INTERNATIONAL CIVIL AVIATION ORGANISATION AND REGULATION OF ECONOMIC ASPECTS OF INTERNATIONAL AIR TRANSPORT SERVICES

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CERTIFICATE

Certified that this dissertation entitled, **"International Civil Aviation Organisation and Regulation of Economic Aspects of International Air Transport Services"** which is being submitted by **Mr. Chakka Benarji,** in partial fulfillment of the requirements for the award of the Degree of **MASTER OF PHILOSOPHY** has not been previously submitted for any degree of this University or any other University and is his original work.

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Dedicated to My Parents

CONTENTS

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CHAPTER - I

INTRODUCTION

Air transport was a very insignificant economic activity some fifty years ago. Air travel was expensive, hazardous and restricted to a very small segment of population. Air freighting was negligible. Since then increasing demand for passenger and freight services, rapid technological development and associated investment, have combined to multiply air transport output many times over, resulting in a sector that today plays an important role in the world economy and the economies of many countries including small countries like Singapore.

Presently, international air transportation has emerged as one of the most important infrastructure industries of the twentieth century. Commerce, communication and national defence, all have become heavily dependent on an efficient and reliable air transportation system, which has led air transport to be treated throughout its history as a unique industry.

In this regard it is worth mentioning the words of the former Secretary General of ICAO, S.S. Sidhu on the role of modern aviation:

> As you all know, civil aviation is one major field which is affected by the revolution in high technology. In a country like India which is vast country with difficult terrain in certain areas, I think aviation has a special significance.

> This is all the more true when we are a developing economy which has to progress rapidly.[1]

As R.P. Anand observes:

> It is impossible to imagine life today without these fast and safe airplanes criss-crossing all states irrespective of their claims of sovereignty. In spite of all their divisions, the world has been united as never before.[2]

Certainly, aviation is, by its very nature, an international activity. In the beginning air transportation has been the object of state intervention. Because states, considered them as part of essential public utilities rather than business. Accordingly, all aspects of international civil aviation have been regulated exhaustively; nothing can be done unless expressly permitted by states. Outerspace activities are free for states unless expressly forbidden.[3] According to Johnson international commercial air transportation is an extension of the state's sovereign power.[4] It implies that states have exclusive control not only over airspace above its territory but also over aviation market. Thus, national airline interests always prevailed in state's air policies.

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1 S.S. Sidhu, "Aviation - An Agent of Change", (inaugural speech), in R.P. Anand, and others (eds.) *Recent Developments in Civil aviation in India*, (Delhi, 1887), p.23.

2 R.P. Anand, "Hijacking- A Disease which needs strong medicine". ibid., p. 143.

3 H.A. Wassenbergh. *The Right of States to Participate in Air and Space Transportation Activities* (The Hague, 1994), p.4.

4 D.H.N, Johnson, *Rights in Airspace* (Manchester, 1965), pp.1-2.

The reasons for state control in most cases the security and safety interests of states coupled with the absence of private investment. Some time protectionist arguments like the infant aviation industry led states to impose strict ownership requirements as a means of exercising control over airlines. Another reason for state intervention is the prestige factor. The international aviation provides ample opportunities to show the flag of a state round the world. It has, from the outset, been viewed as enhancing the prestige of states. Especially small and developing airlines have come to symbolize the equality of states in the strict sense of sovereign equality. All these factors contributed to state intervention in the aviation market, often at the cost of the operational efficiency.

The recent trends, however, have brought a revolutionary change in states perception towards air transport industry. As the air transport has been expanded and matured, its unique status came to be questioned. Why should airlines not be free to compete in the domestic and foreign markets according to market principles? Why should air transport norms continue to be treated specially as opposed to other service industries? The immediate response to these questions was economic deregulation,[5] a process initiated by the United States in the late 1970s according to its

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5 De-regulation goes a step further it intends to free 'a priori' the air transportation activity as such from all 'a priori' government interference. De-regulation therefore, includes free entry into the market both nationally and internationally (i.e. multiple designation for scheduled air carriers), and free competition under free enterprise conditions. It is not a 'free for all' a 'a posteriori' regulation, such as, e.g. in the U.S., the antitrust legislation, for mids practices and arrangements which are not in the interests of competition. See, H.A. Wassenberg, "New aspects of national aviation policies and the future of international air transport regulation", *Air Law* (Deventer), vol. XIII (1988), No.1, p.20.

long held *lassiez-faire* philosophy. Whereas in other countries such as the European Union (EU), it has more commonly been referred to as "liberalization".[6]

As airline operating systems become increasingly liberalised or deregulated in more countries, the logical argument of this process would appear to be free trade in international air transport services. While supporting this trend Wassenbergh points out:

> In international air transportation we have states' air policies which range from strict protectionist mercantilism to liberal, that is, 'open skies' regimes being implemented and advocated as the solution to all problems of the economic regulation of international air transport services. But here still always also counts the doctrine of 'to each his own'. Even under a regime of free markets, a state wants to know what it gets in return for opening its markets to foreign companies. It never is a choice for better regime, but always for the regime which is most advantageous to the state, the one which best serves a state's own interests.[7]

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6 'Liberalization' means adopting a policy of gradually lifting restrictions imposed upon existing companies so that the managements of these companies can more freely determine their activities in the market. Liberlization, therefore, addresses only existing companies which suffer from restrictions imposed by foreign governments on their operations and activities. See, ibid.

7 H.A.Wassenberg, n.3, p.5.

It is true whether it is strict protectionist attitude or 'openskies' liberal policy, better regime would be essential for protecting the state's own interests and also to provide better service facilities to consumer.

A decade of airline deregulation experience in USA brought mixed results.[8] Increasing concentration in national and regional markets more circuitous routes; poorer inflight services, deterioration of labour-management relations have become the facts of the day. In fact, the proponents of deregulation argued that deregulation would create a healthy competitive environment, with many airlines offering a wide range of prices and service options. A decade of more empirical evidence indicates that present realities disprove these expectations.

Deregulation advanced neither economic nor equity goals. The assumptions upon which deregulation was based that, the destructive competition in the industry was unlikely, and that the "contestablity" of markets would discipline the tariff system, which otherwise have proven false. The time has come to reconsider the experiment of airline deregulation. Apart from the US, other like minded states have also initiated various proposals to liberalise international air transporation through an institutional setup i.e. international civil aviation organisation.

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8 Alfred Khan, "Airline deregulation - mixed bag but a clear success nevertheless", *Transport Law Journal*, vol.16 (1986), p. 229 and also see Doctroral thesis (unpublished) of A.Sudhakara Raddy, *Liberalisation and Globalisation of International Air Transprtation: A Legal study of the Chicago-Bermuda Regime*, submitted to Jawaharlal Nehru University, New Delhi, 1996, p.137.

1.1 ICAO AND ITS INVOLVEMENT IN ECONOMIC REGULATORY MATTERS:

International Civil Aviation organisation (ICAO) was established by the Chicago Convention, 1944 intended to provide the legal and institutional frame work for post war international civil aviation,[9] which came into force on April 4, 1947. On October 3, 1947, a protocol was signed by the president of the ICAO Council and the secretary-general of the United Nations bringing into effect an agreement which affliates the ICAO to the United Nations as one of the UN specialised agencies.[10] today it is one of the largest specialised organisations of the United Nations. At present 185 states are members of the organization. It is mandated to oversee and foster the safe and economic development of international civil aviation.

The aims and objectives of the ICAO, set out in Article 44 of the Chicago Convention, 1944,[11] prelude development of principles and

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9 Bin Cheng, *The Law of International Air Transport* (London, 1962), p.31.

10 Ibid.

11 Article 44 of the Chicago Convention, 1944:

a. Insure the safe and orderly growth of internaional civil aviation throughout the world;
b. Encourage the arts of aircraft design and operation for peaceful purposes;
c. Encourage the development of airways, airports and air navigation facilities for international civil aviation;
d. Meet the needs of the people of the world for safe, regular, efficient and economic air transport;
e. Prevent economic waste caused by unreasonable competition;
f. Insure that the rights of contracting states are fully respected and thus every contracting state has a fair opportunity to operate internationa airlines;

techniques of international air navigation and promotion of planning and development of international air transport.

One of the most important functions discharged by the ICAO is the adoption of international standards and recommended practices and procedures concerning the safety, regularity and efficiency of air navigation in order to secure, among the contracting states of the convention, 1944, the highest practical degree of uniformity in regulations, standards, procedures and organisation in relation to aircraft, personnel, airways and auxilliary services in all matters in which such uniformity will facilitate and improve air navigation.[12] Apart from that ICAO has played a significant role in the field of both economic and technical matters of international air transport.

Traditionally, ICAO has focused more on technical and navigational issues rather than economic aspects of international aviation. With the advent of the United States policy of deregulation, however, a growing number of nations have utilized the multilateral forum of the organisation as an area to express their disapproval the unilateral efforts of the United States to impose its will upon the international aviation community.

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contd..

g. Avoid discrimination between contracting states;
h. Promote safety of flights in international air navigation;
i. Promote generally the development of all aspects of international civil aeronautics.

12 Article37 of the Chicago Convention 1944, ICAO Doc. No. 7300/6 and also see Bincheng, n.10, pp.63-64.

When the ICAO secretariat queried the members regarding unilateral measures which adversely affect international air transport, it found that:

> Although international air transport traditionally has been exempted from the application of national laws aimed at ensuring free competition, with the adoption in recent years of air transport policies emphasizing competition, the application of such laws to this field has created a significant issue.... several states refer to recent United States actions under its competition laws and policies and their alleged destabilizing effects on whole international air transport system.[13]

Along with ICAO, certain regional organizations have also been active in this respect. For example, the Sixth Assembly of the Latin American Civil Aviation Commission [LACAC] adopted Resolution A6-4 urging states not to take unilateral antitrust measures which affect international air transport.[14] Similarly, the African Civil Aviation Conference [AFCAC] adopted Resolutions S6-5, S7-1 which expressed concern about unilateral actions taken by a state under its competition laws. The European Civil Aviation Conference [ECAC] has voiced similar objections.[15]

ICAO has grown increasingly active in this area. Throughout the 50 years of its existence, it has conducted studies, some of which are of

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13 ICAO Doc. AT Conf/3-WP/3 (April 9, 1985), p.6.

14 ICAO Doc AT Conf/3- WP/26 (October 16, 1985), p. 5.

15 ICAO Doc AT Conf/3-WP/3 (April, 9, 1985), p. 14.

ad hoc nature and others on a more regular basis, regarding economic and operational aspects of air transport air carriers, airports and air navigation facilities to provide states with information to assist in and evaluate their policy making, and to place regional developement in a world wide context.

1.2. Economic Regulationof International Air Transnsport Services: Pre Chicago Regime :

Prior to world war I, commercial flying did not create much of international problems and was mainly confined to airships and flying boats. The German Zeppelins carried a total of 19,100 passangers in 1912 and 1913, and in the United States a flying boat service connected St. Petersburg and Tampa in Florida during the early months of 1914.[16]

During the world war I manufacture of aircraft gained tremendous importance. All belligerent countries started training very large numbers of flying and supporting personnel. At the end of the war, they were converted for the use of domestic and international commercial air servcies.

Germany, one of the defeated nations, opened the first daily passanger service between Berlin and Weimar *via.*, Leipzig on 5 February 1919, less than three months after the end of hostilities. A French service between Paris and Brussels started on 22 March 1919, followed by the inauguration of services between London and Paris on 25 August 1919.[17]

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16 Paul P. Heller: "International Regulation of Air Transport," *Journal of World Trade Law,* vol. 1.7 (1973), No. 3, pp. 301-315, at p. 302.

17 Ibid., p. 303.

1.2. 1. The Paris Convention, 1919 :

Realizing the need for regulating international flying in the light of the technical developments which took place during the war, and expecting the rapid development of commercial flying both at domestic and international levels, In the years to come, Representatives of many states met at Paris in order to consider these problems. On the initiative of French Government, a conference of thirty eight states was held in Paris and as a result of their deliberations the first International Convention on Air Navigation was opened for signature on 13 October, 1919, and the British-India was a signatory to it.[18]

This convention contained the following basic provisions:[19]

1. According to Article 1 of the convention, the contracting parties recognized that every state had complete and exclusive sovereignty over the air speace above its territory.

2. According to Article 2, the freedom of innocent passage of an aircraft of contracting staes over the territory of other contracting states and the right to use the public aerodromes of that state.

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18 V.S. Mani, V. Balakista Reddy; "The History And Development of Air Law in India: A survey," in S.Bhatt V.S..Mani, V.B. Reddy (eds). *Air Law and Policy in India* (New Delhi, 1994), pp.11-34, at p.13.

19 Peter H. Sand, and others, "Historical Survey of International Air Law Before the Second World War", *McGill Law Journal* (Montreal), vol. 7 (1960), no. 1, pp.24-43, at 33-34.

3. According Article 3, for milatry reasons or in the interest of public safety, an aircraft might be prohibited from flying over certain areas of state's territory, no distinction being made between its own and foreign aircraft.

4. Aircraft of non-contracting states were not to be permitted to enter the air space of contracting states.

5. Uniform and obligatory regulations of air navigation to ensure saftey, imposed.

6. Other legal questions dealt with by the convention included registration of aircraft, certificate of airworthiness, certificate of competency and licences to be issued to aircraft personnel, and cabotage, to name but a few.

Interstingly, the most important achievement of the convention was the creation of an International Commission for Aerial Navigation, commonly known as CINA. Its main functions were:[20]

> Preparation of amendments to the convention for submissionto states for ratification;
>
> Elaboration and revision of the safety and technical regulations; and
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> Interpretation of these regulations and the circulation of information regarding air navigation;

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20 Ibid., p. 34.

CINA possesse administrative, legislative, executive and judicial powers as well as being an advisory body and a centre for documentation. The work of CINA and its sub-commissions proved very helpful in the drafting of the technical annexes to the Chicago Convention of 1944.

Thus, the importance of the 1919 Paris Convention cannot be ignored. Its provisions became part of the national legislation of the contracting states and it proved to be an inspiration to the development of national air law in Europe. The important provisions were carried verbatim in many countries that are followed by 1919 Convention.

1.2. 2. The Ibero - American Convention, 1926:

The *"Convencion Ibero-Americana de Navigacion Arien"*[21] referred as Ibero - American convention 1926. In 1926 when Spain was threatening to withdraw from the League of Nations the *"Ibero-American Air Convention"* between Spain and several South American Republics was signed at a conference held at Madrid.[22]

The main provisions of this convention were similar to the Paris convention, but it technical annexes, however, were not so comprehensive. The Ibero - American convention regarded as obsolete, as two of its principal signatories, Spain and the Argentina, later acceded to the Paris Convention.

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21 Ibid., p. 35.

22 R.Y. Jennings; "International civil Aviation and the Law" *British Year Book of International Law* (London), vol..22 (1945), pp. 191-209, at p. 12.

1.2. 3. The Pan American Convention, 1928 :

More important is the Pan American Convention on Commerical Aviation popularly known as the Havana Convention, a regional agreement between the Pan-American States, adopted at the sixth Pan-American conference held at Havana on 1928.[23] The Havana Convention, primarily a commerical agreement, differted from the Paris convention in several important respects. The Pan American Convention, unlike the Havana Convention, did not have technical annexes and did not create any special organization.

Both these conventions were deficient in some important respects, especially on economic regulations. There was no specific provision relating to the economic regulation of air transport services. In this regard R.Y. Jennings observes:

> all these conventions are deficient in important aspects in particular, neither made effective provision for the operation of regular, scheduled, commerical services, which consequently were still dependent upon the negotiation of bilateral agreements.[24]

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23 Ibid., p. 193.

24 Ibid., p. 194.

This very unsatisfactory state of affairs is well described in the White Paper issued by the British Government on 18 October 1944:[25]

> Neither of these conventions made provision for international regulation in the economic, as opposed to the technical field. In the result, the growth of air transport was conditioned by political rather than economic considerations and its development as an orderly system of World communications was impeded. Summed up, the major evils of the pre-war period were, first, that any country on an international air route could hold other countries to ransom even if those operators only wished to fly over or refuel in its territory; secondly, that there was no means of controlling the heavy subsidization of airlines which all too often were maintained at great cost for reasons mainly of national prestige or as a war potential; and thirdly, that the bargaining for transit and commercial rights introduced extraneous considerations and gave rise to international jealousies and mistrust.

This was the clear position about the economic regulation of air transport service. Above all these conventions mainly concentrated on the safety, security and other aspects. Even a single convention has not mentioned anything about the economic regulation. After the second world war, at the initiative of the American government, the representatives of

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25 This is mentioned by R.Y. Jennings while was emphasising the position of the economic regulation of international air transport service, Doc N.. CMD. 6561 (18 Oct, 1994), ibid.

fifty-four states met at the international civil aviation conference opened at Chicago on 1 November, 1944, and adopted a convention, popularily known as the "Chicago convention of 1944". This Convention superseded the Paris Convention, the Havana Convention, and the Ibero-American Convention. This convention significantly deals with economic regulation of international air transport service.

1.3. Sovereignty of States and Regulation of Air Transport:

In international law, a state is sovereign over its territory and has exclusive jurisdiction over the whole territory.[26] In the law of the air [*lex specialis*], this notion is understood to mean, and has since the beginning of the century been customarily identified, as the state having jurisdiction over the air space above its territory. Roman Law contained the Maxim *Cujus solum ejus est Usque ad coelum et ad inferos,* he who owns the soil, owns everything above and below it.[27] Thus the maxim recognises the complete and exclusive ownership over the land and can logically be extended to the territorial sovereignty.

State sovereignty has, however, ensured that the involvement of other states and nationals of other states in the exchange of goods and services in the territory of one state is conducted with the consent and

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26 Ian Brownlie, *Principles of Public International Law* [Oxford, 3r ed, 1987], p.109, and also see J.G. Starke, *Introduction to International Law* [New Delhi, 10th ed, 1994], p. 157.

27 G.S. Sachdeva, Sovereignty in the Air-A Legal Perspective, *Indian Journal of International Law* (New Delhi), vol. 22 (1982), p. 402.

authorization, explicit or implicit, of the government of that state.[28] Consent is very much essential because the state alone has the sovereign capacity to discharge or exercise any form of jurisdiction within in its territory.

This was explicitly observed by Judge Max Huber, the sole arbitrator in *Island of Palmas Arbitration.* He said:[29]

> Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other state, the function of a state.

The exercise of sovereign rights by one state and the will of other states and nationals of other states to engage in economic activities across their national boundaries have over the years led to many international trade agreements spanning almost every identifiable field of international/economic relations.

As early as the Paris Conference of 1910, state sovereignty over airspace had been an accepted phenomenon. Since the Paris convention, all international agreements in the field of air transport have adopted this concept as a legal truism. In 1944, Article 1 of the Chicago Convention also

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28 B.D.K Henaku, *Regionalism in International Air Transport Regulation* (Leiden, 1993), pp. 396-421, at p. 402.

29 Cited in, J. G. Starke, n.27, pp.157-158, also see D.H.N. Jhonson, n.4, p.2.

reiterated the same principle. Article 1 of the Chicago Convention states that:

> The contracting states recognize that every state has complete and exclusive sovereignty over the air space above its territory.[30]

With the explicit recognition of this international law rule, the drafters of the convention agreed that no international air transport activity could be conducted by any state or nationals of any state in the territory of another state without the consent of the latter. As observed by Bing Cheng "the now firmly established rule of international law that each state possesses complete and exlcusive sovereignty over the airspace above its territory means that international civil aviation today rests on the tacit acquiescence or express agreement of the states flown over[31]

The underlying importance of Article 1 the Chicago Convention is that it led to the inclusion of two important provisions in the convention to govern the exchange of traffic rights.

According to Article 5 of the convention, "each contracting state agrees that all aircraft of the other contracting states, being aircraft not

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30 See J.C. Cooper "the Proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport ", *The Journal of Air Law and Commerce vo. 14* (1947), no. 2, pp. 125-108, at p. 12., V.B. Reddy, "An Analysis of the Chicago Convention of 1944", S.Bhatt, V.S. Mani, V.B. Reddy (eds.) *Air Law and Policy in India* (New Delhi, 1994), pp.123-143, at p. 127; Arnold D.McNair, *The Law of the Air* (London, 1994), p. 6.

31 BinCheng, *The Law of International Air Transport* (London, 1962) p. 3.

engaged in scheduled international air services shall have the right subject to the observance of the terms of this convention, to make flights into or in transit non-stop across its territory, and to make stops for non-traffic purposes without the necessity of obtaining prior persmission, and subject to the right of the state flown over to allocate flight corridors of to require landing. Each contracting state, nevertheless reserves the flight, for reasons of saftey of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facillties to follow prescribed routes, or to obtain special permission for such flights.[32]

As regards scheduled air flights:

According to Article 6 of the convention "No sheduled international air service may be operated over or into the territory of a contracting state, except with the special permission or other authorisation of that state, and in accordance with the terms of such permission or authorisation. [33]

The above two articles of the Chicago Convention explicitly recognise the power of a state to regulate scheduled international air services. No scheduled air operations can be conducted by any state or nationals of any state without the consent of other states concerned. Here the important

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32 See Article 5 of the Chicago Convention, 1944, Annexes provided in S. Bhatt, V.S. Mani, V.B. Reddy (eds) *Air Law and Policy in India* (New Delhi, 1994). p. 539; B.D.K. Henaku, *Regionalism in International Air Transport Regulation* (Leiden, 1995), p. 5., Arnold D. McNair, *The Law of the Air* (London, 1964), p. 7.

33 Ibid.

thing is that a state has complete authority to regulate all matters relating ot the economic operation of scheduled air services within its territory.

Even though Article 5 of the convention did not envisage any thing explicitly, it indicates that without the initial agreement of states agreeing, no non-scheduled air transport operation can be conducted. The whole operation of international civil aviation regulation is, therefore, subjected to the formal consent of states.

1.4. Legal Setting:

The International Civil Aviation convention (Chicago Convention) 1944, is the basis for the establishment of International viation Civil AW Organisation ICAO. In the 1944 conference parties agreed to establish an International organization to regulate all economic aspects in international civil aviation:

> The United States was of the view that in purely technical field, considerable power could be wielded by such an organization, while in the economic and political fields, only consultative, fact-gathering, and fact-finding functions should be performed.[34]

The U.K. strongly advocated a plan based on reciprocity to provide services needed between states and to serve the interests of the travelling

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[34] Convention on international Civil Avition, Doc. 1180, Dec. 7, 1944, p. 15, and also see Ruwantissa, I.R. Abeyratne; "Would Competition in Commercial Aviation Ever Fit into The World Trade organisation"? *Journal of Air Law and Commerce* (1996), vol. 61, no. 4, pp. 793-857, at P. 797.

public. It was further argued that each state should have a fair share in the operation of air services and the traffic carried between states. For instance, the pre-world war II understanding between the U.K. and the U.S. of opening a trans-Atlantic services on a fifty-fifty basis[35].

The U.K. seems to have adopted a balanced approach that supported the establishment of air services to serve the need of the travelling public, while not unduly affecting the rights of states to have a fair share of air traffic for themselves.[36]

Canada suggested the establishment of International Air Authority to plan and foster the organization of air services. This authority would ensure that, so far as possible, international air routes and services were divided freely and equitably between various member states. Every state would have the opportunity to participate in international sector, in accordance with its need for air transportation services and its industrial and scientific resources.

India, while believing that it was essential for "air services to develop rationally" with a certain degree of freedom of the air being the inherent right of every state, went on to say:

> we believe that the grant of commercial rights, that is to say, the right to carry traffic to and from another country is best negotiated and agreed to on a universal reciprocal basis,

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35 Ruwantissa. I.R. Abayratme, n.34, p. 798.

36 Ibid.,

rather than by bilateral agreements. We think that only such an arrangement will secure to all countries the reciprocal rights which their interests require. But the grant of any such freedoms and rights must, in our opinion, necessarily be associated with the constitution of an authority which will regulate the use of such freedoms. It will be the function of such authority ... to ensure that the interests of the people , both of the most powerful and of the small countries are secured.[37]

India's position has been to recommend a liberal approach of universal reciprocity within the parameters of control by an authority that could ensure that the smaller nations were protected from being swamped by larger states. France also strongly supported the establishment of an international organization that could act as a 'watch dog" against predatory practices by states in the operation of International air services.

The point that can be deduced from the various views discussed above is that there was a consensus that competition for air traffic rights, based on the concept of state sovereignty, should be fair and equitable. It is for this reason that some states suggested the creation of an "umpire" to decide whether fair competition was being practised among states.

The economic significance of the Chicago Convention lies entirely in its main theme: meeting the global need for economical air transport while

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37 Ibid., p. 798.

preventing wastage through unfair competition, and providing for a fair opportunity for all states to operate air services. In order to accomplish this goal, the convention, through ICAO, has to consider all the economic implications posed by the operation of international air services by commercial air transport enterprises of the world, particular those of the member states of ICAO.

The Chicago Convention was successful in achieving good results in the technical and administrative fields. It, however, could not succeed much in evolving an agreement concerning commercial aspects of the air transport services. This failure can be attributed to two opposite stances taken by major aviation powers participating in the deliberations of the Chicago Conference. The U.S. advocated a *laissez-faire* policy i.e., "open skies". On the other hand, the U.K. favoured the governmental determination of capacity, and control over routes and fares.

Basically, the Chicago Convention does not contain any economic regulatory provisions specifically regarding the air transport, i.e., routes, frequency, fares and capacity. It includes the following provisions which have a direct effect on the scheduled international air transportation and Articles 1, 6, and 68. Article 44 of the Convention spells out and the objectives of the ICAO:

> The aims and objectives of this organization are ... to meet the needs of the peoples of the world for safer, regular, efficient and economical air transport; prevent economic

waste caused by unreasonable competition and avoid discrimination between contracting states.[38]

As a result, the international air transportation has been heavily regulated and the exchange of commercial rights is not permitted except through bilateral bargaining or reciprocity. However, the Chicago Conference succeeded in drawing two optional agreements, namely International Air Transit Agreement and International Air Transport Agreement. Out of these two agreements the Transit agreement is in force whereas, the Transport Agreement has not yet come into force due to non-ratification by states.

The failure of the Chicago Conference to establish a multilateral air services regime and non-ratification of Air Transportation agreement resulted from the fact that every state tries its best to strike a reasonable balance over the rights to be exchanged with a view to protecting own national economic interests. Having thus failed to achieve multilateralism, states have resorted to bilateral air service agreements to operate international air services (bilateralism).

In this direction the first step was taken by the United States and the United Kingdom. They signed a compromise agreement at Bermuda in February 1946. The Bermuda agreement itself consists of a Final Act, a

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38 Article 44 of the Chicago Convention 1944, ICAO Doc. 7300/6, and also see Bincheng, *The Law of International Air Transport* (London, 1962), p. 53, also see S.Bhatt, "Some Developments in Air Law", *Journal of Indian Law Institute* (New Delhi), vol. 34 (1992), no. 2, pp. 285-295, at p. 290.

bilateral agreement and an attached Annex. The Bermuda bilateral agreement basically contains two elements:[39]

1. An exchange of traffic rights between the contracting parties and privileges for scheduled air services by their airlines, and

2. A system of regulatory devices for regulating the rights that are granted.

In fact the Bermuda agreement encompasses all five freedoms of the air incorporated in the Air Transport Agreement, of all the five freedoms only the third, the fourth, and the fifth freedoms form the core of the agreement and are essential for the development of commercial aviation. The Bermuda Agreement more flexibil with absolutely no control over capacity and no regulation of frequency, thereby leaving ample scope for the exercise of third, fourth freedoms with due considerations on fifth freedom rights, subject only to the principle of *'quid pro quo'*, i.e., reciprocity. Thus the Bermuda Agreement was meant to be the most liberal aviation agreement ever contracted.

However, state practice to follwing the Bermuda I model was never uniform. Some states were willing to grant only restricted freedom to the parties relying on the sovereignty doctrine, while others wanted more freedom. This situation finally led to the denouncement of the Bermuda

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39 A.Sudhakara Reddy, "Liberalization of International Air Transportation- A Legal Study", S.Bhatt, V.S.Mani, V.B.Reddy (eds.) *Air Law Policy in India* (New Delhi, 1994), pp. 145-170, at p. 146.

Agreement on 22 June 1976. The Bermuda II agreement between the US and the UK signed on 22 June 1977, brought about some fundamental changes in the existing regulatory structure.

Also, in the meanwhile, ICAO has grown increasingly active in the economic regulations of air transport. As "open skies" slogan began to be heard in 1977, ICAO convened a special Air Transport Conference in the same year, which has been considered as "the most important gathering since Chicago. It has since convened a IInd and a IIIrd Air Transport Conference in 1980, and 1985 respectively to discuss the development of the regulatory matters in the air transport services.

On a decision taken by the ICAO Council on 11 June 1991 a worldwide Air Transport Colloquium was held in ICAO from 6 to 10 April 1992. This colloquium discussed the strengths and weaknesses of the bilateral system and possible alternative multilateral regulatory structures, etc., Recently, ICAO convened a fourth Air Transport Conference from 23 November to 6 December 1994. The Conference discussed issues of "International Air Transport regulation: Present and Future". It saw an extensive debate about future regulation of civil air transportation. In fact, the rlevance of many of the future arrangements supported by the conference.. As to ICAO's gains from the conference, the organization confirmed that it could successfully focus the aviation community's attention on ideas for the future. It also received from the aviation community a mandate to continue to refine further some of lthe ideas so

far ventiatted as well as to develop new ones.[40] In doing so, ICAO should be in a position to assert its leaderhip, and remain at the centre of debate on global regulatory issues.

1.5. Scope And Objectives:

The present study is undertaken with the following objectives: To examine the ICAO's role in economic regulatory aspects of international air transport services in an era of liberalization, mainly highlighting the reasons behind ICAO's involvement in economic regulatory issues. It seeks to examine the development of economic aspects of international air transport services. It will assess ICAO's role in economic regulation. It also seeks to throws light on state attitudes in respect of :

a. ICAO's role; and

b. Regulation of air transport services as revealed through ICAO debates.

1.6. Methodology:

The present study is essentially an analytical study. Data for the study has been derived from various primary and secondary sources.

The present work is in four chapters. The first chapter is introductory. It outlines the problem for the study, and historical development of the economic regulation of international air transport

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40 John Gunthar, "World Wide Air Transport Conference Provides New Direction for The Future of Economic Regulation," *ICAO Journal*, vol. 49 (1994), no.10, December, pp. 14-16, at p.15.

services, especially in pre-Chicago regime. The study also highlights ICAO's involvement in economic regulatory matters in the post-Chicago regime *vis-a-vis.*, the issues of state sovereignty.

The second chapter exclusively deals with the economic regulatory aspects of air transport services under the Chicago regime. Various provisions of the Chicago Convention and the Bermuda bilateral agreement will be examined analytically. It also deals with the efforts made by states as well as by ICAO to bring in multilateralism in international air transportation.

The third chapter deals with the recent trends in ICAO regulation of commercial air transport services. This chapter mainly concentrate on the 1992 world wide colloquium. It also discusses the important aspects of the IVth Air Transport Conference held in 1994, and finally the applicability of the nascent GATT and GATS principles to Air Transport Services.

The fourth and final chapter embodies conclusions and suggestions regarding the role of ICAO's involvement in the economic aspects of international air transport services and applicability of international trading principles.

CHAPTER - 2

ECONOMIC REGULATION OF AIR TRANSPORT SERVICES UNDER CHICAGO REGIME

2.1.Introduction:

Towards the end of World War II, in 1944 a greater part of the world still remained a battlefield. All human, economic and political resources of the world were still geared to the wartime efforts. However, by that time, the Allied powers were already engaged in building a political foundation for organized peace, and post-war arrangements for reconstruction in many vital fields. The Allied powers were discussing in right earnest a plan for a Universal Organization to maintain peace and security. In 1944 after preliminary exchanges of views between the United States and the United Kingdom, the United States government invited all allied and neutral powers to attend an international conference on international civil aviation in Chicago.

The invitation mentioned three major objectives of the conference: the establishment of provisional world air route arrangements; the establishment of an Interim International Air Council; Agreement on Principles for a permanent aeronautical body and a multilateral aviation convention.[1]

The conference was inaugurated on 1 November 1944, under the chairmanship of Adolf. A. Berle. Jr. of the United States. 54 States had

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1 Proceeding on International Civil Aviation Conference, ICAO Doc. 7300/6, and also see Peter H.Sand, and others, "An Historical Survey of International Air Law since 1944", *McGill Law Journal* (Montreal), vol.7 (1960), No.2. pp. 125-159, at p.126.

sent a total number of 700 delegates,[2] consultants and advisers, about 90 of whom were Military officers[3] participated in the conference at Chicago. The conference went on for thirty seven days from 1 November to 7 December, 1944. Different proposals were made by the different states for the regulation of international civil aviation. The United States proposed that an international body be established having executive functions in the technical field, and merely advisory functions in the economic field.[4] The United Kingdom wanted to entrust the organization with the power to fix routes, frequencies and rates. Canada also proposed economic functions to the organization, such as the power to issue permits for international air transport operators, as the Civil Aeronautics Board (CAB) did in the United States.[5]

The conference without any previous preparatory work proposed to discuss and take decisions on a number of vastly divergent views and proposals. Yet, the conference achieved awesome results by drafting, one major convention,[6] three other agreements[7], a standard form of a

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2 L. Weich. Pogue., "The International Civil Aviation Conference, 1944, and its sequal The Anglo-Americal Bermuda Air Transport Agreement", *Annals of Air and Space Law* (Montreal), Vol. XIX-I (1994), pp.3-47, at p.4.

3 Peter. H. Sand, n.1, p.127. and also see V. Balakista Reddy, "An Analysis of the Chicago convention of 1944; in S. Bhatt, V.S. Mani, V.B. Reddy (eds), *Air Law Policy in India* (New Delhi, 1944), pp. 123-143, at pp. 124-125.

4 Thus the system implying to the system of *'Lassiez-Fair'* and 'Free enterprises' U.S.A. is strong supporter of this system from the begining because of U.S. was well prepared of her large war-stock of transport aircraft.

5 Peter H. Sand, n.1, p.126.

6 Convention on International Civil Aviation.

7 - Interim Agreement on International Civil Aviation.
- International Air Services Transit Agreement.
- International Air Transport Agreement.

bilateral agreement for provisional air routes, and the texts of twelve draft technical Annexes[8].

2.1. 1. The Interim Agreement:

The object and purpose of this agreement was to set up a Provisional International Civil Aviation Organisation (PICAO) for International air services during an interim period, until the Permanent Organisation, i.e. ICAO, and the Chicago convention entered into force. PICAO came into operation on 6 June 1945 and lasted till 4 April 1947.[9]

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See, the Proceedings of the Conference of 1944 at Chicago Nov. 1 to Dec. 7, 1944, pp. 133-372.

8 In 1944 Chicago Convention adopted 12 draft technical Anexes. i.e. the first 12 of the current 18:

1. Personal Licensing,
2. Rules of Air,
3. Meteorological services for international air navigation,
4. Aeronautical charts,
5. United of measurement to be used in air and ground operations,
6. Operation of aircraft,
7. Aircraft nationality and registration marks,
8. Airworthiness of aircraft,
9. Facilitation,
10. Aeronautical telecommunications,
11. Air traffic services,
12. Search and rescue,
13. Aircraft accident investigation,
14. Aerodromes,
15. Aeronautical information services,
16. Environmentla protection
17. Security-sufeguarding international civil aviation against acts of unlawful interference, and
18. The safe transport of dangerous goods by air.

These 18 technical annexes covering the varied and important aspects of air transport operations are a tribute to the sincerity and objectivity of the framers of the Chicago convention. See. V. Balakista Reddy, n.3, p. 141.

9 Peter H.Sand, n.1, p.128, and also see V.Balakista Reddy, n.3, pp.130-132.

2.1. 2. The Convention:

The Chicago convention is a major achievement in post world war II period and as on date it is signed by 156 states. It is divided into four parts containing 22 Chapters, and 96 Articles.[10] It embodies some basic principles such as the sovereignty in the air space, creates ICAO and its constitutional bodies, provides for their powers and functions.

2.1. 3. The International Air Services Transit Agreement:

The Transit Agreement purports to create a conventional right of innocent passage for scheduled flights.[11] It establishes two freedoms and

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10 See for further details Appendix given on S. Bhat, V.S. Mani, V.B.Reddy (eds.) "*Air Law and Policy in India*" (New Delhi, 1994), pp. 539-577.

11 In 1952 the council adopted a definition of the term 'scheduled international air services' for the guidance of states in interpretation or application of Article 5 and 6 of the convention. The Definition also included some notes on the Application of the Definition on an Analysis of the Rights conferred by Article 5 of the Convention. Recommendation 3 of the Special Air Transport Conference (1977) proposed that the council examine the feasibility of revising the Definition. The Matters was taken up by the panel on Regulation of Air Transport Services which concluded that the Definition did not require revision. Nevertheless to emphasize the flexibility of the definition the panel proposed that the notes on the Application of the Definition be modified. The second Air Transport Conference accepted the panel's conclusions and the Conference Recommendation on this was later endorsed by the council. The Definition, revised notes of Rights as follows:

A scheduled international air services is a series of flights that prossesses all the following characteristics:

a. it passes through the air-space over the territory of more than one state;
b. it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;
c. it is operated, so as to serve traffic between the same two or more points, either
   i. according to published time-table or

therefore, it is popularly called the two freedoms agreement. It is a non-commercial agreement. These two freedoms are: The freedom to fly, and carry traffic, non-stop over the territory of another state, and the freedom to make one or more stops for non-traffic purposes such as refulling or other technical purposes.[12] This Agreement was initially signed by 26 states and currently 100 states are parties to it. Two points should not however, be overlooked. The fact that a number of states abstained from accepting the Agreement, suggests that they do not recognize the right of innocent passage. All the agreement may be denounced on one year's notice by any contracting state. Therefore, the Transit agreement does not grant much freedom to airlines as it refers to."[13]

2.1.4. The International Air Transport Agreement:

The International Air Transport Agreement was signed by 16 states, and currently the number is further reduced to 11.[14] The 'transport' agreement also called 'five freedoms agreement' basically provides for commercial freedom to operate air services as advocated by the United States. In addition to the two "technical freedoms" reffered to above, as mentioned in the Air Transport Agreement, it envisages three other "commercial freedoms". The third freedom consists in the "right to

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ii. with flights so regular or frequent that they constitute a recognizably a systamatic series.

See Policy and Guidence material on the Regulation of International Air Transport, ICAO.Doc No. 7278.

12 Bincheng., *"Law of International Air Transport"*, (London, 1962), p.14.

13 Peter H.Sand, and others, "An Historical Survey of International Air Law since 1944", *McGill Law Journal*, Vol. 7, No.2 1960, pp. 125-159, at p.129.

14 Status of certain international air law instruments *ICAO Journal* (Montreal), vol. 44 (1994), No.7, Sep., p. 63.

carry traffic from the home state of the carrier to the grantor state". The fourth freedom is "the right to carry traffic from the grantor state to the flag state of the carrier". The fifth freedom is "the privilege of carrying traffic between the grantor state and third state situated along an agreed route.[15] However, as majority of states refused to accept a "free enterprise" system, the United States, an ardent supporter of free trade regime in air transport, withdrew from the agreement. Other denunciations followed soon and today the agreement is virtually a "dead letter".

2.1.5. The Draft Technical Annexes:

Unlike the Paris Convention of 1919, the Chicago Convention does not contain technical rules for Air Navigation purposes. These technical rules, however, are popularly called the standards and recommended practices (SARP's), and can be found in the 'Technical Annexes" appended to the Chicago Convention. These technical annexes do not require specific adherence by states, and once disignated as annexes to the convention, they are binding as integral parts of the convention subject to Article 54 (l) and 90 of the convention.

2.2. The International Civil Aviation Organization:

The provisional International Civil Aviation Organization (PICAO) established by the Interim Agreement on 6 June, 1945, was the first post-war organization of the United Nations to get under way. Its structure included an Interim Assembly, an Interim Council, and a Secretariat. The new organization replaced the pre-war International Commission Air Navigation in 1947, when the Chicago Convention came

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15 Bin Cheng., n.12, p. 14.

into force on 4 April 1947.[16] After the necessary ratifications of the Chicago Convention by the 26 states the permanent International Civil Aviation organization was established on 4 April 1947. The new convention also superseded the previous Conventions of Paris (1919)[17] and Havana (1928).[18] At present 185 states are members of ICAO.

2.2.1. Functions of the Organization:

The functions of ICAO are regulatory, adjudicatory, and executive. The ICAO council has regulatory power to adopt and amend the technical Annexes.[19]

Adjudicatory powers have also been entrusted to the ICAO Council under chapter XVIII of the Convention. The Council exercises the role of arbitrator in settling the disputes between member states regarding the interpretation of the Convention.[20] In addition, many bilateral and multilateral agreements have conferred a similar power on the council. By virtue of Art 54 (n) of this convention,[21] the Council occasionally gives "advisory opinions", if so requested by member states.[22]

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16 Peter. H. Sand, n.1, p. 129, and also see D.W. Frer, "The Chicago Convention of 1944", in Mark Blacklock (ed.), *International Civil Aviation Orgranisation: 50 Years of Global Celebrations 1944-94* (London, 1995), pp.29-30.

17 Convention relating to the regulation of Aerial Navigation at Paris, on 13th October 1919.

18 The Convention on Commercial Aviation at Havana on 20th February 1928.

19 See. Article 54 (1), (M), Art. 90. the Chicago convention.

20 Articles 84 and 85 of the Chicago Convention, 1944, ICAO Doc. 7300/6.

21 Article 54 of the Chicago convention, 1944, ICAO. Doc. 7300/6 and also see Bin Cheng, n.11, pp. 925-26.

22 The Chicago Convention, 1944, ICAO. Doc. 7300/6.

ICAO's executive functions concern administrative, technical and economic matters. Among the administrative powers, the member states are under an obligation to register their bilateral aviation agreements with ICAO.[23] The technical functions consist of prividing technical assistance for under-developed countries. In the economic field, the powers of ICAO are restricted to requesting, collecting, examining and publishing information and to conduct research.[24]

2.3. Bilateral Air Transport Agreement and the Chicago Convention:

ICAO's involvement in the economic regulation of International air transport has its origins in the Chicago convention of 1944. Article 43 of the Convention sets up the organization, whose objectives are, *inter alia*, to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to meet the needs of the peoples of the world for safe, regular, efficient, economical air transport, to prevent economic waste caused by unreasonable competition and to ensure that the rights of contracting states are fully respected and that every contracting state has a fair and equal opportunity to operate international airlines.[25]

Provision has also been made for the ICAO Council to provide services calculated to maintain and administer the airports and air

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23 See. Article 81,83 Chicago Convention, 1944. Now more than 3000 bilateral agreement are registered in ICAO. also see P.P.C. Haanappel, "Multilateralism and economic bloc forming in International Air Transport", *Annals of Air and Space Law* (Montreal, Canada), Vol. XIX-I (1994), pp. 279-315, at P.291.

24 Art. 54, 55, 67 of Chicago Convention of 1944, ICAO Doc. 7300/6.

25 The Chicago Convention 7, Dec. 1944. ICAO Doc. 7300/6, and also see Bincheng, n.11, p.63.

navigation facilities of a contracting state, leading to the safe, regular efficient and economical operation of International air services of other contracting states in the territory of that state.[26]

The economic significance of the Chicago Convention lies entirely in its main theme: meeting the needs of the peoples of the world for economical air transport whilst preventing waste through unfair competition and providing a fair opportunity for all states concerned to operate air services. In order to accomplish these goals, ICAO has to consider the economic implications of the operation of international air services by commercial air transport enterprises.

The first Interim Assembly of the provisional international aviation organization was held in May 1946. At this session, PICAO Commissioned a group of experts to draft a multilateral agreement on commercial rights for aircraft, which culminated in a draft multilateral Agreement on commercial rights. The draft agreement contained three basic elements:[27]

1. A grant of right to operate commercially to a reasonable number of traffic centres serving each nation's international traffic as conveniently as is practicable;
2. A basic regulatory provision dealing with the amount of capacity to be provided, with subsidiary provisions designed to prevent abuses; and

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26 Ibid., Art. 71.

27 A detailed discussion of the commissions work, see ICAO Doc. C.WP/369 (1949), also see Ruwantissa.I.R. Abeyratne, "The Economic Relevance of the Chicago convention: A Retrospective Study", *Annals of air and space law*, Vol. XIX-II (1994), pp.3-71, at p.14.

3. A provision for the settlement of differences between contracting states through arbitral tribunals with the power to render binding decisions.

The only provision of the Draft on which the parties failed to reach consensus was regarding routes, air ports and capacity. As a results the commission on scheduled and non-scheduled air transport, at the 17th session of the ICAO Council in 1952, examined a secretariat study on regulations in international non-scheduled aviation. The study found at that time, that national policies with respect to the taking on or discharging of traffic in their territories by foreign non-scheduled aircraft had taken a variety of forms.[28]

Some states required permission for each individual flight or series of flights where the granting of permission was based on the circumstances of the each case. Others required specific bilateral agreements and demanded reciprocal treatment for their carriers.[29] The committee noted the Council's view that a "stop for non-traffic purposes", as referred to in Article 5 of the convention, should be taken to include the freedom to load and unload passengers or goods not carried for remuneration or hire.[30]

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28 Ruwantissa. I.R. Abeyratna, n.27, p.15

29 Ibid., P.15.

30 The council had considered "remuneration or hire" to mean same consideration received for the act of transportation from someone other the operator. This interpretation would mean that flights carried out on the business of the operator would enjoy the freedom granted by the first paragraph of Article 5. In 1952 the council adopted a definition of the term scheduled international air services for the guidence of states in interepretation or application of Articles 5 and 6 of the convention. In this meeting council adopted this view. See for further details policy and guidence marterial, n. 11.

At its 15th session on 28 March 1952, ICAO's Council adopted a report which outlined its views with respect to scheduled international air services. This report contained the observation that a scheduled international air service must, in the first instance, consist of series of flights. Article 6, therefore requires that in order to constitute a scheduled international air service, a series of flights must be performed through the air space above the territory of more than one state, performed by aircraft for the transport of passengers, cargo or mail for remuneration. The service must be performed so as to serve traffic between two or more points, either according to a published timetable, or with flights so regular or frequent that they constitute a recognizably systematic series.[31]

The genesis of the current modesl of bilateral agreements in international aviation law was based on 1946 Bermuda 1. The United States and the United Kingdom, as a compromise between the "free market" approach of the U.S. and the somewhat more cautious as conservative approach of the U.K., entered into a bilateral agreement for air services. This came to be known as Bermuda I.[32]

The Bermuda Agreement itself consists of a Final Act. The Bermuda bilateral agreement basically contain two points.[33]

1. An exchange of traffic rights between the contracting parties and privileges for scheduled air services, and

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31 See ICAO Doc. 7278 C/841 (1952), and also see Ruwantissa.I.R. Abeyratne, n.27, p.14.

32 Agreement between the U.K. and the U.S., 11 February 1946, (here in after Bermuda- 1).

33 Bincheng, n.12, pp.200-04.

2. A system of regulatory devices for regulating the rights that are granted.

The exchange of traffic rights under the Bermuda Agreement mainly consisted of the grant of an operating permission to the designated airlines, the grant of transit rights, the grant of traffic rights and the other ancillary rights to facilitate the transit and traffic rights. In fact the Bermuda agreement was based on the exchange of all five freedoms of the air incorporated in the Air Transport Agreement[34], namely:

> First - The right to fly across the territory of a foreign nation without landing,
>
> Second- The right to fly and to land in the territory of foreign nation, for non-traffic purposes.
>
> Third - The right to fly into the territory of the grantor state and discharge committal traffic and cargo coming from the flag state of the carrier.
>
> Fourth- The right to take on board commercial traffic destined for the flag state of the carrier.
>
> Fifth - The right to fly into the territory of the grantor state, for the purpose of taking on, or discharging traffic destined for or coming from, a third state.

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34 A. Sudhakara Reddy: "Liberalization of International Air Transportation - A Legal Study", in S.Bhatt, V.S.Mani, V.B.Reddy (eds.) *"Air Law and Policy in India"* (New Delhi, 1994), pp. 145-170, at p.149.

The last three commercial freedoms of the Air Transport Agreement were the basis of the Bermuda Agreement, These are central to the development of international commercial Aviation.

The Chicago convention has provided a legal basis for bilateralism. Article 1 of the Convention provides that:

> The contracting state recognise that every state has complete and exclusive sovereignty over the air space above its territory.

Article 6 also states that:

> no scheduled international air service may be operated over or into the territory of a contracting state, except with the special permission or authorization.[35]

These two articles specifically declare that every state has to obtain permission or authorization from a destination state before engaging in international air transportation. It means that in accordance with state practice, the requesting state needs to negotiate with the granting state on all aspects of establishment of air service. The required permission may also be granted in other ways, say by reciprocal conduct, besides bilateral arrangements.

As seen already, the Chicago Convention failed to establish a multilateral regime for the regulation of scheduled international air services. In 1944, bilateralism was opted for, at least for the time being

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35 Article 1 and 6 of the 1944 Chicago Convention, see ICAO Doc. 7300/6.

until some kind of multilateral efforts proved successful either to replace bilateralism or to supplement it.

The object of bilateral air transport agreements is to grant commercial right to states or airlines and in addition, lays down the ground rules for the operation of an air service. These commercial rights are granted to any contracting state strictly on the basis of "*quid pro quo*". The two participating governments involved in the negotiations more often tend to give importance to the political considerations rather the economic considerations.[36] In practice this mode of regulating air transport activities is extremely popular. The bilateral agreements are registered with the ICAO Secretariat in accordance with Article 83 of the Chicago Convention.

It is not clear if bilateralism protected the interests of the small states. It is possible to hold that the system of bilateral agreements hindered the economic performance of smaller countries and their airlines. Since the bilateral bargaining is based on the economic strength and aspects of the state, the ecomically weaker states resorted to more restrictive practices to prevent the exploitation by stronger states. A major objective of bilateralism is contained in the "primary justification traffic" principle. By this principle it is meant that service to be initiated and operated by airlines designated in accordance with the bilateral arrangements, should be based on the third and fourth freedom traffic. Any other form of traffic, fifth or sixth is supplementary to the third and fourth. A state which seeks to permit its airlines to carry fifth

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36 B.D.K. Henaku, *Regonalism in International Air transport Regulation* [Leiden, 1993), p. 12.

freedom traffic, for instance, needs to enter into fresh negotiations with the third parties. This cumber some process of negotiating and renegotiating and trading off certain rights in exchange for the fifth freedom right, played a major role to concede only the "primary justification trafffic" i.e., the third and fourth freedom.[37]

2.4. The Chicago Convention: An Effort Towards Multilateralism:

The regulation of economic activity in international air transportation has been dominated by bilateralism. A multilateral approach to regulate economic aspects of aviation is gaining support in recent times with a view to creating a real global market for the air transport activities. The study on multilateralism would relate to whether the Chicago Convention permits or accommodates any other form of economic regulation in international aviation. These efforts started since the beginning of the establishment of ICAO.

The Chicago Convention is a multilateral instrument. The exchange of commercial rights is, however, subjected to Bilateral Air Service Agreements (BASA). The convention codifies principles of public international air law, and sets out procedures and practices for the conduct of international air services. By virtue of the broad mandate given to ICAO by the 1944 Convention, ICAO is in fact, the appropriate forum where, a multilateral instrument on any aspect of civil aviation could be negotiated, if its member states so agree.[38]

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37 B.D.K. Henaku, n.36 p.17.

38 John Gunther, "Multilateralism in International Air Transport, the Concept and the quest". *Annals of Air and Space Law,* Vol. XIX-I (1994), pp.259-274, at pp. 260-61.

The main object of the participants at the Chicago Conference was to promote co-operation among nations and peoples of the world in the field of aviation. Though their further aim of concluding a single multilateral agreement to regulate the economic aspects of the international air transport sector could not materialize in 1994, the object remained an underlying idea to be persued in the future:

> Multilateralism in international Civil aviation is the objective, the idea towards which the world began moving at Chicago, moving some what hesitantly, it is true, but still moving.[39]

Due to the failure on the part of states to ratify the Air Transport Agreement, PICAO continued its efforts at finding a multilateral solution. The first draft of multilateral transport agreement was submitted to PICAO Interim Assembly in 1946, but it was returned for further consideration. A second draft presented to the first ICAO assembly in May 1947,[40] suffered a similar fate. The Assembly decided to appoint a special commission on this subject.

The commission met at Geneva in November 1947. In the meantime, the U.S. and the U.K. had concluded the Bermuda I Agreement. This was resented by other states. In 1953 the General

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39 B.D.K. Henaku, n.36, p.21.

40 Peter H. Sand, n.1, p.138, and also see Gerald F. FltzGerald, "The International Civil Aviation Organization and the Development of Conventions on International Air Law (1947-1978)", *Annals of Air and Space Law*, vol.3 (1978), pp.4-66, and Edward Warner, "PICAO and development of air law", *Journal of Air Law and Commerce*, vol. 14 (1952), p.1.

Assembly of ICAO convened at Brighton, U.K. also had to conclude that a universal multilateral convention was at that moment unattainable.[41]

In spite of all these attempts, the failure of the Chicago Conference to achieve multilateral agreement on air transportation has proved to be a hindrance to the development of air transport.

The failure of multilateralism in the Chicago regime has obviously not discredited the multilateral approach to economic regulation as such. The comprehensive Uruguay Round of International trade Negotiations and especially the General Agreement on Trade in Services (GATS), raised the hopes paving way for multilateralism.

Despite the number of problems, the initiative has been considered as a positive approach in favour of multilateralism in general and Multilateralism in the air transport sector in particular. The reason is that it has sensitized some states to the need to resolve aviation related problems in cooperation with other states rather than going alone. Secondly, it reactivated the matter left unattained about a half a century ago. Simply put, if the entire services sector can be discussed within GATT, why should it pose a greater challenge to the air transport sector to discuss the specific issues relating to that sector either as a global basis or on regional levels. This initiative has encouraged and prompted much discussion on finding an alternative to bilateralism. Whereas the previous initiatives have been mostly from individual airline companies and trading institutions, now ICAO has joined the band wagon.[42]

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41 Peter H. Sand, n.1, p.138.

42 B.D.K. Henaku, n.36, p.26.

The basic object of the multilateral regime should be to seek to ensure equal opportunities for all parties and the development of air transportation should not be confined only to the territories of the larger and developed partners of the multilateral venture. The need for the reassurance of equal opportunities does not necessarily imply the prevention of faire competition. Thus certain measures are essential to combat unfair and unnecessary competition.[43] That is to say, air transport sector should be made free from *a priori* regulations but subject to *a posteriori* regulations to promote fair competition.

The major aim of the multilateral regime should be the creation of equal opportunities for all airline partners of the multilateral regime. The Civil Aviation Conference, hopefully, will not only evolve a constructive guide on how to move forward on issues perplexing the present regulatory system but also be a catalyst for a long term regulatory change and adjustment. Multilateralism is certainly one option. As a vehicle for regulating international air transport it is topical, tempting and interesting. But it is definitely not a panacea as it is sometimes characterized to be. For users and for national growth and development multilateralism has been projected as a worthy legacy for future generations.

2. 5. Institutional Efforts at Air Transport Regulation:

ICAO recognized that the world-wide acceptance of multilateral agreements on the commercial aspects of international air transport has become increasingly difficult. Bilateralism has remained the ruling

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43 Ibid., p.28.

norm for many years. ICAO had only recommended its considerations on commercial multilateralism in air transport around 1975, and since then it has organized three special assemblies, called Air Transport Conferences, intended to address world wide commercial issues. The conferences took place in 1977, 1980 and 1985.

2. 5. 1. First Air Transport Conference 1977 :

The first Special Air Transport Conference (SATC) was held in April 1977, at Montreal. This is one of the most important gatherings since the Chicago conference. This conference revealed, as was expected, a great diversity of views on the identification of and possible solutions to problems relating to international non-scheduled air transport and its differentiation from the scheduled air transport. At this conference many working papers were submitted by the participating countries. Some of them contemplated fairly straightforward changes in the international legal framework for operation of air services.

The Special Air Transport Conference adopted various recommendations. Recommendation 11 provides that "unilateral action by governments which may have a negative effect on carriers' efforts towards reaching an agreement should be avoided as far as possible".[44] When the United States Civil Aeronautics Board issued a show cause order in 1978 threatening to revoke the antitrust immunity for rate-making activities, the ICAO council adopted a resolution requesting the contracting states to refrain from any unilateral action which would

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44 ICAO Doc. 9199 SATC (1977). See, Paul Stephen Dempsey, "The Role of ICAO on Deregulation, Discrimination and Dispute Resolution", *Journal of Air Law and Commerce*, Vol. 52 (1987), No. 3, pp.529-583, at p. 538.

endanger multilateral fares and rate-setting system. The IATA system was supported at the first ATC by more than 100 governments, with the axception of the United States.[45]

In the 1977 special Air Transport conference the developments relating to capacity in international air services had become the most important and pressing problem for the majority of participating countries. The conference adopted the recommendation 4, which recommended that the council undertake certain studies on the regulation of capacity in international air transport. The panel on regulation of Air Transport Services developed for the guidance of States model clauses, criteria, objectives and guidelines covering the Bermuda I 'predetermination'[46] and 'free-determination'[47] methods of capacity regulation. This guidence material was communicated by the council to states for their consideration.

The Second Air Transport Conference[48] adopted two Recommendations[49] concerning capacity regulation and resources. Both

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45 Ibid.

46 'predetermination' is a method where states agree for tariffs during bilateral negotiations itself, see for further details ICAO manual (Montrel, 1994).

47 'Freedetermination' is a method where the fixation of tariffs would be left to the discretion of airlines, ibid.,

48 Report of the second Air Transport Conference, At Conf/2, ICAO, DOC. No. 9297.

49 AT Cont/2 Recommendation 4.
RECOMMENDS that contracting states in formulating the implementing their Aviation Policy, *interalia* in regulating capacity. They take into consideration the need to harmonize traffic requirements with the availability of airport, airways, human and material resources and the need to protect the environment.
AT Conf/2 Recommendation 5.

Recommendations were subsequently approved by Assembly resolution A23-18. The first Recommendation deals with the harmonization of capacity with resources and the environment and the second concerns the effect of fuel availability and allocation upon capacity.

2.5. 2. Second Air Transport Conference 1980:

The second Air Transport Conference (ATC) of the ICAO was held in Montreal in February 1980.[50] The conference did not have on its agenda any item dealing generally with bilateral air transport agreements.

The conference in fact reactivated the findings of the 1977 Special Conference. The conference took new initiatives to clarify the difference between scheduled services and charters. Majority of the delegates at the Conference deplored the U.S efforts at the extraterritorial application of its Antitrust Laws. They argued that "unilateral action which disrupted multilateral tariff negotiations are contrary to the spirit of the Chicago convention, placed international cooperation in peril, and through their destabilizing influence, threatened the economic performance of the international aviation system as a whole".[51] The conference adopted a

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contd....

RECOGNIZING that the supply of fuel for international civil aviation could become critical and the methods of rationing amongst users may become necessay; and

RECOGNIZING that allocations received under any system of rationing may restrict the provisions of airline capacity in such a way as to bring into question the 'fair and equal opportunity" prinicple;

RECOMMENDS that all contracting states should, as far as possible, ensure the adequate supply of fuel for approved operations on a fair and non-discriminatory basis, at prices current in their respective national markets.

50 ICAO Doc. 9297 AT Conf/2 (1980).

51 P.S. Dempsey, n.43, p.538.

series of strong recommendations condemning the unilateral U.S. assault on the tariff integrity of IATA.

Although the objectives of the 1980 ATC, as reflected in the conference, contemplated, as in the case of 1977 SATC, no direct resolutions relating to bilateral agreements. The actual work of the conference resulted in several conclusions which were important for the future development of the economic regulation of air transport sector.

2.5. 3. Third Air Transport Conference 1985:

In 1985, ICAO convened the Third ATC in Montreal from 22 October to 7 November.[52] The conference was devoted to major economic issues in air transport and emphasized the urgent need for ICAO guidelines to avoid or resolve conflicts among states over the application of national competition laws to international air transport.

The conference was attended by some 400 officials from 93 contracting states and 10 international organizations. It approved various recommendations dealing with air service regulatory policies, the role of government in the tariff system, and rules and conditions associated with international tariffs. States were urged to co-operate with each other so as to discourage unilateral measures which would adversely affect fair and equal opportunities to share the benefits by states and their carriers in the operation of international air services. The conference also urged to ensure that their national competition laws

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52 ICAO Doc. AT Conf/3 WP/71 (1985). and also see *ICAO Bulletin*: "Highlights of the 3rd Air Transport Conference", Vol.41 (1986), No.1 Jan., p.9.

should not be applied in such a way as to avoid any conflict with bilateral and multilateral agreements.

Nevertheless, the Third ATC was active on the subject of rate fixing and tariff enforcement. It adopted Recommendation 6/1 which urges states to encourage their air carriers to comply with established tariffs and support local tariff integrity programmes. It also implores the ICAO Council to encourage member states to prevent tariff violations by carrier agents, and implement relevant ICAO Resolutions and Recommendations in that respect.[53] In addition, Resolution 6/2 called upon the states to develop guidelines for tariff enforcement. Res.4/5 urges that incentives like frequent flier programmes, free hotel accommodation, and other commercial activities to promote the ticket purchasing schemes should be encouraged, with the appropriate governmental authorization.

One of the most important achievements after third ATC was the regulation computer reservation systems, which is similar to the U.S. domestic regulation. The conference adopted Recommendation 5/4, [54] which urged the Council to make a study of all relevant aspects of computer reservation systems and to formulate recommendations whose purpose would be to avoid abuses of the system at the international level, and thereby to enhance fair competition between airlines and protect the travelling public.

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53 ICAO Doc. At conf/3 -wp/70 (Nov. 6, 1985) also see P.S. Dempsey, n. 43, p. 546.

54 Ibid.

2.6 Summation:

The ICAO involvement in the economic regulation of international air transport has its origin in efforts at the Chicago Conference of 1944. Basically, ICAO has focused much attention on technical and navigational aspects rather than economic matters of international air transport. As noted already Article 44 of the Chicago Convention 1944 *inter alia*, provides for a role for ICAO "to meet the needs of the people of the world for safe, regular, efficient and economic air transport; and prevent economic waste caused by unreasonable competition".

In recent times, ICAO activities have tremendously increased with the increasing growth of global air transport. In the first SATC, the ICAO discussed six agenda items. Out of the six, three items focused on general aspects of air transport regulation and the other three related to air tariffs. The first agenda item was to assess the usefulness of guidance material on capacity regulation, and the second was on non-scheduled airtransport. The third item focused on the effects of unilateral measures on international air transport and accordingly to develop guidelines, particularly as regards the extraterritorial implications of national legislation.

The fourth agenda item concentrated on government participation in tariff setting procedures. Under the fifth agenda item, the results of the work of the council, was evaluated and a determination made whether to recommend further action.

Finally, it was the increasing complexity of tariff fixing mechanism and the difficulties experienced by states in enforcing tariffs were

discussed as the fifth agenda item. The conference addressed some basic issues and developed certain guidelines for tariff enforcement.

These issues, the chairman of the conference said, included the delineation of the respective roles of airlines and governments in the ditection of malpractices and in the follow-up action and, more fundamentally, the question of accountability and legal powers of governments with regard to tariffs which they had approved.[55] A number of delegates presented views of their concerned governments regarding various issues mentioned in the agenda items.

In 1980, the ICAO convened the second Air Transport Conference (ATC). The second ATC adopted two Recommendations concerning capacity and regulations, and resources. Both Recommendations were subsequently approved by the ICAO Assembly. As already noted, the First Recommendation deals with the harmonization of capacity with resources and the environment and the second relates to the effect of fuel availability and allocation upon capacity.

In late 1985, ICAO convened the Third Air Transport Conference (ATC) in Montreal. This conference was devoted to major economic issues in air transport. The third ATC proposed various recommendations concerning the implementation of unilateral measures which affect international air transport[56] States were urged to co-operate with one another so as to discourage unilateral measures and ensure fair and equal opportunities for sharing of benefits by all states and their carriers in the operation of international air services, as well as ensure that

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55 C.V.M. Mgana, "Commercial issues now paramount', *ICAO Journal* (Montreal), vol. 41 (1986), no.1. Jan., pp. 11-18, at pp.11-12.

56 Recommendation A24-14, See Report of the Third Air Transport Conference, ICAO Doc. AT Conf/3, 9470.

their competition laws are applied in such a way as to avoid any conflict with bilateral and multilateral agreements.

Besides this, the third ATC adopted several Recommendations relating to tariff making and enforcement, techniques for encouraging uniformity in ticket purchasing and also adopted Recommendations to streamline the computer reservation systems.

On a decision taken by the ICAO Council on 11 June 1991. a world wide Air Transport colloquium was held at Montreal from 6 to 10 April 1992. The colloquium discussed the strengths and weaknesses of the bilateral system. As a result of a review of the findings of the colloquium, the ICAO council decided in June 1992 that there was a compelling need to explore new regulatory arrangements for international air transport in the form of an air transport conference. In order to ensure this, the ICAO convened Fourth Air Transport Conference in December 1994, at Montreal.

These are the important achievements of the ICAO in the field of air transport economic regulation. These conferences have charted new areas of work for the organization. The next chapter deals with these.

CHAPTER-3

RECENT EFFORTS OF ICAO AT REGULATION OF COMMERCIAL AIR TRANSPORT SERVICES

For more than a half-century commercial air transport between nations has been governed by an ever-growing number of bilateral agreements. By and large bilaterlism has effectively promoted the rapid growth of the international air transport system so far. Indeed, regulatory liberalization of air transport, which has contributed in no small way to the enormous growth of the world's air transport system, has already found much of its international expression through bilateralism.

The main issue may be if the bilateral system has failed. Multilateralism is not necessarily a universal remedy for the regulation international air services. Any choice between these two should be based on well-considered determination of policy.[1] In recent years, multilateralism has gained an increasing support from numerous ICAO member states. In 1992 a worldwide Air Transport Colloquium was held at Montreal under the auspice of ICAO. In that meeting some of the member states and their airlines expressed a desire in seeking a multilateral approach to the commercial issues of international air transport.

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1 Assad Kotaite, "New Regulatory concepts expected to emerge at World wide conference late next years", *ICAO Journal* (Montreal), Vol. 48, (1993) No.4, May 1993, pp. 20-21, at p. 20.

3.1 The ICAO World Wide Colloquium in 1992:

The ICAO organized a world wide air Transport Colloquium at Montreal, Canada, from 6 to 10 April 1992, which addressed various issues relating to economic regulation of international air transportation. The main issues for the colloquium were:[2]

- multinational ownership and control of designated airlines operating under liberalized bilateral air agreements;
- bloc negotiations in view of the establishment of free trade areas, for instance EU, and similar concentrations in other parts of the world as a counter-measure to a possible EU fortress; and the applicability of international trading principles.
- the steps to be taken in order to meet the challenges of the future i.e, a continued increase of the international air transportation; a growing congestion in the skies as well as on ground as a result of liberalization and insufficient attention to the expansion of the air transportation infrastructure, and
- finally, the ever growing requirements of the protection of the environment.

The 1992 colloquium not only discussed the strengths and weaknesses of the bilateral system, but also explored the possible

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2 Proceedings on Exploring the Future of Internaitonal Air Tranport Regulation, ICAO World Wide Air Tranport Colloquium Montreal, 6-10 April, 1992.

alternative multilateral regulatory structures, in light of air service regulatory relationship between groups of states and the applicability of international trade concepts such as market access, non-discrimination, transparency and increasing the participation of developing states.[3] Besides this, the colloquium thoroughly debated on foreign and multinational ownership of national airlines, nationality of aircraft and access to domestic traffic by foreign airlines etc.

The overall commercial considerations of the colloquium in the field of market access, foreign and multinational ownership of airlines, transparency, non-discrimination and cabotage were directly or indirectly linked with the award of air traffic rights to airlines, which was the primary concern of the colloquium.[4]

The colloquium, it was remarked, did not record much change in the attitudes of states, which had prevailed since Chicago Convention 1944 with regard to commercial aspects:[5]

- The aviation world still adhered to bilateralism as the most flexible system to accommodate and protect the different air carrier interests of the states. The national sovereignty over the airspace and the ownership over air traffic still determined the international air policies of the states. National airline industry was still considered

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3 Ruwantissa I.R.Abeyratne, "The Economic Relevance of the Chicago Convention - A Retrospective Study", *Annals of Air and Space Law,* Vol. XIX-II (1994), pp. 3-71, at p.19.

4 Ibid.

5 This was the view presented by the participating states in the 1992 world wide Air Tranport Colloquium in Montreal. This view was given in the draft proceedings on "Exploring the Future of International Air Transport Regulation', See the ICAO Document on WATC, Montreal 6-10 April, 1992.

as unique in the national, and defence interests of many a state. Only in matters of safety, security and the protection of the environment could a multilateral approach be acceptable.

The colloquium thus concluded that economic multilateralism could only be achieved in international air transport regulation, if states accepted the possibility of giving up ownership and control of their designated air carriers, or abandon the idea of having their own airline industry.[6]

Presenting his views at the colloquium, Susumu Yamaji, Chairman of Japan Airlines, said that the air carriers should learn how to dance together without stepping on each others' toes would be the key to the future. He compared bilateralism to two people dancing the Tango together without stepping on each others feet, multilateralism five people dancing the Tango together, without stepping on each other's feet. "Now I was always under the impression that it always "takes two to tango", so you can see what difficulties lie ahead in this dialogue on multilateralism",[7]he said, the US carriers had an added advantage under deregulation as they had a large domestic traffic base which may exploit the interests of weaker airlines. This was unjust and not called for. Therefore bilateralism might still be considered as the best approach to avoid one-sided dominance in the market and to create a level playing field for competing air carriers.[8]

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6 H.A. Wassenbergh: *"Principles and Practices in Air Transport Regulation"* (Paris, 1993) , p. 236.

7 Text of Presentation by Mr. Susumu Yamaji, Chairman, Japan Airlines. Provided by by ICAO draft proceedings on "Exploring the Future of International Air Transport Regulation". See the ICAO Doc. WATC-1.13/614/92, April, Montreal, 1992.

8 Ibid.,

Jeffrey V. Shane, Assistant Secretary for Policy and international affairs, U.S. Department of Transport, pointed out that the U.S. doctrine of 'a dollar for a dollar' exchange favours foreign air carriers too. He described bilateralism as an anachronism. The U.S. legislation prohibited foreign ownership and control but permited foreign equity participation in U.S. carriers. The U.S. was a strong supporter of the 'open skies' policies. It proposed them to major European trading partners and offered unrestricted aviation regions without government controls over the routes operated, scheduled or non-scheduled. In this regard Shane stated that "in our determination to encourage continued development of new aviation markets, we went beyond the boundaries of traditional bilateral negotiations. When we have a bilateral agreement there is nothing more than we are seeking from our trading partner. We grant extra bilateral authority to permit the country's carrier to serve those U.S. cities that do not otherwise have a single-plane service to their country. In short, we encourage foreign carrier to serve the U.S. 'free of charge'.[9]

In shane's view governments must not participate in air carrier management, except in matters of safety, security and competition.

Ali Ghandour, Advisor to King Hussein of Jordan on Civil Aviation, Civil Air Transport and Tourism, felt that the system of bloc formation on a regional basis presuppored harmony and cooperation and that

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9 Text of presentation by Mr. Jeffrey N. Shane. Assistant Director for policy and International affaris, US. Department of Transportation. Provided by ICAO draft proceddings on "Exploring the future of International Air Transport Regulation" See the ICAO Doc. WATC-1.15/ 6/4/92 April, Montreal, 1992.

multilateral arangements within the region would facilitate 'bilateral' negotiations with other regions.[10] He further wanted to have safety nets for air carriers of the less developed countries.

Oris Dunham, Jr. Director General, AirPorts Association Council International, wanted airports to be involved in the process of exchange traffic rights.[11] Nawal K. Taneja, Department of Aviation, Ohio State University, U.S.A., thought that plurilateralism would be the answer, if multilateralism is not an acceptable solution to all states. A mixed system of bilateral and multilateral arrangements could be applied during the transition period. Intraline traffic became more important than interline traffic, as carriers operated directly to many more points, with change of gauge, blocked space arrangements and by code sharing.[12]

Matthew Samuel, Director, Corporate Affairs, Singapore Airlines, wondered why big and small carriers would not be happy with multilateralism. Liberal multilateralism helped small states overcome the difficulty of gaining access to much larger states even without offering markets of equal size. Similarly, large states can maximise expansion into small states without any hassle. The market place is the final and neutral arbitrator.[13]

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10 ICAO Document on draft procededing on "Exploring the Futur of Air Transport Regulation.", See ICAO Doc. WATC - 2.20/7/4/92 (Montreal), April 1992.

11 Ibid., ICAO Doc. WATC -1.2/14/2/92. Montreal 1992.

12 Ibid.

13 Ibid., See ICAO Doc. WATC- 2.13/7/4/92, Montreal, 1992.

Aruna Mascarenhas, Deputy Director, Planning and International Relations, Air India, said that sovereignty led to proliferation of air carriers. The principle of equal opportunity under bilateralism was a cordinal principle accepted by all states, together with tariff fixing machinery under IATA and safety regulations evolved by ICAO. The interests of the consumer were regarded as supreme under a flexible bilateral system.[14]

Wassenbergh stated that slots at airports were becoming more important than traffic rights. Global interests should prevail over national interests and, therefore, the bilateral system should be replaced by the multilateral system. While commenting on EU regional multilateral efforts, Wassenbery suggested that EU should be given ompetence to negotiate on behalf of the Community air carriers. Governments needed airlines and airlines needed government, both of which would remain inter-dependent. Multilateralism and plurilateralism were only for the development of global air transport. A code of conduct for bilateral air negotiations could be the best way to make states to negotiate the exchange of air services more on free trade principles. The demand of consumer only necessitates such liberalization. This was exemplified by the changes brought in India's air policy to allow more services to increase with cargo capacity as that was needed for export purposes. Wassenbergh regretted that developing countries apparently were in favour of *apartheid* in the air, wishing to keep their air traffic markets separate from the global air traffic market.[15]

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14 Ibid., See ICAO Doc. WATC- 1.16/6/4/92, Montreal, 1992.

15 H.A. Wassenbergh, n.6, p. 237.

The role of ICAO in furthering and implementing the economic goals of the Chicago Convention in an efficient manner, and the way the organisation pursued its objective was one of the significant features brought out by the colloquium. ICAO Secretariat had taken much trouble in trying to focus the delegates thinking on the relevant topics and to maintain quality in the debates and avoid the long Political ramblings that tend to characterize meetings attended by government representatives. The comprehensive background material provided include long lists of question that needed answering, compilations of expert views on the subjects, definitions and examples illustrating the key concepts, excerpts from relevant pieces of legislation, and details of arrangements, industry groupings and organisations.[16]

Finally, the colloquium concluded with the much expected general views in consideration and application of a multilateral approach to the exchange of air traffic rights. It identified the advantages of the multilateralism and its rapid growth in popularty among some nations owing to its timely emergence in a period of rapid transnationalisation of ownership and globalisation a service industries.

The 1992 colloquium identified the following positive aspects of a bilateral system.[17]

1. its capacity to fill in a multilateral void;

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16 See Avmark Aviation Economist's remark cited by Ruwantissa I.R. Abeyratne, n.3, p.21.

17 Proceedings of the ICAO World-Wide Air Transport Colloquium, Montreal 6-10 April 1992, ICAO Doc. NO. WATC 92 and also see Abeyratne, n. 3, pp. 19-20.

2. its symbiosis with the multilateral system of airline co-operation that a frame work of which presently exists;

3. its ability to provide much of the legal basis for the international air transportation system;

4. the way in which it applies fair and equal opportunity for the airlines of negotiating states;

5. the high degree of protection that the bilateral system offers national airlines of all nations of the world;

6. the manner in which bilateralism appears to protect weaker airlines against their more powerful foreign competitors; and

7. the way in which the bilateral system of negotiations for air traffic rights has created a regulatory system that treats international air transport as special among services.

The colloquium also identified some of the disadvantages of bilateralism:[18]

1. the way in which it is being challenged by many who believe airtransport is not special, but a common commercial activity;

2. the perceived disadvantages that the system imposes upon airports, cities and consumers, in particularly by imposing regulatory limitations on growth and opportunity;

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18 *Ibid.*,

3. the manner in which, arguably, the system has not always adapted to changing market and political systems;

4. the fact that costs are incurred in maintaining the bilateral system as opposed to a free market system which would run by itself; and

5. the proliferation and heterogeneity of bilateral agreements that airlines have to contended within the operation of their air services.

The colloquium emerged, as expected, as a forum for collecting points of view of experts in the field and did not align itself either in favour of bilateralism or multilateralism.

3.2 1994 World Wide Air Transport Conference on International Air Transport Regulation:

The Fourth World Wide Air Transport Conference on International Air Transport Regulation was held from 23 November to 6 December 1994 at Montreal.[19] The conference generated enormous interest throughout the air transport world. It was large not just in terms of numbers, who attended the conference but also in the sheer magnitude of the logistics and lengthy preparation. It was a conference that had to happen not just because of the coincidence of 50th anniversary of the Chicago Convetion, but rather because of the enormous changes that have overtaken the air

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19 Working Paper on ICAO World Wide Air Transport Conference on International Air Transport Regulation: Present Future, See ICAO Doc. At Conf/4-Wp/1, 13/5/94.

transport sector over the past 10 to 15 years.[20] ICAO appointed a Study Group of Experts on Regulatory Arrangements for International Transport (GEFRA), which assisted the ICAO secretariat with preparations for the conference.

The conference discussed the present status of regulation, future issues of regulation such as market access, air carrier ownership and control of airlines state aid and subsidies, safeguards, the broader regulatory environment, and also other matters relating to the 'Doing Business' provisions.

3.2.1. Objectives of the Conference :

The 1994 World Wide Air Transport conference is the fourth in a series of air transport conferences organised by the council of ICAO since 1977 to address regulatory issues. The previous three Air Transport Conferences 1977, 1980 and 1985 dealt primarily with coordination and harmonization of policies for the regulation of capacity, tariffs and non-scheduled air transport. The 1994 conference, however, can be distinguished from its predecessors by the fact that its principal focus on the development for the future of a full range of arrangements for the economic regulation of international air transport.

The last occasion on which the aviation community dealt with all the basic elements of regulation was in 1947 when the ICAO convened in

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20 John Gunther., "World Wide Air Transport Conference Provides New Directions for the Future of Economic Regulations, *ICAO Journal* (Montreal, Canada), Vol. 49 (1994), no. 10. December, pp. 4-6, at p.4.

Geneva a commission which sought, in one final and unsuccessful attempt following the Chicago conference, to develop an agreement for a multilateral economic regime to govern, *inter alia,* market access, capacity and pricing in international air transport. However, the 1994 conference was not charged with discussing a multilateral or any other type of agreement nor consider any amendments to the Chicago Convention.[21]

The principles which are reflected in the Chicago Convention have served the air transport industry well over the past 50 years. The principles of sovereignty, non-discrimination, interdependence, harmonization and co-operation at the global level are not the issues in the work of the fourth conference, since these principles remain valid and continue to provide a suitable framework for any possible change to the future regulation of international air transport. The legal regulatory framework encompassed by Articles 1 (sovereignty), 5 (right of non-scheduled flights), 6 (scheduled air services), 7 (cabotage) and 96 (definitions) of the convention can also accommodate changes in regulatory arrangements, structures or procedures.[22]

The conference, however, discussed diverse issues on air transport regulation. It was invited to review briefly current regulatory content, process and structure, as a prelude to and a basis for an examination of future regulatory content under agenda item 1. Under agenda item 3, the

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21 Working Paper on ICAO World- Wide Air Transport Conference on International Air Transport Regulation: Present And Future Montreal, Nov.23 to Dec.6 1994, ICAO Doc. At Conf/4-WP/4, 13/5/94, Montreal, 1994, p.3.

22 Ibid.

conference disscussed the future regulatory process and structure.[23] The essential focus of the work of the conference was on agenda item 2, i.e., market access, safeguards, structural impediments (state aids, subsidies), Broader Regulatory Environment including competition and Environmental Laws and Taxes, Doing business matters, sale, marketing and distribution of air service products *via.*, computer reservation systems.

3.2.2. Future Regulatory Contents:

3.2.2.1. Objective:

In international air transport states have many and varied goals and objectives based on a wide spectrum of political, security, trade, economic and social factors. Some objectives may be explicitly enumerated in laws and policies, others may be implicit in regulatory practices and actions. Furthermore, a number of aims and objectives, including several issues relate to economic regulation are listed in the Chicago Convention on International Civil Aviation. However, for the purpose of evaluating regulatory arrangements between or amongst states, a few key objectives have identified which have taken into account the differing goals and objectives which states have for international air transport.

The principal theme of the 4th conference was the exploration of possible future regulatory arrangements which states might wish to consider. The conference mainly focused on these key objectives in which states choose to use the ICAO as a forum to evolve any potential arrangements.[24] Each of the potential future regulatory arrangements was

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23 Ibid.

24 Ibid., ICAO Doc. At Conf/4-WP/6, 14/4/94, Montreal, 1994, p.1.

presented under Agenda items 2.2 through 2.7. They related to market ascess, safeguards, disputes resolution, structural impediments, regulatory environment, and "doing business" issues.

3.2.2.2.Market Access :

The conference under Agenda Item 2.2 discussed various issues relating to market access i.e, "The proposed future regulatory arrangements on market access and safety net." The proposed future regulatory arrangements on 'market access' and a 'safety net', when taken in conjunction with the proposed regulatory arrangements on progressive introduction of full market access, safeguards, which deal with capacity and pricing, and on ownership and control, foreign investment, and the right of establishment, is designed to provide an integrated interrelated package of provisions that would enable states, to move towards a more open, competitive air transport sector.[25]

"Market Access": Each party would grant unrestricted market access rights to another party for use by the designated air carrier(s) of such other party:[26]

a. for services touching the territories of both parties (without cabotage rights):

b. optionally, for the so called seventh freedom service (i.e. services touching the territory of the granting party but not that of the designating party), and/or optionally, with cabotage rights.

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25 Ibid., ICAO Doc At conf/4-WP/7, 18/4/94, Montreal 1994, p.3.

26 Ibid.

"Safety Net": Each party would have the right to impose a capacity freeze as an extraordinary measure and such a freeze would:[27]

a. be implemented only in response to a rapid and significant decline in the party's participation in a country-pair market:

b. be applied to all scheduled and non-scheduled flights by the carriers of each party and any third state which directly serve the affected country pair market:

c. be intended to last for a Maximum Finite Period of, for example, one year, two years or one year, renewable once:

d. require close monitoring by the parties to enable them to react jointly to relevant changes in the situation (For example, an unexpected surge in traffic):

e. create a situation in which any affected party may employ an appropriate dispute resolution mechanism to identify and seek to correct any underlying problem:

f. require mutual efforts to find the earliest possible correction of the problem and removal of the freeze.

It is noteworthy that the above framework of future regulatory arrangements was intended to function in different structures and relationships, for example, bilaterally between two states, or between two groups of states, and multilaterally with a small or large number of states. It was expected that this structure would also respect all rights, existing and newly granted.[28]

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27 Ibid.

28 Ibid., p.8.

"Progressive Introduction of Full Market Access" is designed to allow states to introduce the full market access in sub-paragraph 2.2 in a phased or incremental manner.[29] States wishing to liberalize their grant of market access progressively would do so by employing any one or more of the following steps which, separately or in combination move at a preferred pace towards full market access:[30]

a. by entering into an agreement or agreements which liberalize blocks of market access (such as the all-cargo market or the non-scheduled market, prior to consideration of one for scheduled passenger operations);

b. by providing a macro-level (country-to-country) guaranteed capacity base and guaranteed periodic incremental increases not tied to market growth:

c. by reducing or eliminating the existing impediments on foreign investment in national air carriers and to having the right of establishment of foreign air carriers;

d. by initially fully liberalizing basic market access for services touching the territories of both the granting and receiving parties, then optionally phasing in the so-called seventh freedom and/or cabotage rights at future times.

The conference was invited to review the proposals on 'market access' and 'safety net' and on the progressive introduction of full market access as a potential future regulatory arrangement.

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29 See. ICAO working paper on AT Conf /4-WP/16 (May 23, 1994), p.3.

30 Ibid.

3.2.2.3. Future Regulatory Content - Safeguards:

The proposed future regulatory arrangements on a code of conduct and a dispute settlement mechanism, which together comprise a safeguard mechanism, are intended to complement and be taken in conjunction with the proposed regulatory arrangements on "market access" and "safety net".[31]

Code of Conduct For Healthy and Sustained Competition: Each party would agree that in order to maintain healthy and sustained competition, no designated carrier shall engage in;

a. Price Dumping: i.e. the introduction by a carrier into a market excessively low priced (not necessarily with malicious intent) which is likely to leave significant adverse impacts on a competing carrier or carriers;

b. Price Predation: i.e., the introduction by a carrier into a market of an excessively low price likely to be perceived as specifically designed, targeted and intended to keep out a new entrant carrier or to drive out a weaker incumbent;

c. Inordinately high pricing: i.e. the introduction by a carrier into a market of a price increase which is unreasonably high for want of price competition or abuse of a dominant position, or collusion;

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31 See. ICAO World wide Air Transport Conference on International Airtransport Regulation: Present and Future, Montreal, Nov.23 to Dec.6 1994. ICAO Doc. AT Conf/4-WP/10, p.2

d. Price Discrimination: i.e., the introduction by a carriers into a market of a price which is unduly or unjustly discriminatory;

e. Capacity Dumping: i.e., the introduction into a market of capacity far in excess of anticipated demand which is likely to have significant adverse impacts upon a competing carrier or carriers;

f. Capacity Predation: i.e., the introduction by a carrier into a market of capacity which is likely to be perceived as specifically designed, targeted and intended to keep out a new entrant carrier or to drive out a weaker incumbent;

g. Capacity Insufficiency: i.e., the intentional under-supply by a carrier or carriers of adequate capacity in a market which is contrary to agreed objectives; or

h. Capacity Discrimination: i.e., the allocation of capacity by a carrier or carriers between components or segments (variously defined) of a market in a manner which is unduly discriminatory.

Indeed, each of these instances of prohibited conduct would call for a contextual examination of allegations of brach. Yet they are useful pegging points that call for bilateral or multilatiral solutions.

3.2.2.4. New Dispute Resolution Mechanism:[32]

In case of disagreement between two parties, whether or not a proposed or actual pricing or capacity action by a designated air carrier constitutes a practice prescribed by the code of conduct for healthy sustained competition, the parties could immediately consult informally or formally. If they agree that the action is contrary to the code, the parties could act on their own to end it promptly. If they disagree, the parties could invoke the dispute resolution mechanism. Resolution of disputes would occur with the aid of impartial air transport experts, selected by parties themselves from a panel maintained by an independent body, in accordance with the following procedure:[33]

a. Three or five persons would be used for immediate fact finding and adjudication;

b. Individual experts could be used for immediate fact finding, facilitation of resolution, mediation and/or adjudication;

c. Individual experts could be used in the role of ombudsman, i.e., investigation of complains regarding infringement of healthy or sustained competition;

d. The aggrieved party would have the option to impose a temporary freeze or temporary reversion to the *status quo ante* as appropriate;

e. The experts could be asked by an aggrieved party to rule first on the need for and continuance of any freeze or reversion to the *status quo ante*; damages could be

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32 Ibid., p.3

33 Ibid.

awarded against the complainant when any such freeze or reversion is found to be unjustified;

f. The selection of an expert or experts (and empanelment if so requested) would be completed within 15 days of receipt of the request and all determinations/decisions be rendered within 60 days of receipt of such request;

g. The parties could use their best efforts to implement the determinations/decisions, unless they agree to be bound by such determinations or decisions;

h. The costs of the mechanism's use could be estimated upon initiation and apportioned equally but with the possibility of re-apportionment under the final decision: and

i. The mechanism would be without prejudice to the continuing use of the consultation process, other supplemental measures such as the use of "good offices" or subsequent use of formal arbitration or denunciation.

States that accept the proposed safeguard arrangements between or among themselves would have to incorporate the code of conduct and access to the dispute settlement mechanism in their agreements and probably in their laws and procedures and to take subsequent action to give effect to the outcome of any employment of mechanism or use of the arrangements would alleviate the need to apply national competition laws

to air carrier capacity and pricing practices. To this extent the arrangements would avoid potential conflict situations with other foreign authorities. Where, however, relevant competition principles continue to apply to other air carrier actions in a competitive market place then the regulatory arrangement in WP/12 on the use of ICAO's guidance on competition laws could be used.[34]

3.2.2.5. Future Regulatory Content -Structural Impediments:

A "structural impediment" to international air transport, in the context of regulatory relationships between or among state is any well-established, long term and not readily changeable (hence structural) legal or physical factor operative within the territory of one state, which is perceived by another state or other states as adversely affecting the ability of its or their air carrier(s) to operate or compete in the market. Provisions concerning structural impediments are rarely, except indirectly, included in air service agreements. For instance, tariff are to be deemed objectionable if they are "artificially low because of direct or indirect subsidy or support". Issues involving such impediments are generally dealt with outside the traditional structure.[35] The conference dealt with the structural impediments under agenda item. 2.5 and two separate heads part 1, state aids/subsidies to air carriers, for which a specific future regulatory arrangement is proposed, and, in part 11, a discussion of physical restraints on access, for which no arrangement is proposed.

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34 Ibid., p.6.

35 Ibid., ICAO working paper no. AT Conf/4-wp/11, .28/3/94, p.1.

The following regulatory arrangement is designed to deal with the adverse effect of state aid/subsidies on international air transport.

State aid/subsidies, Each party would:

a. recognize the state aid/subsidies which confer financial benefits on a national air carrier or air carriers that are not available to competitors in the same international markets can distort trade in international air services and can constitute or support unfair competitive practices; and

b. accordingly, agree to take transparent and effective measures to ensure that the state aid/subsidies to certain air carriers do not adversely impact on other competing air carriers.

The proposed arrangement is primarily designed to increase state participation through fostering a fair, competitive international air transport environment. Participation can be impaired by the distorting effect on competition of certain state aid/subsidies and the arrangement aims at removing these adverse effects.[36]

These state aid/subsidies would set a specific direction for change and adoption, a target for all states in their internal actions, whether they support rapid liberalization or prefer to move more gradually into market-based services. Furthermore, at a time when many governments are

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36 Ibid., p.4.

examining the adverse effects of subsidies on market access with respect to trade in goods and services, this new regulatory arrangement would offer a practical start in adapting international air transport to this important trend in international economic activity. The General Agreement on Trade in Services (GATS) acknowledges "the role of subsidies in relation to the development programmes of developing countries" but also recognizes the adverse effects of subsidies and calls for the negotiation of multilateral discipline to avoid trade distortion effects.[37]

Eliminating state aid/subsidies would provide a level playing field for air carriers to operate in international market. State aid/subsidies would be permitted in the case of fulfilling essential service obligations to underdeveloped areas. [38]

3.2.2.6. Future Regulatory Content - Broader Regulatory Environment:

The broader regulatory environment includes regulatory bodies, chiefly but not exclusively national authorities and their laws, regulations, decisions and other actions which affect international air transport. The regulatory framework of civil aviation authorities dealt with such matters as designation and licensing of air carriers, market access, capacity, and tariffs. Generally, these non-aviation regulatory bodies have different or broader responsibilities than governmental units dealing solely with air transport. In some instances the ability of air transport authorities to

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37 Ibid.

38 Ibid.

influence regulatory actions in these areas may be limited, but efforts are required to ensure the safe and orderly development of international air transport. The conference dealt with the potential future regulatory arrangements under three areas of governmental activity: competition laws, environmental laws, and tax laws relating to air transport .[39]

The GATS and its Annex on Air Transport Services are also important in the broader regulatory environment and have significant implications for the regulation of international air transport.[40]

The Proposed Future Regulatory Arrangement on Competition Laws:

One of the consequences of states using full market access is more competition for airlines with respect to capacity offered and tariffs charged. That increased competition tend to constitute unfair competition and therefore the need for measures to effectively contain and eliminate such unfair practices. The future regulatory arrangement is so designed to meet the needs and to encourage the consistent and effective application of competition laws to international air transport.[41]

Competition laws: Each party would agree:[42]

a. to rely on the safeguards mechanism as the primary means to prevent and eliminate anti-competitive abuses; and

b. where the safeguards mechanism not applicable to use the ICAO guidelines or model clauses on the application of

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39 Ibid: see ICAO working paper No. AT Conf/4-WP/12, 1914/94. pp. 1-2.
40 These were presented in a separate working paper, WP/13/, ibid.,
41 Ibid., p.3.
42 Ibid.

competition laws to avoid or resolve disputes that may arise when applying such laws to international air transport.

The implications of using such competition laws might lead to a conflicting situation where states tend to apply different national competition laws to similar type of cases which would arise during their interaction in operating air services. To avert such a situation, it requires a perfect co-ordination not only at the national level, but also at a regional (such as the European Union) and international level.[43]

Regulatory Arrangement on Environmental Laws:

Given the increasing importance of protecting the environment and its consequences for the economic regulation of international air transport, states should formally commit themselves to support ICAO's guidelines in the environmental regulation of international air transport. It would also be useful for states to agree on certain basic parameters to be used in that activity. The following arrangement is intended to accomplish these two goals :[44]

Each party would:

a. recognize the role of ICAO as the global forum for developing environmental measures for international air transport;

b. acknowledge the importance of and the need for appropriate measures for protection of the environment as it may be affected by international air services;

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43 Ibid.

44 Ibid., p. 5.

c. undertake to give due consideration to any adverse economic effects which relevant environmental protection measures may have on the operation of international air services;

d. ensure that its environmental protection measures do not discriminate against air carriers of other states; and

e. seek to ensure that its environmental protection measures do not discriminate against transport.

States have to adopt the procedures to establish environmental measures affecting international air transport by taking into account the obligations they assume under this future regulatory arrangement. It implies that states could assist each other to meet the non-discriminatory requirement and to consult with other potentially affected states during the formulation stage of those environmental measures.

Regulatory Arrangement on Taxes:-

For many years ICAO's policies on taxation in the field of international air transport have consistently urged states not to impose taxes on three aspects of air services operations. These are:

a. fuel, lubricants, spare parts, and other consumable technical supplies;

b. income and aircraft of international air transport enterprises; and

c. the sale or use of international air transport.

The Council Resolutions of 14 December 1993 (Doc. 8632-C/968) ICAO's policies on taxation in the field of international air transport provide the latest guidelines to states with respect to these three aspects of air operations.[45]

This arrangement is indeed to reinforce and bring into the regulatory regime of ICAO's policies concerning the exemption, reduction and elimination of taxes on air traffic.

Taxes: Each party would undertake to reduce to the fullest practicable extent, and make plans to eliminate as soon as its economic conditions permit, all forms of taxation on the sale or use of international transport by air, including taxes[46]

a. on gross receipts of operators and taxes levied directly on passengers or shippers;

b. represented by charges for functions or services which are not required for international civil aviation; and

c. which discriminate against air transport or against air carriers.

This arrangement would aid state participation in international air transport by offering more efficient, and less costly international air services to users. Taxes on the sale of international transport by air are a relatively inequitable form of taxation and can create a considerable

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45 Ibid., pp.6-7.

46 Ibid., p. 7.

obstacle to the development of air transport as it increases prices causing great inconveniences to users.

3.2.2.7. Future Regulatory Content - "Doing Business" Matter:

Under Agenda item 2.7 the conference emphasised four important aspects of international air operations which affect the exercise of its basic market access rights, namely ground handling, currency conversion and remittance of earnings, employment of non-national personnel and sale and marketing of air service products. Issues relating to the distribution of air service products through computer reservation systems, are also considered to be a "doing business" issue, but they have significant market access implications and therefore can even be viewed as a structural impediment.[47] These aspects are considered as ancillary rights which determine, in large part, how effectively and efficiently an international air service is operated or provided. The basic goal underlying all the proposed regulatory arrangements is to achieve a fair, efficient and competitive environment which will enable international air carriers to respond more effectively to the needs of users in the international and national sectors.

Because of the wide variation in national laws, and policies within states, the degree of importance of each of these ancillary rights will vary from state to state. Some of these rights are already provided, in whole or in part, under the national law or regulations, as a result of provisions in

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47 ICAO Worldwide Air Transport Conference on International Air Transport Regulation: Present and Future. Montreal, 23 Nov-6 Dec 1994. See ICAO working paper AT Conf/4-WP/14, 17/5/94.

some air service agreements, or as a result of regulation by regional organisations such as the European Union. There is a need, however, for widespread and uniform regulatory treatment to each of these ancillary rights by all states providing equal opportunities to utilize market access rights.[48]

3.3 Position of States:

There were many states and groups of state which made their comments and the stated their positions on the traffic right issues at the conference. African states observed that: "the current participation of developing states in international air transport was marginal with no foreseeable improvement in the future" and that Africa's position reflected a downward trend in market access in respect of African carriers. To improve the *status quo*, the African states suggested that the new regulations in air transport should contain "preferential measures" in order to gradually eliminate the current inequalities with respect to air transport market access.[49] The African states further contended that the world order required a new system of ethics which could be reflected in the form of preferential measures, taking into account the economic conditions of developing countries. Making this proposal to the conference, they urged that ICAO be entrusted with the task of developing such preferential measures.

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48 Ibid., p. 2.

49 ICAO working paper No. AT Conf/4-WP/80 (Nov. 23, 1994), p.2 and also see Ruwantissa. I. R. Abeyratne: "would competition in commercial aviation ever fit into the World Trade Organisation ?". *Journal of Air Law and Commerce* (Dallas, Texas), Vol. 61 (1996), no. 4, pp. 793-857, at p. 825,

The Latin American and the Caribbean states reaffirmed the principles and objectives contained in the Chicago Convention, but noted that state parties to the convention had different levels of development and, therefore, any proposal aimed at establishing future air transport regulation must recognise that reality. They recommended an approach that allowed direct participation and adaptation by developing countries, such as that allowed effective transfers of technologies under reasonable financial and economic conditions.[50] They further pointed out that, the proposed safety net, safeguards, and disputes resolution mechanism did not adequately guarantee effective participation or adoption by the region's airlines.[51]

These states requested ICAO, as the governing body for the development of air transport, to continue its indepth studies in such a way that any future air transport regulation would take into account real possibilities for participation and adoption by all states and, in particular, by developing states.

The Russian Federation proposed regionally-based regulation as the most acceptable form for states with compatible levels of economic development. According to it, regional arrangements between groups of states with similar economic development could eventually lead to liberalized market access and a multilateral "open skies" agreement.[52] Russia recommended that the ICAO legal committee should study the legal

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50 ICAO working paper No. AT Conf/4-WP/90, p.1 (Nov.,1994), also see Abeyratne, n. 49, p. 826.

51 ICAO working paper No. AT Conf/4-WP/78 (Nov 23, 1994), p.1.

52 Ibid., also see Rewantissa I.R. Abeyratne, n.49, p.827.

implications of such regulation, allowing the ICAO Secretariat to develop recommendations which would define terms and concepts such as "market access" and access rights.[53]

Several other states also recorded their views on the subject of regulation of air transport. Algeria suggested that air services agreements should be revised on the basis of an equitable sharing of capacity according to the traffic generation of each party up to 65% to 35% division, and that any combination beyond this should not be negotiated multilaterally.[54]

Brazil recommended that a multilateral arrangement should relate only to technical and administrative clauses. Hungary focused attention on the importance of air law and aviation economics in future international air transport, calling for a sustained programme of training of personnel in these subjects to meet future challenges. The Netherlands suggested a *via media* between bilateralism and multilateralism and recommended regional co-operation as the appropriate measure. Japan cautioned the conference against the possible adverse effects of regulatory liberalization and suggested a careful study of the effects of liberalization.[55]

The 4th world wide Air Transport conference was successful in eliciting from some states and groups of states their respective positions on the award of air traffic rights to air carrier. The positions were diverse,

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53 ICAO working paper No. AT Conf/4-WP/78 (Nov. 23,1994), pp.1-2.

54 ICAO working paper No. AT Conf/4-WP/789 (Nov. 23,1994), pp.1-2, and also see I.R. Abeyratne, n.49, p.827.

55 ICAO working paper No AT. Conf/4-WP/93 (Dec.2,1994), p. 3, and also see abeyratne, n. 49, p.827-28.

ranging from regionalism to a request for sustained adherence to bilateralism until a viable alternative was agreed upon. There was also the view that any new regulatory regime should be embarked upon with caution. In addition to this new found counsel of caution, the international air transport industry had also the benefit of knowing how air carriers of the developed and the developing countries conducted themselves between the colloquium and the conference in sharing air traffic rights with one another. Under these circumstances, it is unlikely that a world-wide multilateral regulatory regime would be accepted on an absolute basis in the near future. One alternative seems to be regionalism, although conceptually, it has been met with mixed results such as in the Europe Community and the North America.

3.4 GATT and Air Services:

The General Agreement on Tariffs and Trade (GATT) is the principal international agreement regulating trade in goods between nations.[56] With very few exceptions the GATT does not apply to international trade in services. It was only in the Uruguay Round. that the idea to include new issues such as services was proposed. The Ministerial Declaration on the Uruguay Round of 20 September 1986, issued at Punta del Este, includes in part II the decision to launch negotiations on "Trade in services".[57] The Declaration indicated that the

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56 Alexandre Mencik Von Zebinsky: "The General Agreement on Trade in services: Its Implications for Air Transport". *Annals of Air and Space Law* Vol. XVIII-1 (1993), pp. 359-399, at p 359. See for further details original GATT text.

57 H.A. Wassenbergh: "The Application of International Trade Principles to air Transport". *Air Law,* Vol. XII (1987), no.2, pp.84-93, at p. 84.

trend toward an expanded scope for the GATT negotiations, with the inclusion of new areas such as services, intellectual property rights, and investment, was to be maintained.[58] Part I of the Declaration which dealt with Negotiations on Trade in Goods, was a decision of the contracting parties at the ministerial level, while Part II Negotiations on Trade in Services was a decision of the ministers representing individual governments and contracting parties.

This twin track approach has permitted an Indian author Randhawa to declare in 1987: "while it is correct to say that negotiations to refer to them as GATT negotiations".[59] He note that the expansion of trade in services, and not liberalization, was the immediate objective of negotiations. Liberalization was envisaged as one of the conditions and not as an objective of the negotiations.

The supervisory body for the Uruguay Round negotiations in Trade Negotiations Committee (TNC), in Punta del Esta Declaration, a Group of Negotiations on Services (GNS) was created which held its first meeting on 27 October 1986.[60] The GNS perceived its work on services to be to develop a multilateral agreement, determine sectors it might cover, and then consider sectorial arrangement, including the linkage with the multilateral agreement. Between July 1989 and May 1990, the GNS started the so called 'testing process'. This process consisted of selecting

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58 Von Zebinsky, n. 56, p.370.

59 P.S. Randhawa "Punta del Este and after: negotiation on trade in services and the Uruguay Round", *Journal of World Trade* Vol. 21 (1987), pp. 163-164.

60 Von Zebensky, n. 56, p.371.

six services, including transport of which air transport is a part. The process was not expected to decide the inclusion or exclusion of sectors as such in the General Agreement.[61]

The working group on air transport agreed that no provision of the future multilateral agreement would apply to traffic rights. Participants varied in the extent to which they were prepared to submit "doing business" activities and few participants favoured an effective exclusion of air transport from the scope of the GATS.

3.4.1. GATS And Air Transport Services:

There are a number of similar concepts in the GATT and GATS, but the architecture of the two agreements and the implications of the application of the concepts differ significantly.

The GATS consists of three pillars:[62]

i. the Articles of the Agreement.

ii. Sectoral Annexes[63] ; and

iii. schedules outlining each party's negotiated commitments to liberalize trade in services.

The first Pillar, the Articles of the Agreement, contains two main sets of provisions:[64]

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61 Ibid, p. 372.

62 Gary Sampson, Director, Group of Negotiation on service of Division, GATT [Presentation at the world-wide Air Transport Colloquium, Montreal, C-10 April 1992] .p. 2.

63 See the Appendix given on Annex on air transport services to the Uruguay Round Agreement.

64 Gary Sampson, n.62.

a. general obligations to be applied to all services sectors by all parties to the agreement.

b. Specific provisions to be applied by each party in accordance with liberalization commitments negotiated bilaterally and set out in national schedules to be attached to the agreement.

The second major pillar of the GATS consists of the Sectoral annexes, which form an integral part of the Agreement. The aim of the annexes is to clarify, interpret and, to qualify the application of Articles of the Agreement in the light of Sectoral peculiarities, i.e. the specific techincal, economic or regulatory features of a particular sector. In the final draft, there are Sectoral annexes to take into account of the specificities of telecommunication services, financial services and air transport services.[65]

Finally, the Articles of the Agreement and the sectorial annexes would have little operational value in the absence of commitments to liberalize trade in services on the part of all signatories. To this effect, the participants have been negotiating offers and requests to liberalize trade in services on a bilateral basis. In so doing, they have undertaken to maintain or improve current levels of openness of market access and operating conditions for service suppliers of other parties.[66]

As in many other service sectors, the last decade has witnessed a tremendous change in the aviation industry. Since the GATS aims at

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65 Sampson, n.62.

66 Ibid.

establishing a multilateral framework of principles and rules for trade in services, in general, and for air transport in particular, this future international agreement may conflict with "the basic charter" of international air transport: the Chicago Convention. According to Alexander Mencik Von Zebinsky this problem of conflict between the principles of the Chicago Convention and the GATS may be resolved by way of amendments or by referring to the international law rules with respect to conflicts between international treaties.[67]

However it may not be necessary to have recourse to these two solutions since bilateral air service agreements often contain a clause that provides that "in the event of a general multilateral air transport convention accepted by the contracting parties entering into force the provisions of such convention shall prevail" .[68]

Mainly the application of GATS principles, and notably the MFN clause, to the 'hard rights' contained in bilateral air service agreements has been criticized by a number of authors. Some have contended that in the existing bilateral system in air transport, the application of the MFN clause will be unrealistic. According to Wassenbergh, "it is unthinkable to interpret the MFN clause in international air transport as to mean that the grant of certain hard rights by state A to state B would mean that state C, D, E, etc., can claim, under the MFN clause, the same number of hard

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67 Von Zebinsky, n. 56, p.390, and also see Doctoral Thesis (unpublished) of A. Sudhakara Reddy, *Liberalisation and Globalisation of International Air Transportation: A Legal Study of the Chicago - Bermuda Regime*, Submitted to Jawaharlal Nehru University, New Delhi, 1996, pp. 280 - 82.

68 Von Zebinsky, n.56, p. 393.

rights from A.[69] Some scholars, however, consider that the introduction of the MFN clause alone, without Market Access and National Treatment provision is insufficient to provide adequate protection against existing and potential discrimination. The way the GATS Market Access Clause applies in air transport has also been criticized.

The GATS has been criticized for leaving the highly pervasive government market access restriction to separate negotiation. The national treatment clause of the GATS, especially when applied to 'Soft Rights' has been less criticized. It is quite apparent that the avoidance of discrimination is already a concept well recognized in air transport.

The GATS, in response to some of these critics, has already provided some accommodation by permitting exemptions from the MFN clause and by providing that the market access and national treatment are not general obligations and are subject to, limitations and qualifications set out in national schedules of commitments.[70]

3.5.2. ICAO Involvement:

ICAO involvement in trade in at services started during the first ATC where the issue was first raised. Since then ICAO has showed an ample interest in the Uruguay Round Trade in Services Negotiations. It has been monitoring the various negotiations in trade in services and has regularly contacted and co-operated with the GATT at different levels.

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69 Ibid., p.394.

70 Ibid.

In 1991, the ICAO Council re-examined the need to convene a major conference on trade in international air transport services and considered that there was no apparent need yet for such a conference. However, the ICAO council decided to convene, in April 1992, a world-wide Air Transport colloquium to exchange the view on a number of fundamental issues, including the possible application of trade concepts and principles to international air transport.

As seen already, the 1992 colloquium, while confirming the trend towards the liberalization of air transport regulation, showed strong support for the existing system of bilateral air services agreements. At the same time, some views were expressed that the bilateral system may have reached the limits of its flexibility and now needs to be supplemented by multilateral agreements. Since no common ground has yet been identified for a broadly acceptable multilateral agreement, the fear has been expressed that there might be "a mixed regulatory system of perhaps overlapping and possible conflicting multilateral, plurilateral, and bilateral agreements".[71]

With respect to the application to air transport of GATS trade concepts the colloquium has reiterated the fear that the MFN clause could retard air transport liberalization. On the other hand, it seems that some statement be prepared to deal with the activities enumerated in para 3 of the Annex on Air Transport Services in a comprehensive agreement. Overall, the colloquium certainly underscored the perception that changes

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71 Von Zebinsky, n.56, p.394.

towards greater liberalism are coming and that it will be better for ICAO to "anticipate these changes".

In 1994, the 4th Air Transport conference convened by ICAO, discussed the broader regulatory environment, namely matters relating to the competition laws, environmental laws, and tax laws. The conference broadly supported proposals which built on the existing ICAO policies and activities, designed to encourage the use of these laws in the regulation of air transport relationship. In this context, the conference also looked at the implications of the GATS and the new World Trade Organization (WTO), and underlined once again the aviation community's concerns about maintaining ICAO'S primary role in the economic regulation of international air transport.

It reinforced this policy stance by calling on the organization to take effective action to exert leadership. At the root of this is the worry about the long term potential of the GATS to offer an alternative regulatory vehicle for liberalization of international air transport Services.

CHAPTER - 4

CONCLUSION

International air transport, is a high technology and capital intensive service industry. It is no more an infant industry in many countries as it was in some 50 years ago. It has grown and expanded rapidly geographically quantitatively and technologically within a well defined legal, economic regulatory and institutional framework set down in the 1944 Convention on International Civil Aviation [the Chicago Convention 1944]. A feature of the regulatory regime that governs international air transport is the high degree of commonality in state practices and methodology regarding the regulatory process, as well as its assumptions about world-wide participation and objectives and about its end product, namely promotion of safe and economical air services.

The International Civil Aviation Organisation (ICAO) is a specialized agency under the United Nations system to oversee, and regulate the development of international aviation. The Chicago Convention which laid the fundamental legal foundations and created the ICAO for the development of civil aviation is rightly considered to be the charter for world aviation. The convention and its annexes provide an effective means to establish and maintain standards and recommended practices (SARP's) in the technical and safety areas necessary for the development and expansion of International civil aviation.

The involvement of ICAO in the economic regulation of international air transport has had its origins in efforts at the Chicago Conference of 1944. Several provisions of the convention deal with

specific aspects of the economic regulation of international air transport. Articles 5, 6, and 7 deal with non-scheduled flights, scheduled air services and cabotage. Several other articles[1] also effect the economic regulation of international air transport. Finally, Article 44 of the convention postulates the aims and objectives of ICAO as follows:

a. to meet the needs of the peoples of the world transport, [Article 44(d)]

b. prevent economic waste caused by unreasonable competition, [Article 44(e)]

c. insure that the rights of contracting states are fully respected and that every contracting state has a fair opportunity to operate international airlines; [Article 44(f)]

d. avoid discrimination between contracting states ...." [Article 44(g)]

The delegates to the Chicago Convention also adopted a second multilateral agreement specifically designed to regulate the economic aspects of international air transport, namely, the International Air Transport Agreement. This agreement enumerates the "five freedoms of the air" for scheduled international air services which each contracting state granted to other contracting states. But this agreement received only limited acceptance, which too was subsequently withdrawn by the few signatories, and today it is not in use as a regulatory instrument.

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[1] Article 15 on Airport and similar charges,
Articles 17-21 on Nationality and registration of aircraft,
Articles 23-24 on customs and immigration,
Articles 77-79 on Joint operating organizations and pooled services,
Article 96 on Definitions.

The Chicago Conference also set down the first two of the five freedoms into the International Air Services Transit Agreement, a companion agreement to the above agreement. This agreement received much wider acceptance than the International Air Transport Agreement and currently 100 states are parties. The non-party states are encouraged by ICAO to become parties to it since states failed to reach multilateral agreement for the exchange of commercial rights on a world-wide basis, they resorted to bilateral modes for exchange of traffic rights. First step in this direction was initiated by major aviation powers, the U.S.A. and the U.K. when they entered into an agreement in 1946, to exchange traffic rights, which is popularly called as Bermuda I agreement. Since then, bilateralism became the most preferred mode of regulating the international air services.

There were, however, repeated efforts to reach a multilateral agreement for the exchange of traffic rights since 1945. First attempt was made with in the context of the Provisional International Civil Aviation Organisation. After April 1947, ICAO itself, on three occasions, initiated the multilateral efforts but without any success. Finally a special commission was convened by ICAO in Geneva in November, 1947, where the aeronautical community grappled with varying formulae and approaches to adopt a multilateral regime. But the inability to agree on how, and to what extent, to protect the national air carrier from third party operators on routes between two countries inhibited these attempts.

After the Geneva conference, the pursuit of a multilateral regime was transformed briefly into a regional approach to for exchange of

commercial rights. The establishment of the European Civil Aviation Conference (ECAC) in the mid 1950s came into existence out of hopes for a regional agreement on economic regulation. For several years aviation community stayedaway from the intensive efforts towards multilateralism, and concentrated more on their bilateral based air transport network.

In 1960s the composition and the size of ICAO changed significantly with the changing perception of ICAO's role in several economic matters. In its 15th session, in 1965 the Assembly adopted an important milestone resolution which proposed that ICAO should take up economic problems on a worldwide basis. However, twelve years later ICAO convened a Special Air Transport Conference in 1977 to address specific issues relating to economic regulation of air transport. This Conference and subsequent conferences in 1980 and 1985 revived this area of work for the organization, resulting in not only recommendations on many regulatory policy issues, but also generating numerous ground-breaking studies leading to evolution of guidance and other material on specific aspects such as capacity, tariff regulations and competition laws.

In 1992, the largest gathering of nations took place, to explore the future of international air transport regulation. This was convened by ICAO, known as the worldwide Air Transport Colloquium. The main intention of the 1992 colloquium was to explore the avenues of bilateralism and assess its contribution so far. Yet the Colloquium also highlighted the deficiencies inherent in bilateralism in an ever more challenging and multilateral world, with the developed countries pushing towards multilaralism.

In the 1992 colloquium participants examined the existing situation in the exchange of traffic rights between states. In this regard, Indian representative Aruna Mascarenhas, stated the Indian position forcefully and eloquently, arguing that bilateralism had so far served the industry well and should continue to be the basis of the regime, a stand that found considerable support among other developing countries.

The same year, at 29th assembly of ICAO, S. Kanungo, the Indian delegate, warned of "a discernible attempt on the part of certain powerful foreign carriers to monopolize air space".[2] He favoured more flexibility and progress, and liberalization only within the existing framework of bilateralism, so that the "national interests of developing and small countries are adequately protected".

The colloquium is rightly acclaimed to have ignited a momentum for exploration of new avenues of progress, and ICAO has since maintained that momentum. Within a few weeks of the 1992 Colloquium, ICAO established a worldwide study group of experts (GEFRA) to explore possible new regulatory arrangements.

In 1994, ICAO convened a worldwide Air Transport Conference. It was the fourth in the series. This was held on the historic occasion to commemorate the golden jubilee of the Chicago Convention. It was successful in focusing the aviation community's attention on ideas for a new regulatory arrangements for international civil aviation. This conference prepared the aviation community to move into the twenty-first century. It highlighted the need to address the kind of regulatory tools

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2 Baldev Raj Nayar, *The State and International Aviation in India* (Delhi: 1994), p.2.

and arrangements which will measure up to the long term needs and expectations of states, the industry and users. This conference provided a new direction for the future of economic regulation in International air transport services.

The conference paid rivetted attention to two important things: one, sustained participation by all states in the international air transport system, and the other, adaptation or adjustment of air transport regulation to the broader dynamic global environment in which it operated.

The conference extensively discussed the present and potential regulatory regime. Additionally, ICAO concentrated on the GATT and the new GATS and a model for an alternative approach to the international exchange of air transport rights. The participants of the conference showed interest towards liberalization of international air transport. Perhaps this was the most significant outcome of the conference. For the first time at the global level, the change in the direction of liberalization as a general goal became visible.

The twelve wise men committee of the European Union [EU] remarked significantly that: "state aid to government owned airlines should be forbidden, while privatization is worth promotion". The EU report met with wider acceptance in the industrialized world since it conformed to the 'modern' trends in aviation. But, at a global level, the opinion expressed in the European report stood rejected, as safeguards for developing nations' air carriers were not discussed.

The Uruguay Round of the GATT, which ended in December 1993, revealed a controversy with respect to civil aviation. It produced the

General Agreement on Trade in Service(GATS), which included an annex for air transport services. This annex, however, does not apply the provisions of the GATS to traffic rights and activities directly related to the exercise of commercial rights (hard rights), except with respect to aircraft repair and maintenance, selling and marketing, and computer reservation system (soft rights). The GATS, based on concepts differing from those of the GATT determines its scope for selling services in foreign markets so as to make its provisions universally applicable. As far as air transport is concerned, the non-discrimination principle of the GATT is confined to the three areas mentioned above.

In November 1993, France submitted its view to the wise men committee. Minister Bosson observed that air transport could not totally do without the regulatory intervention of public authorities. Safeguard clauses on rates and capacity should be included in the final arrangements, while public authorities should help air carriers wishing to co-operate; France's approach was a 'regressive' one, yet it should be considered. Along with the intervention of the public authority privatization was promoted to a limited degree. Still in many countries, privatization was limited to a minority share holdings for foreign investors in order for the air carrier to maintain its national status, and there by draw the governmental support. Undoubtedly, the link between the status of airlines and the correlative governmental support they received merits closer attention in the future.

Broadly speaking, multilateralism in international air transport regulation remains an unrealized goal. But multilateralism linked to regionalization of air transport regulation is already being experienced in parts of the world. Regionalization presents significant opportunities for

removal of barriers and for more multilateral co-operation. The most important aspect regionalism is that, it protects the interests of states collectively rather than individually whereby greater bargaining strength *vis-a-vis* non-resional entities which would yield greater benefits. Unfortunately, regionalism may, sometimes, play the role of fortress of a trade-block which prevents the entry of non regional carriers into the pre-trade area. This, in turn, fosters confrontation rather than co-operation among states.

Finally, the main objective of any international regulatory regime, objectively, ought to be that there must be available at all times, a sufficient supply of adequate and safe air transport services, regardless of nationality of the carrier. This is based on the theory that air transport works as a catalyst for international peace and mutual understanding and promotes trade, commerce, tourism and culture.

Since air transport has developed into an activity which covers a global market, not every state has the capability to have or maintain its own airline industry. The airlines of a state to be competitive internationally need a global market presence. But there is no sound, economic, worldwide regulatory formula which offers an ideal solution by guaranteeing that every state can have its own sound, national, globally active airline industry. The only practical approach to ensure this is to look for an international regulatory compromise between bilateralism and multilateralism, flexible enough to be applied to diverse situations and circumstances.

APPENDIX

Annex on air transport services to the Uruguay Agreement*

1. This Annex applies to measures affecting trade in air transport services, whether scheduled or non-scheduled, and ancillary services. It is confirmed that any specific commitment made or obligation assumed under this Agreement shall not reduce or affect a Member's obligation under bilateral or multilateral agreements that are in effect at the entry into force of this Agreement.

2. The Agreement, including its dispute settlement procedures, shall not apply to measures affecting:

   (a) traffic rights, however granted, or

   (b) services directly related to the exercise of traffic rights, except as provided in paragraph 3 of this Annex,

3. The Agreement shall apply to measures affecting:

   (a) aircraft repair and maintenance services;

   (b) the selling and marketing of air transport services;

   (c) computer reservation system (CRS) services.

4. Each Member shall ensure that access to and use of publicly available services offered within or from its territory is accorded to air services suppliers of other Members on reasonable and non-discriminatory terms and conditions where commitments for such publicly available services have been made and unless otherwise specified in its schedule.

5. The dispute settlement procedures of the Agreement may be invoked only where obligations or commitments have been

* See Final Act of the GATS, MTN/FA II-AIB, p. 37; and also see ICAO Doc. WATC/1992, 3.4, p.5.

assumed by the concerned Members and where dispute settlement procedures in bilateral and other multilateral regiment have been exhausted.

6. Council for Trade in Services shall review periodically, or at least every five years, the operation of this Annex and air transport and ancillary services.

Definitions:

(a) *Aircraft repair and maintenance services* mean such activities when undertaken on an aircraft it is withdrawn from service and to not include so-called line maintenance.

(b) *Selling and marketing of air transport services* mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do no include the pricing of air transport services nor the applicable conditions.

(c) *Computer reservation system (CRS) services* mean services provided by computerized systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.

(d) *traffic rights* mean the right for scheduled and non-scheduled carriers to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and airlines to be designated.

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