similar problems arise in the area of national treatment, as internal regulations of services in most countries exceed regulations on goods.[191] Also, as national treatment and market access go hand in hand, a MFN clause will not be as effective without both market access and national treatment provisions.[192]

The concept of national treatment could also have some serious consequences: it is argued as having no place in the service sector because in the goods sector this concept is applied in a subsidiary manner relating to internal protective measures other than tariffs, which are a legitimate instrument of protection under the GATT.[193] However, without a certain basic level of protection afforded by tariffs, national treatment changes from a subsidiary principle into a provision entailing the elimination of any protection, and since most developing countries have yet reached the stage where they are able to take advantage of the reciprocity in national treatment, the concept could have a negative impact on their infant and

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190 *Ibid.*

191 *Ibid.*

192 *Ibid.*

193 *Ibid.*

growing industries.[194] One author had suggested that the introduction of the national treatment principle should be done over a long period of time in order to avoid the elimination of all protection which would certainly be the unpleasant and unpopular consequence of the immediate introduction of the principle.[195] One could argue, however, that it is precisely because under the GATS system there is no obligation for Members to subject any specific activity to increased market access or improved national treatment, that individual Members, to a certain extent, can control the pace of actual liberalization.[196]

Underlying these criticisms of the GATS system is the concern that the system will not necessarily be the great liberalizer of trade in aviation services as promised. Even those in the United States industry argue that the GATS system will conflict with the United States' ability to generally negotiate service liberalizing agreements.[197] However, a number of interesting exceptions in the Annex on Air Transport Services offer some answer to this argument: the Annex specifically addresses this problem of conflict in its first paragraph stating that no provision of the Agreement will apply to "a) traffic rights covered by the Chicago Convention, including the five freedoms of the air, and by bilateral air services agreement; b) directly related activities which would limit or affect the ability of parties to negotiate, to grant or to receive traffic rights, or which would have the effect of limiting their exercise".

Thus, the GNS did seem to take into account the views of some of air transport

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194 *Ibid.*

195 *Ibid.*

196 Wassenbergh, *supra* note 74, pp. 177-178.

197 Platt, *supra* note 10, p. 197.

experts and industry representatives and decided that the Annex should only apply to soft rights, such as groundhandling and CRSs. Hard rights, therefore, are completely excluded by its scope as mentioned in Article 2. Perhaps the reai concern of the United States industry is that they will likely lose their dominant negotiating position they now enjoy under the bilateral system if a new multilateral system is employed.[198]

Although the Annex applies to scheduled and non-scheduled flights, as stated in Article 1, "any specific commitment made or obligation assumed under this Agreement shall not reduce or affect a Member's obligations under bilateral or multilateral agreements that are in effect". This means that the present bilateral agreements in force take precedence over the agreement. Furthermore, Article 4 even gives bilateral agreements precedence when it comes to dispute settlement, as it stipulates that "the dispute settlement procedures of the Agreement may be invoked only where obligations or commitments have been assumed by the concerned Members and where dispute settlement procedures in bilateral and other multilateral arrangements have been exhausted". A question then arises in the case where there is no bilateral agreement between two Members. Most probably they would then be expected to follow the GATS dispute settlement mechanism.

A risk also exists that even when it comes to the application of the GATS principles on the soft rights mentioned in the Annex, countries could, upon signing the agreement in Marakesh on April 15, 1995, make some exceptions as allowed by Article II of the GATS: for instance, that the agreement will not apply to the CRS services in that country or will

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198 *Ibid.*

apply only in 10 years.[199] This could lead to a very uneven global situation, where some countries apply the agreement to the full extent and others either completely exclude certain services or make time constraints.

A closer look at the definition of the services covered by the Annex also leads to some interesting questions.

Aircraft repair and maintenance, as defined in Article 6(a) of the Annex, excludes so-called line maintenance. However, once a state makes a commitment to aircraft repair and maintenance market access provision, does this imply that the state has then to recognize the airworthiness and maintenance license of other countries or lead to mutual recognition?[200] By studying the GATS provisions, and specifically Article VII, the recognition criteria would most probably apply.

Article 6(b) defines the sales and marketing of air transport services by including "opportunities for the air carrier concerned to sell and market freely its air transport services" but excludes the pricing of such services. Pricing, however, is one of the most important aspects of competition within the air transport service industry. If the agreement does not apply to this activity, what exactly does the sale and marketing of air transport include? The opportunities to use market research, to advertise and to distribute are already in place in most markets around the world.

The fact that GATS does not apply to the air traffic rights covered by the Chicago Convention, but does apply, inter alia, to the selling and marketing of air transport services,

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199 H.A. Wassenbergh, Speech delivered at McGill University, Institute of Air and Space Law, Montreal, March 24th, 1994 (unpublished).

200 *Ibid.*

creates a certain dichotomy.[201] Air traffic rights resulting from the Chicago Convention, one author argues, are the tools with which the selling and the marketing of air transport services are carried out and therefore, the two are inextricably linked.[202] The same author explains that Article 1 of the GATS, which defines services as the supply of a service from the territory of one Party into the territory of another, makes matters worse because the application of this definition to air transport services would be implicitly referring to the exercise of air transport rights which are obtained in the Chicago Convention - making the explicit exclusion of air traffic rights in the Annex on air transport somewhat ambivalent.[203]

The inclusion of CRS services are of great interest. CRS services mean big business today as 90% of all airline sales through travel agents are made through CRS services which are owned by airlines or groups of airlines.[204] All the major CRS services have been made into separate corporate entities and are generating enormous revenues and profits in their own right. Although, CRS services are computer services which involve telecommunication network-based enhanced services and tourism services, they also provide a number of services besides the airline industry's needs, such as hotels, cruises and car rentals. Would these services also be covered because they are obtained through the CRS services although they have nothing to do with air transport services?

With some states adhering to the GATS while other states file exemptions against one or more of the specified air transport services, a dual regulatory system will effectively

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201 Abeyratne, *supra* note 35, p. 26.

202 *Ibid.*

203 *Ibid.*

204 Mifsud, *supra* note 108 , p. 167.

emerge.[205] Specific uncertainties could arise from this situation regarding CRS regulation. Many organizations, such as ICAO, ECAC, and some countries, such as the United States, have put into force their own Codes of conduct for CRS services. ICAO's Code of Conduct is respected by some 50 States.[206] Would these codes of conduct be included in the agreement? Does the GATS Annex on air transport services override such codes of conduct? The objective of these codes is usually to ensure that CRSs are used in a fair, non-discriminatory and transparent way to avoid the misuse of these systems, and to ensure fair competition between airlines as well as to protect the interests of the consumers of air transport products.[207] One could argue that these codes could still be useful and should only perhaps be put to the test within the GATS framework if they appear in any way contrary to the GATS principles.

Article 3 bis of the GATS stipulates that "nothing in this Agreement shall require any Member to provide confidential information". This article could prove useful in the case of air transport services where bilateral agreements are usually accompanied by confidential Memoranda of Understandings. States may, and usually do, reserve the confidentiality of these memoranda. However, this takes away a great deal from the obligation of transparency stated in the GATS for how can one render the MFN clause effective without full transparency?[208] Of course, in the commercial world, there are frequently some provisions

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205 C. Lyle, "Revisiting Regulation" in *Airline Business*, April 1994, p. 35.

206 *Ibid.*

207 H. Meyer, "ECAC publishes a Code of Conduct for CRS" in *ITA Magazine*, No. 54, March/April 1989, p. 12.

208 Gunther, *supra* note 175.

which are meant to be kept confidential but this does not alleviate the contradiction or the problems of applying the MFN clause.

Another question which arises is whether the fact that the Annex provides a five- year periodic review shows a lack of confidence in the treaty itself.[209] One could answer that such a procedure, which is also used within the GATT, could be deemed as essential so as to correct certain unfair situations in the future, which had not been foreseen, and to retain a certain flexibility within the system.

Certain issues of concern also arise when it comes to the relationship between the Chicago Convention and GATS.

As GATS aims to achieve a multilateral framework for the negotiations of air transport services, this instrument may conflict with the aviation industry's main instrument, the Chicago Convention of 1944.[210] Many institutional problems may, and probably will, present themselves.

The Chicago Convention's cornerstone principle, as cited in Article 1, is that: "Each contracting State recognizes that every State has complete and exclusive sovereignty over the airspace above its territory". The principle of a state's sovereignty over its own airspace still rules the present-day air service negotiations in bilateral agreements. The principle however clearly conflicts with the cornestone principle of the GATS, the MFN clause.[211] A state's sovereignty over its airspace is clearly threatened when all other states can claim rights in

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209 Abeyratne, *supra* note 35, p. 27.

210 Mencik von Zebinsky, *supra* note 25, p. 388.

211 *Ibid.*

relation to this airspace regardless of whether these rights have been expressly granted to each individual state.

Other potential conflicts could arise with the main objective of GATS, the progressive liberalization of trade in services (an objective which is not included in the Chicago Convention), with the concept of national treatment (which is applicable only to prohibited areas and airport and navigation facilities charges in the Chicago Convention) and with the provisions of regional economic integration of GATS (which the Chicago Convention does not deal with per se).[212] These conflicts may eventually be resolved by way of amendments or even by referring to international law rules such as Article 30 of the Vienna Convention on the Law of Treaties[213], which states how to resolve any conflict between two international treaties.[214] However, bilateral agreements may even offer a possible solution as they often have a clause that provides that in the event of a multilateral air transport convention adopted by the Contracting States, the convention would prevail.[215]

Another institutional problem may arise as to who should deal with certain problems,

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212 *Id.*, p. 389.

213 *Vienna Convention on the Law of the Treaties*, 23 May 1969, 1155 UNTS 331, 1980 CTS 37. Article 30, paragraphs (2) (3) and (4) read:

"2. When a treaty specifies that it is subject to, or that it is not to be considered incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

a) as between States parties to both treaties the same rule applies as in paragraph 3;

b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

214 Mencik von Zebinsky, *supra* note 25, p. 390.

215 *Ibid.*

ICAO or the newly-created GATT World Trade Organization (hereinafter WTO) and what their respective roles should be. Debate about whether air transport services should or should not be included in the GATS agreement took place against a backdrop concerning questions of jurisdiction and appropriate forum.

Early on ICAO tried to assert its competence in the field of air transport and heeded the warning sent out by the political developments of the GATT. The question of who has jurisdiction on the regulation, or deregulation, of air transport services is one of serious consequences and ICAO did try to assert its power through a number of actions. These actions are now being evaluated and the question remains as to which international organization will retain the economic regulation of air transport services in their sphere of competence in the future.

PART IV - The Future of Air Transport Regulation: Under Whose Jurisdiction?

At the outset, some argued that although the underlying premise of GATT was free trade in the air transport sector in order to promote economic growth and development, ICAO, the UN specialized agency in civil aviation, was truly the only proper forum for such a discussion.[216] In order to assert its jurisdiction in all areas concerning civil aviation, ICAO therefore, faced with the progressing work done at the Uruguay Round, took certain measures to remind not only the participants of the trade talks but also their own member

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216 V. Poonoosamy, ICAO Doc. WATC-3.11, p. 4.

States of its special mandate. However, these measures did not necessarily bring about any concrete and innovative actions on the part of ICAO's member States, leaving the door open for possible future measures taken in the field of air transport services by another new international organization.

A - ICAO's reaction to the debate on air transport regulation

ICAO is a functional organization of air transport which, under the Chicago Convention, received a broad and precise legislative mandate on the economic, regulatory and trade related aspects of the air transport sector. As permitted by Article 55 of the Chicago Convention, the ICAO Council may "conduct research into all aspects of international air transport that are of international importance". So far, however, ICAO has been unable to make any significant progress for a multilateral attempt to reduce and eliminate any trade barriers in the field of air transport.

A special conference called in Geneva in 1947 to discuss a draft multilateral agreement on the exchange of commercial rights in international civil air transport ended with ICAO member States adopting a declaration, with only one dissenting voice, that the agreement would not impose any obligation to exchange commercial traffic rights, with these rights remaining entirely discretionary for the parties concerned.[217] In 1953, after the ICAO Assembly referred the problem back to the contracting States for further study, the proposals

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217 Zylicz, *supra* note 87, p. 185.

to revitalize the subject matter within ICAO, although heralded by European initiatives and other attempts, failed due to the opposition of a considerable majority of ICAO member States.[218] ICAO's attempt to standardize bilateral administrative clauses, following the ECAC recommendations as an alternative (limited) approach to multilateral regulation, also never obtained sufficient support from non-European states.[219]

Furthermore, three ICAO conferences convened to achieve multilateral regulations of commercial air transport only resulted in certain soft recommendations on the subject and even the idea of recommending a comprehensive study by ICAO on the relevant interrelated issues was rejected.[220]

ICAO, faced with the new initiatives emanating from the GATT, tried to assert its jurisdictional role as early as 1986 when its General Assembly adopted Resolution A26-14 to express its concern about a possible preemption of its work by GATT and to recognize its constitutional role and its mandate by reaffirming that ICAO is a multilateral body in the UN system competent to deal with international transport.[221] The organization urged its contracting States to ensure that their representatives at the trade in services negotiations were aware of the potential conflicts with the existing legal system and that the ICAO Council would promote a full understanding to all the involved international bodies of ICAO's role.[222]

Then, in 1989, faced with the further developments in the Uruguay Round of the

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218 *Ibid.*

219 *Ibid.*

220 *Ibid.*

221 Wassenbergh, *supra* note 151, p. 84.

222 *Ibid.*

GATT negotiations, the ICAO Assembly adopted another Resolution (A27-14)[223], reiterating their previous resolution by reaffirming, once again, ICAO's competence to deal with international air transport, requesting that the GNS and states take account thereof and to ensure ICAO's participation in the GNS works. The resolution also meant to draw the attention of those concerned to possible conflicts of international commitments and to direct ICAO's Council to take appropriate action in light of the new developments, including the possibility of convening a new Air Transport Conference. As Jeffrey N. Shane, the Assistant Secretary for Policy and International Affairs of the U.S. Department of Transportation remarked:

> "To most of the international aviation community, inclusion of aviation in the new 'GATS' was a shocking, even horrific idea. First, it threatened the survival of a time-honored and esteemed profession: Who would need bilateral aviation negotiators any longer if aviation markets were all opened up through the application of GATT principles? Second, within the United Nations system, the ICAO Assembly quickly circled the jurisdictional wagons: Assembly Resolution A27-14 loudly reaffirmed that 'ICAO is the multilateral body in the United Nations system competent to deal with international air transport'. One suspects that nobody minded very much the delicious ambiguity of the word 'competent' as it appeared in that resolution."[224]

One author also comments that the "action came too late with respect to the GNS work schedules"[225]. ICAO did address a paper to the GNS Chairman in April 1990, presenting the basic characteristics of the existing air transport regulatory system and the relevant sectoral problems, yet ICAO's failure to get its own member States to agree to a multilateral agreement of some sort meant that the organization did not have any alternative

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223 *Resolution A27-14*, ICAO Doc. 9602, p. III-3.

224 J.N. Shane, ICAO Doc. WATC 1.14, p. 2.

225 Zylicz, *supra* note 87, p. 186.

counter-proposals and its expertise did not have the weight it desired so as to be asked to actively participate in the GNS work.[226]

It seems, however, that these Resolutions state clearly what ICAO believed was of the utmost importance: to draw to the attention of GATS and to its member States certain critical features of international air transport which were and are relevant to the question of how air transport should be treated in the context of trade in services negotiations. Their main consideration was that bilateralism, at the operating level, has, over the decades, proven to be a flexible system which allows States to pursue their objectives, whether these regimes are open and competitive or protective and restrictive.[227] ICAO maintained that, although the concept of multilateralism enjoys some renewed interest, any future external multilateral framework would have to be compatible with the existing structure of air transport.[228]

In 1991, one drastic proposal put forth to deal with the situation and encourage the adoption of a multilateral solution was to convene another Chicago Convention.[229] James Oberstar, the U.S. Representative (D. Minn.) and chairman of the House of Public Works and Transportation aviation subcommittee had called for a new Chicago Convention to replace the current system of bilateral agreements with a multilateral regime.[230] He proposed that

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226 *Ibid.*

227 Abeyratne, *supra* note 35, p. 29.

228 *Ibid.*

229 Platt, *supra* note 10, p. 193.

230 "Oberstar calls for New Chicago Convention to End Bilateralism" in *Aviation Daily*, 21 June 1991. However, Milde, *supra* note 6, p. 446, argues that: "The Convention was drafted 50 years ago with considerable foresight and wisdom and its general framework has proved flexible enough to accomodate the technical, economic and geopolitical changes which have taken place since 1944. The Convention does not require any urgent amendments and can serve as the backbone of the international regulation of international civil aviation for many years to come."

each country "designate special negotiators, high level in their own goverments, and different from those who currently negotiate bilateral agreements, to avoid having liberalization become a side line to traditional bilateral matters"[231]. Supporters argued that one of the possible benefits of convening another Chicago Convention is that it would work to avoid some of the problems inherent in the proposal to include air transport in the trade in services GATS system.[232] This proposal was meant to avoid the protracted negotiations that take place within the GATT framework and work at avoiding the mixing of different trade issues with each other so that aviation rights would not be "traded off for soyabeans or something else".[233]

However, the proposal was not met with much enthusiasm as the organizational and logistical effort it would require would obviously be immense. Also, one cannot help but to wonder if another Chicago Conference was summoned, what other problems and issues would come up, and how many of those could and would possibly be resolved. The danger and the risk involved in organizing such an event is that States may not agree on anything and walk away not only without having made any progress on the subject matter at hand, but possibly having significantly set the whole effort back.

One commentator of the aviation scene, former KLM Senior V.P., H.A. Wassenbergh, had proposed a simpler solution, an amendment to the Chicago Convention, beyond just

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231 *Ibid.*

232 Platt, *supra* note 10, p. 193.

233 "Oberstar calls for New Chicago Convention to End Bilateralism" in *Aviation Daily*, 21 June 1991.

Article 7, effectively converting it into a multilateral document.[234] The amendments would eliminate Articles 6 and 7 and amend Article 5 to make it applicable to scheduled air services.[235] Nevertheless, one problem that was identified was obtaining a majority vote for such a proposed amendment to the Chicago Convention,the interests of developing and developed nations most probably clashing once again.

Two Special Air Transport Conferences had already been convened by ICAO in 1977 and 1980 to study the perceived crisis in international air transportation and ICAO's possible significant role in multilateral regulations, but both failed to make any progress.[236] The principle of "one state-one vote" combined with the difficulties among states, especially on economic questions, led the developing countries to vote as a block against all liberalizing proposals, for fear that their national industries would be threatened.[237]

Plagued by these previous failures, ICAO chose a more innovative route than the one suggested in Resolution A27-14 and convened its first-ever colloquium on air transport regulation which was held in Montreal from April 6 - 10, 1992, to debate the pros, the cons and the feasibility of new concepts such as multilateralism, liberalization, bloc air transport negotiations, foreign ownership and other related topics. What emerged was a studied and

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234 Platt, *supra* note 10, p. 193. Milde, *supra* note 6, p. 422, writes that Article 6 does not require an amendment to accomodate plurilateral or multilateral exchange of traffic rights but "Article 7 detracts from the general principle of Article 1 and is not responsive to any modern concept of international trade. If there is any need to maintain Article 7 at all, its last sentence should be deleted because it is open to varying interpretations and appears unjustifiably restrictive [...] In the light of the practices of the E.U. and the drive towards liberalization of the trade in services evident in GATT, this anachronistic and protectionistic provision cannot last and will be overtaken by economic realities."

235 *Ibid.*

236 J.N. Shane, ICAO Doc. WATC 1.14, p. 2.

237 B. Stockfish, *supra* note 138 , p. 640-641.

varied critique of the application of the system of bilateralism, of the possible future system of multilateralism and also of the GATT system and the application of its principles to the air transport services sector. Some of the concerns had been heard before, others had not.

The ICAO colloquium on regulation was "the first global ICAO gathering to review major regulatory issues in aviation since the Chicago Convention was signed in 1944"[238]. It differed from normal ICAO meetings in several ways: there were no opening statements by delegations, no working papers to be examined, no resolutions to be drafted and no recommendations to be prepared. With the pressure removed to reach a certain consensus, the risk of politics getting in the way was virtually erased since the purpose was simply to encourage a free flow of ideas and to debate their feasibility.[239] ICAO's Secretariat had several goals in mind for the colloquium: to focus the delegates' attention on the relevant topics, to maintain quality in the debate and to avoid long political tirades that tended to characterize other meetings attended by government representatives.[240] These representatives were also given background material such as lists of questions to be answered, compilations of expert views on specific subjects, excerpts from relevant pieces of legislation and details of agreements, organizations and industry groupings. The colloquium was designed as a first step in a process to ensure and consolidate ICAO's continuing role in air transport regulation and, at the time, this no-pressure think tank that was set up seemed to move in the right direction by at least showing that the organization was concerned and was

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238 H. Nuutinen, "The tortuous path to plurilateralism" in *The Avmark Aviation Economist*, May 1992, p. 17. See also *Proceedings of the ICAO World Wide Air Transport Colloquium, Montreal 6-10 April 1992*, ICAO Publication Order No. WATC92.

239 *Ibid.*

240 *Ibid.*

trying to deal with the priorities of the day for air transport regulation. Delegates openly discussed and studied their opinions and views on the applicability of international trade concepts to air transport.

Mr. Vijay Poonoosamy, Director of legal and international affairs of Air Mauritius, presented a brief detailing the various consequences of the application of trade concepts to air transport. He argued that the application of an unconditional MFN clause would threaten the regulatory structure of international air transport and impede its progressive liberalization.[241] He stressed that the priority should be the long term public interest in a better air transport system and not the short term demands of the market, pointing out that many States still view air transport in terms of its public utility role and regard their national airlines as necessary for national development, national defence and the maintenance of vital trade and communications links; in other words, protecting non-market objectives which are perceived as incompatible with the laws of free entreprise.[242] He disagreed with the premise that the GATT's free trade in the air transport sector would promote economic growth and development and he stated that ICAO, which had provided a means for governments to cooperate in the development and maintenance of an effective trading environment for international air transport, was still the proper forum to chart any chosen regulatory course of survival.[243]

The Director General of IATA, Mr. Gunther Esser, stated that most international

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241 V. Poonoosamy, ICAO Doc. WATC-3.11, p. 1.

242 *Id.*, p. 4.

243 *Ibid.*

airlines categorically opposed the inclusion of air transport services in the GATS.[244] He drew attention to the economic concerns of the airline industry and promoted the need for a balance between economic regulations and a free market, on the basis that bilateralism per se cannot exist on its own and perhaps multilateralism practices in such areas as tariff co-ordination would be beneficial.[245] However, Mr. Esser did state that any multilateral or plurilateral attempts were best developed by ICAO and not the GATT.[246]

Yet, in his brief, the Director of the GNS Division of the GATT, Gary Sampson, noted that the airline industry has changed and has moved towards not only reducing administrative regulation of airlines but also towards the promotion of competition through greater reliance on market forces as opposed to relying on government to determine service levels such as fares, capacities and frequencies.[247] He believed that the clear distinction between hard rights and soft rights and the application of GATS only to soft rights would ultimately enable participants to focus on doing business without restraints under the GATS system.[248]

Noted American scholar Dan Kasper, for his part, explained that the fundamental GATT principles such as the unconditional MFN and market access clauses were likely not to advance but rather to impede the liberalization of the aviation sector.[249] He advocated a

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244 Abeyratne, *supra* note 35, p. 31.

245 *Ibid.*

246 Ibid.

247 Sampson, *supra* note 89, p. 3.

248 *Id.*, p. 4.

249 D. Kasper, ICAO Doc. WATC-3.17, p. 5.

conditional MFN clause under a plurilateral system where only those willing and able to accede to the terms of the agreement would be required to comply.[250] This is an idea based on the like-minded States proposal, whereby States with the same objectives and the same ideas would more easily adhere to a liberalizing agreement amongst themselves.

In the final analysis, though, the ICAO Colloquium of April 1992 did not achieve any consensus on regulatory approaches and the air transport world had to continue living in a hybrid world.[251]

Trying, however, to capitalize on the momentum generated by the Worldwide Air Transport Colloquium of April 1992, ICAO organized a worldwide group of experts known formally as the ICAO Secretariat Study Group of Experts on Future Regulatory Arrangements for international air transport (hereinafter GEFRA). Formed in response to the urging of the global air transport community, GEFRA proved to be an unusual study group because of three factors: its composition, its task, and its method of work.[252]

The Secretary General of ICAO took care of the group's composition by inviting recognized experts, each one with a well-established reputation in international air transport regulation and with some experience as a senior management or policy-making position in government or in the aviation industry, from every continent to participate.[253] These special

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250 *Ibid.*

251 Gunther, *supra* note 1, p. 272.

252 J.R. Chesen, "High level study group of experts uses an unconventional approach to complete vital work" in *ICAO Journal*, April 1994, p. 26.

253 *Ibid.* Group members were: Abdeljaouad Daoudi, Director General - Air Administration, Morocco; Robert Esperou, Chief of Air Transport Services, Directorate General of Air Transport, France; Ali Ghandour, Adviser to his Majesty King Hussein of Jordan on Civil Air Transport and Tourism, Jordan; John Kerr, Assistant Secretary, Department of Transport and Communications, Australia; Juan Pablo Langlois, Secretary General, Civil

high-level participants also had an unusual task to tackle, according to the Secretary General's letter of invitation: to develop ideas, concepts and proposals about future regulatory arrangements for international air transport.[254] Their task was to address a number of topics which were the basic objectives States would have for entry into new regulatory arrangements, the equitable delineation of market access including route, traffic and operational rights, the broadened criteria (beyond ownership and control) for airline use of such access, the nature, purposes and specific kinds of safeguards required to ensure fair competition, the potential structural impediments (including subsidization of airlines and physical restraints on access), possible relationships with the broader regulatory environment (including that of competition law and trade arrangements), the treatment of issues affecting how airlines do business in foreign countries and any other identifiable related issues.[255] What this list of subjects to be studied by GEFRA clearly shows is that ICAO was trying to take practical and serious steps in the economic regulation field, a field that the Chicago Conference missed out on. By inviting top-notch personalities in the field, it is obvious that the organization meant to set up some theoretical platform that might lead to greater developments at the ICAO November-December 1994 Worldwide Air Transport Conference in Montreal.

Aviation Board, Chile; Aruan Mascarenhas, Deputy Director, Planning and International Relations, Air India, India; Vijay Poonoosamy, Director, Legal and International Affairs, Air Mauritius, Mauritius; Hans Raben, Management, Kingdom of the Netherlands (Former Director General of Civil Aviation); Kenneth Rattray, Solicitory General of Jamaica; Mathew Samuel, Director, Corporate Affairs, Singapore Airlines, Singapore; Jeffrey Shane, Wilmer, Cutler & Pickering, Washington, D.C. (Former Assistant Secretary for Policy and International Relations, U.S. Department of Transportation); Sir Gil Thompson, Director-Emeritus, Manchester Airport, Great Britain.

254 *Ibid.*

255 *Ibid.*

The task was extremely complex as it involved the study of dozens of international air transport aspects expressed in 3 000 bilateral agreements and the taking into account of the ongoing worldwide debate about the future of regulation and commercially sensitive issues.[256] Numerous new regulatory arrangements would be studied, from a global perspective, including the spread of liberalized regulation in distinct ways in the different regions of the world, the trend towards increased privatization and expanded foreign ownership of airlines and the changing regulation of computer reservation systems, to name but a few.[257]

Three elements defined the approach of the group: one was to focus on the content of regulatory arrangements rather than on the regulatory structures or processes; the second one was to aim at macro concepts and to steer clear of the micro-management that had proved detrimental to bilateral and multilateral negotiations; and finally, there was an implicit recognition of the World Air Transport Colloquium's conclusion that multilateralism would evolve gradually and different structures, including bilateral and plurilateral ones, which could and should coexist globally.[258]

However, although GEFRA was to create components and new regulatory arrangements, in concept form which others could combine into some new or amended air service agreement, the group was not intended to envision or draft the text of any new

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256 *Ibid.*

257 *Ibid.* In contrast to most opinions expressed in the past by various policymakers, which often were of a certain national or regional perspective, the GEFRA project was done for each and every Contracting State of ICAO and each State would then remain free to use or not to use the conclusions of that work.

258 Lyle, *supra* note 205, p. 33.

agreement or model agreement.[259] The fact that a model agreement was not a goal of such a group of leading experts was unfortunate as it was a golden opportunity to have proposed with a certain amount of authority a model agreement to contracting States of ICAO. Such an action would surely have propelled the discussions and developments on the subject ahead and offered a studied proposal. As well, each expert, well aware of the concerns of the states of their region, could have foreseen and dealt with these concerns at the primary level of development. Yet, once again, it seems that ICAO was not willing to take such a gamble.

Nevertheless, GEFRA did identify certain motivating factors that would push states to pursue a new regulatory arrangement. The first two, also characterized as the most crucial, would be a continuing desire on the part of states to participate on a sustained basis in the air transport system and an adaptation to the changing global commercial and operating environment with external and internal pressures present.[260] Other motivations included the enhancement, growth and improvement in the quantity and quality of service, the simplification and elimination of detailed and complex regulations and, finally, the flexibility to maximize opportunities for air carriers to innovate.[261] None of these conditions seem to exist in a majority, or even a minority, of states today.

The group managed to reach a consensus in late 1993. Their most important conclusion was that each of the new regulatory arrangements could be used by states either bilaterally or multilaterally and the new arrangements would allow states to adapt to the

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259 Chesen, *supra* note 256, p. 26.

260 Gunther, *supra* note 1, p. 272-273.

261 *Id.*, p. 273.

increasingly competitive environment while continuing to participate actively in international air transport.[262]

On the subject of market access, the group set up new regulatory arrangements where each party to the arrangement would grant "basic" market access rights to each other for use by their designated air carrier(s) for services touching the territories of the parties, while allowing complete flexibility on the points served, routings, and the way the markets were served.[263]

The arrangement would allow an unlimited number of carrier designations and each party would agree to work towards a removal or reduction of the impediments to foreign investment and towards creating a right of establishment for air carriers by foreign nationals on their territory.[264] Optional additional market access rights, such as cabotage, or access to particular markets, or incremental capacity increases, would encourage progressive liberalization and would be compensated for with a safety net such as the right to impose a capacity freeze as an extraordinary measure.[265] This safety measure would be permitted only in response to a rapid and significant decline in the share of a party's designated carrier in the country-pair's market and would apply to scheduled and non-scheduled flights for a maximum finite period while all the concerned parties tried to agree on measures to correct the situation.[266]

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262 Lyle, *supra* note 205, p. 33.

263 *Id.*, p. 34. The ways in which a market could be served would be through on-line service or interlining, code-sharing or blocked space arrangements.

264 *Ibid.*

265 *Ibid.*

The group also tried to find a solution to one of the current problems in the existing bilateral negotiating process, namely that governments are negotiating on behalf of their national airlines. This situation translates into many of the bilateral agreements including clauses on ownership and control specifying that airlines must be owned and controlled by nationals of one of the two countries concerned. These clauses are proving to be incompatible with the reality of today's aviation world which consists of increasing transnational ownership of airlines, regional blocs, joint marketing arrangements, codesharing and franchising arrangements.

The new regulatory arrangements proposed by GEFRA would allow a carrier to be designated if it remains substantially owned and effectively controlled by nationals of one or more states (or the states themselves) in a predefined group of states, or if it has its headquarters or principal place of business in territory of the designating party.[267] These proposals are, nevertheless, quite flexible and wide and could prove adequate enough to deal with the wide variety of arrangements which exist today.

Taking into account the vast number of air carriers that are still owned by their governments today, structural impediments, such as state aids or subsidies, would not be prohibited or treated ipso facto as constituting unfair competitive practices, but would be judged on the measures' transparency to ensure that aids to certain carriers do not adversely

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266 *Ibid.* Safeguards would be included in the arrangements. In contrast to the safety net which would be for exceptional use in specific markets, safeguards would be continually present to ensure a prompt and effective solution to unfair competition through pricing and capacity. Two new regulatory arrangements would act as safeguards: a code of conduct for healthy sustained competition and an innovative dispute resolution mechanism, both of these replacing governmental pricing and capacity controls on air carriers.

267 *Ibid.*

affect competition.[268] It is understandable that the group decided not to treat state aids or subsidies as an unfair competitive practice as it would have been unrealistic to completely disallow any such governmental action. Perhaps, also, such a tolerant approach to this situation may allow certain states to accept the arrangement and adhere to it more readily and willingly.

GEFRA's new regulatory arrangements were seen as potentially resulting in a gradual process in which some states would immediately opt for multilateralism, while others applied a new, flexible approach to problem-solving within their existing bilateral agreements.[269] Their conclusions were well-thought out and certainly constituted a serious and respectable answer to any other liberalizing scheme, such as the GATS. Yet, whether the ICAO member States would appreciate and be willing to accept or apply these ideas was unpredictable.

GEFRA's conclusions and work were to be presented at ICAO's Worldwide Air Transport Conference to be held at the ICAO Headquarters in Montreal in November-December 1994.

The landmark conference was awaited with expectations ranging from cynicism, based on the perception of the ICAO as a bureaucratic monolith, to hype.[270] The intention of the Conference was not to seek a constitutional amendment to the Chicago Convention, nor to

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268 *Id.*, p. 35. "Doing business" aspects are an important part of international air transport regulation as they include maintenance or product distribution. On this subject, the group had to take into account the recent adoption of the GATS which added further dimension to their discussion, since the GATS included specific "doing business" soft rights, such as aircraft repair and maintenance, selling and marketing, and computer reservation systems. According to the group, the main objective of the doing business clauses was to significantly decrease the applicable red tape, and with that objective in mind, perhaps GATS would prove efficient.

269 *Ibid.*

270 *Id.*, p. 32.

draft a multilateral agreement, but rather to examine the set of future regulatory arrangements as developed by GEFRA.[271]

It was intended to be an evaluating and sifting exercise rather than a policy-making event structured in such a way as to permit an objective study of how new regulatory concepts and relationships could benefit the international air transport system and, perhaps, even acting as a potential catalyst in bringing about an updating of the present regulatory arrangements.[272]

On November 23, 1994, ICAO opened the worldwide air transport conference in Montreal to examine the timely subject of both the present and the future of international air transport regulation. Its particular focus was to be on the possible new regulatory arrangements. As this global air transport conference was only the fourth ever held by ICAO, it had already aroused considerable interest since it came at a time when dramatic changes were taking place in the broader world environment in which international air services are provided and regulated. One preparatory document for the conference contained the following statement:

> "Existing air transport regulation has grown in both volume and complexity over the past five decades, matching that of the air transport system itself. Yet, while growing, air transport has remained to a large extent within the patterns established when air transport was an infant industry. In the broader world environment in which international air services are provided and regulated, certain dramatic changes are occurring. These include multinationalization, liberalization, privatization, globalization and other phenomena which impact air transport and its existing regulation by States. This conference is a timely response by ICAO to a pressing need of its member States for appropriate ways for air transport regulation to be adapted

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271 Abeyratne, *supra* note 35, p. 29.

272 Chesen, *supra* note 256, p. 26.

> to these dramatic changes. Finding new ways to regulate international air services, new 'tools' that both continue and enhance the opportunities that all countries seek to participate in the system, yet adapt regulation to today's broader world environment will be the major task of the conference."[273]

As with each ICAO air transport conference, the one held in November, 1994, was a special worldwide meeting convened by the Council to bring together the member States of the organization to discuss current issues involving the economic regulation of international air transport, with air navigation, safety and similar topics excluded, the focus being on the regulation by governments of the commercial aspects of international air services. Although the three previous conferences (in 1977, 1980 and 1985) had dealt primarily with co-ordination and harmonization of policy for the regulation of capacity, tariffs and non-scheduled air transport, this fourth conference convened by the Council could be distinguished from its predecessors by the fact that its principal focus was on the development for the future of a full range of arrangements for the economic regulation of international air transport.[274] The origins of the conference lay in the changing air transport environment of privatization, liberalization and globalization, along with changes in the external environment such as new world trading arrangements developed through the Uruguay Round, and specifically through GATS.[275]

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273 "New Wings: A Glimpse at the Past and the Future of Civil Aviation" in *ICAO's 50th Anniversary Information Kit*, ICAO, Montreal, 1994, p. 7. It is also of interest to note that the conference closed on December 6, 1994, a landmark date as it was one day before the 50th anniversary of the signing of the Chicago Convention. ICAO'S Assembly Resolution A29-1, *ICAO's 50th Anniversary Celebrations (1994)*, declares: "7 December each year, starting in 1994, as International Civil Aviation Day and Instructs the Secretary General to inform the Secretary General of the United Nations accordingly."

274 *Report of the World Wide Air Transport Conference on International Air Transport Regulation: Present and Future*, ICAO Doc. 9644, 1995, p. 5.

275 *Ibid.*

The conference took place against the backdrop of difficult, but improving, financial times for air transport, overcapacity and depressed yields in many air carrier markets, uncertainty and complexity in many aviation relations between States, widespread concerns about the future direction and stability of both the regulatory and operating environment and the evolving structural changes in the industry.[276] Also in the backdrop, was the changing role of governments and air carriers, including national air carriers and a greater number and variety of interests which are increasingly influencing air transport policy and regulatory process.[277]

The conference was to start by looking at the present regulation and then turn to future regulatory content, as delegates would attempt to understand, develop, refine and interrelate possible future regulatory arrangements, i.e. specific conceptual approaches to the joint regulation of particular subjects States as parties to air transport agreements.[278] Then, parties would consider how States who wish to use these arrangements could do so. Finally, conclusions from the conference would be consolidated and recommendations on further actions by ICAO and/or by States would be developed. An air transport conference, it is important to note, is not designed, intended or empowered to negotiate or to draft any international treaty or agreement, nor can it produce resolutions, binding or otherwise.[279] The

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276 *Ibid.*

277 *Ibid.* This variety of interests included trade, infrastructure providers, labour, communities, tourism groups and users.

278 J.R. Chesen, "1994 and beyond: Worldwide Air Transport Conference Plans for the Future" in *ICAO Journal*, Vol. 49, No. 7, Sept. 1994, p. 60. These particular subjects would include market access, airline pricing and dispute resolution.

279 *Ibid.*

advantage of this characteristic, however, is that it can do what possibly no other forum can, as it brings together the world's air transport authorities in a single place to listen to new ideas from many sources, to deepen their understanding of each other's concerns and to share in major work exploration. Therefore, although the conference's subject-matters and goals were ambitious, this was counterbalanced by the fact that it cannot impose any requirements of any kind on any member State and observers believed the prospects for what the conference could accomplish were enhanced considerably by its non-negotiating, non-drafting structure and by the quality and objectivity of the preparatory work done by GEFRA.[280]

Although it is true that this format does offer a certain flexibility to States to freely voice their concerns and positions on a specific topic, it is perhaps the absence of a resulting mandatory binding agreement which hinders any possible concrete plan of action on the part of States at the outcome of any such conference.

The first item on the agenda was the study of the present regulation. The conference, from the outset, affirmed that «the principles espoused in the Chicago Convention of sovereignty, non-discrimination, interdependence, harmonization and co-operation at the global level, had served air transport well and were not at issue».[281] Therefore, any review of the Chicago Convention was, from the beginning, rejected.

In reviewing the present regulation, a number of delegates addressed the value and benefits of the widespread bilateral structure of regulation of international air transport and expressed support for the idea that the present experience of liberalization had shown

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280 *Ibid.*

281 *Report of the World Wide Air Transport Conference, supra* note 274, p.7.

disbenefits and benefits and that, so far, the former might outweigh the latter: while many delegates declared that they had no objection to regulatory change, liberalization, or increased competition in international air transport, concerned them because of its possible adverse consequences of unrestricted competition and the ever-present economic and other disparities between States which may not allow the possibility to adapt to such an environment.[282] What they advocated was a gradual but progressive liberalization process with suitable safeguards devised to ensure participation by all States, including, most importantly, developing countries.[283]

The conference concluded, upon discussion of this item, that states have differing national regulatory goals and policies, that any change in the international air transport regulatory system should be evolutionary, with due regard to the provisions of the Chicago Convention, to participation in international air transport, to the wider economic benefits of air transport, keeping in mind the reality of disparities among States, and that States which have not done so should again be urged to become parties to IASTA.[284]

Upon discussion of item 2, future regulatory objectives, the conference participants identified certain objectives: participation in international air transport by all States, which is defined as a reliable and sustained involvement by a State in the international air transport system; adaptation, meaning the adjustment of air transport regulation to the broader dynamic environment in which international air transport operates; enhancement, meaning

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282 *Ibid.*

283 *Ibid.*

284 *Id.*, p. 8-9.

the growth and improvement in the quantity and quality of the international air services received by a States to and from its territory; simplification, signifying the elimination of complex and detailed management of most existing regulatory arrangements; and, finally, flexibility meaning the design of new regulatory arrangements for international air transport in ways permitting air carriers to maximize opportunities.[285]

There was general support for direct, meaningful and sustained participation by all States in the international air transport system and sovereignty, under Article 1 of the Chicago Convention, which was still regarded as a guarantee of participation and as a basis for a State's choice of the forms of participation which best suited its national or regional interests.[286] Therefore, once again, the sovereignty principle was deemed untouchable as the cornerstone and basis for all future regulatory schemes.

States acknowledged the need for regulatory change but emphasized that it must be accomplished in a planned, evolutionary and orderly manner, to respect equality of opportunity and avoid jeopardizing the participation of certain States in international air transport.[287] There was strong support for co-existence of different regulatory regimes as a basic principle, both for the objective of participation and for an orderly adjustment to change, with air carrier capacity in the market place identified as one area where there was a particular need for accomodation between liberalized and regulated regimes.[288]

The conference also reaffirmed that the principles of the Chicago Convention

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285 *Id.*, p. 10-11.

286 *Id.*, p.11.

287 *Ibid.*

288 *Ibid.*

(sovereignty, non-discrimination, interdependence, harmonization and co-operation, and the safe and orderly development of international civil aviation and equality of opportunity) were the appropriate framework of future market access arrangements, with these arrangements taking into account the need to promote safe and efficient air carrier operations, the social and economic policies of States and the interests of all stakeholders in air transport.[289] "Safety net" or safeguard arrangements for full market access had to take into account the strategic interests of States to participate international air transport, with appropriate preventive measures to control them.[290] Although one view was expressed that free, vigorous competition was the most effective means to control such uses as predatory pricing or capacity, and therefore there was no use for a "safety net", this view did not receive support.[291]

There was agreement at the conference on the need to review the traditional ownership and control requirement in order that carriers could broaden potential sources of investment and that States be given greater opportunities to meaningfully participate in international air transport.[292]

The conference also addressed the issue of computer reservation systems (CRSs), which were recognized as powerful marketing tools which played an important role in the effective use of market access but could also be regarded as a structural impediment which,

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289 *Id.*, p. 19-20.

290 *Id.*, p. 20.

291 *Id.*, p. 19. Although the report does not identify which State particpant expressed this view, according to J. Gallagher, "Coming clean" in *Airline Business*, March 1995, p. 30, it was the United States who was trying to argue against the need of any safeguards.

292 *Id.*, p. 25.

by means of competitive abuses and practices, could mislead users.[293] Participants concluded that the ICAO Code of Conduct for CRSs, which was deemed a useful and appropriate tool for regulating CRS, should be reviewed based on the principles of transparency, accessibility and non-discrimination, and that there was a "particular need for close and effective collaboration between ICAO and GATT with respect to CRS"[294].

On the subject of trade agreements and arrangements, the participants pointed out that air transport had been included in the GATS because the States negotiating the agreement did not wish to exclude any service sectors from progressive liberalization.[295] The argument was brought up that formulating a most-favoured nation principle for services had proved difficult and States were allowed to individually exempt services from that type of treatment.[296] Participants were also anxious about the five-year review of the existing coverage of air transport services and the need to put the co-operation between ICAO and GATT on a more formal basis with mutual responsibilities clearly spelled out.[297] Specifically:

> "There was concern that if ICAO did not take an active and effective role in developing future regulatory arrangements in the economic area, particularly at the multilateral level, there would be increasing pressure to include more air transport services in the GATS. A structured, progressive liberalization based on the future arrangements being considered by the Conference suggested as one means to counter such pressures, and action at this Conference could prevent aviation interests from being traded-off against non-

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293 *Id.*, p. 49.

294 *Id.*, p. 50.

295 *Id.*, p. 37.

296 *Ibid.*

297 *Ibid.*

aviation benefits in other fora."[298]

The conference concluded by recognizing the special characteristics of air transport sector, of the importance of reaffirming the primary role of ICAO in this sector, and for ICAO to take effective action to exert a leadership role in the economic regulation of international civil aviation.[299] The conference also expressed its concern for both the short and long-term implications for ICAO and reiterated the importance for the co-operation between ICAO and the new WTO in trade matters relating to international air transport.[300]

All these conclusions show ICAO's and its member States' concern over the future regulation of the sector, yet, what was evident at the conference was that the organization was, once again, far from solving or even coming close to offering a possible solution. The discussion concerning GATS was surprisingly short and without much innovation. States reaffirmed previously known positions and no strong consensus emerged, except to express concern over possible infringement on sovereignty and threats to the existence and viability of national air carriers, all under the flag of the Chicago Convention and the belief that every country has the right to its own air carrier. Once again, the air transport sector was treated at the conference as an infant industry which must be protected.

One observer summarized the conference in the following harsh words:

> "The attempt to launch a worthwhile debate on multilateralism at last November's ICAO worldwide air transport conference resulted in little more than a furious finger wagging competition between the organization's 137 member States. By far the largest forefinger belongs to the U.S., the country

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298 *Ibid.*

299 *Id.*, p. 38.

300 *Ibid.*

that has the power to unleash or restrain global liberalization."[301]

Few expected radical changes to emerge from the conference and participating countries fell into three predictable categories: the first group, which included most of Africa and Japan, the latter being labelled 'restrictive', wanted to restrict liberalization; the second group, consisting of European and Asian countries, was happy to observe that ICAO has so far failed to get a good grip on the main issue of freeing up market access; and the third group, led by the U.S., which was characterized as 'archliberal', argued in favor of greater or complete liberalization.[302]

In fact, the U.S. was criticized for its 'negative' attitude and for its failure to use the opportunity to further its stated liberalization goals. Instead, its insistence on arguing against the need for safeguards or dispute resolution mechanisms in a liberal regime (a need, ironically enough, which is recognized by virtually all the member States) provoked a major row and a strong response from developing countries in particular, as countries accused the U.S. of implementing an open skies policy only if the U.S. will benefit from it.[303] The Japanese representatives, on the other hand, argued for the need to rebalance existing bilateral agreements before liberalizing any further.[304]

The conference, instead of discussing and agreeing on common goals, asked ICAO

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301 J. Gallagher, "Coming clean" in *Airline Business*, March 1995, p. 31.

302 *Ibid.*

303 *Ibid.*

304 *Ibid.* Mr. Kosuke Shibata, Director of international air transportation division at the Japanese ministry of Transport, quoted in Gallagher, *supra* note 301, commented that there must primarily be equal opportunities for Japanese carriers, not further limits on U.S. carriers as the U.S. routinely claims. He declared that: "There has to be an equal footing for competition before going ahead with liberalization."

to do additional work on a number of issues and to focus, contrary to U.S. wishes, on safeguards and safety nets against unfair competition as a prerequisite to any liberalization of market access.[305]

The rejection of the proposals on market access may indicate that ICAO is too wide a forum to take the lead on liberalization issues. Although the conference did allow an airing of the different viewpoints, it is clear that if the majority wants status quo, then the organization cannot act as a forum for change. This reality reinforces the belief of some that ICAO should focus on its traditional role of monitoring safety and technical standards.[306]

The main mandates on the multilateral framework that ICAO received from the Conference include competition safeguards, ownership and control issues, code-sharing complications, review of ICAO's code of conduct on CRSs, "doing business" matters, an analytical model to evaluate the net benefits of a liberalization scheme, a structure to regulate hard rights on a bilateral or multilateral basis and, preferential measures to ensure the effective participation of developing countries.[307]

The greatest consensus to emerge was on the possible future broadening of criteria of ownership and control with the main principle of designating a carrier which remains substantially owned and controlled by nationals in a predetermined group of countries being

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305 *Ibid.* Worse still for the U.S., the African Airline Association (AFRAA) asked the conference to develop special treatment for African carriers, which would include the right to stop or suspend concessions if rival carriers' capacity and pricing threatened the interests of African airlines, more favourable treatment in CRS displays for African airlines and a mechanism for the rationalization of capacity and the prevention of predatory pricing by limiting discounting.

306 *Ibid.* This opinion was also in view of the United Nations budgetary constraints ICAO is subject to and the fear that it will not be able to carry out the numerous mandates received by the conference.

307 *Ibid.* See also *Report, supra* note 274, p. 59.

accepted. The idea is that such relaxation would give carriers a better access to capital and could release multinationals from the constraints of bilateral agreements.[308] Therefore, the financial realities of hard economic times have caught up to States who are now looking for new additional sources of investment for their own fledging national carriers.

Participants in the conference seemed to agree that there was no prospect in the near future for a multilateral agreement on hard rights, while liberalization on a regional and subregional level, such as those under way in the E.U., parts of Africa and South America, seemed a more imminent prospect.

Although the conference did offer an opportunity for ICAO and its member States to meet and reaffirm their jurisdiction on the subject of the future economic regulation of air transport, its failure to present a common program and blueprint perhaps reinforces the proposal that any clear, decisive and progressive developments in this field would best be served and undertaken within the WTO. However, the jurisdictional struggle between these two international organizations does not offer a clear solution as to who should, and could, undertake the progressive liberalization of air transport, and in which manner.

B - The appropriate forum for the future regulation of air transport services: ICAO or the WTO?

The question of which of these two international organizations, ICAO or the WTO, is the proper forum to undertake the daunting task of liberalizing air transport services is quite

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308 *Ibid.*

complex. There are, of course, as in every debate, valid arguments for both sides.

ICAO's role in the past 50 years in the world of aviation cannot be dismissed easily. Although on the subject of economic regulation the organization has not been as successful as with the implementation of standards and practices in the safety and security realms, the fact remains that ICAO has the mandate, the experience and a fair amount of expertise in a wide-range of air transport matters, whether technical, economic or legal.[309] ICAO has taken the position, by way of the Resolutions it has adopted on the subject, that international air transport is an economic activity in which there is a strong national interest and involvement, as well as a long established comprehensive and detailed structure of standards, principles and operating arrangements.[310]

Yet, in contradiction to this position, the main strength of the GATS approach to air transport services is its commitment to liberalization within a defined time frame and its discipline in accomplishing its objectives.[311] Two additional reasons have also been identified as to why the GATT, or rather now the WTO, is seen as the appropriate custodian for air transport services: first, the modern aviation trend towards globalization, privatization, cross-border alliances and CRS conglomerates and the overall tendency of air transport operators to seek market access have made bilateralism an outdated method of negotiation and the multilateral ideal of the GATT needs to be kept mind when changing the structure of

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309 Abeyratne, *supra* note 35, p. 28.

310 *Id.*, p. 29.

311 *Id.*, p. 32.

international civil aviation; second, the WTO does advocate a process of gradual liberalization by negotiating market access and relying on an efficient dispute settlement mechanism.[312]

As set out in the Agreement Establishing the World Trade Organization[313], the WTO has an important and effective mandate to pursue liberalizing policies in all areas of trade included in the GATT and the GATS. After recognizing in its preamble the far-reaching consequences of economic development in all areas of life, of the need for positive efforts to ensure the share in the growth in international trade for developing countries, and contributing to the objectives by substantially reducing tariffs and other barriers and eliminating discriminatory treatment, the Agreement establishing the WTO declares:

> "*Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations"

Therefore, the scope of the WTO, as set out in the preamble and in Article II of the Agreement, is to provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes of the Agreement, which include GATT and GATS. The organization, as explained in Article III, is meant to facilitate the implementation,

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312 *Id.*, pp. 32-33.

313 *Agreement Establishing the World Trade Organization* in 33 *I.L.M.* 13 (1994) 1. The WTO Agreement has four Annexes. Annex 1 includes substantive trade agreements on trade in goods (Annex 1A), the new General Agreement on Trade in Services (GATS, Annex 1B), and the new Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C). Annex 2 consists of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Annex 3 provides for the Trade Policy Review Mechanism, a process of multilateral surveillance of national trade policies. The agreements in Annexes 1, 2 and 3 (the "Multilateral Trade Agreements") are integral parts of the WTO Agreement and binding on all Members of the WTO. Annex 4, on the other hand, holds agreements ("Plurilateral Trade Agreements") which are binding only on those Members that have accepted them.

administration and operation, and further the objectives of the Agreement and provide the necessary framework for its implementation.[314]

Article V establishes the WTO's relations with other organizations declaring that «the General Council shall make the appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO». Presumably, any such necessary arrangements will be made with ICAO. Article V also allows the General Council to make the appropriate arrangements for consultation and cooperation with non-governmental organizations.

The key provisions on decisionmaking in the WTO were agreed in the last months of negotiations.[315] Article IX states that, unless otherwise provided, the WTO shall continue the practice of decision-making by consensus, defined as non-objection, followed by GATT, and where a decision cannot be arrived at by consensus, the matter at issue may be decided by voting by majority, with each Member of the WTO having one vote.[316]

All contracting parties to GATT, which accept the Agreement, according to Article

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314 See A. Porges, "General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations - Introductory Note" in 33 *I.L.M.* 1(1994), p. 2. Its structure, as presented in Article IV, gives the Ministerial Conference, which will meet at least once every two years and is composed of representatives of all the Members, the task of carrying out the functions of the WTO and to take the necessary actions to this effect. The General Council, composed of representatives of all the Members and which shall meet as appropriate, will carry out the Ministerial Conference's functions, in the intervals between the latter's planned meetings. The General Council will also establish the rules of procedure and shall discharge the responsibilities of the Dispute Settlement Body and of the Trade Policy Review Body. According to Article IV(5), a special body, called the Council for Trade in Services, will be set up to oversee the functioning of GATS.

315 *Id.*, p. 3.

316 Special majorities of two-thirds, three fourths or consensus are only provided in a number of instances, with particular attention paid to safeguards on adoption of binding interpretations of the WTO Agreement or the Multilateral Trade Agreements, waivers of obligations and amendments. In the exceptional circumstance of the Ministerial Conference deciding, according to Article IX(3), to waive an obligation imposed on a Member by any of the Agreements, it is to be done with an annual review of any such granted waiver.

XI, will become original members of the WTO, and least-developed countries "recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities".[317] According to Article XIII, GATT and GATS will only apply between Members if they consent to such an application.

Upon reading the Agreement, it is evident that the WTO is responsible for the functional and institutional application of GATS and any part thereof. The mandate given to the WTO by the Members is to pursue and further trade liberalization by means of consensus and trade negotiations.

However, a few arguments do identify the problems with the proposal that the air transport sector would perhaps be more appropriately, or at least more effectively, liberalized within the WTO structure. The first argument is that aviation issues, according to the United Nations system, already come within the purview of an organization specialized in international civil aviation, the ICAO.[318] Furthermore, Articles 44(e) and (f) of the Chicago Convention charges the ICAO with the task of ensuring the prevention of economic waste caused by unreasonable competition and insuring that the rights of Contracting States have a fair opportunity to operate international airlines. Although these articles do not guarantee the right of States to having their own national airline regardless of global competition and trade developments, some have stated that by replacing bilateralism by multilateralism some

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317 Article XIV also provides for original membership in the WTO for the European Communities. Porges, *supra* note 313, p. 3, explains that: "Thus the EC will be an original Member in its own right; when the EC votes, it will have a number of votes equal to and not exceeding the number of Member States which are Members of the WTO".

318 Abeyratne, *supra* note 35, p. 33.

States would be precluded from having a fair opportunity to operate international airlines on an equal opportunity basis and would interfere with the State's right to practical enjoyment of fair and equal opportunities in the operation of air services this result going effectively against the spirit of international civil aviation of sharing air services, which is giving every country an opportunity to operate such air services.[319] Yet, in answer to this argument, this right, although facilitated by many mechanisms set up by ICAO, is not, as already mentioned, a guaranteed right. That the principle of sovereignty was sacrosanct in the aftermath of World War II is understandable but that in 1995, when trade barriers are being torn down within regions in all sectors and aviation has proven to be a costly and not always profitable venture for many governments, one must ask if this view of aviation, no longer an industry in its infancy, is justifiable. Perhaps, the difficult answer for many States is that it is no longer viable to treat this service sector as an untouchable, to be protected at all costs, but rather as another trade sector that may be used to each country's advantage in its bargaining strategy. In fact, although ICAO, according to Articles 44(e) and (f), is supposed to ensure fair competition, it has not always been able to and could not do so because of various geographic and political realities. In contrast, the GATS system has an actual timetable for liberalizing measures and possible sanctions if these measures and goals are not respected. A set timetable with dates to respect is more of an incentive than the Chicago Convention was able to provide.

Yet another argument criticizing the GATS system specifically points out that the GATS principles, such as an unconditional MFN clause, will probably lead to competitive

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319 *Id.*, p. 35-36.

imbalances between airlines.[320] As the MFN principle only applies, according to the Annex, for now, to soft rights, the argument has now changed that hard rights should be included in a multilateral agreement but outside the GATS/WTO system.[321] In answer to the first part of this argument, one must point out that imbalances between airlines have always existed and still do exist. These imbalances result from various components including a negotiating States' geographical position to its political position and, foremost, what that State has to offer at the bilateral bargaining table. The second part of the argument,which suggests a separate multilateral agreement for hard rights, basically encourages on top of the first regulatory mechanism (bilateralism), a second regulatory mechanism, meaning the GATS for soft rights, and, finally, a third system for hard rights. Perhaps the idea is that the two latter systems would eventually replace the bilateral system, yet such a path is not assured of being free of pitfalls. Since the process of liberalizing air transport services has already been discussed and measures have been taken in one structure, why desist from that effort and set anew, rather than build upon those foundations offered?

Another argument analyzes the long and tedious process of negotiations and disputes within the GATS system which take years to resolve and has identified it as a drawback compared to the expeditious measures available within the bilateral system.[322] Although it is true that government to government talks can bring forth results which are more easily evaluated, the possibility of abuse however, and unreasonableness, is also frequent. Within

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320 *Id.*, p. 33.

321 *Ibid.*

322 *Ibid.*

the competence of a certain trade-liberalizing organization, abuses will not be tolerated as easily. If the dispute settlement mechanism is not satisfying for States then measures could and should be taken to ratify the applicable process and make it more efficient.

Yet, the main threat identified with bringing air transport rights within the WTO structure is that the total liberalization of international air services would result in free competition worldwide, leaving only a few mega-carriers to enjoy the whole aviation market as the rights of others who are edged out in the process would soon be forgotten.[323] Although it is possible and probable that with liberalization many airlines would not be able to compete, the main thrust of a GATS system is not to stall or deter competition, rather it is to promote competition by way of equal opportunities and absence of barriers. Therefore it is foreseeable that once the initial phase of true liberalization is over, when certain uncompetitive carriers are no longer in the market, that other new carriers would have the opportunity and no barriers to entry to compete within the aviation market.

ICAO itself, however, has been the target of some mounting criticism, the most important of which being its work pace.[324] With so many technical and economic developments worldwide emerging at a rapid speed, many countries, such as the U.S., feel that ICAO must follow set agendas and deadlines. Criticism of ICAO politics echoes that of its work pace. Because much of ICAO's work is in the technical field, many think that the U.N. agency should be immune from the politics endemic to other U.N. organizations.[325]

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323 *Id.*, p. 37.

324 J. M. Feldman, "Navigating Change" in *Air Transport World*, October 1994, p. 78.

325 *Id.*, p. 79. Former KLM negotiator Henri A. Wassenbergh is quoted in the article as declaring that: "Fifty years at ICAO must be sufficient to arrive at some agreement on the economic regulation of air transport."

Unfortunately, this has not proven to be the case and certainly not in the economic regulation field.

Yet, still, IATA has suggested that ICAO adopt the GATT principles with regard to all aspects of the air services agreement except in the area of air traffic rights and frequency of operations of aircrafts.[326] However, the International Chamber of Commerce (ICC), upon studying the application of GATT principles to trade in services including air transport, suggested that international civil aviation organizations consider in depth the application of multilateral trade principles to international air transport as air transport should not be dealt with by non-aviation bodies such as the GNS or the GATT but rather by specialized organizations such as ICAO, ECAC or others.[327] This way, according to the ICC, the aviation field would retain its purity of having characteristics and attributes that are susceptible to negotiations, although air traffic rights should be negotiated in a more efficient system than that of bilateralism.[328]

However, while ICAO and the WTO are on hold over who will be responsible in the future for regulation concerning air transport, they are not the only options available to the liberalization path. The Organization for Economic Cooperation and Development (OECD) has embarked, as of June 1994, on the latest of a series of studies on air transport with a view to presenting its conclusions by early 1996.[329] Some feel the 25-member organization has the

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326 *Id.*, p. 34.

327 Cited in R.C. Van Der Maaten, "International Air Transport and GATT" in *ITA Magazine*, No. 54, March/April 1989, p. 15.

328 Abeyratne, *supra* note 35, p. 34.

329 Gallagher, *supra* note 301, p. 33.

advantage over ICAO because it consists of a smaller forum of industrialized countries (including the leading aviation nations and the European Commission, which represents Community external interests as a whole), while others worry about the specific exclusion of developing countries from its membership.[330] Though the OECD has no power to implement its recommendations, it can exert peer pressure among like-minded countries and has a history in other sectors of evolving successful approaches to the issues raised by competition laws and transnational ownership, including playing a major role in developing the basic concepts that allowed trade in services to be encapsulated in GATS.[331]

The Chicago Convention and ICAO nevertheless still garner support. As one author writes:

> "Focusing on the 'core essentials' of the Chicago regulatory system - the equality of opportunity, non-discrimination and the right of each state to have its own international air services - it should be possible to try to identify one or more aviation-related motivating objectives of the widest possible interest to all concerned. On the other hand, it should be recognized that the bilateral agreements that complement the Chicago principles, while creating countless different and conflicting tools impeding development of a truly world-wide system, nevertheless have demonstrated their ability to accomodate diverse national views"[332]

Perhaps, to seek a common motivation and possible basis for building up an aviation-related multilateral system accomodating the broadest possible views, ICAO should follow

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330 *Ibid.* Geoffrey Lipman, president of theWorld Travel and Tourism Organization, who is involved in the OECD's work, answers that the exclusion of developing countries from membership in the organization need not preclude their interests from being taken into account and adds that: "It is unacceptable to think of a global system with no place for the developing countries, but that does not mean it is unacceptable for the countries that believe in liberalization to push the envelope forward. The study will make every attempt to develop a framework which takes into account of the aspirations of the developing countries" (as quoted in Gallagher, *supra* note 303, p. 33).

331 *Ibid.* The OECD also initiated the methodology that put agriculture on to the Uruguay Round agenda, another difficult sector where States were very reticent about instituting liberalization.

332 Zylicz, *supra* note 87, p. 186.

a progressive simplification of international air transport regulation and strive for new arrangements that would be structured to allow various participating states to move towards such simplification of regulation on various time-tables, all involving reciprocal treatment and sectoral balance requirements, elements which are absent in the GATS regime.[333] This proposal takes into account the fact that the aviation community is not mature enough to eliminate national claims for participation in international air services and considers that the new approach would be independent of the GATS world-wide liberalization providing an alternative to a plurilateral, limited multilateral or targeted multilateral approach while retaining some of their most efficient elements.[334]

Certain necessary conditions precedent for any serious contemplation of a broad multilateral approach have been identified. One is the need for the aviation community to address whether this sector's habits, practices and mindset, even its language, can take air transport out of its regulatory insularity, and two, whether it can achieve the improvements expected of it, in other words, it is not enough that there is dissatisfaction with the present bilateral system, but there must be a need for agreed upon goals and benefits that will materialize.[335] For states not to participate there must be certain legitimate obstacles such as a fear of marginalisation and a loss of regulatory sovereignty. Yet, it is obvious by ICAO's 1994 Conference that none of these conditions exist today, and therefore since the majority

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333 *Id.*, p. 187. A good starting point to this proposal would be the GEFRA arrangements and allowing member States to opt for the arrangement that suits their needs best.

334 *Ibid.*

335 Gunther, *supra* note 1, p. 269.

of States members of ICAO are not ready and willing to embark on such a proposal, the majority will dictate not only at what speed, but also if ICAO will be able to act decisively in this area in the future.

CONCLUSION

In 1944, the stage for the regulation of air transport was set by an important number of states gathered in Chicago. With 50-year hindsight, the fact that 52 nations agreed to a worldwide structure for aviation in five weeks is worth celebrating. However, while the Chicago Convention has served as an organizational turning point for a dynamic new industry, it left a key issue unresolved that still festers today. That key issue is the economic regulation of air transport.

The purpose of Part I, entitled "The historical background of the economic regulation of international air transport since the Chicago Conference of 1944", was to examine the few articles of the Chicago Convention which deal with economic regulation and their consequences. Although the drafters of the Convention did open the door to some multilateral exchange of air traffic rights among states via two additional agreements, IATA and IASTA, states were not willing to adopt such a framework. Instead, following the lead of the Bermuda Agreement of 1946 between the U.S. and the U.K., air transport has been regulated by bilateral agreements between states, numbering more than 3 000 today. Although this bilateral system has served the aviation world adequately in the past 50 years, it also fosters protectionist policies, heavy government intervention, commercial inequalities among airlines and major inefficiencies in the air transport system worldwide. As a result, more and more calls are voiced for a renewed attempt at a multilateral system to address these issues. Aviation no longer being an industry in its infancy, it should therefore be treated as a commercial activity benefitting from the global trade liberalization trend. Yet, states still show a great deal of resistance to the system as governments fear a loss of control over their

aviation policies and the possible failure of many existing national carriers if such a framework were to be adopted. Some states have tried to follow a multilateral approach to air transport within specific geographical areas, such as the E.U., LACAC and ASEAN, liberalizing the air traffic rights among a specific group of States. These efforts among like-minded states offer another possible venue for air transport liberalization.

Part II, entitled "The regulation of trade in services and the air transport sector", studied an alternative option to the Chicago Convention system under which air transport could be liberalized, namely the GATT system. The GATT offers basic trade principles, such as the MFN clause, the national treatment clause and the transparency principle, which aim to ensure non-discrimination in specific trade sectors between different states. Its main goal being trade liberalization, some argued that the GATT framework could be appropriately applied to liberalize air transport services. However, the MFN and national treatment clauses could have some undesirable effects, such as producing a field where only the lowest common denominator would be accepted leading to an environment where some states have a liberal air transport policy and others retain the status quo. Liberalization under the GATT auspices is also seen as posing a threat to the principle of sovereignty and to the existence of national carriers. There are no guarantees that national carriers could survive in such an environment (and probably a large number would not) meaning that there are no guarantees that certain regions of the world would have air transport policies. The process of including trade in services under the GATT umbrella agreement was set forth by the GNS, which adopted a definition of services wide enough to encompass all service trade practices. The GNS also studied the possibility of including specific service sectors, one which was air transport services. Many delegations declared great hesitation at including this sector in the agreement

with proposals ranging from a total to a partial exclusion of air transport services from the application of the agreement. The final solution proved to be a sort of compromise between the different groups.

Part III, entitled "The General Agreement on Trade in Services and the Annex on air transport services" presented the framework for trade in services as was drafted by the Contracting Parties and adopted on December 15, 1993. The basic provisions of GATS include the MFN clause, the national treatment clause, the transparency principle, a dispute settlement procedure and the possibility of safeguards in specific situations. The scope of the Annex on air transport services is limited only to soft rights, specifically groundhandling, sales and marketing and CRSs. However, the agreement does foresee future negotiations to widen its scope of application and other air transport services may be included in the future.

Part IV, entitled "The future of air transport regulation: under whose jurisdiction?" examined ICAO's efforts in the past to draft a multilateral solution acceptable to all its member States. ICAO has organized a colloquium on the subject (in 1992), a study group of experts (known as GEFRA) and a number of conferences (the last one having taken place in November-December 1994). All these events were opportunities to present and discuss various multilateral solutions but, in each case, member States refrained from committing themselves to any concrete plan of action. Faced with the developments within the Uruguay Round negotiations, the organization even adopted resolutions to declare its competence on the matter. However, with the advent of GATS, a new organization, the WTO, may take the lead in the liberalization efforts. Its goal is to promote the liberalization of trade in services and this objective will be achieved by relying on a set timetable of negotiations. Yet, both organizations may be eclipsed by a third, the OECD, which has undertaken a study of this

specific field. Although the OECD can only make recommendations to its members (which do not include developing countries), it has used persuasion diplomacy and pressure politics very effectively in its past endeavours to incite and promote change.

How will the future economic regulation of air transport unfold? Certain comments can be made upon study of the subject: the first is that air transport is no longer an industry in its infancy in need of protection. For fifty years, it has developed and thrived. Although the concerns of some states, regarding national carriers, available services on all routes and security issues, are valid, they can, and must, be addressed under any scheme of liberalization with the use of safeguards and safety nets. Secondly, for the next few years, it is likely that any multilateral and liberalizing regime will be established on a regional level, most probably amongst like-minded states. It is simply easier to negotiate such a plan when all the states involved have the same objectives and the same frame of reference. Thirdly, if any possible liberalization proposals are to be launched under ICAO's jurisdiction, it will only achieve success if a majority of member States are willing to participate. As long as the majority of ICAO's member States still want the status quo, the organization will have a difficult time promoting such progressive change. This is why it is most probable that any liberalizing economic regulation will come from other sources or institutions such as the WTO, although the author does submit that as the United Nations' agency responsible for civil aviation, the subject matter would best be served if it were retained under ICAO's jurisdiction. However, unless ICAO can convince its member States of the importance of this, the reality of the worldwide trend of trade liberalization will catch up with the field of air transport most likely spearheaded by another source.

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