

RUWANTISSA ABEYRATNE\*

## The Worldwide Air Transport Conference of ICAO and its Regulatory and Economic Impact

### I. INTRODUCTION

The Fifth Worldwide ICAO Air Transport Conference<sup>1</sup>, entitled *Challenges and Opportunities of Liberalization*, was held in Montreal from 24 to 28 March 2003 and attracted 794 participants from 145 Contracting States of ICAO and 27 observer organizations. The Conference was held in the backdrop of an economic slowdown which had occurred in the two previous years, where the world's stock markets had fluctuated; growth slowed in Western Europe and other industrialized areas; the Japanese economy was bordering on recession and the United States and the rest of the world were still reeling from an unprecedented terrorist attack<sup>2</sup> which had set the aviation world back in the amount of 30 billion US dollars. During the Conference, and in the face of an ongoing war in Iraq, several of the world's airlines announced cuts in jobs and flight schedules in response to a slump in air travel made worse by the war.<sup>3</sup>

In order for a clear perspective of viewing the potential of the aviation industry to cope with the difficulties currently faced by the air transport industry, and more importantly to put the Fifth Worldwide Air Transport into perspective, it is necessary to examine the dimensions of air transport and its contribution to the world economy.

\* The author, who is a senior official at the International Civil Aviation Organization, has written this article in his personal capacity.

1. The Fourth Worldwide Air Transport Conference was held in Montreal from 23 November to 6 December 1994. Before this Conference, three other similar Conferences, which addressed issues primarily concerned with co-ordination and harmonization of policy for the regulation of capacity, tariffs and non-scheduled air transport had been held by ICAO in 1977, 1980 and 1985. The Fourth Conference saw the emergence of 'future regulatory arrangements' which were specific conceptual approaches to the regulation of international air transport by governments. Several of the proposed arrangements, such as the progressive liberalization of market access, safeguards, preferential measures for developing countries and a 'safety net' featured prominently at the Fifth Worldwide Air Transport Conference. See Doc 9644, ATConf/4, *Report of the Worldwide Air Transport Conference on International Air Transport*, Montreal, 23 November-6 December 1994 at p. 6. See also this journal 1995 (XX), pp. 22 *et seq.*
2. *Britannica Book of the Year*, 2002, Encyclopedia Britannica Inc: Chicago, at p.188.
3. 'World's Airlines React to War with Cuts', *The Air Letter*, No. 15,205, Monday, 24 March 2003. See also 'Airline Bookings Plunge Amid War Fears', *The Air Letter*, No. 15,203, Thursday 20 March 2003.

The ICAO *Annual Report of the Council* for the year ending 31 December 2001 indicates that in 2001, the world economy witnessed a sharp slowdown in growth in almost all major regions. The world gross domestic product (GDP) grew approximately 2.5 per cent in real terms. For the industrialized countries, GDP grew only by 1.2 per cent; the North American economy showing economic growth of about 1.2 per cent, almost 3 percentage points lower than the previous year. GDP growth for developing countries amounted to about 4 per cent, some 1.7 per cent lower than in the year 2000.<sup>4</sup> International tourism decreased in 2001 by an estimated 1.3 per cent, due to the events of 11 September and the weakening of the economies of the major tourism generating markets. The World Tourism Organization (WTO) estimates that almost 690 million tourists travelled to foreign countries in 2001.

According to the *Annual Report of the Council*, available statistics pertaining to air transport in 2001 reflect that in 2001, the total scheduled traffic carried by the airlines of the then 187 Contracting States of ICAO amounted to a total of about 1,621 million passengers and some 29 million tonnes of freight.

In 2001, the overall capacity was reduced, but at a lower rate than the decrease in traffic. Hence, the average passenger and weight load factors on total scheduled services (domestic plus international) decreased to 69 and 59 per cent respectively.

On a regional basis, some 35 per cent of the total traffic volume (passengers/freight/mail) was carried by North American airlines. European airlines carried 28 per cent, Asia/Pacific airlines 27 per cent, Latin American, and the Caribbean airlines, and Middle East airlines 4 per cent each, and African airlines 2 per cent.

Data for individual countries indicate that in 2001 about 43 per cent of the total volume of scheduled passenger, freight and mail traffic was accounted for by the airlines of the United States, Japan and the United Kingdom (32, 6, and 5

4. In 2001, Africa's economy achieved a 3.7 per cent GDP increase. The aggregate economy of the region with the largest share of the world economy, Asia and the Pacific, grew at some 3.6 per cent in 2001, above the world average. Europe achieved an average GDP growth of 1.9 per cent, almost half of the growth rate of the previous year. The Central and Eastern European economies grew around 3 per cent. The countries of the Commonwealth of Independent States (CIS) showed a significant GDP growth, averaging about 6.2 per cent, but about 2 per cent lower than the previous year. The Latin America and the Caribbean Region was adversely affected both by the slowdown in the global economy and by the financial crisis in Argentina. As a result, the Region's GDP growth slowed down to 0.7 per cent, about 3 percentage points lower than the previous year. Linked to the fall in oil prices, the Middle East Region's economy grew only by about 4.5 per cent, down almost 1 percentage point from the previous year. In 2001, the 25 largest airports in the world handled some 1,030 million passengers, according to preliminary estimates (Table 8). During the same period, the airports concerned (16 of which are located in North America, 6 in Europe and 3 in Asia) also handled some 11 million commercial air transport movements. See *Annual Report of The Council 2001*, ICAO Doc 9786, Chapter I.

per cent respectively). On international services, almost 37 per cent of all traffic was carried by the airlines of the United States, the United Kingdom, Germany, and Japan (17, 7, 7, and 6 per cent respectively).

As for airlines, the 25 largest airports in the world handled some 1,030 million passengers in the year 2001, according to preliminary estimates. During the same period, the airports concerned (16 of which are located in North America, 6 in Europe, and 3 in Asia) also handled some 11 million commercial air transport movements.<sup>5</sup> On the basis of schedules published in multilateral airline schedule guides, the *Annual Report of the Council* of ICAO estimates that at the end of 2001 there were some 781 air carriers worldwide providing scheduled passenger services (international and/or domestic) and about 113 operating scheduled all-freight services. Compared with the same period in 2000, this represents a net overall increase of 87 air carriers.

The trend of privatization of government-owned airlines continued in 2001. In several cases, however, privatization plans were deferred or postponed because of the complexities encountered in the process or the economic situation of the airlines concerned, or owing to other circumstances. In contrast to the general trend, government shareholdings in several privatized carriers were increased in order to rescue the carriers from imminent collapse.

Although 2002 was a difficult year for the air transport industry whose prosperity took a downward direction, 2003 portended to be even more challenging. This is mostly due to airlines taking more courageous and calculated risks toward higher yield in response to trends in economic and global security.

Although this should prove beneficial in the long term, the sense of uncertainty that prevails in 2003 will affect the supply of air transport services if only in response to the natural apprehension of uncertainty in getting short-term return on investments. Since individual airlines are increasingly challenged to deliver improved results in 2003, the Fifth Air Transport Conference was also conscious of the environmental challenges the world faced with a trend toward increasing supply of air transport services bringing with it an ominous dimension of concern for the environment and the compelling need for the

5. *Ibid.* Between 1992 and 2001, the reported number of commercial air transport aircraft in service increased by about 39 per cent from 14,919 to 20,771 (excluding aircraft with a maximum take-off mass of less than 9,000 kg). Within these totals, turbojet aircraft numbers increased by about 35 per cent, from 12,008 to 16,229, over the same period. In 2001, 990 jet aircraft were ordered (compared with 1,553 in 2000) and 1,219 aircraft were delivered (compared with 1,009 in 2000). The backlog of unfilled orders at the end of 2001 was 3,799 aircraft compared with 3,649 at the end of 2000. The financial commitment in terms of jet aircraft orders placed with the major aircraft manufacturers in 2001 is estimated to be about 69 billion. The number of turboprop and piston aircraft ordered in 2001 was 89, and 109 aircraft were delivered during the year.

industry to move toward sustainability within its own parameters of development. The significance of this reality is brought to bear by the fourth principle of the Declaration of the June 1992 *Rio Summit*<sup>6</sup>, which states that in order to achieve sustainable development, environmental protection must constitute an integral part of the development process and cannot be considered in isolation from it.<sup>7</sup> The integral link between development and environmental protection, with a view to ensuring sustainable development, was developed as early as in 1972, when member countries of the European Economic Community, through their heads of State endorsed the view that economic development must intrinsically be proportionate to improvement in the quality of life.<sup>8</sup>

## II. ACHIEVEMENTS OF THE WORLDWIDE AIR TRANSPORT CONFERENCE

### A. The Global Declaration

The pivotal point and culmination of the Conference lay in a *Declaration of Global Principles for the Liberalization of International Air Transport* adopted by the Conference by ovation, which, *inter alia*, emphasized the critical importance of safety and security in international air transport; noted the changes since the Fourth Worldwide Air Transport Conference in 1994 in the regulatory and operating environment of international air transport brought about by economic development, globalization, liberalization, and privatization; and reaffirmed the basic principles of sovereignty, fair and equal opportunity, non-discrimination, interdependence, harmonization, and cooperation set out in the Chicago Convention which have served international air transport well and continue to provide the basis for future development of international civil aviation.

The Declaration calls upon ICAO and its Contracting States, together with the air transport industry and other stakeholders in civil aviation, to work to ensure that international air transport continues to develop in a way that ensures high and improving levels of safety and security; promotes the effective and sustainable participation in and benefit from international air transport by all States, respecting national sovereignty and equality of opportunity; and takes into consideration the differing levels of economic development amongst States

6. *1992 United Nations Conference on Environment and Development (Rio Summit)*.

7. See P.W. Birnie and A. Boyle, *Basic Documents on International Law and the Environment*, Clarendon Press: Oxford, 1995 at p. 6.

8. See *Purpose for a Resolution of the Council of European Communities on a Community Programme of Policy and Action in relation to the Environment and Sustainable Development*, a document released in 1992 which quotes the 1972 endorsement, Brussels, 30 March 1992, Doc COM(92) 23 final, Vol. II at p. 19.

through maintenance of the principle of ‘community of interest’ and the fostering of preferential measures for developing countries. The Declaration also calls for the providing of adequate supporting infrastructure at reasonable cost, facilitation of the provision of resources – particularly for developing countries, and allowing for growth on a basis that is economically sustainable, supported by adaptation of the regulatory and operating environment, in order to strive to limit its environmental impact. Also considered important is the meeting of reasonable expectations of customers and public service needs, particularly for low traffic or otherwise uneconomical routes, promoting efficiency and minimizing market distortions. Another important dimension is the call for a system which safeguards fair competition adequately and effectively; promotes cooperation and harmonization at the subregional, regional and global levels; and has due regard for the interests of all stakeholders, including air carriers and other operators, users, airports, communities, labour, and tourism and travel services providers; with the ultimate purpose of giving international air transport as much economic freedom as possible while respecting its specific characteristics and in particular the need to ensure high standards of safety, security, and environmental protection.

The preeminent consideration in the Declaration was safety and security, which was considered of paramount importance in the operation and development of international air transport. The Declaration therefore called upon States to accept, in close cooperation with each other, their primary responsibility for ensuring regulatory oversight of safety and security, irrespective of any change in economic regulatory arrangements. However, a caveat is included in the Declaration that security measures should to the extent possible not disrupt or impede the flow of passengers, freight, mail or aircraft.

The Declaration also exhorted the general principle that further economic liberalization must be implemented in a way so as to ensure that there is a clear point of responsibility for each of safety and security in a clearly identified State or other regulatory authority designated by that State for any given aircraft operation.

In recognizing the importance of respecting national sovereignty and equality of opportunity, the Declaration also contains a provision that requires States to develop and maintain safeguards to ensure safety, security, economic stability, and fair competition. High priorities among this general approach are to ensure that the necessary infrastructure of airports and air navigation services is provided worldwide at reasonable cost and on a non-discriminatory basis; airport and air navigation services charges to be applied only towards defraying the costs of providing facilities and services for civil aviation; special consideration to be given to the interests and needs of developing countries, among which are preferential measures and financial support. Recognition of the importance of environmental considerations is contained in the statement that the global aviation community should continue to work to promote the

development of air transport in an environmentally responsible way, limiting the impact of air transport so as to achieve maximum compatibility between safe and orderly development of civil aviation and the quality of the environment.

One of the major elements and concerns addressed in the Declaration is liberalization of air transport. In this context, there is a statement in the Declaration that ongoing regulatory evolution should create an environment in which international air transport may develop and flourish in a stable, efficient and economical manner without compromising safety and security and while respecting social and labour standards. Prominence is given to the International Air Services Transit Agreement (IATA), where the Declaration urges that States that have not signed the agreement must give urgent consideration to so doing.

One of the critical and thought provoking provisions in the Declaration is found in clause 4.4, which provides that each State will determine its own path and own pace of change in international air transport regulation, in a flexible way and using bilateral, subregional, regional, plurilateral or global avenues according to circumstances. Given that the overall approach of the Fifth Worldwide Air Transport Conference was 'how to liberalize' (as against 'whether to liberalize' which was the preoccupation of the earlier Air Transport Conference), this provision seems to say that the issue of how to liberalize is very much left to the States themselves, to be done at their own pace. If this be the purport and intent of this provision, it does not say anything much except to endorse what States had been doing prior to the Conference. One wonders in this context what the intent of the Contracting States of ICAO was, in adopting this platitude.

A repetition of the intent of this clause is found in the provision immediately proceeding clause 4.4, where States are requested that they should, to the extent feasible, liberalize international air transport market access, ensure air carrier access to international capital and air carrier freedom to conduct commercial activities – again a truism and fact of economic reality that had been happening in the aviation community before the Conference. Regarding cargo services liberalization, the same type of 'endorsement' is seen in the statement that States should give consideration to liberalizing the regulatory treatment of international air cargo services on an accelerated basis, provided that clear responsibility and control of regulatory safety and security oversight is maintained.

A more positive and forward-thinking approach is seen on the subject of ownership and control where the Declaration unequivocally pronounces that States should give consideration to accommodating other States in their efforts to move towards expanded transborder ownership and control of air carriers, and/or towards designation of air carriers based on principal place of business, provided that clear responsibility and control of regulatory safety and security oversight is maintained.

On the issue of competition and cooperation, the Declaration encourages the

establishment and application of competition law to ensure the safeguarding of fair competition as States progress towards a liberalized marketplace.

One of the positive averments in the Declaration is found in the request of States to avoid adopting unilateral measures which may affect the orderly and harmonious development of international air transport, with the additional request that they should ensure that domestic policies and legislation are not applied to international air transport without taking due account of its special characteristics. The provisions to follow are equally meaningful where States who provide aid for the air transport sector are exhorted to take transparent and effective measures to ensure that such aids do not adversely impact on competition in the marketplace or lead to unsustainable outcomes, and that they are to the extent possible temporary.

Arguably, the most significant and thought provoking provision of the Declaration lies in clause 6.1, where it is acknowledged that ICAO should continue to exert the global leadership role in facilitating and co-ordinating the process of economic liberalization and ensuring the safety, security, and environmental protection of international air transport. The importance of this statement lies in the fact that it has seemingly relegated ICAO's global leadership role in the process of liberalization to a position of mere facilitator and co-ordinator. Detractors of this provision could argue that it effectively precludes ICAO from attaining its objective, explicitly recognized in the *Convention on International Civil Aviation* of 1944<sup>9</sup> of 'insuring' the safe and orderly growth of air transport and developing international air transport so as to meet the needs of the peoples of the world for safe, regular, efficient, and economical air transport including preventing economic waste caused by unreasonable competition and insuring that the rights of Contracting States are fully respected and that every Contracting State has a fair and equal opportunity to operate international airlines.<sup>10</sup> The argument could be further made that the profile of an organization that has, by international treaty been given a leadership role of ensuring orderly growth of international air transport, along with insuring, *inter alia*, equality of opportunity for the operation of commercial air services has been undermined by assigning to it the role of facilitator and co-ordinator.

Such an argument, however, would be destitute of legal validity on the ground that fundamental principles of treaty law dictate that an unsigned Declaration would be subservient to an international treaty that is multilaterally signed and in force. In this sense, the Declaration would merely give a direction toward the goals at hand and leave the validity and authority of the provisions of the Chicago Convention untouched and unaffected. Although a Declaration could be

9. *Convention on International Civil Aviation*, signed at Chicago on 7 December 1944. See Doc 7300/8, eighth Edition, 2000, hereafter cited as the Chicago Convention.

10. *Id.* Article 44 (a), (d), (e), and (f).

interpreted to be a treaty in certain circumstances<sup>11</sup>, the Global Declaration adopted by the Conference is by no means a treaty in the definitive sense of the word. The Vienna Convention on the Law of Treaties, in Article 2(1) (a) defines a ‘treaty’ as

An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>12</sup>

The Global Declaration is certainly not an international agreement concluded between States and, more importantly, not governed by international law, since any treaty ‘governed by international law’ embraces an intention to create obligations under international law. If there is no such intention, as was the case in the Global Declaration, there would be no binding treaty obligation in such a document.<sup>13</sup>

## **B. Conclusions and Recommendations of the Conference**

In terms of safety and security aspects of liberalization the Conference observed that economic liberalization has implications for safety and security regulation, which need to be properly addressed at the national, bilateral, regional, and global levels, as appropriate, in order to ensure continued safe, secure and orderly development of civil aviation. The Conference also recognized that the Chicago Convention imposes responsibility on Contracting States for compliance with standards and practices related to safety and security. Therefore, irrespective of any change in economic regulation, safety and security must remain of paramount importance in the operation and development of air transport. The Conference therefore concluded that, in a liberalized economic environment, safety and security regulation must not only be maintained but should also be strengthened. Measures to ensure compliance with applicable safety and security standards and to enhance regulatory oversight should form an integral part of the safeguards for liberalization.

It was agreed by the Conference that, when introducing economic liberalization, States should ensure that safety and security not be compromised

11. See Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000 at p. 22.
12. *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 1986.
13. See the *Aegean Sea Continental Shelf* Case, where the International Court of Justice considered the terms of a joint communique issued by the Greek and Turkish Prime Ministers and concluded that it was not a treaty, since the intention to bind oneself to a treaty must be gathered from the terms of the instrument itself and the circumstances of its conclusion, not from what the parties might claim after the fact of adopting a joint statement or declaration, Antony Aust, *supra*, note 10, at p. 17.

by commercial considerations, and that clear lines of responsibility and accountability for safety and security be established for the parties involved in any liberalized arrangements. Regardless of the form of economic regulatory arrangements, there should be a clear point of contact for the safety and security oversight responsibility in a clearly identified ICAO Contracting State or other regulatory authority designated by that State for any given aircraft operation. In this regard, it was the conclusion of the Conference that the ICAO should continue to play a leading role in developing global strategies for the regulation and oversight of aviation safety and security, both definitively and in the context of facilitating economic regulatory reform. The changing regulatory and operating environment in international air transport calls for the development of new regulatory devices capable of adapting to changes and addressing related concerns. Pending such new regulatory arrangements, measures must be taken in the interim to ensure that the existing safety and security regulatory system continues to function effectively. It was further recognized that meeting this challenge requires seamless international cooperation and concerted efforts from all Contracting States, regional aviation bodies, the industry and all other stakeholders in civil aviation. The Conference therefore called upon the ICAO to conduct a study with a view to clarifying the definition of the State or States responsible for safety and security oversight, and possibly to recommend amendments to the existing ICAO regulatory provisions in this area.

On the subject of air carrier ownership and control the Conference concluded that growing and widespread liberalization, privatization and globalization call for regulatory modernization in respect of conditions for air carrier designation and authorization in order to enable carriers to adapt to the dynamic environment. The Conference noted without reservation that, while there are concerns to be addressed, there could also be benefits in liberalizing air carrier ownership and control provisions, observing at the same time that past experience of liberalization in ownership and control has demonstrated that it can take place without conflicting with the obligations of the parties under the Chicago Convention and without undermining the nature of international air transport.

One of the positive considerations that impelled the Conference in its progress on ownership and control issues was that there was widespread support by States for liberalization, in some form, of provisions governing air carrier designation and authorization. In this regard, it was recognized that approaches vary widely from substantial broadening of provisions beyond national ownership and control in the near term, through gradual reduction of specified proportions of national ownership, to limited change for the time being regarding certain types of operations (for example non-scheduled or cargo), application within certain geographic regions, or simply case-by-case consideration. As a result of such varied approaches, there is a consequential need for flexibility in associated regulatory arrangements to enable all States to follow the approach of their own

choice at their own pace while accommodating the approaches chosen by others.

The Conference concluded that, whatever the form and pace of liberalization, conditions for air carrier designation and authorization should ensure that safety and security remain paramount, and that clear lines of responsibility and accountability for safety and security are established for the parties involved in liberalized arrangements. Economic and social consequences of liberalization were also considered by the Conference at some length. The Conference recommended that in liberalizing the conditions for air carrier designation and authorization, States should ensure that the economic and social impact, including the concerns of labour, are properly addressed, and that other potential risks associated with foreign investments (such as flight of capital, uncertainty for assurance of service) are fully taken into account.

The general goal of the Conference of – progressive regulatory liberalization – was viewed in light of the proposed regulatory arrangement of the ICAO Secretariat, of a new optional criterion for airline use of market access in addition to ICAO endorsed options for community of interest (as enunciated in Assembly Resolution A24-12). This option was based on principal place of business and effective regulatory control by the designating State. The Conference concluded that while it is up to each State to choose its liberalization approach and direction based on national interest, the use of the proposed arrangement could be a catalyst for broader liberalization. Accordingly, it was concluded that, given the flexibility already existing in the framework of air services agreements, States may, in the short term and at their discretion, take more positive approaches (including co-ordinated action) to facilitating liberalization by accepting designated foreign air carriers that might not meet the traditional national ownership and control criteria or the criteria of principle place of business and effective regulatory control.

In terms of the ICAO's role, the Conference concluded that, as background to the subject of liberalization, a case study approach to liberalization experiences, while of necessity limited in scope, would provide a suitable vehicle for the analysis and dissemination of information on such experiences of States at national, subregional, regional or plurilateral level. The Conference was convinced that case studies on liberalization may assist States to further develop their liberalization approaches and policy options and that ICAO should continue to develop and disseminate by appropriate means case studies and information on liberalization experiences. Conversely, States were urged to submit such information to ICAO for general dissemination.

A new area of consideration at the Conference was the issue of interaction between the industry and employer. The Conference concluded, after sustained consideration, that liberalization may have various implications for labour, which should continue to participate as an important stakeholder for the development of the air transport industry. Therefore, the conclusion was that States should observe and respect the ILO *Declaration on Fundamental*

*Principles and Rights at Work*, and take the necessary measures to promote social dialogue with the active participation of labour as a way to find innovative and socially responsible solutions. As regards the interests of the service provider, the Conference concluded that while airlines and providers of airport and air navigation services are interdependent, their commercialization and privatization in a liberalized environment has a number of competitive consequences and financial implications for both sides. A valid consideration was that long term cooperation between airlines and service providers are one means to bring stability in that environment and an effective tool in this regard was the use of consultation which could form an essential part of their relationship.

Based on the above conclusions, the Conference recommended that air carrier designation and authorization for market access should be liberalized at each State's pace and discretion progressively, flexibly and with effective regulatory control in particular regarding safety and security. Also recommended was the new proposed alternative criterion of the Secretariat mentioned above, particularly to be applied to instances where States addressed the issue of air carrier designation and authorization in their international air transport relationships, where they could use it as an option at their discretion and in a flexible manner.

The Conference also recommended that States may at their discretion take positive approaches (including co-ordinated action) to facilitate liberalization by accepting designated foreign air carriers that might not meet the traditional national ownership and control criteria or the criteria of principle place of business and effective regulatory control. States that wish to liberalize the conditions under which they accept designation of a foreign air carrier in cases where that air carrier does not meet the ownership and control provisions of the relevant air services agreements could use three ways, i.e.

by issuing individual statements of their policies for accepting designations of foreign air carriers; issuing joint statements of common policy; and/or developing a binding legal instrument, provided that they assured whenever possible that these policies are developed in accordance with the principles of non-discrimination and non-exclusive participation.

Among the recommended action by the Conference is that the State designating the air carrier provides or ensures the provision of adequate oversight of safety and security for the designated air carrier, in accordance with standards established by ICAO. In this regard, States could notify ICAO of their policies, positions and practices including retention of the traditional criteria, and individual or joint statements of common policy, on the conditions under which they accept the designation of an air carrier pursuant to an air services agreement. As for the ICAO's role, it was recommended that the organization maintains and makes public information on States' policies, positions or practices on air carrier

ownership and controls and assists States or groups of States requesting development and further refinement of the option ready discussed. ICAO has also to continue to monitor developments in the liberalization of air carrier ownership and control, and address related issues as required.

With regard to market access the Conference concluded that since the 1994 Worldwide Air Transport Conference, considerable progress has been made in liberalization of market access, particularly at the bilateral, regional, and subregional levels. More importantly, it was noted that States have generally become more open and receptive towards liberalization, with many adjusting their policies and practices to meet the challenges of liberalization. It was conceded by the Conference that past experience has confirmed that the existing bilateral, regional, and multilateral regulatory regimes based on the Chicago Convention can and do coexist, and can each accommodate different approaches to air transport regulation. Encouragingly, these regimes continue to provide a viable and flexible platform for States in pursuing liberalization according to their specific needs, objectives and circumstances. The Conference noted, with satisfaction, that the number of open-skies and other liberal agreements are evidence that these regimes have been very effective in increasing liberalization, and the momentum should be maintained.

Also noted by the Conference was the importance of the International Air Services Transit Agreement (IASTA) for liberalization and the operation of international air services. States were therefore encouraged to pursue, and ICAO continue to promote, universal adherence to and implementation of the IASTA.

With regard to the somewhat sensitive issue of applying the basic GATS principle of most favoured nation (MFN) treatment to traffic rights, the Conference concluded that it remains a complex and difficult issue. While there was some support to extend the GATS Annex on Air Transport Services to include some so-called 'soft rights' as well as some aspects of 'hard rights', the Conference was of the view that there was no global consensus on whether or how this would be pursued and that it was inconclusive at this stage as to whether the GATS is an effective option for air transport liberalization. Although one of the ICAO's paths of action remained the pursuit of multilateralism in commercial rights to the greatest extent possible, the Conference observed that conditions are not ripe at the present time for a global multilateral agreement for the exchange of traffic rights. Therefore, States should continue to pursue liberalization in this regard at their own choice and own pace, using bilateral, regional and/or multilateral avenues as appropriate. The Conference commended the proposed ICAO Template Air Services Agreements (TASAs) which provides detailed guidance on liberalization options and approaches.

Airport congestion, a possible critical issue to liberalization and the injection of capacity to fill demand, although thus far not constituting a significant constraint on the conclusion by States of liberalized air services agreements, demanded due consideration at the Conference, particularly in terms of airport

capacity constraints and long-term infrastructure needs when faced with liberalized market access. The Conference strongly believed that problems involving air carriers which are unable to exercise their entitled traffic rights at a capacity-constrained airport may, if necessary, be addressed in the context of discussions on the relevant air services agreements. In this regard, States were urged to give sympathetic consideration to the request for preferential treatment from those States whose airports are not slot-constrained but whose air carriers are unsuccessful in obtaining slots at slot-constrained airports, consistent with relevant national legislation and international obligations.

States were advised in the Conference's conclusions that any slot allocation system should be fair, non-discriminatory and transparent, and should take into account the interests of all stakeholders. It should also be globally compatible, aimed at maximizing effective use of airport capacity, simple, practicable and economically sustainable; and that ICAO should continue to monitor closely regulatory and industry developments, develop an inventory of States' practical experience with liberalization and disseminate relevant information to Contracting States. ICAO should also continue to keep current the existing guidance material on the economic regulation of international air transport and develop new guidance, as necessary, to facilitate liberalization and improve harmonization, for example, through the Template Air Services Agreement (TASA) submitted for the Conference to note.

Aircraft leasing (both wet and dry) was another significant consideration of the Conference, which concluded that leasing offers considerable benefits to air carriers, enables expanded and more flexible air services and provides opportunities for the establishment of new carriers. However, and in spite of its attendant benefits, the Conference noted that it also raised economic and safety regulatory issues which need to be addressed. In this regard, States were required by the Conference to review where necessary their regulatory responses to the use of leased aircraft in international services to and from their territory. They were further required to ensure clear responsibility for safety oversight and compliance with minimum safety standards, whether through the inclusion of appropriate provisions in their air services arrangements or by the establishment of agreements pursuant to Article 83 *bis*<sup>14</sup> of the Chicago Convention. The Conference also imposed on the ICAO an obligation to make available to Contracting States, for optional use at their discretion, the model clause on leasing proposed by the Secretariat after amendment and the addition of explanatory notes to clarify the meaning of 'appropriate authority'; make a clear distinction with respect to 'wet' leased and 'dry' leased aircraft; and take into account short-term, *ad hoc* wet leases.

14. Article 83 *bis* allows a State of Registry of an aircraft leased, chartered or interchanged and operated from another Contracting State to transfer the functions and duties from the State of Registry to the other State by agreement.

Finally, the Conference took up for consideration the subject of air cargo and concluded that air cargo, and in particular all cargo operations, should be considered for accelerated liberalization and regulatory reform in view of its distinct features, the nature of the air cargo industry and the potential trade and economic development benefits possible from such reform. In this respect obligations would devolve upon States to consider the possibility of liberalizing all cargo services using jointly or severally unilateral liberalization of market access for all cargo services without bilateral reciprocity; negotiation or liberalizing all cargo services through bilateral agreements and negotiations to ensure reciprocity; and using a multilateral/plurilateral approach for the liberalization of all cargo services. The Conference agreed that States should give consideration to a model clause considered by the Conference as an option for use at their discretion in air services agreements.

### 3. REGULATORY AND ECONOMIC IMPACT OF THE CONFERENCE

The most salutary contribution of the Fifth Worldwide Air Transport Conference to the air transport industry was its wide ranging reach in the areas covered. The Conference appropriately laid primary emphasis on the need for air transport to develop through a global framework of safety and security and confirmed ICAO's pre-eminent leadership role in this area. The mention, both in the Declaration and Conclusions of the Conference, of safety, security, economic stability and fair competition as the pivotal areas of progress in liberalization of air transport not only puts the industry into perspective but also brings to bear the complexities faced. With regard to ownership and control, the forward thinking inclusion of principal place of business is both timely and expedient for the growth of air transport. The call for crystallized principles of competition law applicable to the market place ensures the much needed safeguards in a volatile and rapidly evolving market. This, coupled with a consideration of the industry's sensitivity toward the rights of the airline passenger, the impact of the industry on the tourism industry, and the value of human resources that serve the industry, showed the recognition of the Conference of the compelling need to address the issues affecting air transport in their entirety.

One of the most remarkable features of the Conference was the consideration given to airport congestion and environmental concerns. By doing so, the Conference endorsed the importance of ensuring that the development and growth of the air transport industry must essentially be sustainable.

In the aftermath of the Conference and the years to follow, States would have to give cautious consideration to the application of the guidance provided both in the Declaration and the Conclusions and Recommendations of the Conference. The future for many airlines will be fraught with overcapacity and falling yields. These negative factors will be aggravated by high fuel costs. Liberalization will intensify competition, giving rise to even more dominant and powerful alliances

and there will be a real and tangible need for governments and regional blocs such as the European Community to enforce and regulate anti-competitive conduct of air carriers. Smaller and less competitive carriers, particularly those State-owned, would have to stringently cut costs and depend on the regulator to keep the rise of fuel costs at a minimum. The emphasis placed by the Conference, and its views on labour will have to take a front seat and occupy the attention of the regulator. More and more, airlines will be called upon to review their labour costs, which is largest single cost element.

Globalization of competition is one of the key messages of the Conference which brings with it the important message for governments to rethink their strategies with regard to the air transport strategy as an integral part of their national competitiveness. Any agreement to bring in an aspect of trade within a liberalized framework is generally a pro-active measure, which brings to bear the willingness and ability of the governments to face trading issues squarely in the eye. However, any agreement for trading benefits would be ineffective without the element of competition. The essential requisite for success in trading relations is competition, which in turn leads to national prosperity. A free trade agreement is merely the catalyst in the process.

National prosperity is created, not inherited. Although national resources are a State's assets, the prosperity of a nation does not necessarily emerge solely from the natural endowments of the State concerned, nor from its labour resources, but rather from a certain localized process which engulfs economic structures, national values, culture and institutions. The essential catalyst to trade is national competitiveness.

National competitiveness is one of the most critical drivers of successful government and industry in every nation. Yet for all the discussion, debate, and writing on the topic, there is still no persuasive theory to explain national competitiveness. What is more, there is not even an accepted definition of the term 'competitiveness' as applied to a nation. While the notion of a competitive company is clear, the notion of a competitive nation is not. The deliberations of the Conference clearly brought to bear this point and implicitly called upon States to revisit their own strategies with regard to the air transport industry on the basis that the most important feature of a competitive nation is its decisive characteristic that allows its companies to create and sustain competitive advantage in particular fields—the search is for the competitive advantage of nations. Of particular concern are the determinants of international success in technology and skill-intensive segments and industries, which underpin high and rising productivity.

Classical theory supports the principle that the success of nations in particular industries based on so-called factors of production such as land, labour, and natural resources is based on the fact that nations gain factor-based comparative advantage in industries that make intensive use of the factors they possess in abundance. Classical theory, however, has been overshadowed in advanced industries and economies by the globalization of competition and the power of technology.

Any new approach must recognize that in modern international competition, companies compete with global strategies involving not only trade but also foreign investment. What a new theory must explain is why a nation provides a favourable home base for companies that compete internationally. The home base is the nation in which the essential competitive advantages of the enterprise are created and sustained. It is where a company's strategy is set, where the core product and process technology is created and maintained, and where the most productive jobs and most advanced skills are located. The presence of the home base in a nation has the greatest positive influence on other linked domestic industries and leads to other benefits in the nation's economy. While the ownership of the company is often concentrated at the home base, the nationality of shareholders is secondary.

A new theory for air transport must move beyond comparative advantage to the competitive advantage of a nation. It must reflect a rich conception of competition that includes segmented markets, differentiated products, technology differences, and economies of scale. A new theory must begin from the premise that competition is dynamic and evolving; it must answer the questions:

Why do some companies based in some nations innovate more than others? The most important feature of a competitive nation is its decisive characteristic that allows its companies to create and sustain competitive advantage in particular fields – the search is for the competitive advantage of nations. Of particular concern are the determinants of international success in technology and skill-intensive segments and industries, which underpin high and rising productivity.

In the continuing debate over the competitiveness of nations, no topic engenders more argument or creates less understanding than the role of the government. Is government an essential helper or supporter of industry, employing a host of policies to contribute directly to the competitive performance of strategic or target industries? Or is it the 'free market' view that the operation of the economy should be left to the workings of the invisible hand.

Both views are seemingly incorrect. Either, followed to its logical outcome, would lead to the permanent erosion of a country's competitive capabilities. On one hand, advocates of government help for industry frequently propose policies that would actually hurt companies in the long run and only create the demand for more helping. On the other hand, advocates of a diminished government presence ignore the legitimate role that government plays in shaping the context and institutional structure surrounding companies and in creating an environment that stimulates companies to gain competitive advantage.

Government's proper role is as a catalyst and challenger; it is to encourage – or even push – companies to raise their aspirations and move to higher levels of competitive performance, even though this process may be inherently unpleasant and difficult.

#### 4. CONCLUSION

If the findings of the Fifth Worldwide Air Transport Conference were to be taken seriously, there would have to be a serious review of global cultural and commercial paradigms that have so far applied to air transport. States will have to take a closer look at air transport as a competitive industry that would have to be regulated as such and not as a property held under rigid sovereign parameters and overprotective national interest. This by no means implies that principles of State sovereignty and the overall regulatory control of States on the air transport industry have to be abandoned. On the contrary, they are more important than ever, particularly when addressed within safety and security concerns. Also, the inextricable link between air transport and its sustainable development has to be carefully examined. The most critical factor that adversely affects environmental protection is that the global political structure which is based on the primacy of States as sovereign entities has created conditions detrimental to sustainable development. The significance of the demographic structure of the world and its varied political interests underscore the inevitable emergence of a dichotomy between exponential increases in population; the needs thereof and the limited resource base available for development to meet such needs. Therefore sustainable development must, as a necessity, be addressed within the context of balancing population and natural resources.<sup>15</sup> It is within these parameters that a study should make an assessment whether air transport, in its different trade dimensions, is a distinct threat to sustainable development. In this and other regards, the Conference correctly placed the regulatory ball squarely in the States' courts. It will be interesting to see how they would play it.

15. UNFPA/Norman Myers, *Population, Resources and the Environment: The Critical Challenges*, UN Population Fund, New York: 1991 at p.5.