

## Emergent Trends in Aviation Competition Laws in Europe and North America

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### I. INTRODUCTION

The International Civil Aviation Organization has recorded that scheduled passenger traffic for the European region as a whole is expected to grow annually at rates of 4.4, 5.7, and 6 per cent for the years 1999, 2000 and 2001 respectively.<sup>1</sup> These figures, when compared to overall world airline growth of 4.1, 5 and 5.7 per cent for the years in question<sup>2</sup> are impressive, particularly given the fact that the airlines of Europe excluding those of the CIS States are expected to continue this growth-trend in a steady fashion. An inevitable corollary to airline growth in a region would be the exponential evolution of competition among the carriers. Although other regions of the world also reflect propensities of growth in air transport, the European region is unique in terms of its legal and regulatory structure and the nature of geographic distribution of air traffic potential. With Europe's clusters of relatively small countries (as compared to larger countries such as the United States, Canada and Russia), the region's carriers need to, as of necessity, formulate strategies in order to maximise the enormous potential offered by the region and achieve the figures forecasted.

The United States stands both as initiator of global policy pertaining to civil aviation and as the most prolific contributor to aviation in the region. Its influence, therefore, on civil aviation in the next millennium would be significant. The above notwithstanding, the importance of the roles played by Canada, Mexico and the South American and Caribbean nations in shaping the destiny of aviation in the years to come cannot be underestimated.

The United States has been actively promoting the virtues of a liberalised international air transport structure since 1978. This is reflected by the signing of 23 bilateral agreements by the United States between 1978 and 1982, based on a liberal formula.<sup>3</sup> This trend has continued vigorously, prompting Secretary of State Rodney E. Slater to say in 1997 that the accelerated movement towards achieving open-market

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<sup>1</sup> *The World of Civil Aviation, 1998–2001*, ICAO Circular 275-AT/115, Part III Chapter 6, Regional Highlights, Trends and Forecasts, at p. 107.

<sup>2</sup> *Ibid.*

<sup>3</sup> P.P.C. Haanappel, *Pricing and Capacity Determination in International Air Transport*, Kluwer Law and Taxation, Deventer, the Netherlands, 1983, at p. 27.

aviation agreements in 1997 has put the US Department of Transportation (DoT) on a fast track toward making open-skies the worldwide standard.<sup>4</sup> In 1997 the United States reached open-skies agreements with 15 countries, more than in all previous 10 years combined.<sup>5</sup>

Canada, on the other hand, has been less market-driven and more cautious. Some scholars have reported that Canadian bilateral agreements in air transport tend to restrict, rather than facilitate international competition.<sup>6</sup> One reason given for this cautious approach is that it is the belief of Canada that a traditional international aviation strategy, which was more protective of airline interests, would obviate the “destructive impact of competition”.<sup>7</sup>

This article will evaluate competition in air transport in Europe and North America (United States and Canada) on a comparative basis, focusing on legal, regulatory and economic factors that are the key players in this process.

## II. AVIATION IN EUROPE

Air transport in the European Community is fundamentally regulated by two treaties, i.e. the Treaty which establishes the European Coal and Steel Community (ECSC Treaty) and the Treaty which establishes the European Economic Community (EEC Treaty). The former, which was signed in Paris in 1951, addresses issues related to the carriage of coal and steel through the media of rail, road and inland waterways and as such is not directly relevant to aviation. The latter, on the other hand, admits of issues relating to all modes of transport in the carriage of persons and goods and is of some relevance to aviation.

The EEC Treaty, which was signed in Rome on 25 March 1957,<sup>8</sup> has at its core a Common Transport Policy (CTP) concept which is calculated to achieve the fundamental purposes of the European Community.<sup>9</sup> One of the most salient features of the EEC Treaty is that the tasks of the Community are set out succinctly in Article 2 of the Treaty, which provides *inter alia* for the adoption of a CTP as provided for in Article 3(1) of the Treaty. This provision is linked to Article 74, which in turn provides that the objectives of the Treaty in relation to issues of transportation would be pursued by State Parties within the parameters of the CTP, which is established by the Council of Europe through secondary legislation.

<sup>4</sup> US DoT News Release, Monday 5 January 1998.

<sup>5</sup> *Ibid.*

<sup>6</sup> Marlin Dresner and Michael Trethaway, *Policy Choices for Canada International Air Transport*, *Proceedings of the Administrative Sciences Association of Canada*, International Business, 1987, at pp. 83-94.

<sup>7</sup> See Donna Mitchell, *Canadian International Air Transport Historical Background and Current Policy*, Ministerial Task Force on International Air Transport, 1997.

<sup>8</sup> Treaty Establishing the European Economic Community, signed in Rome on 25 March 1957, 298 UNTS 11.

<sup>9</sup> The word “Community” alludes to the European Economic Community which is now called the European Community consequent upon the signing of the Treaty on European Union on 1 November 1993.

The rights and duties of the Council of Europe in establishing the CTP, particularly in the fields of air and maritime transport, can be attributed to a 1986 case<sup>10</sup> and to Article 189 of the EEC Treaty, which admits of the Council adopting such measures as common rules attributable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States; the conditions under which non-resident carriers may operate transport services within a Member State; and any other appropriate provisions.

Article 84(1) of the EEC Treaty makes the provisions of the title of the section relating to transport apply to rail, road and inland waterway, with a qualifier in Article 84(2) which gives the discretion to the Council to decide whether, and to what extent and by what procedure, appropriate provisions may be laid down for sea and air transport. This is immediately followed by the discretion given to the Council to unanimously decide whether, to what extent and by what procedure, appropriate provisions may be laid down for maritime and air transport. Although explicit mention of air and maritime transport is made in Article 84, implicit in the Treaty is the understanding that the transport Title will not *ipso facto* apply to the two modes of transport. The applicability of the Treaty to air and maritime transport was examined in some detail in the 1974 case of *Commission v. France*<sup>11</sup> where the Court observed:

“Whilst under Article 84(2), therefore, sea and air transport, so long as the Council has not decided otherwise, is excluded from the rules of Title IV Part Two of the Treaty relating to the CTP, it remains, on the same basis as other modes of transport, subject to the general rules of the Treaty.”<sup>12</sup>

The Court subsequently confirmed this view in a later case<sup>13</sup> decided in 1977. Both the 1974 and 1977 decisions make it incontrovertible that the general rules of the Treaty apply *per force* to transportation in general, if the Council, acting under Article 84(2) does not decide to the contrary. This means essentially that the Commission has upon it a legal duty<sup>14</sup> as well as a political duty<sup>15</sup> to ensure that the general provisions of the Treaty are applied to air and maritime transportation.

The Treaty on European Union (TEU) is a supplemental treaty which embellishes the provisions of the EEC Treaty, particularly by adding that the Council shall lay down measures to improve transport policy, in addition to its duties in Article 75(1). The TEU also laid down the principle that the Council is obligated in all instances to act on proposals from the Commission, consequent to obtaining the opinion of the European Parliament. This procedure is laid out in Article 189C of the EEC Treaty and the TEU merely enforced the need for the Council to act according to the provision. The TEU also requires that the European Community should

<sup>10</sup> *European Parliament v. EC Council*, Case No. 18/83, (1986) 1 CMLR 138 ECI.

<sup>11</sup> *Commission v. France*, Case No. 167/73, (1974) ECR 359.

<sup>12</sup> *Ibid.*, at 367.

<sup>13</sup> *EC Commission v. Kingdom of Belgium*, Case No. 156/77, judgment of 12 October 1977, [1978] ECR 1881.

<sup>14</sup> Article 175 of the EEC Treaty addresses issues pertaining to recourse for failure to act.

<sup>15</sup> As per the powers of the European Parliament provided for in Articles 137 to 144 of the EEC Treaty.

contribute to the establishment and development of trans-European networks in the fields of transport, telecommunications and energy infrastructures, as per Article 129b(1) of the Treaty of the European Community.

The Joint European Council, in October 1997, confirmed the creation of a European Common Aviation Area (ECAA) which would encompass the European Community States, Member States of the European Economic Area (EEA) and the Associated States of Central Europe. The common aviation area is based on the *Acquis Communautaire* in air transport, and is founded in a multilateral agreement which contains transitional provisions on market access and environmental protection with particular emphasis on noise. European Community legislation is extended by the ECAA Agreement in areas relating to market access and ancillary issues; competition rules; air traffic management; safety; environmental protection; social aspects; and consumer protection.

The perceived dichotomy of wide ranging powers of the European Union in terms of its external relations in air transport on the one hand, and the inhibitions cast upon the Union by the seminal legislative instrument—the Treaty of Rome<sup>16</sup> by not explicitly granting the Union competence, has led to sustained examination by the adjudicatory process. The European Court of Justice (ECJ) in 1971 decided that the Community has both external competence and internal competence on an intra-Europe basis. This judgment gave implicit external competence to the European Union to take over control of negotiations on behalf of European Member States in matters relating to international air transport agreements. Although this implicit right has not been used by the Union extensively, it was indeed used in the 1990s when the European Community adopted internal rules pertaining to computer reservations systems (CRS) on an intra-Europe basis. This right does not, however, extend to trade in services, on the basis of a 1994 ECJ judgment which decided that trade in services including trade relating to air transport services is beyond the jurisdiction of the Union.

With the advent of the Maastricht Treaty of 1992,<sup>17</sup> which provided that the European Community may decide to co-operate with third countries to promote projects of mutual interest, it was possible to encompass the countries of Central and Eastern Europe within the purview of the European Union, thus extending some flexibility to the rigid treaty law governing Europe, particularly in relation to trade in services and commercial competition in air transport. In January 1993 when the third and final phase, or third package of European Community air transportation liberalisation took effect, there were in place regulations covering areas such as market access, slot allocation and scheduling.

<sup>16</sup> See note 8, above.

<sup>17</sup> Treaty on European Union, 7 February 1992, 1 CMLR 719.

#### A. COMPETITION WITHIN EUROPE

The tightly woven Pan-European legislation on competition reflects the desire of the European nations to band together as a collective force rather than compete individually with other nations or among themselves in the field of air transport. The combined European markets rank third world wide and, in 1996–2000 it was expected that European air carriers would be responsible for approximately 28 percent of world aviation<sup>18</sup> in passenger kilometres. Although a combined Europe is more populated than North America, airlines of the European Union countries have not optimised on this potential market primarily owing to their high operating costs. A few airlines were on top, such as British Airways, KLM and Lufthansa in the mid-nineties, while most other European carriers were operating at below break even levels.<sup>19</sup> However, as a result of the rapidly evolving collectiveness of the European States and their competitive banding together, particularly in the liberalisation of intra-European markets, European Union carriers have now entered more intra-European routes and several airlines of European States have established subsidiaries in other Union Member States.

The success of the European Union States in tightening their air transport legislation and liberalising air transport intra-Europe is a classic example of the “cluster” theory, which is based on the competitive advantage of a cluster of nations which are geographically proximate to each other. In this case, the air carriers of a cluster of European States, interconnected and linked by commonalities and complementarities, are given the opportunity of forming alliances, sourcing their capital, goods and technology to locate their operations within the European Continent wherever it may be cost effective. The prevalence of clusters in economies, as against isolated competition, brings to bear new concepts about national, municipal and international economies and opens a whole new dimension of competition centred around liberalisation on an intra-continental legal structure.

Clustering in European air transport in areas of slot allocation and market access has created new management agendas for European carriers, giving them a tangible stake in key business areas such as taxation, utility cost sharing and wages. The European Union States, in their macroeconomic vision, have created a driving force in the European air transport industry, not only by maximising on air transport potential within the Continent, but also by creating new types of dialogues between air transport enterprises within Europe.

The essential theory of clustering is founded upon the interaction of economic potential of a group of enterprises. Clusters of European airlines operating within Europe would affect competition by increasing the productivity across the board of constituent partners; by increasing the capacity of commercial partners’ innovation and

<sup>18</sup> *Association of European Airlines Yearbook*, 1996, Brussels, at p. 19.

<sup>19</sup> *Ibid.*, at p.15.

growth in productivity; and by stimulating new business strategy that expands business and the dimensions of the cluster. Clusters also effectively maximise economies of agglomeration by promoting proximity of operation whilst minimising costs and increasing proximity to markets.

Together with the overall thrust of the cluster phenomenon in Europe brought about by tight legislation on liberalisation, European nations have also the advantage of the immense capacity of their air transport industry to innovate and upgrade. Europe has retained competition advantage within the Continent through a highly localised process.

#### B. COMPETITION OUTSIDE EUROPE

For the European Union nations, the most important is arguably the North Atlantic air transport market between the United States and Europe. A primary commercial tool which European carriers have used in participating in this market is the air carrier alliance. The North Atlantic market was by far the largest in the world in the mid-nineties, with 34 million passengers carried in 1993.<sup>20</sup> The largest country pair in this market link is United States–United Kingdom which accommodated 43 percent of all United States–Europe traffic in 1997.<sup>21</sup>

Although post war trends of Bermuda I and Bermuda II bilateral understandings, which had certain restrictions on capacity and tariffs, were perceived as inhibiting the hidden potential in air transport between the United States and Europe, the United States external aviation policy of liberalisation, which was launched in 1978, paved the way for more competition between the two. The Netherlands, which blazed the trail with the first liberalised bilateral in 1978 with the United States<sup>22</sup> was followed by Belgium<sup>23</sup> and Germany<sup>24</sup> in quick succession.

One of the most significant commercial considerations, which has sometimes been a contentious issue with regard to transatlantic air transport, has been the extra-territorial application of European Union and United States competition law. Understandably, both the Union and the United States have explicit policy pertaining to air transport which is carried out by legislation. It is not unusual therefore that the laws applicable to trans-national air transport—from both ends—may be questioned by either side as being extra-territorial. Such a contention does not necessarily reflect *mala fides* on the party against whom extra-territoriality is alleged. Usually, the question of extra-territorial application of national laws arises in instances where in the absence of

<sup>20</sup> *US International Air Passenger and Freight Statistics*, 1993, Vol.1 No.5, Washington, 1994, at p. 21.

<sup>21</sup> *US Internal Air Passenger and Freight Statistics*, 1998, Vol.1 No.8, Washington, 1998, at p. 32.

<sup>22</sup> See Amendment of March 31, 1978 (1123 U.N.T.S. 345, T.I.A.S. 8988) to the Air Transport Agreement between the Government of the United States and the Government of the Kingdom of the Netherlands, 3 April 1957, 410 U.N.T.S. 193, T.I.A.S. 4787.

<sup>23</sup> US–Belgium Agreement, T.I.A.S. 9231.

<sup>24</sup> See Bartkowski & Byerly, *Forty Years of U.S.–German Relations*, (1997) 46:1 *Zeitschrift Für Luftund Weltraumrecht* (German Journal of Air & Space Law), p. 3 at p. 8.

an international framework of competition rules, the extra-territorial application of national competition laws is perceived to be necessary to patch up loopholes emerging from the territorial reach of national jurisdiction.

The United States, for its part has, through its courts, applied US antitrust laws to commercial activities conducted outside the United States if such activities impinged upon the equilibrium of commercial activities within the United States by having a direct, substantial and reasonably foreseeable effect within the country.<sup>25</sup> *The Foreign Trade Antitrust Improvement Act* of 1982,<sup>26</sup> which grants the United States courts jurisdiction over aspects of foreign conduct, grants the US DoT jurisdiction over air routes between the United States and a foreign country, including routes which are entirely outside the United States if competition on such routes is reasonably likely to have an adverse effect on the United States. As a result of this legislative possibility, courts in the United States have jurisdiction over antitrust actions brought by private entities even where such actions may concern foreign entities.<sup>27</sup>

In a laudable and fair attempt at balancing harmoniously the stringent application of United States law to foreign conduct with external co-operation, the United States has enacted the 1994 *International Antitrust Enforcement Assistance Act* which broadly admits of arrangements with foreign authorities to investigate antitrust violations through the exchange of information and common and reciprocal retrieval of evidence.

European Union rules on extra-territoriality are not explicit and, therefore, are not incorporated in the competition provisions of Articles 85 and 86 of the EEC Treaty. Although at best an inference may be drawn from an interpretation of these provisions and extra-territoriality may be imputed to the provisions, the European Court of Justice in the 1988 *Woodpulp* case<sup>28</sup> applied the principle of the *lex situs* to jurisdiction, and held that it is the place where the anti competitive arrangements take effect that determines the jurisdiction of the Union in matters relating to competition.

Since Article 87 of the EEC Treaty requires appropriate regulations or directives to give effect to the principles as set out in Articles 85 and 86, it flows logically that implementing legislation is necessary to give effect to Articles 85 and 86<sup>29</sup> in the instance of issues arising from air transport in routes between the European Union and a third country, or in routes that are entirely outside the community. Mention must be made in this regard to the case of *Ahmed Saeed*<sup>30</sup> where the German Federal Court of

<sup>25</sup> *United States v. Aluminium Co. of America* (Alcoa), 148 F 2d 416 (2d Cir 1945). See also Ludwig Weber, *Modern Trends in the Antitrust/Competition Law Governing the Aviation Industry*, 1995, XXII Air & Space Law, at p. 101.

<sup>26</sup> Also known as the Sherman Act 37, 15 V.S.C. § 6a.

<sup>27</sup> See Weber, note 25 above at p. 103.

<sup>28</sup> *Ahlstrom et al v. Commission* ("Woodpulp"), 1988, reported in Giemulla *et al*, *European Airlaw*, The Hague, 1997, at c. 4a.

<sup>29</sup> Article 86 provides that in certain circumstances, any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

<sup>30</sup> *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs E. V.*, Case No. 66/86, [1989] ECR. 803, [1990] 4 CMLR. 102.

Justice sought the ruling of the European Court of Justice on a matter pertaining to the selling in Germany of air tickets to the public at prices below the level approved by the Federal Minister of Transport, in contravention of local German municipal law. The issue was whether Article 86 of the EEC Treaty had overriding jurisdiction over local laws of Union States, and the ECJ held that Article 86 is directly applicable in national courts even in the absence of implementing legislation.

### III. AVIATION IN NORTH AMERICA

Canada and the United States negotiated and entered into an open-skies agreement in 1995. The negotiations, which commenced in the latter part of 1994, were smooth compared to the nearly 30 years of difficult negotiations the two countries had in settling their ideological differences regarding traffic rights.<sup>31</sup> The Open-Skies Agreement is viewed as being successful beyond the expectations of its strongest proponents and it is indeed worthy of inquiry as to whether this agreement impelled Air Canada, which was essentially a protectionist carrier, to move toward aggressive competition in the trans-border air transport market.<sup>32</sup> Another corollary was the dramatic growth of traffic between the two countries in the first three years after the signing of the agreement. Both Canadian carriers, Air Canada and Canadian Airlines benefited by the agreement which gave these carriers opportunities to embark upon new routes between Canada and the United States and use code sharing agreements with US carriers.<sup>33</sup>

Although Canada still exercises a somewhat cautious approach towards South America, Central America and the Caribbean, the United States is proceeding quickly with these countries by encouraging them into liberal agreements in air transport. In 1997, the United States signed its first open-skies agreement with a Latin American country by signing for an open-skies aviation regime with Panama. On this occasion, DoT Secretary Slater said:

“This first open-skies agreement in Latin America represents the opening of an important market for US citizens, businesses and airlines. It also is an important step for Panama and the Central American region as these countries move to develop further their economic resources and create new tourist destinations.”<sup>34</sup>

Secretary Slater, identifying South America as one of the world's fastest growing economic regions, hoped that the United States–Panama agreement would be a precursor to other agreements between the United States and South American

<sup>31</sup> See Raymond J. Kaduk, *Canadian Carrier Strategies and the 1995 Open-Skies Agreement*, *Journal of Air Transport Management*, Volume 5 No. 3, 1997, at p. 145.

<sup>32</sup> *Ibid.*, at p. 152.

<sup>33</sup> Carole A. Shifrin, *Open-Skies Pact Boon to Canada, U.S.*, *Aviation Week and Space Technology*, 2 March 1998, at p. 43.

<sup>34</sup> *United States Panama reaches Open-Skies Agreement*, DoT Press Release 33-97, Friday, 14 March 1997.

countries.<sup>35</sup> This prophecy of Secretary Slater was realised just two months later when he signed open-skies agreements with six Central American countries in May 1997.<sup>36</sup>

The most fundamental issue that has to be addressed in the context of aviation in the Americas is whether a liberalised structure, leading ultimately to open-skies between carriers of the Americas and other parts of the world, will have consequences on a global scale. On the one hand, an open-skies regime will infuse more air transport services to where there is demand, irrespective of considerations for market share and protection of carriers who are unable to compete. On the other, uncontrolled proliferation of air transport may bring about ecological problems, tourism problems and other infrastructural difficulties to small nations developing tourism potential. The issue therefore boils down to the question: would open competition be beneficial to civil aviation on a global basis, as advocated by the more prolific air transport service regions such as North America, South America and Europe?

#### IV. TRADING POLICIES OF CANADA AND THE UNITED STATES

##### A. CANADA

Canada has prolific foreign ownership in the private sector of the country's economy and therefore has approached the regulation of foreign investment somewhat cautiously.<sup>37</sup> This situation and the trends that are the corollaries of it have kindled the regulation of foreign investment, particularly with the help of appropriate measures that have been adopted.<sup>38</sup> With the establishment of the Foreign Investment Review Agency (FIRA),<sup>39</sup> Canada adopted a restrictive policy on foreign direct investment, screening every foreign investment through FIRA, regardless of resources offered and

<sup>35</sup> Ibid.

<sup>36</sup> *Secretary Slater signs Open-Skies Agreement with Central American countries*, DoT Press Release 67-97, Friday, May 9 1997.

<sup>37</sup> See the *Gordon Commission Report* which analysed the extent of foreign ownership in Canada. This Report proposed that foreign investment in Canada be controlled in four ways, including control by a central review board: *Report of the Royal Commission on Canada's Economic Prospects*, Queen's Printer, Ottawa, 1958. A subsequent study, the *Gray Report*, concluded that it was necessary to regulate foreign investment in Canada in view of the very high level of foreign ownership in Canada. According to this report 76% of the energy sector and 90% in various other sectors were under foreign ownership: see *Foreign Direct Investment in Canada*, Information Canada, Ottawa, 1972.

<sup>38</sup> For material on Investment between Canada and the United States see, H.I. MacDonald, *Nationalism in Canada, Foreign Ownership: Villain or Scapegoat*, T.E. Reid ed. Holt, Reinhart and Winston, Toronto, 1972, at 71; T.F. Frank and K.S. Gudgeon, *Canada's Foreign Investment Control Experiment: The Law, The Context and the Practice*, 1975, 50 N.Y. Univ. L.R. 76; D. McDowall, *A Fit Place for Investment?* Study No. 81, Conference Board of Canada, Ottawa, 1984; S. Wex, *Instead of FIRA: Autonomy for Canadian Subsidiaries?* Institute for Research on Public Policy, Montreal, 1984; G. Dewhurst and M. Rudiak, *From Investment Screening to Investment Development: The Impact of Canada's Foreign Investment Review Agency (FIRA) and Investment Canada in Canada's Technological Development*, 1986, II Can. U.S. L.J., 149. For material on investment similarities in Canada and Mexico see J.H. Hodgson, *Las Inversiones Extranjeras en el desarrollo de Canada y de America Latina*; R.B. Farrell, *America Latina y Canada Frente a la Politica Exterior de los Estados Unidos*, Fondo de Cultura Economica, Mexico, D.F. 1975, at 56.

<sup>39</sup> *Foreign Investment Review Act*, S.C. 1973-1974. See also J. Turner, *Canadian Regulation of Foreign Direct Investments*, 1983, 23 Harv. Int'l L.J. 333; M. Dewhurst, *The Canadian Federal Government's Policy in Foreign Direct Investment*, E. Fry and L. Radebaugh ed. *Regulation of Foreign Direct Investments in Canada and the United States*, Brigham University, Provo, Utah, 1984, at 27.

wealth and size of the investment, and allowing only foreign investments of significant benefit for Canada.<sup>40</sup>

FIRA was subject to sustained criticism from all parties who had dealings with the Agency. Complaints concerned the inordinate delay in the completion of the process (which usually took from 12 to 18 months), its indiscreet screening process, the lack of care in considering relevant information, the seemingly arbitrary selection criteria, and above all the fact that foreign investors were required to negotiate with an Agency, which in the end, was not the one having powers to take the final decision with regard to the investment proposal under consideration. FIRA was therefore perceived by Canada's trading partners as a discretionary organ impeding the free flow of trade and investments.<sup>41</sup> One of the examples of discontent among Canada's trading partners is seen in the formal complaint brought by the United States against certain requirements imposed by FIRA on foreign investors to the GATT in 1982, resulting in a GATT panel concluding that the domestic sourcing requirements of the Agency were inconsistent with Canada's obligations as stipulated in Article III:4 of the GATT.<sup>42</sup> However, FIRA does not appear to have been as ominous in its negative approach to foreign investment as it was perceived to have been, since the average approval rate of investment proposals was at that time 90 percent. It is worthy of note however, that the level of foreign ownership in Canada declined from 37 percent in 1971 to 24 percent in 1987 under FIRA.

In 1984 Canada implemented a major reversal of the existing *status quo* by adopting its "Open for Business" Policy. The newly elected Conservative Government and its enactment of the *Investment Canada Act*<sup>43</sup> (ICA) ensured the repeal of the FIRA, replacing it with the Investment Canada Agency and an altogether new philosophy.<sup>44</sup> The ICA has conceptually encouraged foreign and domestic investment since basing its philosophy on the legislative recognition that foreign investment was beneficial to Canada.<sup>45</sup> The Act abolished the mandatory review process for the establishment of all new Canadian businesses and required a review in the case of direct acquisitions of

<sup>40</sup> *Foreign Investment Review Act*, see note 39 above, n. 11, Article 2(1). Small investments of \$ 5 million which employed no more than 200 employees however, required only the formality of registration.

<sup>41</sup> See J. Albrecht, *Canadian Foreign Investment Policy and the International Political Legal Process*, Canadian Yearbook of International Law 1982, University of British Columbia Press, Vancouver, 1984, at 149.

<sup>42</sup> Article III.4 of GATT provides:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

See also, *Administration of the Foreign Investment Review Act*, Report of the Panel, July 25 1983, BISD 30th Supp., at 140 (1982-1983).

<sup>43</sup> *Investment Canada Act*, R.S.C. 1985, c 28 (1st Supp.).

<sup>44</sup> See generally M. Heinz Juergen, *Regulation of Foreign Investment in Canada* (LL.M Thesis), McGill University, Canada, 1986. The author analyses comparatively the FIRA and ICA in his thesis. See also, J. Baker, *From FIRA to Investment Canada, Canada-U.S. Economic Relations in the Conservative Era of Mulroney and Regan*, E. Fry and L. Radebaugh ed., Brigham University, Provo, Utah, 1984, at 47. Also generally, J.M. Spence, *Current Approaches to Foreign Investment Review in Canada*, 1986, 31 McGill L. J. 507.

<sup>45</sup> ICA, see note 43 above, n. 15, Article 2.

\$ 5 million or more, indirect acquisitions of over \$ 150 million, and those investments relating to the advancement of culture.<sup>46</sup>

As a response to FIRA, ICA's investment review process was streamlined and given a lower profile than that enjoyed by FIRA. Under the new system, the investor received an answer to his investment proposal within 45 days of his proposal being deposited.<sup>47</sup> ICA adopts the criterion of selection to be that the reviewed instrument must be of net benefit to Canada.<sup>48</sup> This criterion has not impeded the successful review in any of the reviewed transactions brought before Investment Canada since its creation.<sup>49</sup>

There were also restrictions on foreign ownership in Canada in specific sectors of the economy, as is the case in many other countries. These sectors included aviation,<sup>50</sup> banking,<sup>51</sup> fisheries,<sup>52</sup> agriculture,<sup>53</sup> shipping,<sup>54</sup> oil, gas and uranium production<sup>55</sup> and broadcasting and cable distribution.<sup>56</sup>

## B. THE UNITED STATES

Unlike in Canada, foreign investment has caused much less political upheaval in the United States. The United States has been, up to the 1980s, a strong net exporter of capital and did not have much to fear from foreign influence in trade issues within the country. In the earlier 1970s however, with the burgeoning oil crisis, petro dollars

<sup>46</sup> Ibid., Article 14(1)(a). This regulation obviated the review of 90% of the transactions that were required to be reviewed by FIRA. See however, G.C. Glover, D.C. New and M.M. Lacourciere, *The Investment Canada Act: A New Approach to Foreign Investments in Canada*, 1985, 4 Bus. Lawyer 83 at 98 where the authors claim that the 10% of the investment categories that were retained from the FIRA days comprised 90% of the total transactional value of investments in Canada and therefore this apparent achievement of the ICA is merely illusory.

<sup>47</sup> Ibid., Article 21(1). This period is extendable to a maximum of 75 days, unless the investor agrees to the contrary. Both the FIRA and the ICA considered the review of a proposal to be based on policy rather than law. See E.J. Arnett, *From FIRA to Investment Canada*, 1985, 24 Alb. L. R. 1 at 26.

<sup>48</sup> Ibid., Article 21. The criteria determining "net benefit to Canada" are similar to those followed by FIRA and vests the Minister responsible for the implementation of the ICA with a large discretion. Article 20 provides that these criteria should be based upon the effect of the investment on labour and employment, productivity, human and other resources, technological development and benefit, national and international market competition, the extent of participation by Canada and the consistency of the investment with national, economic and cultural policies of Canada.

<sup>49</sup> Three-quarters of the 5266 investment proposals received up to the end of 1990 were not subject to review, and the 25% of those that were reviewed had all been approved. See *The Opportunities and Challenges of North American Free Trade: A Canadian Perspective*, Ottawa, Investment Canada, May 1991, at 44. See also *Investment Canada Annual Report 1990-1991*, Investment Canada, Ottawa, 1991.

<sup>50</sup> *Aeronautics Act*, 1985 R.S.C., Ch. F-2.

<sup>51</sup> *Bank Act*, 1985 R.S.C., Ch B-1.

<sup>52</sup> *Fisheries Act*, 1985 R.S.C., Ch F-14.

<sup>53</sup> *Western Stabilization Act*, 1985 R.S.C., Ch W-7.

<sup>54</sup> *Canada Shipping Act*, 1985 R.S.C., Ch S-9.

<sup>55</sup> *Territorial Lands Act*, 1985 R.S.C., Ch F-7; *Canadian Petroleum Resources Act*, 1986 Can. Stat., Ch 45; *Canada Oil and Gas Act*, S. C. 1981 C 81. The Canadian energy policy has often been subject to criticism on the basis that the Canadian Government adopted a policy of inordinate appropriation and that such policy was calculated to Canadianize the industry. See C. J. Olmstead, E.J. Krauland and D.F. Orentlicher, *Expropriation in the Energy Industry: Canada's Crown Share Provisions as a Violation of International Law*, 1984, McGill L. J. 439. Also, for a descriptive analysis of Canada's Energy Programme see E. Mendes, *The Canadian Energy Program: An Example of Assertion of Economic Sovereignty or Creeping Expropriation in International Law*, 1981, Vand. J. Trans. 475.

<sup>56</sup> *Broadcasting Act*, 1985 R.S.C., Ch B-1.

were invested in the United States leading to a 38.3 percent and 22.3 percent increase in foreign direct investment in 1973 and 1974 respectively. This figure can be contrasted with a 6 percent increase on average in the decade between 1962 and 1972. This quantum leap in foreign investment caused grave concern in Congress and led to a national inquiry being instituted which called for measures affecting foreign investors in the United States. The 27 volume and 9,000 page long final report, describing comprehensively the regulations facing foreign investors, concluded that a sufficient number of sectors were appropriately regulated, recommending that substantial change to the existing policy was unnecessary.<sup>57</sup>

Unlike Canada's comparably restrictive foreign investment policy, the United States has a liberal "open door policy" on foreign direct investment and is one of the most open economies in this respect. The United States *International Investment Policy Statement* of 1983 confirmed:

"The United States has consistently welcomed foreign direct investment in this country. Such investment provides substantial benefit to the United States ... We provide foreign investors fair, equitable and non-discriminatory treatment under our laws and regulations. We maintain exceptions to such treatment only as far as necessary to protect our security and related interests which are consistent with our international legal obligations."<sup>58</sup>

The United States has adopted the approach that the absence of regulation encourages investment and is beneficial to the United States economy,<sup>59</sup> and has therefore generally adopted a non-discriminatory treatment for foreign investors.<sup>60</sup> A commentator adds:

"Foreign nationals and companies are treated as favourably as nationals or companies of the United States with respect to the establishment and operation of enterprises in this country ... Further, on the basis of the national treatment principal investors from other countries can generally make investments in this country on the same legal terms as American investors."<sup>61</sup>

The "open door policy" and national treatment principal however, does not reflect an accurate picture of the status of foreign investment in the United States. In contrast to what the "open door policy" is perceived to be, there are numerous laws that effectively preclude this policy from taking full effect, thus impeding foreign investments in the country. An example of this inhibitive approach is the 1988

<sup>57</sup> *Foreign Direct Investment Study Act of 1974*, 15 U.S.C. 786 (1982); *Foreign Direct Investment in the United States: Report of the Secretary of Commerce to the Congress in Compliance with the Foreign Investment Study Act of 1974*, (1976).

<sup>58</sup> *International Investment Policy Statement*, 19 Weekly Comp. Pres. Doc. 1214 (September 1983) cited in J. Raby, *The Investment Provisions of the Canada-United States Free Trade Agreement: A Canadian Perspective*, 1990, A.J.I.L. 395 at 400.

<sup>59</sup> See generally, E.M. Graham, and P.R. Krugman, *Foreign Direct Investment in the United States*, Institute for International Economics, Washington, 1989.

<sup>60</sup> The United States is limited by its Constitution and by the treaty provisions governing the country in its capacity to regulate foreign investment. There are built in guarantees that are offered to foreign investors in the *Friendship, Commerce and Navigation Treaties* (FCN), the *OECD Code of Liberalization of Capital Movements*, which have a direct effect on the United States legal system, and the guarantee of due process and non discrimination entrenched in the United States Constitution.

<sup>61</sup> H.E. Bale Jr., *The United States Policy Towards Inward Foreign Direct Investment*, 1985, 18 Van J. Trans. L. 199 at 207.

“Exon-Florio Amendment” which provided the President with broad powers to review investments of foreign investors on his own initiative for any reason including those which directly or indirectly affect national security. The President may also review a foreign investment following the complaint of a third party.<sup>62</sup>

Investors may, by their own volition, serve notice on the Committee on Foreign Investment in the United States (CFIUS). In addition, the CFIUS can also decide to inquire into an investment by itself. It then advises the President of its decision with regard to an investment and the President ultimately decides whether or not the investment is contrary to national security interests. The notion of “national security” is ambivalent in this context, lacking a precise definition, and this hiatus has left great discretion to the Executive in the implementation of the Act. The Act is used infrequently and each case is evaluated individually.<sup>63</sup>

In addition, many other sectors which operate through a fixed maximum level of foreign participation are excluded from foreign investor participation entirely or partially. These restrictions are seen at the federal level in the fields of communications,<sup>64</sup> transportation,<sup>65</sup> aviation,<sup>66</sup> energy and national resources,<sup>67</sup> banking<sup>68</sup> and defence.<sup>69</sup> Federal laws such as antitrust regulations contained in the *Clayton Act* of 1914<sup>70</sup>—which prohibits direct or indirect acquisition of shares of a company when it would affect or lessen competition in such a way as to incline the creation of a monopoly—and the *Sherman Act* of 1890<sup>71</sup>—which prohibits monopolies

<sup>62</sup> *Omnibus Trade and Competitiveness Act of 1988*, Pub. L. No. 100-418, 102 Stat 1107 (West Supp. 1989) See J.A. Knee, *Limiting Abuse of Exon-Florio by Takeover Targets*, 1989, 23 Geo. Wash. J. Int'l L & Econ. 475. Also, M Sandstrom and C Coccuza, *The Omnibus Trade and Competitiveness Act of 1988: an Overview*, 1989, 3 Rev. Int'l Bus. L. 65; M. Prichard, *Status of the Omnibus Trade Bill and the Canada-U.S. Free Trade Agreement*, 1988, 2 Rev. Int'l Bus. L. 95.

<sup>63</sup> On 1 February 1990, President Bush issued an order based on the Exon-Florio Amendment, to the China National Technology Import and Export Corporation to divest its holdings in MAMCO, a United States manufacturer of aircraft components. MAMCO was a firm which fabricated custom made metal components for the use of manufacturing civilian aircraft and helicopters. See J. Mendenhall, *Recent Developments: U.S. Executive Authority to Divest Acquisitions Under the Exon-Florio Amendment—the MAMCO Divestiture*, 1991, 32 Harv.J. Int'l L. 285 at 294. See also D.S. Nance and J Wasserman, *Regulation of Imports and Foreign Investment in the United States on National Security Grounds*, (1990) 11 Michigan J. Int'l L. 926 for a discussion of Presidential powers on the regulation of foreign investments on national security grounds.

<sup>64</sup> The Federal Communications Commission may refuse to grant a broadcasting licence if the corporation applying for the licence is owned by foreigners and if it is in the national interest to refuse the grant of such licence. See *Federal Communications Act*, 47 U.S.C. 734 (1976).

<sup>65</sup> *Jones Act of 1920*, 46 U.S.C. 802 (1976 & Supp. V 1981).

<sup>66</sup> *Federal Aviation Act*, 49 U.S.C. 1301 (1976 & Supp. V 1981).

<sup>67</sup> *Atomic Energy Act*, 42 U.S.C. 2133, 2134 (1982); *Mineral Leasing Act*, 30 U.S.C. 22 (1982); *Agricultural Foreign Investment Disclosure Act*, 7 U.S.C. 3501 (1978). See also P. Scarborough, *The Foreign Investor in the United States: Disclosure, Taxation and Visa Laws*, (1985) 19 Int'l Lawyer 85 at 94.

<sup>68</sup> *National Bank Act*, 12 U.S.C. 1974. The restrictions aimed at under the banking laws of the United States are based on the nationality of the directors of a foreign investment company and not on foreign ownership.

<sup>69</sup> One of the most compelling elements of State control of foreign investment in the United States is based on national defence under the *Defence Production Act of 1950*, 50 U.S.C.A. App. 2170 (West Supp. 1989).

<sup>70</sup> *Clayton Act*, 15 U.S.C. 1981.

<sup>71</sup> *Sherman Act*, 15 U.S.C. 1981. See J. Davidow, *Extraterritorial Application of U.S. Antitrust Law in a Changing World*, 1976, Vol 8 L & Pol. Int'l Bus. 895; P.N. Swan, *International Antitrust—The Reach and Efficacy of United States Law*, 1984, 63 Oreg. L.R. 177; J.A. Kraft, *Recent Development, Antitrust Law: Extra-Territoriality: In re: Uranium Anti-trust Litigation*, 1988, 21 Harv. J. Int'l L. at 515.

created by contract, conspiracy or other ways that restrain trade—may also bring to bear serious effects on the foreign investors' investments in the United States.

## V. COMPETITION OPTIONS

### A. THE TRANSATLANTIC COMMON AVIATION AREA

As to whether there should be absolute, untrammelled competition within the Americas and between the Americas and Europe is a critical issue for the coming years. Of course, one recent suggestion has been to crystallise a “convergence of regulatory principles” between Europe and the United States in competition by establishing a Transatlantic Common Aviation Area (TCAA). This concept, suggested by the Association of European Airlines (AEA) in a policy statement,<sup>72</sup> puts forward detailed and realistic proposals on how to bring about an ideal regulatory convergence between the European region and the United States, addressing three areas:

- (i) matters in respect of which harmonisation is necessary;
- (ii) those in respect of which convergence could take the form of mutual recognition; and
- (iii) those which could in principle be left at the discretion of each party.

The TCAA concept advocates the freedom of the parties to provide services; addresses issues pertaining to airline ownership and the right of establishment; provides recommendations with regard to competition policy; and offers guidelines on the leasing of aircraft.

Since the TCAA aims at replacing traditional governmental regulatory control of such aspects of competition as market entry and pricing, the issues emerging from competition policy are by far the most complex and difficult to deal with, within the parameters of the TCAA. Although the fundamental postulates of competition in Europe (as followed through by European Union regulations) and the United States are broadly similar in intent, and both depend to a certain extent on the application of extra-territoriality in their regulations, there are obvious differences such as those embodied in the different approaches to transatlantic airline alliances. Also, the United States stringently relies on a principle of “public interest” in its air transportation policy, European competition rules are not as explicit in their policies. The basic essence of a TCAA would therefore establish the principle that matters of route sharing, capacity, pricing and frequency of services should be driven by market forces rather than be determined by governmental intervention. This way a certain commonality could be established between air transport of the two regions.

Another option of course, is to allow absolute open competition between Europe and North America. Although globalisation of competition in trade is a reality, in the case of air transport it may be premature, since the current bilateral air services

<sup>72</sup> Aeropolitical News, IATA, Ref. 744-18.11.99.

negotiations structure still seems to work, and absolute globalisation of air transport will involve the question of air transport being encompassed in the General Agreement on Trade in Services (GATS) which contains the Most Favoured Nations (MFN) treatment clause under the General Agreement on Tariffs and Trade (GATT) which later came within the purview of the World Trade Organization (WTO). Under the MFN clause, a GATS member could be required, immediately and unconditionally, to accord to the services and service suppliers of any other Member, treatment no less favourable than it accords to like services and service suppliers of any other country. This is not practical as the application of the MFN principle to international air transport would adversely affect and hold back the ongoing process of liberalisation between like minded States.

#### B. COMPETITION IN NORTH AMERICA UNDER THE WORLD TRADE ORGANIZATION

Although no State in the Americas or Europe has advocated or recommended the inclusion of air transport services in the GATS, it is worthwhile to inquire as to whether globalisation of trade in air transport would lead to a situation where it would be discussed under the GATS umbrella. It is reported that Phil Condit, Chairman of Boeing, has viewed the concept of a worldwide open skies regime as “extremely disruptive” and recommended that developing an international aviation infrastructure probably would have to occur under an international body, such as the WTO.<sup>73</sup>

At the 31st session of the ICAO Assembly which held deliberations from 19 September to 4 October 1995, the Assembly adopted a resolution which recognises ICAO as the multilateral body in the United Nations system competent to deal with air transport and develop, *inter alia*, on a continuing basis, policy guidance on the regulation of international air transport for contracting States. The thrust of this resolution is that ICAO is charged on a continuing basis to recommend policy on the economic regulation of air transport.<sup>74</sup> It remains to be seen how this mandate would be affected by the conservatism which still attaches to commercial air transport.

There has been sustained interest in the world of commerce aimed at bringing international air services within the GATS under the umbrella of GATT. The above resolution of the 31st session of the ICAO Assembly addresses this issue by recognising that ICAO has actively promoted an understanding by all parties concerned of the provisions of the Chicago Convention<sup>75</sup> and of ICAO’s particular mandate and role in international air transport. The resolution also requests WTO and its Member States to accord due consideration to the fact that ICAO has a constitutional responsibility to international air transport and which could be discharged through the results of

<sup>73</sup> Condit Supports Development of Chapter 4 Turboprops with Lower Emissions, Aviation Daily, Thursday, 4 November 1999, at p. 1.

<sup>74</sup> A31-WP/224, P/57, Report on Agenda Item 36.1-5.

<sup>75</sup> *Convention on International Civil Aviation*, signed at Chicago on 7 December 1944: see ICAO doc 7300/7 Seventh edition, 1977.

ICAO's World-wide Air Transport Conference and ICAO's continuing work on economic regulation of international air transport.<sup>76</sup>

At its 32nd Session, the ICAO Assembly, in September 1998, adopted Assembly Resolution A 32-17 containing a consolidated statement of continuing ICAO policies in the air transport field. This Resolution, in Appendix A, Section IV, reaffirms the primary role of developing policy guidance on the regulation of international air transport and, *inter alia*, requests the WTO and its Member States to accord due consideration to ICAO's constitutional responsibility for international air transport. The Resolution also requests the ICAO Council to continue to monitor the developments in trade in services and keep the Contracting States advised.<sup>77</sup>

At its 158th Session in November 1999, the Council considered and adopted a Resolution<sup>78</sup> which, *inter alia*, affirmed that the exclusion of "traffic rights" and "services directly related to the exercise of traffic rights" from the GATS is consistent with the aviation communities' general goal of gradual, progressive, orderly and safeguarded change towards market access as well as the effective and sustained participation of all States in international air transport. The Resolution also urges ICAO Contracting States that are members or prospective members of WTO to carefully examine the implications of any proposed inclusion of an additional air transport service or activity in GATS, while requesting WTO to take full cognisance of ICAO's policy on trade in services as contained in Assembly Resolution A 32-17. The Council also considers that ICAO should be actively engaged in any review of the classification of international air transport activities for the purposes of negotiation or application of the GATS to air transport.

Earlier, in the process of its deliberations, the ICAO Colloquium of 1992 considered the views of experts on whether air traffic rights should be considered trade in services and brought within the purview GATT—a proposal that had been included in the Agenda of GATT under GATS. There has been sustained debate in the aviation world whether air services performed by commercial airlines—operating both scheduled and unscheduled flights—should be included in the General Agreement on Trade in Services (GATS) of the General Agreement on Tariffs and Trade (GATT).<sup>79</sup> GATS

<sup>76</sup> *Id.*

<sup>77</sup> See Assembly Resolutions in Force (As of 2 October 1998), ICAO Doc 9730, p. III-1 at p. III-4.

<sup>78</sup> See C-WP/11247, 2/11/99, Appendix.

<sup>79</sup> GATT was a multilateral body established in Geneva on 1 January 1948 on the coming into force of the General Agreement on Tariff and Trade (GATT) negotiated and signed by 23 countries. GATT functions as the principal international body concerned with negotiating the reduction of trade barriers and with international trade relations. While being an organisation to which Member States belong, where they could use it as a forum in which they can discuss and overcome their problems and negotiate to enlarge world trading opportunities, GATT is also a code of rules which is calculated to liberalise world trade. GATS is an Annex to the main GATT agreement and has a special segment on air transport services as trade in services.

One of the agreements contained in the Final Act of the Uruguay Round (see note 116 below) establishes a World Trade Organization which will serve as single institutional framework for the GATT as well as all the agreements and arrangements concluded under the Uruguay Round. This permanent organisational framework, which replaces the GATT structure, will be headed by a Ministerial Conference at least once every two years and will include a General Council to oversee the operation of the Agreement and to act as both a dispute settlement body and a trade policy review mechanism. Therefore, all references to GATT in this paper will infer references to the World Trade Organization.

seeks to establish a multilateral framework of principles and rules for trade in services with a view to expansion of such trade under conditions of transparency,<sup>80</sup> national treatment<sup>81</sup> and progressive liberalisation.<sup>82</sup> The fundamental principle of GATT is its Most Favoured Nation (MFN) Treatment clause<sup>83</sup> whereby each party to the agreement accords immediately and unconditionally to services and service providers of any other party, treatment no less favourable than that it accords to like services and service providers of any other country. These provisions reflect the basic philosophy of GATS and play a vital role in affecting the decision of the international community on whether or not air transport services should be brought under its purview. Other features of GATS which have attracted discussion in relation to air services are provisions relating to increasing participation of developing countries within GATS<sup>84</sup> and dispute settlement.<sup>85</sup>

The issue of trade in services in general was discussed in GATT's latest round of multilateral trade negotiations launched by ministers of GATT contracting States who met in September 1986 in Punta del Este, Uruguay. The Uruguay Round was the 8th round of multilateral trade negotiations held by GATT so far,<sup>86</sup> and by far one of the most complex. This round of negotiations was assisted by the Group of Negotiators on Services (GNS) which the GATT established in 1986 to follow the services negotiations. The GNS had drafted a detailed agreement comprising 35 articles and

<sup>80</sup> Article III of GATS requires each party to publish promptly all relevant laws, regulations, administrative guidelines and all other decisions, rulings or measures of general application, by the time of their entry into force.

<sup>81</sup> GATT's national treatment philosophy provides foreign services and services suppliers with treatment no less favourable than that accorded to a country's own services and service suppliers.

<sup>82</sup> Since GATS is an Annex to the GATT agreement it should be noted that the provisions of GATS are governed by those of GATT and that both documents incorporate the same basic principles.

<sup>83</sup> Article II of GATS. Article XVI extends the MFN principle to market access.

<sup>84</sup> Article IV of GATS provides that the increasing participation of developing countries in world trade shall be facilitated through negotiated specific commitments by different parties. It also requires developed Member States to establish contact points within two years from the entry into force of the GATS agreement to facilitate the access of developing States' service providers to information related to their respective markets concerning: commercial and technical aspects of the supply of services; registration, recognition and obtaining of professional qualifications; and the availability of service technology. The provision also states that special priority would be given to the least developed States in the implementation of Article IV and particular account would be taken of the difficulties experienced by developing States in accepting negotiated commitments in view of their special economic situation and their development, trade and financial needs.

<sup>85</sup> Article XXIII on dispute settlement is considered to be well balanced and equitable and provides that if any Party should consider that another Party has failed to carry out its obligations or commitments under the agreement, it may make written representations or proposals to the other Party or Parties concerned and the latter should give sympathetic consideration to the representations or proposals so made. If no satisfactory settlement could be arrived at, the GATT agreement provides for a formal dispute settlement procedure in Articles XXII and XXIII.

<sup>86</sup> There have been 7 rounds of trade agreements so far: 1947 in Geneva; 1949 in Annecy, France; 1951 in Torquay, United Kingdom; 1960–1962 in Geneva (the Dillon round); 1964–1967 in Geneva (the Kennedy round); 1973–1979 in Geneva (the Tokyo round) where negotiations were launched at a ministerial meeting in September 1973 in Tokyo. The Tokyo round produced the most comprehensive agreements of the round of negotiations where 99 Member States participated. Negotiations of the Tokyo round were concluded in November 1979 with agreements covering: an improved legal framework for the conduct of world trade (including recognition of tariff and non-tariff treatment in favour of and among developing countries as a permanent legal feature of the world trading system; non-tariff measures (subsidies and countervailing measures); technical barriers to trade; government procurement; customs valuation; import licensing procedures; a revision of the 1967 GATT anti-dumping code; bovine meat; dairy products; tropical products; and, an agreement on free trade in civil aircraft. The agreements contained special and more favourable treatment for developing countries.

five annexes, where one of the annexes comprises provisions on air transport services. The Annex on Air Transport Services applies both to scheduled and unscheduled air services and generally excludes its application to the following:

- air traffic rights covered by the Chicago Convention, including the five freedoms of the air<sup>87</sup> and bilateral air services agreements; and,
- directly related activities which would limit or affect the ability of parties to negotiate, grant or to receive traffic rights or which would have the effect of limiting their exercise.<sup>88</sup>

Notwithstanding the above provisions however, GATS applies *inter alia* to computer reservations systems in air transport; the selling or marketing of air transport services; and transactions in civil aircraft.<sup>89</sup> The proposition, i.e. that GATS would not apply to air traffic rights covered by the Chicago Convention but apply to the selling or marketing of air transport services, creates *in limine* a dichotomy that has to be resolved. Air traffic rights that result from the Chicago Convention's provisions is the tool with which the selling or marketing of air transport services are carried out and the two are inextricably linked to each other. Confusion is worse confounded by Article 1 of GATS which defines trade in services as *inter alia* the supply of a service from the territory of one party into the territory of another party. The application of this definition to the provision of air transport services by an air transport enterprise would lead one to the inexorable conclusion that the definition of trade in services provided in GATS refers implicitly to the exercise of air traffic rights—which are obtained by virtue of the Chicago Convention. The explicit exclusion of air traffic rights in GATS is therefore ambivalent.

For the present, the overall purpose of including air transport services in GATS seems to be to apply the broad principles of market access and the MFN philosophy to the selling or marketing of air traffic services. The purview of GATS in controlling air transport services would therefore be considered only in situations where air traffic rights are exercised multilaterally or plurilaterally. GATS would not apply in instances where States elect to use Article 6 of the Chicago Convention which governs all bilateral air services agreements and requires that the permission of a grantor State is necessary for a commercial air transport enterprise to operate air services in to or out of a State. In any event, the Annex on Air Transport Services to GATS does not reflect

<sup>87</sup> The five freedoms of the air were created at the Chicago Conference of 1944 and comprise the following:

- 1) the right to fly over the territory of a State without landing;
- 2) the right to land in the territory of a State for non-traffic purposes;
- 3) the right to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;
- 4) the right to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses; and,
- 5) the right to take on passengers, mail and cargo destined for the territory of any other contracting State and the right to put down passengers, mail and cargo coming from any such territory.

<sup>88</sup> *Annex on Air Transport Services*, General Agreement on Trade in Services, MTN. TNG/W/FA Article 2.

<sup>89</sup> *Ibid.*, Article 3.

confidence in itself by providing, in Article 6 of the Annex, that the operation of the Annex shall be reviewed periodically or at least every five years.

There are two provisions in the Annex on Air Transport Services in GATS which are also worthy of mention. One is on the access to and use of publicly available services offered by a Party on reasonable and non-discriminatory terms,<sup>90</sup> and the other is on dispute settlement procedures which could be invoked only where dispute settlement procedures provided for in bilateral air services agreements, or under the Chicago Convention itself, have been exhausted.<sup>91</sup>

The regulation of air transport services lies within the purview of ICAO which maintains in its Legal Bureau a register of all bilateral air transport agreements. The bilateral air transport agreement usually includes a reciprocal agreement between States for their carriers to have fair and equal opportunity in operating air services between their territories without unduly affecting the air services operated by each other. Under a bilateral agreement, capacity offered by carriers must bear close relationship to the needs of the people using air transport.<sup>92</sup> These regulatory provisions have so far succeeded in protecting carriers of lesser developed States by obtaining for them fair and equal opportunity to operate air services in routes that are shared by more established carriers of wealthier nations.<sup>93</sup>

Since GATS cannot sustain air transport services within a bilateral framework, it now remains to be seen whether the aviation community would move in the future toward placing air traffic rights in a multilateral or plurilateral system. In such an eventuality GATS would doubtless rejuvenate its efforts at seeking to include air transport services within its purview under liberalised market access and the MFN treatment clause. In this context, the role played by ICAO—the guardian and mentor of international civil aviation—becomes relevant.

ICAO has the mandate (under the Convention on International Civil Aviation signed in Chicago in 1944), experience and expertise in a wide range of air transport matters—technical, economic and legal. Issues of operating arrangements, market access, pricing and capacity for the designated airlines of each State are the subject of bilateral air transport agreements between States, except for arrangements within the European Economic Community for mutual relations between Member States. International air transport is, in effect, conducted under an extensive network of some 1,800 separate bilateral agreements or treaties. ICAO has taken the position 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.

<sup>90</sup> Ibid., Article 4.

<sup>91</sup> Ibid., Article 5.

<sup>92</sup> These conditions are the result of an agreement reached on 11 February 1946 by the United States and the United Kingdom in Bermuda. For a clear analysis of the Bermuda Agreement see Ramon de Murias, *The Economic Regulation of International Air Transport*, McFarland, North Carolina, 1989, 52–72.

<sup>93</sup> See generally, R.I.R. Abeyratne, *The Air Traffic Rights Debate—A Legal Study*, (1993) XVIII-I Annals of Air & Sp. L. 3

ICAO believes it important to draw to the attention of GATS and its Member States certain critical features of international air transport which are relevant to any present or future consideration of how air transport should be treated in the context of the trade in services negotiations. The main consideration that impels ICAO to steadfastly maintain its position as the guiding force behind air transport services, is that it feels that bilateralism at the operating level has over the decades proved to be a flexible system which allows States to pursue their objectives, whether these be open and competitive or more protective or restrictive regimes for their airlines. ICAO strongly maintains that any external multilateral framework which sought general or limited application would need to recognise and be compatible with this existing structure of air transport.

Nevertheless, multilateralism in the form of a broad-based consensus on principles and guidance to States in the conduct of their air transport activities has enjoyed renewed interest in ICAO in recent years. While seeking to progressively develop positions and guidance to assist States in their regulatory/economic activities, ICAO recognises the sovereignty of States in pursuing their own national air transport policies and objectives. ICAO's role in this sphere is therefore merely consultative and recommendatory without being incompatible with liberalisation in this sector. ICAO has also expressed its resolve to continue to co-operate with GATT and the GNS in its trade in services discussions in order that ICAO's views and concerns, and the particular features of the international air transport sector, are properly taken into account by GATT and the GNS.

The Organization's position on the regulation of air transport services was formally adopted at its 7th Assembly held in June/July 1953 where Assembly Resolution A 7-15 resolved that there was no prospect at the time of achieving a universal multilateral agreement, although ICAO acknowledged that the achievement of multilateralism in commercial rights remained an objective of the Organization. This Resolution is still in force and reflects ICAO's commitment to achieving an acceptable multilateral basis for air transport services.

Later, at its 26th Session in September/October 1986, the ICAO Assembly adopted Resolution A 26-14, which reaffirmed that ICAO was the multilateral body in the United Nations system competent to deal with international air transport and urged contracting States which participated in any multilateral negotiations on trade in services where international air transport was included to ensure that their representatives were fully aware of potential conflicts with the existing legal system for the regulation of international air transport. The Resolution also requested the ICAO Council to actively promote a full understanding by international bodies involved with trade in services of the role of ICAO in international air transport and the existing structure of international agreements regarding air transport. This Resolution helped sensitise States and GATT regarding the air transport sector. Although this Resolution is no longer in force, it reflects adequately ICAO's philosophy on the subject. In view of the significant recent and possible future developments in the trade in service

negotiations, the question arises however, as to whether this policy is fully adequate to continue to serve the interests of ICAO and international air transport over the next few years, or whether it requires reassessment and additional directives from the Assembly.

Assembly Resolution A26-14 gave guidance to States and the Council and expressed certain concerns but it did not set out an organisational view on the inclusion of international air transport in a multilateral agreement on trade in services. A future session of the Assembly may consider developing such a view for transmission to GATT and the GNS as well as to Contracting States.

One possible view the Assembly may consider might be that air transport should not be included in a services agreement. The adoption of such a position by ICAO could be grounded on two of the concerns found in Resolution A26-14. One is the Organization's concern about ICAO's role as the United Nations specialised agency responsible in air transport matters. The other is the Organization's concern for the integrity of the Chicago Convention principles and arrangements and the widespread system of bilateral air transport agreements that are a consequence of those principles.

At ICAO's air transport Colloquium of April 1992, at least two speakers expressed the need to exercise caution on the subject of handing over air transport services to GATS. The International Air Transport Association (IATA)'s Director General, Gunter Esser, informed the Colloquium that most international airlines categorically opposed the inclusion of air transport services in GATS. Dr. Esser, while recognising that national interests clearly exist in air traffic rights issues, drew the attention of the Colloquium to the economic concerns of the airline industry. He saw the need for a balance between economic regulations and a free market, on the basis that bilateralism *per se* cannot exist on its own in view of multilateral practices in such areas as tariff co-ordination which have proven that plurilateralism has a distinct edge over bilateralism in commercial air transport.<sup>94</sup> Dr. Esser's assessment was that any such plurilateralism would be best developed by ICAO and not a trade institution such as GATT.<sup>95</sup>

Another speaker at the Colloquium, Vijay Poonosamy, said:

"The underlying premise of GATT is that free trade in the air transport sector will promote economic growth and development. I beg to differ. To enable international air transport to deliver its many and varied goods in a safe and orderly manner we must steer a common sense and enlightened course between regularity overkill and destructive laissez-faire. For more than 45 years ICAO has provided a means for governments to co-operate in the development and maintenance of an effective trading environment for international air transport. Today ICAO provides the proper forum for charting such a vital course for survival."<sup>96</sup>

Mr. Gary Sampson, Director, GNS Division GATT, expressed the view that the airline industry over the last decade had changed dramatically, moving towards

<sup>94</sup> ICAO WATC-1.10, 6/4/92 at 1. See also, *Airline Business*, June 1992, at 37. Also, Ron Katz, *ICAO Montreal Colloquium, the Future of Air Transport Regulation*, 10 IFALPA International Quarterly Review, June 1992, 13-15.

<sup>95</sup> *Aviation Daily*, April 9 1992, at 56.

<sup>96</sup> ICAO Doc. WATC-3.11, 8/4/92 at 4.

reduced administrative regulation of airlines and the promotion of competition through greater reliance on market forces as opposed to government fiat in determining service levels such as fares, capacities and frequencies. Sampson further stated that although there was clear distinction between “hard rights” such as air traffic rights and “soft rights” such as marketing and sales rights, the application of GATS both to hard and soft rights would enable participants to concentrate their efforts on doing business without restraint under the GATS agreement.<sup>97</sup> Mr. David Buckingham, the Australian delegate to the Colloquium was of the view that what the international community needed was not a simplistic affirmation of the relevance to aviation of the GATT principles of free trade, but a broad-based agreement that liberalised trade in aviation rights.<sup>98</sup> Mr. Daniel M. Kasper, author,<sup>99</sup> stressed that fundamental GATT principles such as the unconditional MFN and market access clauses were likely to impede rather than advance liberalisation. Instead, he advocated a conditional MFN treatment scenario under a plurilateral system where only those parties willing and able to accede to the terms of the said agreement would be required to comply.<sup>100</sup>

The main strength of the GATT approach to air transport services lies in its commitment to liberalisation within a defined time scale. The discipline of GATT in accomplishing its objectives also acts as a positive factor. In a general sense GATT is viewed with favour by those who see some merit in its role as custodian and guide of air transport services, for two reasons:

- i) the modern trend of aviation towards globalisation, privatisation and cross-border alliances and Computer Reservations Systems (CRS) conglomerates and the overall tendency of air transport operators to seek market access, have made bilateralism obsolete. The changing structure of international civil aviation needs to consider multilateralism which is the ideal of GATT.
- ii) the Uruguay Round which intends to envelope air transport services in the GATT concept advocates a process of gradual liberalisation (firstly only of “soft” rights), negotiated market access and an efficient dispute settlement system.<sup>101</sup>

Arguments against the GATT’s role in air transport services are however, more compelling, the most basic being that aviation issues must essentially come within the purview of an organisation specialised in international civil aviation such as ICAO. The strongest objection is aimed at the principles of GATT such as the unconditional MFN treatment philosophy which is calculated to lead to competitive imbalances

<sup>97</sup> ICAO Doc. WATC-313, 8/4/92 at 4.

<sup>98</sup> ICAO Doc. WATC-315, 8/4/92 at 5.

<sup>99</sup> See Daniel M. Kasper, *Deregulation and Globalization, Liberalizing International Trade in Air Services*, Balinger, Massachusetts, 1988.

<sup>100</sup> ICAO Doc. WATC-317, 8/4/92 at 5.

<sup>101</sup> Geoffrey Lipman, *Is GATT just another Four Letter Word?* Aerospace World, Vol IV September 1990, 97 at 98. See also, Daniel M. Kasper, *The GATT approach—Applying the GATT to Air Services—Will it Work?* ITA Magazine, November/December 1989, 5 at 9–12.

between airlines, and the long and tedious process of GATT which would take years to resolve disputes, whereas under the existing bilateral system more expeditious measures are available.<sup>102</sup> To overcome this problem, experts have suggested that GATT's MFN rule should apply only to "soft" trading rights in aviation (such as ground handling, CRS systems and sales) and "hard" rights should be included in a multilateral agreement outside GATT.<sup>103</sup> Kasper opposes the application of the MFN philosophy to air services:

"... unconditional MFN would deprive air service negotiators of essential flexibility. Trade barriers in air services vary widely in form and impact across markets, forcing even liberal nations to discriminate when granting traffic rights in order to counteract the sometimes severe restraints their carriers encounter in foreign markets. Due to the nature of this non-tariff barriers and to the fact that they often arise in ancillary markets, a universal solution, such as the elimination of the ancillary restraints by all signatories, would be exceedingly difficult to negotiate and to enforce.

Under these circumstances, adopting unconditional MFN would undermine the ability of governments to tailor packages of economic rights that offset the mix of restraints in particular foreign markets. It would be especially troubling for those markets characterised by a high degree of co-operation between the national airline and the government."<sup>104</sup>

There is also the disturbing thought that unlike in a bilateral negotiation for air traffic rights, where two States can readily analyse the economic implications of sharing air traffic rights between points of the two States, the MFN principle would create a free-for-all, the consequences of which would not be capable of being economically assessed or controlled.

IATA has suggested that ICAO adopts 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 aircraft. This suggestion has been strongly resisted by the International Chamber of Commerce (ICC) which argues that the aviation field should retain its purity of having characteristics and attributes that are susceptible to negotiation, although air traffic rights should be negotiated under a more efficient system than the prevailing bilateral system. Kasper shares a compatible view:

"To achieve true liberalisation in air services, a new approach will be required, one that focuses on securing agreement among a relatively small group of liberal trading partners willing to abide by a strict condition on a reasonably level playing field."<sup>105</sup>

Although GATS does not seek control over air traffic rights, it is appropriate to consider this subject as a future consideration of the overall GATT philosophy. It is evident that the principles of GATT are inconsistent with the present legal regime that applies to air traffic rights. The Chicago Convention is the sole legal document that

<sup>102</sup> Kathryn B. Creedy, *Should Air Transport be in or out of GATT?*, *Interavia*, Vol. 9/1990, 716 at 717.

<sup>103</sup> *Id.*

<sup>104</sup> Daniel M. Kasper, *Deregulation and Globalization, Liberalizing International Trade in Air Services*, Balinger, Massachusetts, 1988, at p. 96.

<sup>105</sup> *Ibid.*, Preface.

governs the principle of air traffic rights and explicitly recognises the principles of State sovereignty in Article 1. The sovereignty of a State reserves for that State the right to control activities within its territory and, *a fortiori*, the Convention strengthens this concept by requiring that special permission of a State must be obtained for the operation of air services in to and out of its territory by an air transport operator of another State.

The foregoing discussion reflects that, ever since the question of commercial air traffic rights arose as a corollary to the principle of sovereignty as recognised in the Paris Convention and later, in the Chicago Convention, air transport has been viewed as a social need, run on equality of opportunity that is not a mere theoretical concept but one that can be practically enjoyed by States.<sup>106</sup> To these qualities have been added the view of Dr. Wassenbergh, that State policy in civil aviation must protect the integrity and identity of the national society.<sup>107</sup> The Chicago Convention, in its Preamble calls for co-operation between nations and peoples so that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically. The Chicago Convention further charges ICAO with the task of ensuring the prevention of economic waste caused by unreasonable competition,<sup>108</sup> and insuring that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines.<sup>109</sup> The critical question therefore is whether multilateral liberalisation of the bilateral air services agreement would preclude some States from having a fair opportunity to operate international airlines on an equal-opportunity basis. It is only logical to conclude that the answer to the question of whether multilateralism should ultimately replace bilateralism would lie in a clear perception of what is meant by the term "multilateralism" in this context, and whether multilateralism would interfere with the States' right to the practical enjoyment of fair and equal opportunity in the operation of air services.

<sup>106</sup> See John C. McCarroll, *The Bermuda Capacity Clauses in the Jet Age*, Journal of Air Law and Commerce (JALC), Vol. 29, Spring 1963, No.2 115 at 119 where the author says: "fair and equal opportunity ... to operate should mean ... equality of practical capability to operate".

See also, P. Van Der Tuuk Adriani, *The Bermuda Capacity Clauses*, JALC, Vol. 22 Autumn 1955, No 406 at 413.

<sup>107</sup> Dr. H.A. Wassenbergh lists seven objectives of a State's policy in respect of modern civil aviation. They are :

- a) to contribute to the functioning of the international community of States as a total legal order by upholding and further developing the rule of international law;
- b) to protect the integrity and identity of the national society;
- c) to promote the nation's participation in man's activities in the air and space;
- d) to create the best possible conditions and opportunities for use by the public of aviation and space activities;
- e) to increase the benefits to be derived from the use of the air and outer space for its nationals;
- f) to promote the further development of technology and the knowledge of man;
- g) to co-operate with other States on the basis of equal rights in order to bridge conflicting national interests and achieve the aims mentioned above. See H.A. Wassenbergh, *Reality and Value of Air and Space Law*, III Annals Air and Space L., McGill, Canada, 1978, 323 at 352.

<sup>108</sup> Chicago Convention, see note 75 above, at Article 44(e).

<sup>109</sup> *Ibid.*, Article 44(f).

### C. NATURE OF WTO'S COMPETITION RULES

The World Trade Organization which—unlike GATT—is not an agency of the United Nations, has reached an understanding with ICAO to address the issue of air traffic rights at an appropriate time in the future.<sup>110</sup> It is therefore very relevant to examine the competition rules of WTO.

The genesis of competition law in trade and, therefore, of WTO rules on competition, may well lie in the United Nations Conference on Trade and Employment, held in Havana in November 1947. This conference laid the ground for the International Trade Organization (ITO), the charter of which had two chapters relating to competition. Chapter III of the Charter of the ITO provided that no Member shall impose unreasonable or unjustifiable impediments that would preclude other members from obtaining on equitable terms, facilities for economic development. Chapter V, which provided for the elimination of restrictive business practices, required that each Member will take appropriate measures, individually or through collective involvement, to prevent business practices from affecting international trade thereby leading to restrained competition, limited access to markets or fostered monopolistic practices.<sup>111</sup> The ITO competition rules were embellished with controls over price-fixing and other forms of anti-competitive practices endemic to private enterprises. However, the functioning of ITO never attained fruition and these provisions remained academic. A second attempt was made by the United Nations Economic and Social Council (ECOSOC)<sup>112</sup> and this effort too was destined for failure. The third attempt, made by GATT in 1959, also failed to elicit a concrete proposal. Later, the Organization for Economic Co-operation and Development (OECD) established a system of exchange of information and a procedure for consultation of competition rules among enforcement authorities.

WTO was established on 1 January 1995 and will administer the new global trade rules, agreed in the Uruguay Round, which came into effect on the same day. These rules, which are the result of seven years of negotiations among Member States of GATT, establish the rule of law in international trade—estimated at \$ 5 trillion in 1995. The WTO involvement in world trade is estimated to raise the fiscal proportions of trade to \$ 500 billion by the year 2005.<sup>113</sup> The WTO has a membership of 150 States and is far wider in scope than its predecessor, bringing into the multilateral trading system trade in services, intellectual property protection and investment. Unlike GATT, which was a provisional treaty serviced by an *ad hoc* secretariat, WTO is a fully fledged international organisation in its own right and administers a unified package of agreements to which all Member States are committed. In other words, it is an

<sup>110</sup> A31-WP/224, P/57, 2/10/95 at 36.1:17.

<sup>111</sup> For a detailed discussion of the ITO, see Robert R. Wilson, *Proposed ITO Charter*, American Journal of International Law, Vol. 41, No. 4, October 1947, p. 879 at pp. 881 and 882.

<sup>112</sup> U.N. Economic and Social Council, *Official Records, 134th Session, 546th meeting* (5/SR.546 September 11 1951). See also Report of the *ad hoc* Committee on Restrictive Business Practices, (E/2380, March 30 1953).

<sup>113</sup> *Focus Newsletter*, WTO, Geneva, January/February 1995, at p. 2.

improved version of GATT and serves as an effective watchdog of international trade and management consultant. Its economists are required to keep a close watch on the pulse of the global economy and provide studies on the main trade issues of the world.

WTO considers that the following four fundamental factors are shaping the world economy: the broader integration of the world economy; the sharply different trends in the developed and developing countries; the spread of market-oriented reforms; and the end of the cold war.<sup>114</sup> On the subject of market-oriented reforms WTO believes:

“If there are no rules in trade then the resulting anarchy will inevitably lead to conflict. International norms not only ensure freedom for economic agents to operate in their commercial interest across national frontiers. They also enhance the freedom of governments in their trade policy interventions, by defining the scope of actions permissible within the confines of international law. The behaviour of all governments becomes more predictable when all accept the rules of the game.”<sup>115</sup>

Obviously, WTO believes that a coherent set of rules followed in conformity with the accepted norms of international law should govern competition. This does not necessarily mean that WTO is against free trade. It merely means that free trade has to be conducted according to accepted universal norms and these norms have been explicitly laid out in the WTO Agreement. The trade in services portion of the agreement carries specific rules of competition. One of the seminal principles of the agreement requires each member State to accord immediately and unconditionally to services and service suppliers of any Member, treatment no less favourable than that it accords to like services and service suppliers of any other country.<sup>116</sup> Called the most favoured nations treatment (MFN) clause, this provision *in limine* establishes common ground between trading partners and creates certain parameters of activity for partners to follow. The MFN clause is the cornerstone of the WTO principles and acts as the fundamental postulate on which other WTO competition rules are based.

Transparency is another concept which has been recognised for practical applicability in the WTO rules. Accordingly, each Member is required to publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of the agreement.<sup>117</sup> There is also the requirement of publication of international agreements pertaining to or affecting trade in services to which a Member is a signatory.<sup>118</sup> Article XVII of the agreement lays down the principle of national treatment which requires each Member to accord to services and service providers of any other Member, in respect of all measures affecting the supply of services, treatment

<sup>114</sup> See speech of Peter D. Sutherland, Director General of WTO, *World Trade Organization Press Release* PRESS/1, 27 January 1995 (95-0156) at 1.

<sup>115</sup> *Ibid.*, at p. 5.

<sup>116</sup> *General Agreements on Tariffs and Trade, Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations* (done at Marrakesh, April 15 1994), 33 I.o.M. 1125 (1994), Annex 1B, Part II Article II.

<sup>117</sup> *Ibid.*, Article III.

<sup>118</sup> *Id.*

no less favourable than it accords to its own like services and service suppliers. This provision is effectively tied up with the principle of elimination of all discrimination from the applicability of the agreement, as reflected in Article V, achieving the dual goal of elimination of existing discriminatory measures and prohibition of new or more discriminatory measures.

The requirement for equality of treatment is also reflected in provisions related to market access, whereby the agreement requires, in Article XVI, treatment no less favourable from any Member to others than that uniformly provided under WTO rules.

It is claimed that, since the primary purpose of the WTO system is to achieve trade among Members as liberally and fairly as possible while retaining the essence of non-discrimination in trade practices, the WTO system should guarantee a fair and equitable opportunity for market access by enterprises of Members to the national markets of other members. This is done mainly through the removal of governmental barriers to the extent possible and the convergence of national regulatory regimes such as those which relate to intellectual property rights.

One of the most serious challenges faced by WTO in this regard is the claims by some States of "unfair trade" by others, where the claimant States feel victimised by private business practices of enterprises of other States. The corollaries of anti-dumping is one such example, where, the exporter is faced with the situation in which imports to his country are precluded by his country, with a view to compelling the consumption of the exporters goods within the country of production. This practice often leads to price hiking and protectionism within a market. The WTO rules therefore strive for fair and equal opportunity in competition, the same way the bilateral air services agreement requires.

One of the major considerations of the WTO is the perceived incompatibility between business practices of countries and uniform competition rules which are required to be enforced globally. There is an obvious link between business systems and corporate behaviour on the one hand, and competition rules (or the lack thereof) on the other. There is also probably a functional relationship between them in that competition rules partly reflect existing business systems and corporate behaviour (a regulatory system functions well only if it is fundamentally accepted). Also, business systems and corporate behaviour often adjust to, and take advantage of the possibilities opened by competition rules.

To that extent, the disparities between competition rules, on the basis that what is permitted in one State may be prohibited in another, may influence disparities in business systems and corporate behaviour and may constitute an impediment for enterprises which seek entry into another market. Some examples are cited below.

In the European Community where governmental barriers such as tariffs and import restrictions have been removed, competition policy measures play a vital role in ensuring that the common market operates without hindrance by private restrictive

business practices. In the EC, the role of competition policy has increased dramatically with the progressive integration of the common market.

In the Structural Impediment Initiative (SII) negotiated between the United States government and the Japanese government in 1989–1990, business customs and corporate behaviours were the major issues. The United States government has claimed that restrictive business customs and corporate behaviour were the major impediments which restricted effective market access to the Japanese market by foreign enterprises. In accordance with the SII, both governments have agreed that an increase of competition rules in Japan would increase market access to the Japanese market by foreign enterprises by removing private restrictive business practices. A number of reforms of the Japanese Anti-monopoly Law resulted from this agreement including an increase of administrative surcharge and criminal fine to be imposed on enterprises when they engage in cartels.<sup>119</sup> This functional relationship between competition rules and business systems and corporate behaviour, rooted as they are in cultural, economic and political traditions, may however, often place limitations upon possible achievements attained by the applicability of partial harmonisation of competition rules. Differences in business systems and corporate behaviour are generally wide-ranging and complex, and the application of competition rules often may fail to bridge the gap between the two elements. This notwithstanding, a vigorous enforcement of competition rules in trading nations may still be able to play a useful role in preparing common rules which could be made applicable to trading nations. The adoption of common rules of conducts for enterprises may well reduce undue imbalances in different business systems and could pave the way for enterprises to compete for roles in markets of trading states outside their own market place.

WTO should also take into consideration the fact that as globalisation of national economies is achieved, through the removal of governmental barriers to trade such as tariffs and import restrictions, new trade issues may arise. One such issue is the possible incompatibility between different regulatory/business systems among trading States. Differences in domestic regulatory systems and in business customs and behaviours often emerge as barriers to trans-national business activities. These differences may take the form of inconsistencies between technical standards, taxation, environmental protection measures, labour standards and other barriers which hamper enterprises seeking to engage in trans-boundary trade. Such differences obviously create disparity among the States concerned.

Extra-territoriality is one concept which could affect more than one jurisdiction in the application of domestic trade policy. The United States, the European Community and Germany are proponents of extra-territoriality where competition rules are applied to commercial conduct of foreign enterprises which conduct business in places other than those whose domestic markets are affected by such trade. In the

<sup>119</sup> See Matsushita, *The Structural Impediments Initiative: an Example of Bilateral Trade Negotiation*, Michigan Journal of International Law, Vol. 12, No. 2, Winter 1991, at pp. 436–449.

seminal *Alcoa* case<sup>120</sup> of 1945, the United States courts established the “effects” theory, whereby commercial conduct carried out overseas but which is intended or calculated to affect the United States would be subject to United States antitrust laws. This doctrine has been followed by the courts in the United States with an unfailing consistency, culminating in recent guidelines on international commercial operations adopted by the United States Justice Department.<sup>121</sup> These guidelines contain principles that give the United States a wide scope of extra territorial jurisdiction in respect of anti competitive practices which foreign enterprises follow in countries outside the United States, provided such activities adversely affect the United States’ market in that particular commercial activity. One of the most compelling features of this legislation is its emphasis on “market access” relating to United States’ businesses in foreign countries. A number of hypothetical examples incorporated in these guidelines reflect that the Department of Justice would challenge the conduct of foreign enterprises in foreign countries if such enterprises would hinder United States’ enterprises from using opportunities of exportation of goods to a foreign country or investing in a foreign country.

In the famous *Woodpulp* case<sup>122</sup> the Court of Justice of the European Communities decided that the EC competition rules apply to agreements of foreign enterprises which are entered into outside the European Community as long as they are implemented within the common market.

One cannot deny that in this era of global economy, some degree of extra-territoriality in the enforcement of national competition rules is inevitable. A State would therefore be seen as being justified in applying its competition rules to the conduct of foreign enterprises abroad when conduct which occurs in a foreign country affects its economy adversely, particularly where the State in which such conduct occurs has no competition rules or has no intention to prohibit such conduct. This phenomenon is easily reflected by trans-national business entities who may engage in restrictive business practices in a “twilight zone” where no State can fully exercise jurisdiction and yet harmful effects of such restrictive business practices may be felt in one or more States. To say that there should be no extra-territoriality of any kind in the application of competition rules would mean that such trans-national entities can engage in anti-competitive conduct with impunity.

There is, of course, the consideration that an extra-territorial application of competition rules is a costly business both for the enforcement agency and for the foreign defendants, and is often a second-best solution to a problem which essentially inquires as to how to cope with trans-national anti-competitive conduct. An extra-territorial application of competition rules is often not as effective as it would be if applied domestically. A State which attempts to apply its anti-competitive laws

<sup>120</sup> *United States v. Aluminium Company of America*, see note 25 above.

<sup>121</sup> See *BNA, Antitrust and Trade Regulation Report*, Vol. 67, No. 1685 (20 October 1994) at p. 488 *et seq.*

<sup>122</sup> *Ahalstrom Osakeyhtio v. Commission*, (1988) ECR 5193.

extra-territorially to a defendant enterprise located abroad could always face difficulties of enforcement and considerations of forum and jurisdiction. There could also be disabling legislation in a foreign State which may effectively preclude extra-territoriality.

The *Watchmakers of Switzerland* case<sup>123</sup> of 1955 exemplifies the essential commercial law principle of the United States, that applicability of anti-trust laws on foreign enterprises may often entail conflict with legislation of other States. The court in this case held that a watch repair enterprise, conducted in the United States by two Swiss corporations, could be subjected to the domestic laws of the United States. The court further held that in order for a foreign corporation to be present within the jurisdiction of a court for the purpose of service of process, there must be proof of continuous local activities and a showing that under all the circumstances of the case the forum is not unfairly inconvenient. Even though the two Swiss entities had no property in the United States and did not carry out their activities directly (the business activities of the Swiss corporations were carried out by an American corporation in the United States), since the Swiss corporations determined the prices and terms of the business enterprise, the court further held that the Swiss corporations could be subjected to anti-trust statutes and tariff laws of the United States.<sup>124</sup>

In the watershed case of *Laker Airways Limited v. SABENA Belgian World Airlines*,<sup>125</sup> it was held that territoriality-based jurisdiction allows states in the United States to regulate the conduct or status of individuals or property physically situated within a territory even if effects of the conduct are felt outside that territory, and conversely, conduct outside a territory, which is calculated to have a substantial effect on that territory, may also be similarly regulated. It was also held that a state has jurisdiction to prescribe law governing the conduct of its nationals whether such conduct takes place inside or outside the territory of that state. Accordingly, the plaintiff—Laker Airways Limited, a British corporation seeking remedy in the United States—whose activities in question took place in countries other than the United States, was deemed to be subject to United States anti-trust legislation on the basis that such activities gravely impaired United States' interests.<sup>126</sup> In deciding upon the contentious question whether the law of the United Kingdom should apply to the plaintiff, the court compared the diametrically opposed anti-trust legislation of the United Kingdom and the United States and held:

"We find no indication in either the statutory scheme or prior judicial precedent that jurisdiction (by the United States) should not be exercised. Legitimate United States interests in protecting consumers, providing for vindicating creditors' rights, and regulating economic consequences of those doing substantial business in our country are all advanced under the congressionally prescribed scheme. These are more than sufficient jurisdictional contacts under

<sup>123</sup> *United States v. The Watchmakers of Switzerland Information Center Inc. et al.*, 133 F. Supp. 40.

<sup>124</sup> *Ibid.*, at 41.

<sup>125</sup> 731 F.2d 909 (1984).

<sup>126</sup> *Ibid.*, 910.

*United States v. Aluminium Co. of America*<sup>127</sup> and subsequent case law to support the exercise of prescriptive jurisdiction in this case.”<sup>128</sup>

In the United States, the scope of antitrust legislation and protection thereby extends to those persons who are either directly or indirectly affected adversely by antitrust violations by third parties. The adverse effect on the plaintiff must be one that the laws were written to guard against. An example of this principle can be seen in the *Uranium Anti-trust Litigation* of 1979<sup>129</sup> where a business entity which indulged in a “tying arrangement”<sup>130</sup> to sell its product was considered a violation of antitrust legislation. The tie-in resulted in a drop in demand for the product concerned, giving way to a drop in prices and adversely affecting other competitors of the product in the market.

The role of WTO in extra-territoriality becomes significant when one considers the eventuality where the extra-territorial application of competition rules becomes too costly or burdensome on the States concerned. WTO offers the alternative of its own dispute settlement process and a framework within which Members may seek positive comity and a certain convergence or harmonisation of competition rules. There have been several proposals for convergence, the most practical and well thought out of which is the Draft International Antitrust Code (DIAC) proposed by a group of competition law scholars, called the Munich Group. The DIAC proposes that there should be a comprehensive international antitrust code covering the major areas of competition law such as horizontal agreements, vertical agreements, mergers and acquisitions, the relationship between competition law and industrial policies and others. It also recommends the establishment of an international antitrust agency which shares the responsibility of enforcement of international competition rules with the national governments.

Ideas expressed in the DIAC are similar to Chapter V of the ITO Charter, giving one the impression that the DIAC may well have been drafted along the lines of the schemes of international antitrust enforcement contemplated by the ITO Charter. The DIAC remains the most ambitious of the proposals made so far in recent years.

Another attempt at international antitrust regulations is reflected in the work of a task force established by the American Bar Association which issued a report (ABA Report) advocating an agreement among States with regard to some basic principles on unlawfulness of cartels and unification of filing requirements under the merger laws of various States. The report contains a modest recommendation seeking partial harmonisation through an agreement among States on basic principles and does not

<sup>127</sup> *United States v. Aluminium Company of America*, see note 25, above.

<sup>128</sup> 731 F.2d 909 (1984) at 945–946.

<sup>129</sup> *In re Uranium Antitrust Litigation, Westinghouse Electric Corporation v. Rio Algom Limited et al.*, 473 F.Supp. 393 (1979).

<sup>130</sup> A tying arrangement is the sale of one item (the tying product) only on condition that the buyer would take the second item (the tied product) from the same source. Such arrangements are *per se* unreasonable and violative of antitrust laws if the tie-in involves two distinct products, and the party has sufficient economic power in the tying market to impose significant restraints in the tied product market.

seek the establishment of a comprehensive international authority to enforce international rules.

Professor Eleanor Fox of New York University Law School has developed the idea of the DIAC further, where she proposes a scheme in which States would agree on “a few fundamental world-linking principles” of competition policy such as, *inter alia*, prohibition of cartels and positive comity.<sup>131</sup> Fox’s proposal basically requires each State to carry out convergence of competition rules while adopting fundamental principles established in an international agreement.

The advantage of the DIAC approach to establish an international code is that in such an instrument, rules and obligations of Member States would be clear and Member States would have a clear goal to achieve. It must be mentioned that a somewhat similar approach has been made within the framework of the WTO, in the area of intellectual property. In the Agreement on Trade-related Intellectual Property Rights (TRIPs), principles with regard to the minimum protection of intellectual property rights and the enforcement of the rights under intellectual property laws are clearly laid out, and Members are obligated to incorporate these principles in their domestic legislation, while allowing for a grace period in the case of developing countries. It would not be incorrect to say therefore that in this respect, the DIAC approach has already a precedent in the WTO system.

The disadvantage of a comprehensive international code approach may be that it lacks flexibility. It is often true that when comprehensive principles are already declared, Member States do not have a choice but to accept them, and there may well be justification to consider principles other than those declared in the code which may be more feasible. There could even be possibilities of applying different combinations of such principles.

As mentioned earlier, TRIPs is an attempt to accomplish convergence of the intellectual property laws of Members. If TRIPs proves to be successful, then an international code approach may be a good prospect as a model for international competition laws. Since the TRIPs was formally initiated only at the beginning of 1995, it is premature to predict the prospect of domestic implementation of such a scheme by Members at the present time.

Yet another approach is the “instalment” or “evolutionary” approach for which there is an important precedent in WTO. This precedent, which is adopted in GATS, provides for a general scheme for future negotiations in the liberalisation of trade in services within the general principles of the most-favoured nation treatment clause and transparency clause. At the present time, the liberalisation of trade in services is largely left to future negotiations and GATS only provides for a scheme of negotiation. This is largely due to the fact that trade in services is a complex field involving complex and

<sup>131</sup> See generally, Eleanor Fox, *Antitrust, Trade and the 21st Century—Rounding the Circle*, Record of the Association of the Bar of the City of New York, at pp. 536–588.

diverse issues. Admittedly, however, it is encouraging that the GATS scheme could be drawn on by Members if the need arises in the future.

## VI. CONCLUSION

In the field of air transport, the European Union has shown that national prosperity is created not inherited and that, contrary to popular belief, a commercially successful enterprise within a nation does not necessarily grow because of that nation's natural endowments, its cheap labour force or its currency values, but rather by the capacity of that industry to innovate and upgrade. As the winds of change are sweeping commercial aviation towards the new millennium, European nations have shown that, at least in air transportation, nations have become more, not less important. They have created competitive advantages for themselves through a highly localised process.

States of Europe must reconcile with the fact that, unlike large nations such as the United States, Canada and Russia, individual European States are relatively small in size. Geographic magnitude of a country becomes a relevant consideration in air transport both in terms of the volume of traffic generated by a particular country and the negotiating leverage it has in bartering air traffic rights and points of departure and landing. If a country is small, it is usual for that country to have fewer airports than a larger country and the latter would consequently have more opportunity at bargaining. Therefore, incontrovertibly, European States have to band together in order to optimise their collective potential.

Strict European Union legislation should continue in product performance, product safety and environmental impact to promote a competitive advantage and stimulate and upgrade domestic demand. The last element—environmental impact—should be particularly addressed in harmony with global regulations as promulgated through the International Civil Aviation Organization. As a future measure, European States should also continue limiting direct co-operation in the air transport field among industry rivals in order to obviate anti-competitive conduct. As a supplemental measure, competition should be deregulated and State monopolies—which are already discouraged in the Union—should be eschewed. Finally, governments should pursue vigorously an open market policy which veers from managed trade that has a tendency to deal with the fallout of national competitiveness.

As for European airlines, they should continue to seek out pressure and challenge in order to innovate commercially toward more achievements while seeking out their most capable competitors as motivators. More importantly, and as prudent airlines must, airlines of European nations should establish early warning systems which would indicate any hint of change in the air transport market both within and without Europe. Airlines could find and serve passengers and consignors who have the most anticipating needs; find places whose regulations foreshadow emerging regulations elsewhere; bring outside expertise into their management teams if needed and constantly conduct research on market access.

In the quest for globalisation of European air transport activity, airlines should tap selectively into sources of advantage in other nations' airlines. However, airline alliances have to be used only selectively in order to minimise cost bases and obviate relinquishing profits that would accrue to an airline without the alliance concerned. Inevitably, an airline alliance shows the partners mediocrity to an extent, particularly if profits are not optimised and alliances are formed on core activities.

The central theme for European nations and their airlines for the future is the "leadership" which they currently hold in air transport regulation by being second to none and equal to the best.

As regards North America, it must be stringently maintained that the United States, Canada or any other country has not, in its pursuit of open skies, advocated the GATS umbrella. The United States approach has been in keeping with its policy of "public interest" and of maximising air transport as a service industry to confront the challenges of the upcoming decades. The GATS example served only to show a certain similarity of equal opportunity and competition under the MFN clause, which would be reflective of the philosophy of an open skies regime, where all States participating in an open skies policy with each other would enjoy absolutely equal air traffic rights on a reciprocal basis.

As to the question whether the GATS negotiating scheme should be adopted with regard to international competition policy, the main consideration should be that if such is ever considered, it should be contemporaneous with the consideration of a scheme within the WTO for negotiating international antitrust principles. Negotiations may be on a total harmonisation or a partial harmonisation basis. Such an approach would have the advantage of the possibility of introduction by Members of a variety of international competition agreements out of which they could select a suitable one. Also, if this approach is adopted, it would be important for Members to have a firm commitment to promote competition law and policy both internationally and domestically. Such commitment should be clearly declared. Also it may be necessary to establish, as in GATS, a time schedule within which negotiations should be carried out.

A declaration of fundamental principles of competition would also be necessary. This declaration should contain analogous provisions to most favoured nation treatment, national treatment and transparency. Consideration should also be given to prohibition in principle of cartels, resale price maintenance, boycotts and others. One should, at the same time, be cautious that given the wide variety of principles that are followed by Members with regard to other areas such as mergers and acquisitions, vertical non-price restraint and predatory pricing, it may be feasible merely to declare general and abstract principles which require Members to promote competition policy in such areas.

Although admittedly WTO is not the only forum in which a scheme of convergence of competition laws can be accommodated (the OECD for example is, to every purpose, an appropriate forum), there is compelling reason for such a scheme to

be considered under the WTO umbrella due to the volume of Membership that WTO carries. Among the more than 125 States which participated in the Uruguay Round leading to the establishment of the WTO Agreement, not all of them have competition laws and many of them are not ready for it yet. When an international competition code is drafted, it is but logical to expect a certain degree of universality in its principles and such could be accomplished on a wider scale, given WTO's Membership.

Professor Petersmann has recommended<sup>132</sup> that an international competition code may be accommodated as an agreement of Annex 4 of the WTO Agreement, which contains optional agreements. Petersmann examines the idea of a smaller number of nations entering into such an agreement initially, such as the United States, Japan and members of the European Community, with Canada and Australia joining in. A grace period for developing States to join the agreement has also been addressed. He believes that, at least in the initial stage, an international competition code among a smaller number of Members may work more effectively. Such an agreement may, according to Petersmann, address "market access" issues effectively.

Generally, it is felt that the inclusion of an international competition code in the WTO Agreement would have the advantage in that co-ordination between competition policy and other policies embodied in WTO agreements such as TRIPS, the Safeguard Agreement and the Antidumping Agreement would be accomplished easier than it would be if a competition code is established separately from WTO. Another envisaged advantage is that the dispute settlement process incorporated in Annex 2 of the WTO Agreement could be utilised when a dispute arises relating to the enforcement of competition laws.

Perhaps the only similarity between the competition rules of the existing bilateral structure relating to the air services agreement and WTO competition rules is the insistence by both systems on the requirement of fair and equal opportunity. The current bilateral structure of the air services negotiations will remain in force as long as States consider subjectively, the potential of air traffic that their carriers would have over others, by excluding others from given market segments. This the States can do, not only because of Article 6 of the Chicago Convention but also by virtue of the underlying principle of sovereignty which legally entitles a State to prohibit a carrier from flying into or out of its territory without that State's permission. As the preceding discussion has revealed, the protectionist attitude that pervades commercial air transport is not limited to struggling carriers of developing nations but applies to mega carriers who "protect" what they believe to be a legitimate share of their market. In this backdrop, the term "market access" can only be used with the word "reciprocity". The *status quo* in commercial aviation is therefore by no means consistent with the competition principles advocated by WTO.

<sup>132</sup> Petersmann, *Proposals for Negotiating International Competition Rules in the GATT-WTO World Trade and Legal System*, Aussenwirtschaft, 49, Jahrgang (1994), Heft II/III, Ruegger S. 231-277.

If the concept of “market access” of commercial aviation is to be in consonance with WTO competition rules, the first step that the aviation community would have to take is to change its overall philosophy and consider all international air traffic as international property rather than national property. This calls for a radical change in international policy on the subject of air traffic rights, where individual States would be considered as having an overall duty towards their citizens and whereby citizens are considered as units of an international community of nations, rather than being considered units of that particular State. In other words, States would represent citizens as nationals of an international society. The international traffic market would then be taken as a whole and nations would adapt themselves to an extra-national approach in sharing international air traffic. Once the extra-national philosophy is in place, it would not be difficult to consider extra territoriality in competition in a manner compatible with WTO competition rules, particularly in the context of the latter’s emphasis on uniformity. The principles of transparency, most favoured nation treatment and dispute resolution could then all fall into place.

Although theoretically, the above proposal may sound logical and workable, in practicality, it cannot be denied that States have jealously guarded their historical rights to air traffic over the past fifty one years and would therefore be reluctant to embrace a multilateral approach to enter into open competition. This is the greatest challenge that the American region will have to face in the next decade.