

Reform of Air Cargo Transport Regulation Through the WTO and GATS

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ABSTRACT

This paper examines the air cargo transport system and the regulatory framework in which it operates. It suggests that the regulatory system that has governed air cargo transport throughout its modern history has been eclipsed by changes in global trade and global economics. This paper proposes that if air cargo transport is to achieve its full potential as an efficient and integral part of global trading networks, then the regulatory system in which it operates must adapt to these changes as well. It is the thesis of this paper that the most effective method of adapting the air cargo regulatory system to the new realities of global trade and economics is through the WTO and GATS.

This paper begins by introducing the history and development of the air transport system, especially as it relates to air cargo transport and regulation. The limitations of this system are introduced, as well as the benefits a reformed system would bring to bear on global trade. The introduction concludes by stating the thesis of this paper, that the air cargo regulatory system should be reformed through the WTO and GATS, as well as the implications of such reform.

The paper continues by describing the air cargo market, including the nature and types of air cargo services, the players in the market,

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trends in air cargo and its prospects for the future. The current system of international air cargo regulation is examined next, with a particular emphasis on the historical and other circumstances that influenced its development. Following a brief introduction to the WTO and GATS, including its current limited coverage of air transport, this paper explores the benefits of air cargo transport reform, various mechanisms available to achieve such reform, and why reform through the WTO and GATS should be preferred above all others. This paper next examines how such reform would be achieved through GATS, including the specific legal techniques involved and the problems likely to be encountered.

This paper concludes by examining the significance of air cargo transport regulation reform through GATS, including its likely effect on passenger air transport regulation and on world trade in general.

INTRODUCTION

A. THE ROLE OF AIR CARGO TRANSPORT IN WORLD TRADE AND THE REGULATORY SYSTEM IN WHICH IT OPERATES

Trade in goods forms the fundamental basis of most world economies. Since the beginning of trade, the transport of goods from producer to market and from market to consumer has been an essential part of every mercantile transaction. Beginning with the twentieth century, the transport of goods by air has played an important and ever expanding role in the course and conduct of world trade. Air cargo transport has grown and matured to become an integral part of the global transportation infrastructure, facilitating the movement of goods and information across vast distances in relatively short periods of time.

Air cargo transport is part of a broader air transport system that includes passenger air transport, as well as a broader cargo transport system that includes surface modes of transport, such as sea, road and rail. For most of its history, air cargo transport has been more closely linked with passenger air transport than other modes of cargo transport.¹ This affinity for the mode of transport – air – rather than the subject of the

1. See DR. RENE JOHN FENNES, *INTERNATIONAL AIR CARGO TRANSPORT SERVICES, ECONOMIC REGULATION AND POLICY* 32 (1997), discussing integrators, multi-model carriage: (“Interestingly, this means that the air cargo industry is best analyzed not by following the normal sectoral approach, which looks at the transport mode, but rather by looking at the product offered. Yet, as far as regulation is concerned, most regimes in the world still use a segmented approach in accordance with transport mode.”) See also INTERNATIONAL CHAMBER OF COMMERCE, COMMITTEE ON AIR CARGO TRANSPORT, *AIR CARGO AND THE WTO* 5 (1998), available at http://www.ccwbo.org/home/statements_rules/statements/1998/air-cargo_wto.asp. (“Air transport is increasingly becoming only one element in the overall inter-modal cargo transport chain. The point of focus has moved from the transport mode to the goods themselves. For the users of integrators, for example, the mode of transport is irrelevant, it is the on-time delivery factor which is important.”)

transport – cargo – has had implications for the development of the air cargo transport system and the regulatory framework in which it operates. Because of this affinity, an understanding of the passenger air transport system is essential to an understanding of the air cargo transport system.

The modern air transport system traces its origins to the close of the Second World War.

Reflecting one of the primary lessons of the war, the Chicago Convention of 1944 acknowledges the legal principle that sovereign states have exclusive control of the airspace above their territory, as well as the right to determine the circumstances by which one may access that airspace, if at all. It is upon this bedrock notion that the foundation of the modern air transport system is built. A profound document in its time and to this day, the Chicago Convention was quickly ratified by the victorious Allies and many others. It continues to enjoy nearly universal acceptance by the nations of the world.²

Within this international regulatory framework, access to sovereign airspace was achieved through bilateral air transport agreements. Although the U.S. had pushed for broader, multilateral grants of airspace access, the issue was deferred at Chicago due to the objections of the British, who felt that such an arrangement would disproportionately benefit the Americans with their large fleet of war-surplus aircraft and wartime manufacturing capability. The issue was resolved between these two powers through a bilateral air transport agreement, the original Bermuda Agreement, a model quickly followed by other states. The result was a global civil air transport system composed of thousands of interlocking bilateral trade agreements, not all of them transparent, that governed the conditions by which air transport services may be conducted between one state and any other.³

Bilateral air transport agreements specify the routes that airlines of party states may fly, and provide for a system of government control over capacity that may be offered on those routes and the fares that may be charged. Such agreements also limit the benefits of their terms to airlines owned and controlled by the states party to the agreement or their nationals. Ownership and control regulation is one mechanism by which

2. ANTHONY SAMPSON, *EMPIRES OF THE SKY, THE POLITICS, CONTESTS AND CARTELS OF WORLD AIRLINES 71* (Hodder and Stoughton 1984). (“Chicago and its offspring ICAO did provide the starting-point for the phenomenal development of world airlines and air travel in peacetime, at a speed which few of the delegates had conceived possible. It permitted an exchange not just of landing rights, but of information, safety systems and routine technology which, though soon taken for granted, far exceeded the pre-war arrangements.”)

3. *Id.* at 72. (“The Anglo-American agreement at Bermuda became the prototype for all other countries over the next thirty years, and it was followed by a ‘vast cobweb of bilateral international agreements’ as professor Bin Cheng called it, ‘linking individual pairs of states.’”)

national origin and destination (O&D) traffic is protected, and the economic gains of such traffic are directed toward their home states. Likewise, capacity and fare restrictions are designed to provide price support to a nation's airlines, while limited traffic rights guard a nation's air transport network and the O&D traffic carried on it.

By their nature, bilateral exchanges of authorities to conduct civil air transport operations between states were made on the basis of a reciprocal exchange of benefits to be gained by each state.⁴ In any such exchange, states carefully weighed the rights it gave against those it got in return. More often than not, these considerations resulted in limited exchanges of rights, conspicuously omitting the right to pickup and discharge passengers and cargo at points behind, between and beyond the territories of states party to the agreement. In extreme measures to protect national O&D traffic and national airlines, some bilateral air transport agreements even specified a predetermined split of traffic between airlines of states party to the agreement.

Within the framework of interlocking bilateral air transport agreements, as well as national laws that licensed and limited the number of airlines and the degree of foreign ownership allowed, a highly regulated air transport marketplace emerged. This marketplace bore the imprint of protectionist national air transport objectives, as well as the regulatory policies designed to implement them:

- Bilateral air transport agreements limited the number of airlines authorized to conduct flights between partner states, and provided for government control of capacity and fares.
- Bilateral air transport agreements tightly controlled traffic rights between states, specifying gateways open to traffic from partner states, as well as accessible destinations behind, beyond and between.
- Bilateral air transport agreements limited the ownership and control structures of a state's airlines, allowing only airlines owned and controlled by a state or a state's nationals to exercise authorities granted to that state.
- National law prohibited the transport of domestic traffic by foreign airlines.
- National law governed who could be licensed as an airline, and the conditions under which they could fly, including authorized routes.
- National law provided that only a state's nationals could own or control an airline licensed by it.

The totality of these policies and the regulations that served them had as their object and effect the protection of a state's airlines, strategic

4. *Id.* ("The dreams of open skies gave way to the realities of horse-trading between governments over landing rights, gateways and freedoms.")

economic interests and national security. The result was the emergence, in most states, of national airlines, or “flag carriers”, which transported the bulk of a state’s O&D traffic, and which were the primary beneficiary of the various regulatory restrictions imposed on the air transport marketplace, and subsidies and preferences afforded to national airlines.

Despite protectionist overtones that seem rather extreme today, or perhaps because of them, these policies were highly successful in building a global civil air transport system from the ashes of the Second World War. Within only a very few years, it was possible to travel by air to virtually any destination on the globe with a reasonable assurance of an aircraft’s and an airline’s safety and security. Aircraft became more advanced and more numerous. An air cargo industry emerged to cater to a new demand for fast and efficient air cargo transport. In these respects, these highly restrictive regulations were products of their time, and did indeed serve their time well.

Although most of the above regulations are recognizable in the air transport system of today, the current air transport regulatory framework is less restrictive than that which prevailed in the period following WWII. Important global economies such as the U.S. and the European Community (EC) have undertaken a process of “deregulation” of their air transport marketplaces, and eased restrictions on market access, pricing and capacity. Governments have divested their interests in national “flag” carriers, and airlines are increasingly subject to the forces of the marketplace. Bilateral air transport agreements are less restrictive, and affect a broader and deeper exchange of rights among partner states.

Like the restrictive regulatory system that emerged from WWII, deregulation was a product of its times. The deregulation of air transport achieved during the 1980s and 90s reflects a maturing of the air transport industry, and a consensus that the protective policies of the past had largely achieved their goal of building a stable, efficient air transport infrastructure. No longer a developing industry that needed pampering in order to survive, the air transport industry, so went the argument, could now survive the forces of the marketplace and all their vagaries on its own and without government help. Although in practice this sentiment proved to be a bit optimistic, this shift transformed air transport regulation from a system designed to nurture and protect the industry itself, toward a system that benefited the ultimate consumers of air transport, passengers and shippers. Nevertheless, even considering the effects of deregulation, the air transport system of today remains one of the most highly regulated industries in the world, with market access, pricing and ownership and control restrictions found in no other industry.

B. RECENT DEVELOPMENTS IN AIR CARGO TRANSPORT — THE
GLOBALIZATION OF TRADE

As in the period leading up to deregulation of the air transport market, the air cargo market of today is changing rapidly in response to broader economic and political change. The last decade has seen unprecedented changes to the manner in which global trade is conducted.⁵ Democracy and capitalism have spread, opening formerly closed markets and creating new markets where none existed before. The movement of goods, capital and persons has become freer. New technologies allow instantaneous access to vast amounts of information. The end of the Cold War's divisions has integrated the world's economies to an extent never before seen.⁶

Evidence of these changes in the course and conduct of world trade is abundant. The last decade has seen the rise of the concept of "global manufacturing," in which the various stages of a manufacturing process take place in different corners of the globe, to be brought together only when the finished product is delivered to the market.⁷ Automobiles, computers, electronic equipment and other durable goods are manufactured in so many and in such diverse locales that the phrase "Made in

5. See George Melloan, *Qatar Offers the Best Chance for Economic Recovery*, WALL ST. J., July 31, 2001, at A19. ("There is only one economy, and it is global. One of the great intellectual breakthroughs of the post-World War II era has been the recognition by most political leaders that free trade serves their own interests. Some, in Japan, South Korea or Brazil, for example, have tried to game the system by promoting exports and restricting access to their own markets. But the leaders who count, in the U.S. and Europe, have promoted three major global trade liberalization negotiations, the Kennedy, Tokyo and Uruguay rounds. The resulting expansion of world trade has brought about a corresponding enlargement of the world economy, lifting millions out of poverty and into the middle class."). See also Michael M. Phillips, Steve Liesman & Christopher Rhoades, *As G-8 Leaders Meet, Europe, Japan Must Rely on U.S. to Lead Recovery*, WALL ST. J., July 20, 2001, at A1. ("What they, and others, have learned in the meantime is that the world economy is more closely linked today than ever before. Problems in the U.S. quickly turn into problems elsewhere. Much about the world has changed in the decade since. For one thing, globalization has proceeded apace, and a rapidly spreading network of computers, satellites and fiber-optic cables has linked world trade, investment and financial markets more tightly than ever before. Exports now account for 48% of the output of developed nations, up from just over 37% a decade ago. And as important as expanding trade has been the growing reach of multinational companies. 'What we probably underestimated,' says Christian Noyer, vice president of the European Central Bank, 'was the impact of more big companies operating worldwide. No matter where they're based, a sudden weakening of the U.S. economy prompts them to cut investment elsewhere—in Europe and in Asia. So the spread goes more rapidly than before.' Many of these companies spread their operations around the globe in the past decade in part to diversify their risks from a regional economic downturn. But the increased integration of the world economy means diversification today doesn't always help. 'Now, there's no place to hide,' says Joseph Quinlan, senior global economist at Morgan Stanley Dean Witter.")

6. See BOEING COMMERCIAL AIRPLANES, CURRENT MARKET OUTLOOK, WORLD DEMAND FOR COMMERCIAL AIRPLANES AND AVIATION SUPPORT SERVICES 5 (2001).

7. See AIRBUS, GLOBAL MARKET FORECAST 2000-2019 42 (2000).

America” or “Made in China” often conveys only part of the truth.⁸

“Just-in-time manufacturing”, another modern manufacturing technique, relies on precise, timely delivery of materials and components to keep an assembly line supplied and functioning.⁹ Stocks of inventories that once fed assembly lines are reduced or eliminated altogether for huge savings in storage and warehousing costs. Commercial purchasers and their suppliers have instantaneous access to current inventory stocks and current pricing information, allowing ordering and invoicing to be simplified, and some purchases to be made automatically without the intervention of either the customer or the supplier.

In addition to these “business-to-business” marketplaces, internet-based “business-to-consumer” marketplaces have exploded, with consumers selecting merchandise and confirming pricing and paying by credit card “online.” In some cases electronic automation allows order, invoice, payment and delivery to consumer to be achieved without the need for human intervention on the part of the seller.

Internet-based technologies that allow instantaneous access to vast amounts of information make the above techniques and countless other new business methods possible. These technologies themselves and hundreds of others rely on new computer hardware and software that, along with electronic devices and new types of composite materials, have created new classes of high-value, low-volume and low-weight goods. The rush to bring these new classes of goods to the market before the relentless march of technology renders them obsolete has created a new type of perishable good - computer hardware and software.¹⁰

These changes and countless others have conspired to dramatically alter the market for air cargo transport services. Air cargo services must now reach geographical markets never before served. New classes of goods and perishables have expanded the product markets that justify the

8. See BOEING, *WORLD AIR CARGO FORECAST 2000/2001* 49 (2000).

9. Rick Brooks, *UPS's 2nd Quarter Net Fell 9.4% as Shipping Slowed Worldwide*, WALL ST. J., July 20, 2001 at A2. (“UPS, which moves about 5% of U.S. economic output at any time, is an economic bellwether. It also is an increasingly important link in global supply chains and carries shipments across more than 200 foreign borders.”)

10. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *OECD WORKSHOP ON REGULATORY REFORM IN INTERNATIONAL AIR CARGO TRANSPORTATION, BACKGROUND DOCUMENT 5* (1999). (“[T]ransportation by air of goods/freight for commercial purposes plays an increasingly important role in the global economy. New forms of international trade and investment, including electronic commerce, global sourcing and manufacturing networks, and international trade in perishable and high-technology goods, use the air mode for their transportation needs. Quantity and efficiency of air cargo services are essential for the development of these new forms of globalization. Air cargo has contributed to and benefited from the recent rapid growth of the world economy and globalization and internationalization of production. It offers a fast and relatively safe mode of transport for low volume, low weight but high value products.”)

expense of air cargo transport. Changes in manufacturing techniques have placed a new premium on the timeliness and precision of deliveries, while changes in commercial and consumer buying habits have stimulated a new demand for simple, timely and comprehensive shipping solutions.

Air cargo services suppliers have responded to these new demands by adopting new business methods and offering new types of products. Air cargo services are becoming more integrated, offering under one company and one brand name comprehensive delivery services that used to be supplied by other service providers, including surface transport, customs clearance and logistics services.¹¹ These integrated suppliers are expanding their reach by entering new markets and expanding services to existing markets. Cargo hubbing and other cost savings techniques allow these expanded services to be offered while still reducing costs to the consumer. Integrated suppliers offer time-definite delivery products that guarantee delivery in a specified number of days or hours. Door-to-door delivery services are being offered by a single company under a single brand name, simplifying the shipping process for increasingly demanding customers and opening the complex world of shipping and package delivery to consumers for the first time. Some companies will now offer to supply a customer's entire supply management needs, including not just shipping but also inventory management, billing and invoicing.

C. NEW REGULATORY DEMANDS OF A GLOBAL ECONOMIC SYSTEM

The current regulatory framework of the air cargo transport system stifles the potential of these dramatic new developments and their efforts to serve the new global economy.¹² The traditional regulatory system, developed by nations to serve a different time and different needs, is not conducive to the free and uninhibited exchanges demanded by the vibrant and open economic system as described above.¹³ For example:

11. FENNES, *supra* note 1, at 18. ("The more traditional forwarders have seen their market share substantially reduced by the inroads of integrated air freight forwarders. These integrated forwarders no longer perform intermediary functions but have taken the step to partially, or even wholly, perform transportation and ancillary services themselves. These forwarders have become a mixture of the traditional forwarder, carrier, handler, etc. They present themselves to the shipper offering one product: delivery, total transport and care, from door to door for a fixed price.")

12. See BOEING COMMERCIAL AIRPLANES, *supra* note 6, at 5. ("Globalization, itself influenced by expansion of world airline networks, encourages nations to adjust the regulatory environment. Many countries have removed competitive constraints within their national boundaries, and airlines are free to choose where to fly, how much service to provide and how much to charge.") See also INTERNATIONAL CHAMBER OF COMMERCE at 4. ("[G]lobal networks cannot achieve their full potential in the current patchwork of bilateral air services agreements.")

13. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 1, at 3.

- Protection of O&D traffic ignores the increasing globalization of manufacturing processes and the reductions in the types and amounts of goods truly “originating” in a single nation.
- Market access restrictions inhibit the efficient allocation of services to the markets exhibiting the greatest demand, and prohibit the development of efficient hubbing networks.
- Capacity and fare restrictions prohibit the economic and efficient pricing of services.
- Ownership and control restrictions inhibit the efficient allocation of capital to the airlines best positioned to capitalize on emerging and underserved markets.
- Restricted access to other transport sectors inhibits the free intermodal transport required to design and offer comprehensive integrated services.

These restrictive regulations all demand reform if the potential of the new global economy and the role of air cargo transport in it are to be realized. To be fair, many of the restrictions as described above have been relaxed in limited ways and in some markets. In fact, it is due to this selective deregulation that the innovative services as described above were made possible in the first place, and their potential in other markets made known. But in order for the full economic potential of air cargo transport to be realized, the global regulatory framework in which it operates must be fully and finally reformed.

D. REFORM OF AIR CARGO TRANSPORT REGULATION

Various mechanisms have been proposed to undertake air cargo transport reform, some with the prospect of immediate, incremental gain, others with the prospect of more comprehensive reform, but slower progress. Bilateral air transport reform offers the prospect of immediate progress, at least among states party to the agreements, as well as extreme flexibility. More comprehensive bilateral reform may be achieved in the context of “open skies” agreements. Bilateral open skies agreements may be expanded to include other partner states as well, resulting in “multilateral” or “plurilateral” open skies agreements among several states.

Groups of states may agree to liberalize their air transport markets among themselves, as has been achieved with the common air transport market of the European Community. It has been proposed that various islands of air transport reform, such as the U.S. domestic market and the European Community internal market, should combine to form a “com-

mon aviation area” or CAA.¹⁴ The common aviation area would be open to accession by other states or regional associations of states. An organic process, common aviation areas offer the prospect of piecemeal reform that ultimately approaches comprehensive, multilateral reform.

Multilateral reform in all its various iterations offers the prospect of more comprehensive, fundamental reform of the air cargo transport system. Within the air transport regulatory system a vehicle for multilateral reform has been in place since the Chicago Convention in the form of the International Air Transport Agreement.¹⁵ Another existing vehicle for multilateral reform of the air transport system is the WTO. The WTO is an international organization dedicated to facilitating trade among nations. With more than 130 member states representing 90% of world trade, the WTO serves as a forum for trade discussions, negotiations and agreement among member states.¹⁶

It is the thesis of this paper that the best way to undertake the reform of air cargo transport regulation is through the WTO and the General Agreement on Trade in Services, or GATS. The WTO and GATS are global institutions with a venerable heritage of world trade liberalization. They exist already, obviating the need to undertake a new and painstaking multilateral reform instrument. They are highly regarded and well subscribed among the world’s great trading nations, and contain all the tools and mechanisms needed to achieve comprehensive, meaningful air cargo transport reform. The basic principles of the GATS trading system, especially “most favored nation” (MFN) treatment, are designed to reduce trade barriers in the most efficient and fair manner possible, and are thus the ideal regulatory framework for the integrated, global economies of today.

Furthermore, the WTO and GATS are comprehensive trade forums with jurisdiction over most industrial and service sectors. The potential for cross sectoral trade concessions and reforms through GATS is uniquely suited to the conduct of air cargo transport of today, which cuts across many industrial sectors, including air transport, surface transport, freight forwarding and information technology. The potential for cross-sectoral concessions affords GATS advantages over other forums for addressing the complex air cargo transport system, and increases the likeli-

14. See SECRETARY GENERAL KARL-HEINZ NEUMEISTER, DEPUTY SECRETARY GENERAL KEES VEENSTRA & ASSOCIATION OF EUROPEAN AIRLINES, TOWARDS A TRANSATLANTIC COMMON AVIATION AREA 3. See also DEPUTY SECRETARY GENERAL KEES VEENSTRA & ASSOCIATION OF EUROPEAN AIRLINES, IN SEARCH OF A MORE EFFICIENT REGULATORY FRAMEWORK 7 (2001).

15. International Air Transport Agreement of 1944, 59 Stat. 1701.

16. WORLD TRADE ORGANIZATION, THE WTO IN BRIEF: PART 2 THE ORGANIZATION at Part 2.

hood of states realizing a comprehensive multilateral reform. This is especially important in an era in which the integrated services of integrators, express couriers and logistics solutions providers are expected to capture an ever increasing share of the air cargo transport market.

The WTO and GATS also address the special needs of developing nations,¹⁷ nations with the most to gain through enhanced access to infrastructure technologies such as air cargo transport. The “multiplier effect” of even modest advances in air cargo transport services made possible through GATS reform could have a huge impact on these economies, and better the lives of millions of people in these developing nations.

Finally, air cargo transport reform through the WTO and GATS fulfills the promise of GATT.¹⁸ GATT, well-subscribed by nearly all the major trading nations of the world, promises the benefits of trade reform through the freer exchange of goods. Goods must be transported to market and from market to consumer, and increasingly in today’s economies this transport is achieved by air. GATS liberalization of air cargo transport thus effects a tidy, symmetrical fulfillment of the primary objective of GATT, and of liberalized world trade in general.

E. IMPLICATIONS OF AIR CARGO TRANSPORT REFORM THROUGH THE WTO AND GATS — THE WAY FORWARD

Against the broad backdrop of human history, the development of the air transport system has been incredibly fast. The twentieth century witnessed both the origin of human flight and its development into the global mass transport system of today; a system capable of linking nearly all peoples and places across the globe. The pace of global change has been especially rapid in the last ten years, with new technologies and a new openness among nations conspiring to break down technological, political and physical barriers. This new openness has changed the course and conduct of trade, and fostered new and innovative ways of doing business. As the fastest, safest and most reliable form of transport, air cargo has emerged as the preferred form of transport in this integrated new world. Air cargo transport is relied on in today’s integrated global economies as never before, and will form an indispensable and perhaps predominant part of all trading systems of the future.

Unfortunately, the regulation of air cargo transport has not kept pace with this change. The current regulatory system inhibits the full flowering of air cargo transport, and the integrated, global economies that increasingly rely on it. The WTO and GATS offers the fastest, most fair and most comprehensive prospect for reform of the air cargo trans-

17. *Id.* at Part 4.

18. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 1, at 4.

port system, preferable to all other existing and proposed vehicles. Reform of air cargo transport through the WTO and GATS would ratify these vehicles as the preferred method of air transport reform, and direct all subsequent air transport reform efforts toward this method. Subsequent reform efforts, especially passenger air transport reform, would then be undertaken in a WTO-GATS context, to the exclusion of other reform vehicles, including bilateral open skies agreements, other regional or multilateral agreements and common aviation areas. The preference for the WTO and GATS also strengthens these institutions, and demonstrates their viability as vehicles for world trade reform efforts in other sectors.

THE AIR CARGO MARKET

A. THE NATURE OF AIR CARGO AND AIR CARGO TRANSPORT

The air cargo market is composed of goods shipped by air and the enterprises that undertake to ship them. The term "air cargo" is not well-defined in a regulatory sense, and is often used interchangeably with air freight. As used in this paper, air cargo means simply goods shipped by aircraft from one destination to another through the air transport system. Although not directly relevant to this paper, air mail is often excluded from the definition of air cargo because in some jurisdictions it is subject to its own regulatory system distinct from passengers and other forms of cargo.¹⁹

Air cargo transport is usually more expensive than other forms of transport such as road, rail and sea, and is generally faster than other transport modes, especially over long distances and intercontinental routes. Air cargo is particularly sensitive to the weight of goods shipped, as weight bears more directly on the cost of air transport than other transport modes.

These factors combine to create a profile of goods shipped by air that are generally of high value and low weight and volume.²⁰ A high percentage of finished goods ready for market are shipped by air,²¹ including manufactured goods such as computers and electronics equipment, lightweight plastics, composite materials and clothing. Bulk commodities such as steel, coal and grains are generally unsuited to air transport. All types of perishable goods are shipped by air, reflecting the high value of the

19. BOEING, *supra* note 8, at 12.

20. *Id.* at 42, regarding the trans-pacific market, ("The air market primarily consists of commodities valued at \$16 per kilogram or more. Commodities in these categories historically make up more than 50% of all airborne traffic.")

21. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 10, at

25. ("... exports contain more finished goods than imports, and the former are better suited to air transportation.")

goods and the advantage of speed that air transport affords over other transport modes. Newspapers were among the original perishables shipped by air, as were organic perishables such as cut flowers, fruits, vegetables and other agricultural products.

In today's new economy, new technologies have given rise to new types of perishable goods and new types of products suitable for air transport. Moore's law states that computing power will double every eighteen months.²² Since the dawn of the computer age, this law has assured that computing and other electronic devices will become obsolete with alarming speed and regularity. Consumer demand for the latest gadgets ensures that computing and electronic products and the software that run them will eventually become worthless, sometimes in a matter of weeks or days. The time saved by shipping these perishable products by air may result in several more weeks of marketable shelf life, and contribute significantly to a product's profitability over its brief life cycle.

Regular, profitable air cargo routes have been developed to rapidly transport these high-tech goods among manufacturing centers and from manufacturer to market, many originating in Asia and terminating in the consumer markets of North America and Europe. The manufacturing techniques frequently employed to produce new goods compounds the value of air cargo transport to the profitability of these high tech products. Often the components of these products are produced in manufacturing locations all over the world, with final assembly taking place only upon delivery to market. When these manufacturing techniques are employed, rapid, reliable air cargo transport becomes not just a means to deliver the finished product to market, but an integral part of the manufacturing process itself, and adds valuable shelf life to a finished product. This transformation reflects air cargo's shift from a "premium" to a "mass" transport service.²³

The link between air cargo transport and high-value, high-tech goods is demonstrated by the relationship between the volume and value of all cargo shipped. While it is estimated that only 2% of the total volume of cargo is transported by air, the peculiar economics of air cargo are such

22. THE PROGRESSIVE POLICY INSTITUTE, THE NEW ECONOMY INDEX – WHAT'S NEW ABOUT THE NEW ECONOMY?, available at <http://www.neweconomyindex.org.html> (Nov. 1998). ("Moore's Law (named after Gordon Moore, a founder of Intel), which says that the processing power of microchips doubles every 18 months, has a corollary: the cost of computing is dropping by nearly 25 percent per year.")

23. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 10, at 21. ("Today world demand for air cargo services is in the midst of a shift from a "premium" to a "mass" transportation market. This evolution is visible in the long-term growth pattern of the industry, as world trade transported by air has picked up since the early 1990's. According to many indicators, the role of air cargo in the global economy should considerably expand in the years to come.")

that 30% of the total value of merchandise is shipped by air.²⁴ This fact reflects the relatively small transport capacity of the commercial air transport fleet as compared to other modes, but also the strong link between air cargo transport and high value, high-tech goods. Goods may be valuable due to their intrinsic worth, such as computer chips, or because they are perishable, such as the overnight transport of documents. The latest consumer electronic device or software package (Windows 95) are examples of goods that are both intrinsically valuable and perishable, and that are therefore uniquely suited to air cargo transport. The growth in the number and variety of these types of high-tech perishable goods has contributed in large part to the growth in air cargo transport over the last few years, and to the development of new types of air cargo services, such as door-to-door and time-definite services catered to meet the particular demands of these goods and their producers.²⁵

The nature of air cargo differs from passenger air transport in important ways. Air cargo transport is often unidirectional, which can lead to inefficiencies if there is insufficient traffic to fill the aircraft on the return trip. This "backhaul" problem exists between markets with an imbalance in the directional flow of goods, such as between the east and west coasts of the U.S. (more goods are manufactured on the east coast and shipped to the west coast than vice versa) and between North America and Asia (more goods are shipped to North America than vice versa, reflecting the imbalance of trade between the two economies).

Air cargo carriers sometimes solve the backhaul problem by designing triangular or circular routes that connect a series of one-way flights. Although such routings solve the backhaul problem, they often present regulatory issues. Such routings frequently involve 5th freedom, seventh freedom and even cabotage flights, and therefore require the air carrier to possess or obtain underlying economic authority to conduct such flights. For scheduled air cargo flights, unlimited fifth freedom authorities are not routinely exchanged between states in their bilateral air transport agreements, and seventh freedom and cabotage authorities are rare or nonexistent.²⁶ Unscheduled or charter authority for cargo flights is granted on an ad-hoc basis by affected states, and is more liberally authorized.²⁷ While more flexible and easier to obtain, unscheduled or

24. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 1, at 1.

25. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 10, at 23, regarding express and time definite services, ("Delivery times are lower, and in principle guaranteed: 'overnight services promise .5/1 day delivery times in many parts of the world. Goods carried are also generally more valuable, and a value/weight index of US\$30 per kg could be considered a benchmark.")

26. *See Id.* at 58-59.

27. *Id.* ("Scheduled cargo services are therefore fully included in ASA's, both in their combined passenger and all-cargo segments. Flight routes, carrier designations and capacity plan-

charter authority is not granted on a permanent basis, and must be continuously reapplied for. The tenuous nature of such authority may not offer the reliability that some air cargo customers demand, and makes it risky for air carriers to invest in infrastructure and other improvements designed to provide enhanced services, such as hubbing and sorting operations.

Air cargo transport is conducted on a different schedule than most passenger air transport services. While passenger air transport services exhibit a preference for daytime operations, especially during early morning and late afternoon peaks periods, air cargo transport operations may be conducted at any time of the day, and may even exhibit a preference for nighttime operations. Nighttime operations allow carriers, especially integrated carriers and express couriers, to avoid competition with passenger airlines for scarce slots at crowded hubs, and allow greater access to an airport's other infrastructure facilities during off-peak hours, such as taxi ways, ground handling, refueling, and terminal and hanger space. For major express courier operations such as UPS, FedEx and DHL, airport operations at major hubs begin at night and continue throughout the early morning hours until passenger operations begin again. Such scheduling provides for efficient and high-capacity airport utilization with a minimum of disruption to either passenger or cargo operations.

While offering logistical advantages, especially at crowded passenger hubs, nighttime operations pose other difficulties, especially high noise levels at hours of the day when affected persons are much more inclined to protest. No one likes to be kept awake at night by aircraft noise and these and other environmental effects of nighttime cargo operations often stir vocal opposition from neighborhood and environmental groups.

B. THE CARGO CHAIN — PLAYERS IN THE AIR CARGO MARKET

Air cargo transport is often described as one component of the cargo "chain" that transports goods from one destination to another, through the efforts of a series of transport services suppliers.²⁸ Some of these suppliers provide actual cargo transport, whether by air or other transport mode, while others perform only administrative or logistical services that speed the transport process along.

The cargo chain begins with the shipper of goods. Sometimes referred to as the sender or consignor, shippers are the source of demand

ning of carriers are provided for by these regulations. However, ASA's cover only scheduled services. Flight authorizations for non-scheduled (charter) operations, which play an important role in express cargo, remain under the ad hoc supervision and unilateral policy decisions of national aeronautical authorities.")

28. FENNES, *supra* note 1, at 14.

for cargo transport services.²⁹ Most shippers employ the services of forwarders, specializing in the management of the transport of goods on behalf of their shipping clients.³⁰ Forwarders rarely transport the goods themselves, but instead rely on their highly specialized knowledge of shipping options and regulations to arrange for optimum shipping solutions.³¹ Forwarders are able to consolidate shipments from a number of clients in order to obtain the discounted rates afforded full loads, and pass those savings on to their clients.³²

Forwarders turn to carriers for the actual transport of goods. Large forwarders have relationships with carriers in all transport modes, and will select the mode and carrier best suited to a particular client's needs.³³ The urgency of the delivery, cost and particular characteristics of the cargo are all factors a forwarder will take into consideration in choosing among modes and carriers on behalf of a shipper. Specialized forwarders may deal only in a single mode, such as air cargo transport, or a single type of good, such as live animal transport. In either case, forwarders will have a variety of carriers to choose from in determining the method of transport best suited to a client's needs.

If air cargo transport has been selected as the preferred transport mode, it is the air carrier that actually transports the goods from one airport to another.³⁴ Air carriers may be airlines that carry cargo exclusively, known as all-cargo carriers, or airlines that carry cargo in combination with passengers, known as combination carriers. Following carriage by air, goods are frequently transferred to some form of surface transportation for final delivery to the receiver, also known as the consignee. A forwarder will have arranged such surface transportation in advance as part of its service to the shipper. The complex series of transfers between modes of transport and carriers is arranged in advance and specified on a document called an air waybill. The air waybill contains important information about the nature of the shipment and the journey it will take from shipper to receiver.³⁵

29. *Id.* at 15.

30. *Id.* at 16.

31. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 10, at 16. (“[F]reight forwarders . . . design and market cargo services, collect freight from shippers, consolidate shipments for carriers, and deliver the goods to consignees.”)

32. *Id.*

33. *Id.* at 18. (“Freight forwarders have at their disposal large numbers of daily flights and other transportation services offered on the market, which they assemble according to shippers’ needs.”)

34. *Id.* at 16. (“Air carriers . . . actually operate aircraft and carry freight physically between airport points.”)

35. FENNES, *supra* note 1, at 41.

C. NEW TYPES OF AIR CARGO SERVICES — INTEGRATORS, EXPRESS COURIERS AND LOGISTICS SOLUTIONS PROVIDERS ..

The complex air cargo chain and the high degree of specialization among various suppliers in the chain is becoming increasingly simplified. New business models are emerging that undertake all the elements of the cargo chain under one company or brand name, and that steer a shipment all the way from shipper to receiver, including guaranteed, time-definite services, and comprehensive door-to-door services. In response to these new types of services and services providers, established transport companies are expanding their services into other elements of the cargo chain, and broadening their line of transport products and services. Undertaken in response to new demands of shippers, these innovative new business models and product offerings find themselves increasingly in conflict with regulations designed to govern older business models.

C.1. Integrators

Integrators provide more comprehensive shipping services than a traditional air carrier or forwarder. Integrated carriers combine the functions of the forwarder and carrier in one company, or at least under one brand name, and offer the shipper a total shipping solution.³⁶ An integrated carrier will often provide multi-modal transport, including both surface and air transportation necessary to deliver cargo from origin to final destination. An integrated carrier often owns its own trucks and aircraft, and its employees perform all the tasks necessary for the total transport of a shipment. In some cases, an integrated carrier may subcontract with a third party carrier in order to supplement capacity to account for peak seasonal demand, or in order to access markets in which the integrated carrier does not have regulatory authority to access in its own name.

The comprehensive nature of the service offered by integrators is referred to as “door-to-door” service.³⁷ The massive networks maintained by integrated carriers are capable of transporting small shipments from virtually any location to another within the effective range of its network. Business-to-business and business-to-consumer markets are both served by the integrators’ door-to-door product. Integrated carriers are not as well equipped to deal with large, bulk cargo loads, although

36. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 10, at 16; FENNES, *supra* note 1, at 24.

37. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 10, at 16. (“[I]ntegrators/express carriers, which as one entity provide the different components of door-to-door service.”)

they are in the forefront of developing comprehensive logistics solutions for large shippers.

C.2. Express Couriers

A subset of the integrated, door-to-door market is the express courier market. Express couriers add the element of time-definite delivery to the comprehensive door-to-door nature of integrated service.³⁸ Express courier services developed to serve the document delivery market, frequently guaranteeing overnight delivery of small document parcels within a certain territory.

Although originally limited to the express courier market, time definite services are becoming more important to all shippers. Just-in-time manufacturing and zero-inventory techniques rely heavily on time-definite delivery services. All types of businesses engaged in cargo transport, including express couriers and forwarders, air carriers and integrators, are being asked to add a time-definite element to the services they provide.

Proprietary tracking and tracing systems are an integral part of door-to-door and time-definite services. These systems allow a shipment to be traced throughout the entire delivery chain, from pickup at origin to delivery at final destination. Tracking and tracing systems add an element of transparency to the transport process, and provide shippers who can track their own shipments with an added sense of security and peace of mind. Along with huge investments in aircraft and trucking equipment, sorting facilities, and personnel, tracking and tracing hardware and software form part of the investment in infrastructure that fully integrated carriers must maintain in order to serve their shipping clients.

C.3. Logistics Solutions Providers

Some shippers are asking their transport providers to supply more than just transport services. They demand a company that can manage their entire system of inflow and outflow of goods and materials. Logistics services providers will design a supply chain for clients that includes not just shipping, but a variety of services on either end of a shipping transaction, such as ordering, invoicing, storage, inventory management and tracking.³⁹ Logistics services providers rely on their core expertise in

38. *Id.* at 19. ("Express carriers provide freight forwarding with time definite delivery properties and continuous shipment trucking by using proprietary inter-modal transportation networks. . . . They may also have recourse to local third party carriers because of regulatory reasons.")

39. *Id.* at 23. ("The object of this service is to optimize the logistics chain (the transport mode/storage point/delivery time/delivery cost selections) according to shippers' needs and market circumstances. Transportation is only an element of a wider service. Providers of such value adding logistics services often offer inventory management services, and handle storage points

providing comprehensive shipping solutions, and on new information technologies that automate and track inventories and shipments from the initial supply of materials to a manufacturing process through to final delivery of finished product to market or consumer. Freight forwarders and integrated carriers are entering the logistics services business in response to a growing number of clients who want all their processes to be integrated in a single, easy to track and monitor system, and provided by a single supplier with responsibility for the entire process. In such a system, shipment of goods by air, if undertaken at all, represents just one component of a larger logistical solution.

D. SIZE OF THE AIR CARGO MARKET AND PROSPECTS FOR GROWTH

For much of its history the story of the air cargo transport business was that of excess capacity looking for demand.⁴⁰ At the close of WWII and especially following the Berlin airlift there was tremendous air cargo capacity in the form of surplus military aircraft and pilots trained to fly them.⁴¹ The introduction of wide-body jet service in the 1970s brought a similar glut of capacity in the form of belly-hold space on aircraft scheduled for passenger service.⁴² Although airlines were anxious to subsidize their passenger services with revenues from freight sales, there remained a dearth of products that justified the higher expense of shipment by air.⁴³

New technologies and the new economies that rely on them have created a new demand for the type of high-speed, reliable transportation that air cargo transport provides. Air cargo transport is the preferred

and buffer stocks on behalf of shippers, as part of further optimization of the logistics chain. . . . Value adding logistics begin to be used in electronic commerce, where transportation companies handle orders, stocks and deliveries on behalf of shippers.”)

40. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 1, at 5. (“Air cargo services used to be by-products, with cargo filling up the unused passenger capacity of aircraft, but this is no longer the case as an ever increasing proportion of high value commodities are transported by air, justifying new all cargo services.”) See also FENNES, *supra* note 1, at 22. (“Because of the introduction of wide body aircraft, aircraft came on the market with enormous surplus belly capacity which enabled many carriers to top off their aircraft load with cargo to earn extra income and make operations more profitable. See also, ALAN J. WRIGHT, CARGO AIRLINES 7 (Ian Allan 2000) “The introduction of jets soon became a significant feature of the air freight scene, mainly because many carriers found themselves with more capacity than needed for passenger work, so alternatives were sought to achieve adequate utilization.”)

41. *Id.* at 5. (“During the ensuing period (after the start of WWII) the benefits of air freight became fully appreciated, with the military forces making increased use of this form of transport as the war progressed. When peace was restored in 1945 a similar situation existed to that of 25 years earlier, when a considerable number of aircraft suddenly became surplus to requirements. Numerous new airlines were launched, many by ex-RAF pilots eager to continue flying careers.”)

42. *Id.* at 8.

43. See FENNES, *supra* note 1, at 22.

mode of transport of high-value, high-tech perishables, and is justified by the speed and reliability air transport affords. Air cargo transport is also the primary shipping option for global manufacturers and just-in-time manufacturers that rely on timely, reliable delivery of components as an integral part of their manufacturing processes.

As the transporter of the new economy's high value output, air cargo is often looked to as an economic bellwether.⁴⁴ Known as an "early cyclical," air cargo transport is particularly sensitive to inventories, especially inventories of high-tech, high-value goods. As sales slow and inventories pile up, demand for air cargo transport slackens, indicating a slowing of high-tech economies. Conversely, air cargo is among the first indicators to rebound in an economic upturn, as markets rush to restock depleted inventories.

In 1999, worldwide air cargo traffic, including mail, was 137.1 billion revenue ton kilometers (RTKs). That figure is expected to grow at a rate greater than that of underlying economic growth (3% over the next twenty years) to reach 470 RTKs by 2019. This would represent a tripling of air cargo traffic over the period, and an average annual growth rate of 6.4%.⁴⁵ (Airbus predicts a smaller, yet robust growth rate of 5.7% over the same period.)⁴⁶ Mature economies such as Europe and North America will experience slower growth, although they will account for a larger percentage of overall economic activity.⁴⁷ Growth in markets linked to Asia, especially the intra-Asian market, will exhibit the strongest growth over the period, with the intra-Asian market predicted to grow at a blistering 8.6% per year. North America-Asia and Europe-Asia flows will also be strong, with growth exceeding the global average annual growth rate.⁴⁸

The superior projections of air cargo over both the passenger air transport business⁴⁹ and growth in worldwide gross domestic product⁵⁰ reflect the changing nature of air cargo transport. In its developmental stages, air cargo transport was a premium service justified only by exceptional economics of the products involved or an emergency time crunch.⁵¹ With the development of global and just-in-time manufacturing techniques, as well as increased reliance on door-to-door and time definite

44. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 1, at 2. ("Air cargo is an indicator of wider economic trends, often showing the way in and out of recession.")

45. BOEING, *supra* note 8, at 11-12.

46. AIRBUS, *supra* note 7, at 42.

47. BOEING, *supra* note 8, at 13.

48. *Id.*

49. *Id.* at 7. (4.8%.) See also AIRBUS, *supra* note 7, at 4. (5.7% per year.)

50. BOEING, *supra* note 8, at 7. (3% per year.)

51. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 10, at 21, 24.

services, air cargo transport is becoming an integral part of smoothly functioning economies. No longer a luxury employed to speed delivery of a product, air cargo transport is being incorporated into the manufacturing and service delivery process itself.⁵² The increasing reliance of global economies on air cargo transport services goes a long way toward explaining its superior growth projections over the next twenty years, and its evolution from a premium to a mass-market service.⁵³

Most of this superior growth is expected to be captured by new types of air cargo services suppliers, the integrators, express couriers and logistics solutions providers. The time-definite and door-to-door services offered by integrated carriers are among the fastest-growing in the industry. The express industry grew at a torrid pace in North America in the 1980's, and now comprises nearly 63% of the U.S. domestic cargo market, up from 4% in 1977. This rate will cool in the near future, reflecting the maturing of the industry. However, the international express industry is expected to pick up where the U.S. industry left off, and replicate the blistering growth set by the U.S. industry over the next twenty years. Boeing forecasts the international express industry to grow 13% through 2019, with its overall share of international traffic expanding from 9.2% in 1999 to 31% in 2019.⁵⁴

These incredible growth figures reflect the evolution of the express segment from a novelty service into an integral part of the way business is conducted. Time-definite and door-to-door services have become an established part of the business models of the new industries that have grown up in the period since the 1980's, including all of the e-commerce companies of the late 1990s, as well as older "bricks and mortar" companies that have adapted to meet the challenges of these new business models.

INTERNATIONAL AIR CARGO TRANSPORT REGULATION

International air cargo transport regulation is necessarily a matter between sovereign states, and is governed by bilateral trade agreements known as bilateral air transport agreements. Like other forms of air transport regulation, bilateral air transport agreements are designed by

52. *Id.* at 21. ("Today world demand for air cargo services is in the midst of a shift from a 'premium' to a 'mass' transportation market. This evolution is visible in the long-term growth pattern of the industry, as world trade transported by air has picked up since the early 1990's. According to many indicators, the role of air cargo in the global economy should considerably expand in the years to come.")

53. *See Id.* at 24. ("The air cargo industry is no longer just a premium/exclusive transportation service, offering highly customized remedies to the deficiencies of the postal service on the one hand, and to the specific transportation needs of perishable, urgent or precious goods on the other.")

54. *See* BOEING, *supra* note 8, at 2-3.

states to fulfill the objectives of their national air transport policies. At one time, the policy of bilateral air transport regulation for most states was the protection of national O&D traffic, in furtherance of national objectives of building a strong and stable air transport industry. At other times states have taken a more open attitude toward their bilateral air transport agreements, and allowed freer access to their home markets, freer pricing and freer capacity provisions. States have also used bilateral air transport agreements to achieve sectoral air transport goals, such as special provisions for air cargo transport.

A. INTERNATIONAL AIR CARGO TRANSPORT REGULATION IN THE U.S.

Like other nations, the U.S. directed its bilateral air transport relations toward strategic economic goals. For the most part, the U.S. has consistently pursued open international aviation markets, in the belief that open access and freer competition were in the best interests of U.S. carriers and the U.S. economy as a whole.⁵⁵ This is true of both passenger and air cargo markets. During the period from 1944 to 1977, the U.S. had no separate position on international air cargo regulation.⁵⁶ It was simply grouped together with international air transport regulation and regulated according to traditional bilateral air transport agreements. International air cargo was not a large market at that time, and most U.S. carriers, to the extent they focused on air cargo at all, were interested primarily in the U.S. domestic air cargo market.

Coincident with U.S. domestic air transport deregulation, the U.S. began seeking more open air transport relations with its partners in international trade, with regard to both passenger and cargo air transport. The primary vehicle for achieving such open relations was the "open skies" bilateral air transport agreement. Open skies agreements entailed, at the very least, a full exchange of the five basic freedoms of flight, full market access including routes, frequencies, capacity and designation, and double disapproval pricing.⁵⁷ Open skies agreements often included special provisions for air cargo, including air cargo rights that mirrored

55. FENNES, *supra* note 1, at 199. ("The deregulation process in fact emphasized the basic international policy of the U.S. to strive for international air transport markets, as open as possible, a policy that it had pursued even before the second world war. The conviction that an open policy would be in the benefit of the strong aviation industry was now supported by the fundamental conviction, embodied in the Deregulation Act, that open markets were the best possible way for air transport to develop and prosper.")

56. *Id.* at 184. ("Until the period of domestic deregulation, the policy declarations of the respective administrations were silent on air cargo as a specific issue. Cargo was an issue that was handled in the same fashion as the other air transport elements, passenger and mail carriage, as one total issue under the bilateral system.")

57. *Id.* at 206.

passenger rights, intermodal rights, and liberal charter provisions. The U.S. open skies with Singapore, for example, includes special rights of U.S. carriers to conduct cargo hubbing operations out of Singapore.⁵⁸

Open skies agreements represent a break with the traditional way of negotiating bilateral air transport agreements that carefully balanced reciprocal exchanges of benefits. Open skies agreements and the way they were pursued by successive U.S. administrations acknowledge that the U.S. often has more to give in bilateral air transport trade than its trading partner. Instead of seeking equal benefits, open skies agreements seek a reciprocal attitude toward air transport on behalf of its bilateral partner.⁵⁹ A fully open and free air transport market is all that the U.S. seeks from its partners in an open skies agreement, no matter how large or developed the partner's air transport market. Today, the U.S. has open skies agreements in place with 56 states, including states with small air transport markets such as Guatemala.⁶⁰

The U.S. strategically pursued open skies agreements with some states in order to pressure other states to agree to open skies agreements.⁶¹ In Europe, the U.S. used an open skies agreement with the Netherlands to gain a foothold on the Continent, and force other states to agree to similar agreements, lest all the advantages of liberal access to the U.S. market accrue to the Netherlands. These agreements were beneficial to both partners, of course, but the U.S. is said to receive an extra benefit from European open skies agreements that is not reciprocal to its European bilateral partners. Specifically, the U.S. obtains fifth freedom rights in most of its open skies agreements, rights that can be linked together in Europe to provide access to the European internal market. Cumulatively, these fifth freedom rights may even allow minor forms of hubbing in Europe by U.S. carriers. European states also obtain fifth freedom rights from the U.S., but such rights are not as useful in North America due to the vast distances between the U.S. and other major trading nations. Europeans are heard to complain that they should be granted access to the U.S. domestic market in their bilateral agreements, as only the U.S. domestic market is comparable to U.S. carrier access to Europe's internal market, accessible by cumulative fifth freedom routes.⁶²

58. *Id.* at 205.

59. *Id.*

60. U.S. DEPARTMENT OF TRANSPORTATION, INTERNATIONAL AND DOMESTIC AVIATION, NEW/EXPANDED BILATERAL AIR SERVICES AGREEMENTS (2002), available at <http://ostpxweb.dot.gov/aviation/index.html>.

61. FENNES, *supra* note 1, at 215.

62. See Neil Kinnock, *The Future of the Global Airline Industry*, Address at the 12th Annual FT World Aerospace and Air Transport Conference (September 3, 1998 London). ("While the integration of the industry is seriously hampered by the existing bilateral framework in gen-

The U.S. has also expressed an interest in sectoral bilateral air transport agreements, particularly those covering air cargo. As part of its statement on international air transport policy, the Bush administration stated that it would consider separate air cargo agreements, if they were considered a step toward a broader air transport agreement.⁶³ There is a vocal constituency in the U.S. in favor of separate air cargo agreements. Federal Express has consistently and vocally endorsed separate air cargo agreements as a way to achieve concrete steps toward more open air transport relations in advance of passenger air transport agreements.⁶⁴ Not without self interest, Federal Express is an advocate of sectoral liberalization in order to fulfill its ambition of building a global hubbing system linking its North American, European and Asian operations. Sectoral agreements or limited passenger agreements are sometimes used as precursors to broader open skies agreements, as was the case with the United States-German open skies agreement.⁶⁵

B. INTERNATIONAL AIR CARGO TRANSPORT REGULATION IN EUROPE

In Europe, international air transport relations among Member States of the European Community are open and free. The Third Package of air transport regulation created an internal market for air transport within the EC, resulting in completely liberalized air transport relations among Member States. While the Third Package technically represents a form of international air transport regulation, the internal market for air transport it creates is often analogized to a large domestic market, such as the U.S. domestic market.

eral, I must emphasize that this is particularly the case in relation to the so-called 'open-skies' agreements. . . . In spite of the rather evocative title 'open skies', openness is hardly a quality of the agreements when every party continues to designate its own carriers on the basis of strict nationality clauses, without regard for the fact that the European signatory is only a part of an existing aviation market with no internal barriers."); *see also* FREDERIK SORENSEN, AN OPEN AVIATION MARKET – THE EU APPROACH 5. ("One reason for U.S. hesitation may be the fact that they have never really opened their market. The open skies policy only applies to flights between the U.S. and other countries! Foreign carriers do not have access to the domestic American market. It seems that while the U.S. is keen for the EU to open its internal air routes to all carriers, it is less willing to reciprocate."). *See also* EUROPEAN COMMISSION, THE HEADACHE OF "OPEN SKIES" AGREEMENTS *available at* http://europa.eu.int/comm/transport/themes/air/english/at_9_en.html. ("These agreements allow U.S. carriers free access to routes within the EU, between member states that have signed up with Washington, whilst the U.S. domestic market remains closed to European carriers."); EUROPEAN COMMISSION, COMMISSION TAKES FURTHER LEGAL ACTION AGAINST MEMBER STATES' "OPEN SKIES" AGREEMENTS WITH THE UNITED STATES 1 (1998).

63. FENNES, *supra* note 1, at 202.

64. *Id.*

65. *Id.* at 209.

The Third Package makes no distinction between passenger air carriers and air cargo carriers, and thus applies to both equally. The Third Package also makes no distinction between scheduled and unscheduled carriers, allowing air carriers full freedom to determine their scheduling priorities. The result is a completely free and open air cargo transport regulatory system for Community air cargo carriers for routes within the Community. This freedom is of great benefit to Community air cargo carriers. However, as discussed above, the internal European air cargo market is rather small, both physically and economically, making it difficult for Community air cargo carriers to fully exploit the benefits of this market without combining it with other inter-European markets.

While the Community air cargo market is completely free and open, the markets between Europe and other nations remain subject to traditional bilateral air transport agreements.⁶⁶ Thus, while air transport relations among Member States are governed by Community legislation, air transport relations with states outside the Community remain subject to traditional bilateral air transport agreements. This unusual situation has worked to the advantage of some states. For example, the U.S. has used the cumulative effect of open skies agreements with individual Member States to pry open the European air transport market to the benefit of U.S. carriers.⁶⁷ Member States complain that this gives U.S. carriers access to the EC internal air transport market, while leaving the U.S. internal market closed to European carriers.

The disparate regulatory approach to the EC internal transport market and the air transport market between the EC and third parties has placed the European Community in a difficult position. On one hand, it would like to secure the most favorable trading terms with other nations on behalf of its member states. This would argue for EC competence to negotiate air transport agreements with third parties on behalf of all Member States. On the other hand, the EC has until now respected individual Member State competence to enter into their own air transport agreements with third states according to their own air transport policies and goals. The difficulty, as shown by successful U.S. efforts to break open to internal EC air transport market for U.S. carriers, is that the air transport policies of individual member states have a significant impact on other members of the Community. Indeed in such an integrated economy there could be no other result.

66. *See Id.* at 289.

67. *See Id.* at 295. ("These efforts were aimed not only at the bilateral markets with these individual countries, but were also indirectly aimed at the Community. By committing as many European countries as possible to the principle of the open air transport market, it would become more difficult for the Community to take a protectionist stand in any future discussions with the U.S.")

In order to address this problem, the European Commission has challenged Member State authority to enter into bilateral air transport agreements with third states. In a suit before the European Court of Justice (ECJ), the Commission has claimed that the European Council has granted the Commission exclusive competence in the field of air transport, and that therefore Member States no longer have the legal authority to enter into their own bilateral air transport agreements.⁶⁸ In the view of the Commission, the Commission is the only European institution with the authority to negotiate "bilateral" air transport agreements between the European Community and third states.

The advocate general in the case issued his opinion in January 2002, finding largely in favor of the Commission and against the Member States and their open skies agreements. In the opinion of the advocate general, nationality clauses⁶⁹ contained in the open skies agreements (and most other bilateral air transport agreements) violate one of the bedrock principles of European Community law, the freedom of establishment. Although the opinion of the advocate general is not binding on the court, the advocate general's opinion is followed by the ECJ most of the time. A final decision by the court is expected Summer 2002.

The Commission's legal challenge to the open skies bilateral agreements is significant, because a successful suit could upset the entire trans-Atlantic air transport market. If the opinion of the advocate general is followed by the ECJ and United States-European bilateral open skies agreements are found to be illegal under Community law, it is unclear under what legal authority continuing trans-Atlantic air transport would take place. Old bilateral air transport agreements would not govern because they were voided by the open skies agreements that succeeded them. However, unless a transition period is built in by the ECJ to give the U.S. and the European Commission time to negotiate a substitute agreement, there would be no air transport agreement in place governing US-EC air transport.

A ruling favorable to the Commission would have important strategic implications in the lucrative trans-Atlantic air transport market. Europeans have long complained that the U.S. piecemeal approach to the

68. See EUROPEAN COMMISSION, *supra* note 62, at 11.

69. Nationality clauses found in most bilateral air services agreements permit one party to refuse the designated airlines of another party if they are not substantially owned and controlled by the other party or its nationals. In this manner, the benefits of traditional bilateral air services agreements have been limited to the parties to the agreements themselves, and to the exclusion of airlines of third states. See Zuckert, Scoutt, & Rasenberger LLP, *European Court says 'Bye Bye Bermuda'*, AVIATION ADVISOR, November 6, 2002 available at <http://www.zsrlaw.com/publications/Newsletters/AA%20Nov%206%2002.htm> ("The Bermuda-type agreement became the template for hundreds of bilateral, nationality-restricted air transport agreements, and it served the U.S. airlines well").

European air transport market dilutes the negotiating strength of Member States. Arguably, together Member States can negotiate from a much stronger position, and would be able to extract greater concessions from the Americans than individual Member States can. Individual Member States have been reluctant to grant the Commission full competence to negotiate on their behalf, however, perhaps because they believe they can extract the unique benefits that they seek from the Americans in one-on-one negotiations. If the advocate general's opinion is followed by the court, it is much more likely that Member States will cede some or all of their negotiating authority to the Commission, making it possible for the Commission to negotiate "bilateral" air transport agreements between the EC and third states, and begin crafting a common external air transport policy for the first time.

Interestingly, the U.S. was willing to negotiate with the European Community as a whole in the years before it initiated its open skies strategy. In 1988 the U.S. proposed a separate air cargo agreement with the EC in anticipation of a broader passenger agreement.⁷⁰ The EC was unable and unwilling to consider such an agreement at that time. Later the European Commission did win a limited mandate from the European Council to negotiate with third states, although this external competence was limited to so-called "soft rights."⁷¹ Soft rights include marketing and other affiliated air transport services, but not the so-called "hard rights" such as route authorities and other market access provisions that are the primary subject of bilateral air transport agreements.

C. AIR CARGO TRANSPORT REFORM

The air cargo market continues to evolve, and the regulatory framework in which it operates must evolve with it. New air cargo services and air cargo products continue to be introduced, reflecting the growing importance of air cargo to world trade, and the increasing reliance on air cargo by mature and developing economies of the world. A variety of different approaches may be taken to air cargo reform in order to keep pace with these changes. They range from rapid, bilateral reform with immediate impact, to slower, multilateral reform reflecting broader, more comprehensive reform objectives. All are designed to adapt to new global political, economic and technological circumstances, and secure air cargo's future in the emerging patterns of world trade.

Bilateral air transport reform offers the prospect of immediate effect, as well as extreme flexibility. Partner states may decide the nature and extent of any such reform, allowing air cargo to be addressed separately

70. FENNES, *supra* note 1, at 202, 292-293.

71. *Id.* at 308-309.

or linked to reforms in other areas of air transport. Sectoral bilateral reform may be undertaken in anticipation of subsequent broader reform. For example, bilateral air cargo reform may be undertaken as a segue to broader passenger reform, especially, as is often the case, if the details of a passenger reform agreement cannot be worked out immediately.

Comprehensive bilateral reform may be achieved in air cargo transport as opposed to piecemeal reform. Such is the approach advocated by the Organization for Economic Cooperation and Development (OECD).⁷² OECD favors a separate protocol to be attached to existing bilateral air transport agreements that addresses air cargo relations between partner states in full.⁷³ The effect of this protocol would be to fully reform air cargo transport regulation between partner states, allowing the full exercise of rights necessary to undertake the latest in air cargo service offerings, such as express delivery services, cargo hubbing and logistics services.⁷⁴

Bilateral open skies agreements may also be open to accession by other states, resulting in plurilateral agreements, or signed by several states at once, resulting in multilateral open skies agreements. A multilateral open skies agreement was entered into by the U.S., Singapore, Chile, New Zealand and Brunei.⁷⁵ A multilateral open skies agreement decreases the number of bilateral air transport agreements, and helps to establish the open skies framework as a preferred pattern of air transport reform. The agreement is notable for the strength of the cargo carriers among parties to the agreement, such as Singapore Airlines and Lan Chile, and includes special provisions for cargo handling and intermodal operations.

Regional air cargo transport reform may be undertaken among groups of like-minded states. The EC internal air transport market is perhaps the most successful such reform. Regional air transport reform could also be achieved sectorally, and then later broadened. An air cargo transatlantic common aviation area (TCAA), for example, could liberalize the air cargo market between the U.S. and the EC, and later be broadened to include passenger air transport.

Multilateral air transport reform may be undertaken through existing or new instruments. Originally part of the package of agreements

72. See, OECD WORKSHOP ON PRINCIPLES FOR THE LIBERALIZATION OF AIR CARGO TRANSPORTATION, SUMMARY RECORD 3 (2000).

73. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, OECD WORKSHOP ON PRINCIPLES FOR THE LIBERALIZATION OF AIR CARGO TRANSPORTATION, PRINCIPLES FOR THE LIBERALIZATION OF AIR CARGO 13 (2000).

74. *Id.* at 3-4.

75. Multilateral Agreement on the Liberalization of International Air Transportation, November 15, 2000, Bandar Seri Bagawan, Brunei.

forming the Chicago Convention of 1944, the International Air Transport Agreement (IATA) represents an existing instrument that may be co-opted for modern air transport reform.⁷⁶ OECD proposes a new multilateral instrument to comprehensively reform air cargo transport relations among member states.⁷⁷ The instrument would liberalize the hard rights and soft rights necessary to conduct the full range of modern air cargo services, including market access provisions, pricing and capacity provisions, competition provisions, full freedom to diversify operations into forwarding and surface transport and full freedom in ground handling.⁷⁸ A new multilateral instrument would have to be agreed upon by all parties to the agreement and ratified according to national law. This is traditionally an arduous process, and would undoubtedly slow the pace of reform. However, the result would be a comprehensive, multilateral air cargo transport regime capable of fully supporting the most modern air cargo transport services and techniques.

Another existing instrument for air cargo transport regulatory reform is the WTO and GATS. Already in place for some air transport soft rights, the GATS Annex on Air Transport Services could be expanded to include various air transport reforms, including sectoral reform of air cargo transport as a whole.⁷⁹ The GATS Annex on Air Transport Services is in the process of a thorough review begun in 2000, and air cargo transport reform is included on the GATS 2000 reform agenda. Air cargo reform through the WTO in GATS represents an efficient, fair approach to air cargo transport reform, one which promises to meet the needs of the rapidly developing air cargo transport industry both now and in the future. In order to understand how GATS reform may meet the demands

76. International Air Transport Agreement of 1944, 59 Stat. 1701. Interestingly, the origins of the ownership and control clauses that pervade bilateral air transport agreements of today may be traced back to IATA. Section 6 of IATA provides, ("Each contracting state reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another state in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting state. . ."). This clause, in a multilateral context, was probably designed to exclude uninvited states, which at that time amounted to Axis powers, from the airspace of signatory states. When IATA failed to catch on, the clause was transferred without change to the Bermuda Agreement between the U.S. and the UK. However, in a bilateral context, the same clause has a much more restrictive effect, as there are only two party states to the agreement. Bilateral ownership and control clauses therefore limit the benefits of the agreement to the airlines of the two party states, and keep third party airlines off the routes between the two party states. This would not be the effect of the same clause in a multilateral context.

77. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 73, at 23.

78. *Id.* at 4.

79. See IRISH COALITION OF SERVICE INDUSTRIES, INTRODUCTION TO THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS), available at http://www.icsi.ie/NewFiles/gats_intro.html.

of the air cargo industry, it is important to understand the WTO and GATS trading systems.

AIR CARGO TRANSPORT REGULATION AND THE WTO

A. THE WTO AND GATS

The World Trade Organization (WTO) is an international organization dedicated to trade among nations.⁸⁰ The WTO has more than 130 members accounting for over 90% of world trade.⁸¹ The heart of the WTO is a set of legal agreements that lay the ground-rules for international trade. The agreements bind member nations to the trade terms to which they have agreed, and guarantee such trade terms to other member nations. Trade disputes among member nations are channeled toward a dispute resolution process that minimizes the risk that trade disputes will escalate into political or military conflict. The result is an international trading system that is stable and predictable, and that facilitates and lowers the cost of international trade. Beyond serving as a forum for memorializing trade agreements among member states, the WTO also works actively to lower trade barriers among members. By hosting successive rounds of trade negotiations and facilitating communication among trading partners, the WTO actively promotes a reduction in tariffs, regulations and other barriers to international trade.

Since 1947, the General Agreement on Tariffs and Trade (GATT) has served as the forum for negotiating lower customs duty rates and other trade barriers among member nations. Subsumed within the WTO in 1995, GATT is an umbrella agreement for trade in goods, and contains sectoral agreements in areas such as agriculture, textiles, etc. Since 1995, the General Agreement on Trade in Services (GATS) has served as the forum for negotiating lower barriers to trade in services among member states. As GATT applies to trade in goods, GATS applies the principles of freer and fairer trade to international service industries such as banking, insurance, telecommunications, transport and tourism. The WTO Council for Trade in Services oversees the operation of GATS.

Because of the complicated nature of cross-border trade in services and the myriad national regulations governing the supply of services, it was long thought that application of WTO principles to international trade in services would be impossible. However, new technologies have

80. See generally WORLD TRADE ORGANIZATION, *supra* note 16; IRISH COALITION OF SERVICE INDUSTRIES, INTRODUCTION TO THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS), available at http://www.icsi.ie/NewFiles/gats_intro.html; TRADE IN SERVICES DIVISION, THE GATS: OBJECTIVES, COVERAGE AND DISCIPLINES; WTO SECRETARIAT, TRADING INTO THE FUTURE: THE INTRODUCTION TO THE WTO, SERVICES: RULES FOR GROWTH AND INVESTMENT, available at http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm.

81. WORLD TRADE ORGANIZATION, *supra* note 18, at 1.

resulted in new methods for supplying international trade in services, entrenched government service monopolies have eroded and restrictive service industries have been gradually reformed, creating new opportunities to liberalize cross-border trade in services.⁸²

Together, these forces have increased the possibilities for international trade in services, and created a demand for a liberalization of cross-border trade in such services.⁸³

GATS meets this demand by providing a framework for liberalization of international regulation of trade in services. Coverage of a service sector under the GATS framework results in obligations of member states toward the regulation of that particular sector. These obligations may be broadly categorized as *general obligations* that apply directly and automatically to all members, and *specific commitments* that apply only to those sectors and activities to which a member has undertaken specific obligations.⁸⁴

General obligations of members under GATS include Most Favored Nation treatment (MFN) and transparency.⁸⁵ One of the intellectual cornerstones of GATS and the WTO, MFN provides that members are required to extend to service suppliers of other members regulatory treatment no less favorable than that accorded to like service suppliers of any other country.⁸⁶ "Favor one, favor all, MFN means treating one's trading partners equally."⁸⁷ The extension of this equal regulatory treatment is to be immediate and unconditional. As part of a member's general obligation to a particular service sector, MFN applies even if a member has made no specific commitments to provide foreign companies access to its markets under the WTO.⁸⁸

The general obligation of transparency requires members to publish all laws and regulations relevant to the supply of services.⁸⁹ Members are required to notify the WTO of any changes to these laws or regulations, and set up points of public inquiry within government. Services suppliers interested in doing business in the territory of a member may then contact these inquiry points regarding the regulations governing foreign service supply in the territory of that member.

Members may undertake *commitments* resulting in additional regula-

82. TRADE IN SERVICES DIVISION, *supra* note 80, at 1.

83. *Id.*

84. *Id.* at 4-5.

85. *Id.*

86. *Id.* at 4.

87. TRADING INTO THE FUTURE, *supra* note 80, at 2.

88. *Id.* at 3.

89. *See generally*, WTO SECRETARIAT, *supra* note 80, at 5.

tory obligations and undertakings toward a particular service sector.⁹⁰ These specific commitments may include *market access commitments* and *national treatment commitments*. A commitment in a specific service sector means that a member has decided to open that sector to foreign service supply. Typically the result of negotiations with other members, a member's commitment to a specific sector carries the force of law, and is legally enforceable against that member by other members. Member commitments for each sector are contained in detailed schedules that list all the various service sectors and member commitments in each area.

A *market access commitment* is the opening of a member's domestic market to foreign service supply. Typically negotiated in multilateral packages, market access commitments contain negotiated and guaranteed conditions for conducting trade in services.⁹¹ Market access commitments may be improved at anytime, but changes for the worse are difficult, and must be accompanied by compensation to affected members. Market access commitments may effect a broad, unlimited access of a specific service sector to foreign entry, or may be limited in certain ways. Six types of limitation are possible under GATS: the number of services suppliers granted access to a market; the total number of service operations or total quantity of service output; the number of persons that may be employed in a sector; the value of transactions in a sector; the legal form of the service supplier; and the participation of foreign capital.⁹²

Pursuant to a *national treatment commitment*, in any sector in which a member has made specific commitments that member is obliged to grant foreign services suppliers treatment no less favorable than that extended to its own services suppliers.⁹³ If a member makes a national treatment commitment, then once a foreign company has been allowed to supply a service in a member state there may be no discrimination between the foreign and local companies.⁹⁴ The primary national treatment obligation is to eliminate measures that would modify, in law or in fact, the conditions of competition in favor of a member's own service industry at the expense of cross-border supply of the same service.

An example would serve to clarify the different types of commitments a member may make. If a member commits itself to allow foreign banks to operate in its domestic market, that is a market access commitment. If the government limits the number of licenses it will issue to foreign service suppliers, that is a market access limitation. If a member also says that foreign banks are only allowed one branch while domestic

90. TRADING INTO THE FUTURE, *supra* note 80, at 5.

91. *Id.* at 8.

92. WTO SECRETARIAT, *supra* note 80, at 8.

93. TRADE IN SERVICES DIVISION, *supra* note 80, at 5.

94. TRADING INTO THE FUTURE, *supra* note 80, at 9.

banks are allowed many, that is an exception to the national treatment principle, and may be prohibited depending on the degree of commitment undertaken.⁹⁵

An important feature of the GATS trading system is an ongoing obligation of member states to review and expand their sectoral commitments. The so called “built-in agenda” of GATS, members must recognize that their commitments made in the initial negotiating round that established the WTO and GATS, the so-called Uruguay Round, represent just a start, and must commit themselves to successive rounds of negotiations aimed at achieving progressively higher levels of liberalization.⁹⁶ GATS provides for new rounds of negotiation to be undertaken at least once every five years, with the last round having been undertaken in 2000. Serving as a forum for these successive rounds of negotiations is one of the most important functions of the WTO.

The cumulative effect of GATS general obligations, specific commitments and commitments to undertake successive rounds of negotiation is a powerful impetus toward trade liberalization. The GATS principles of fairness and openness, combined with MFN treatment and national treatment that multiply the effect of these principles across hundreds of trading nations, results in rapidly diminishing trade barriers and a significant opening of service markets to foreign supply. These built-in features make GATS a powerful tool for trade liberalization, a tool well-suited to the increasingly integrated global economies of today.

B. GATS COVERAGE OF AIR TRANSPORT

Despite the power of the GATS mechanism for achieving a reduction in trade barriers, and despite the fact that virtually all other service sectors are included within the GATS framework, air transport services are covered only in small part by GATS.⁹⁷ One of the few service sectors to be granted special treatment under GATS, air transport services are dealt with in a special annex to GATS. The Annex on Air Transport Services provides that, “the Agreement (GATS) 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.”⁹⁸ The Annex then goes on to list specific air transport services that are included under GATS, including aircraft repair and maintenance services, the selling and marketing of air transport services, and

95. *Id.* at 8.

96. TRADE IN SERVICES DIVISION, *supra* note 80, at 10.

97. WTO COUNCIL FOR TRADE IN SERVICES, AIR TRANSPORT SERVICES: BACKGROUND NOTE BY THE SECRETARIAT, S/C/W/59 1 (1998).

98. *Id.*

computer reservation system services (CRS).⁹⁹

International air transport proved to be a sector where full inclusion in GATS was impossible, due largely to the complex framework of existing bilateral and multilateral air transport agreements.¹⁰⁰ This existing framework, while cumbersome, complex and opaque, does amount to a viable system of international air transport regulation and has resulted in the successful creation of a robust global air transport system. Unfortunately, this system also proved to be irreconcilable with GATS, at least during Uruguay Round negotiations. Rather than impede the implementation of GATS for all other service sectors, it was decided to set the bulk of the air transport sector aside for the time being.

There were a number of reasons for setting aside air transport. For one, as an entrenched system, it was clear that even if some members were willing to make commitments in the sector, other would not. This would lead to further complexities in an already complex system, as GATS would apply to some air transport relations and existing bilateral agreements would apply to others. No one was anxious to be responsible for the creation of such a mess, much less try to implement it in practice.¹⁰¹ Aside from that, however, the very nature of bilateral air transport agreements are incompatible with GATS principles.¹⁰²

As discussed above, bilateral air transport agreements are negotiated on the basis of a reciprocal exchange of benefits between partner states. With the exception of open skies agreements that exchange air transport rights on an "open attitude for open attitude" basis, typical bilateral air transport agreements are premised on a balanced exchange of hard rights, such as market access, frequencies, capacity and fares. The GATS system, particularly the MFN treatment principle, offers the prospect of trade liberalization regardless of reciprocity between members. Recall the MFN principle: favor one, favor all. This disparity between reciprocity and MFN treatment is of serious concern to air transport regulation reformers, especially those that hope to achieve air cargo transport reform through GATS.

With traffic rights and other important hard rights excluded, one may legitimately ask why air transport was included within the scope of coverage of GATS at all. After all, hard rights, including traffic rights, fares, capacity and frequencies, are the primary matters to be exchanged in any bilateral air transport agreement. If not included within the scope of

99. *Id.*

100. Richard Smithies, *Regulatory Update, Air Transport and the General Agreement on Trade in Services (GATS)*, 2 J. Air Transp. Mgmt. 123 (1996).

101. *Id.* at 124.

102. *Id.*

GATS, the significance of GATS coverage of air transport in economic terms is greatly diminished.

The answer lies in the organic nature of the GATS trading system. While recognizing that the current GATS coverage of the air transport sector is limited to certain soft rights, the fact that air transport is included at all offers the prospect for expanded coverage of air transport in successive rounds of negotiation.¹⁰³ A foothold in the air transport sector, current GATS coverage implies that the difficult issues presented by complex bilateral air transport agreements are not to be ignored, just deferred. Subsequent negotiating rounds have the obligation to tackle the issues these bilateral agreements present, and undertake the difficult process of incorporating them within the scope of the GATS system with other air transport matters. While perhaps overly optimistic, inclusion of soft rights under GATS at least reflects a hope and a prayer that hard rights will one day fall within the scope of GATS.¹⁰⁴

C. PROSPECTS FOR BROADER INCLUSION OF AIR TRANSPORT WITHIN GATS

The scope of GATS coverage of the air transport sector has no effect on a broad range of important air transport services. In some cases such as CRS services and sales and marketing services, these services are already covered under national or bilateral forms of regulation, making their inclusion under GATS even less impactful. However, given the stated objective of GATS, which is to achieve progressive liberalization over time, members have the opportunity, if not the obligation, to consider broader inclusion of air transport services under GATS.¹⁰⁵

A number of additional air transport services have been proposed for inclusion under GATS, ranging from the relatively simple, such as ground handling services, to the ultimate goal, the inclusion of comprehensive passenger and cargo air transport services, including traffic rights, within the GATS framework.¹⁰⁶ Possibilities for further inclusion of air transport services under the GATS framework that have been proposed include: charter operations; all-cargo services; foreign ownership restrictions; ground handling services; airport services; airport slots; and leasing

103. *Id.*

104. *Id.*

105. *Id.*

106. *See generally*, WTO Council for Trade in Services, Communication from Australia: The Mandated Review of the GATS Annex on Air Transport Services, S/C/W/167 (2000); WTO Council for Trade in Services, Communication from the European Communities and their Member States: GATS 2000 Transport Services, S/CSS/W/41 5-6 (2000); WTO Council for Trade in Services, Communication from New Zealand, Chile and Singapore: Air Transport Services (1999).

of aircraft.¹⁰⁷ It is the thesis of this paper that all-cargo services should be included within the GATS coverage of air transport services, as discussed more fully below.¹⁰⁸

D. REFORM OF AIR CARGO TRANSPORT REGULATION THROUGH GATS

D.1. The Case for Air Cargo Transport Reform Through GATS

The lesson of the history of air transport regulation is that such regulation does not exist in a vacuum. Air transport regulations exist in order to further policies and goals established by states and their policy makers. In different eras, protectionist air transport policies served the goal of building large and stable aircraft manufacturing and airline industries, while deregulation served the goal of subjecting such industries to the forces of the marketplace and redirecting them toward serving consumer interests.

The WTO, GATS and MFN treatment are also indicative of their times, reflecting broader global political and economic trends. Evidence of these trends and the changes they represent are everywhere. Physical, political and economic borders have come crashing down. With the end of the Cold War, long-held animosities have disappeared and a new openness has pervaded. Democracy has spread, and with that the spread of capitalism. Markets once closed are opening and new markets are being created. The movement of persons, capital, goods and information is becoming more free. The world's economies are integrated as at no other time. Time has shrunk, as new technologies allow instant communication of vast amounts of information. Capital is spreading all over the globe, as global economic players invest in new markets and establish foreign trading relationships, affiliates and subsidiaries.

Increasing integration and the breakdown of traditional economic and political barriers have given rise to new methods of doing business.

107. PIERRE LATRILLE, COMMENTS TO THE ICC, EXTRACTS FROM THE REPORT OF THE ICC AIR TRANSPORT COMMITTEE MEETING OF 10 OCTOBER 91 (1997). See also IATA GOVERNMENT AND INDUSTRY AFFAIRS, AIR TRANSPORT SERVICES AND THE GENERAL AGREEMENT ON TRADE IN SERVICES, OVERVIEW OF PREPARATIONS FOR GATS 2000 NEGOTIATIONS 70 (1998).

108. One interesting possibility for inclusion of air transport services within GATS is air carrier foreign ownership restrictions. Many members include foreign ownership and control restrictions in their national laws governing airline licensing. Part of the heritage of post-WWII protectionism, these regulations were intended to coddle national airlines and reserve to them domestic traffic and government subsidies. Although still important to many states for national security and other reasons, at the very least members could schedule their present restrictions in the form of GATS commitments. The effect of such commitments would be to outlaw future tightening of these restrictions, and possibly even foreshadow the loosening of them in successive rounds of negotiations. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 72, at 7.

The entire globe is now open to the most efficient allocation of the costs of doing business. Labor, storage, manufacturing, information processing and countless other business services may now be undertaken anywhere, depending on the cost of undertaking the service and the cost of subsequently integrating that service into a global business operation. Global manufacturing, in which various components of a complex product are manufactured all over the world and assembled for final distribution upon delivery to market, is increasingly relied upon by the world's leading companies. A refinement on global manufacturing, just-in-time manufacturing relies on precise and accurate delivery of materials and components to keep an assembly line supplied and functioning. Aided by internet-based information technology that allows full access to manufacturing information and related supply needs, just-in-time manufacturing achieves significant savings in storage and warehousing costs, savings eventually passed on to consumers.

These new methods of doing business place a premium on efficient transport systems.¹⁰⁹ As business methods and techniques become more dispersed, the links between these remote operations become more important. Materials, components and finished goods often must be shipped several times before final delivery to market. Shipping becomes not just the coda to the manufacturing process, but a part of the process itself.¹¹⁰ This is especially true in the case of logistics services providers, who engineer an entire manufacturing, inventory and supply system. In this environment, the speed, reliability and universality of transport systems becomes paramount. Indeed, global and just-in-time manufacturing techniques would not be possible without this type of transport infrastructure to support them.¹¹¹

109. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 10, at 1. ("Air cargo plays a crucial role in ensuring the competitiveness and commercial success of a large number of industries across the globe. It is an area of the world economy where policy reforms promise great direct and indirect benefits. Successful regulatory reform in the air cargo sector will most likely pave the way for similar progress in air transportation as a whole.") *See also*, INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 1, at 1. ("[T]he commercial success of e-commerce relies heavily on the existence of efficient, liberalized delivery networks, of which air cargo services constitute the key link.")

110. *See* FENNES, *supra* note 1, at 13. ("Transport of goods is of major importance to other economic processes such as the buying and selling of goods, the production of goods, and the allocation of production factors. Transport has evolved from being a necessary, but secondary activity, to a fully matured and major element of the production and distribution process required for industry and trade.")

111. WORLD TRADE ORGANIZATION, COUNCIL FOR TRADE IN SERVICES. COMMUNICATION FROM NEW ZEALAND, CHILE AND SINGAPORE: AIR TRANSPORT SERVICES 1 (1999). ("The possibilities created by the expansion of air freight have helped underpin and respond to the globalization of production distribution systems. This has led to further integration into the world economy of countries distant from major industrial centers and enhanced the demand for long

The transport industry, and in particular the air cargo transport industry has responded to these changes, and adapted to meet the new demands placed upon it. The old air cargo transport system of forwarders, air carriers, agents and surface transport providers is increasingly giving way to integrated transport systems. Integrators, express couriers and logistics services suppliers provide comprehensive transport services, including air transport when necessary. Their product has moved beyond carriage of goods by air. In its place they offer new types of products to their customers, including time-definite delivery services, door-to-door delivery services, and comprehensive inventory management and supply services. These new types of products meet the demands of new business methods and techniques, by providing the speed, reliability and global coverage needed to integrate dispersed operations in a comprehensive, reliable and cost-efficient manner. In this new paradigm, air cargo transport, and in particular integrated air cargo transport, has emerged as the transport system of choice of the new global economy.

Integrated air transport systems are constrained, however, by the current air cargo regulatory system.¹¹² This system, developed in a different time to serve different policy goals, does not match the demands of the new world economies, and the efforts of the integrated air cargo transport system to serve them. This system cannot service integrated global economies, and in turn reach its own potential as an efficient, integral part of those economies, in the current patchwork of outdated, anachronistic regulations.

A new regulatory system is needed to propel the air cargo regulatory system forward and meet the demands the new global economies have placed upon it. The GATS trading system in the WTO framework is the perfect such system.¹¹³ The principles upon which it is based, openness,

haul services. At the same time, it has coincided with and helped make possible the development of leaner production cycles, including just-in-time inventory management.”)

112. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 10, at 7-8. (“The current regulatory system does not permit all air carriers to base their operations on market demand for their air cargo services. They are confined to a range of accessible bilateral routes and continue to be constrained by a range of restrictions to their access to other countries’ domestic markets. They cannot design international route structures and develop services in full and free competition with each other. Also, they cannot build and match their route networks and operational capacity with available service demand at the global level. . . . Beyond traffic rights, carriers are also constrained by a range of other rules affecting operational and ‘doing business’ opportunities. These rules restrain their corporate and business structures, notably their ownership and control structures, the possibility to contract freely with domestic/local carriers abroad, and to diversify into complementary services such as trucking and in certain instances, freight forwarding, in order to develop seamless transport services for domestic and international customers.”)

113. See FENNES, *supra* note 1, at 355. (“Since air cargo is vital for trade and economic relations in general, and the effectiveness of GATS in particular, there is all the more reason for

transparency and fairness, are perfectly suited to the integrated economic world of today. The tools at its disposal, including MFN treatment and national treatment are designed to effect the fairest and broadest liberalization of regulations in the most efficient manner possible. They facilitate the free flow of goods and services across increasingly irrelevant borders. The system is equipped with a comprehensive and well-respected dispute resolution mechanism designed to minimize political and military involvement.¹¹⁴

Moreover, GATS air transport regulatory reform is uniquely equipped to address the challenges of the air cargo transport system of today. An integrated business, today's air cargo transport may involve the traditional carriage of goods by air, but also surface transport, computer tracking and tracing systems, warehousing and storage, customs clearance, forwarding, ground handling, and many other formerly distinct services. GATS, which accommodates the possibility of cross-sectoral trade negotiations, offers the ability to negotiate in several or all of the sectors needed to accomplish an integrated air cargo transport system at once.¹¹⁵ This is a powerful tool, as it allows the entire, integrated nature of air cargo transport to be considered and negotiated, rather than through piecemeal negotiations or a patchwork of regulation. The result is that the integrated air cargo transport system may be considered as a whole by a single group of negotiators, lending coherence and efficiency to the entire reform process. No other system of air cargo transport regulatory reform offers this unique advantage.

GATS air cargo transport reform also helps fulfill the promise of GATT.¹¹⁶ The GATT world trading system promises to open up nations and markets to the free flow of goods. Undertaken earlier than GATS, GATT was one of the first comprehensive multilateral efforts to reduce tariffs and other barriers to the cross-border trade in goods. Largely considered a political and regulatory success, the fruits of GATT must be realized in practice on an ongoing basis. Trade must be achieved and goods must actually cross borders in order for GATT to be a success. Air cargo transport reform through GATS helps fulfill that promise by providing the transport system required to effect that cross-border trade.

GATS to look more closely at the specific problems of air cargo and air cargo services. Because GATS includes, in one multi-lateral negotiation, all commercial aspects of the cargo chain and the services that are supplied in that chain by the diverse services suppliers, it is an ideal forum to deal with air cargo issues.”)

114. *See Id.* at 405-406

115. *Id.* at 405. (“Because of the broader context of the WTO, it will be possible to break through dead-lock situations through cross-sectoral concessions . . .”)

116. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 1, at 3. (“As import barriers for the entry of goods are progressively lifted in many countries, the transport means used for this purpose needs to be liberalized simultaneously.”)

Goods transported across borders within a GATS air cargo transport system reflect a tidy, symmetrical fulfillment of the promise of GATT. Furthermore, the types of goods increasingly transported by the new air cargo transport system of today are the high value, high-technology goods GATT most hopes to stimulate.

Air cargo transport reform through GATS also offers a number of incidental benefits. GATS and the WTO pay particular attention to the needs of developing economies.¹¹⁷ These economies especially would benefit from air cargo transport reform, as transport infrastructure improvements would have multiplier effects that ripple throughout these developing economies.¹¹⁸ Any improvement in air transport infrastructure holds the promise of improving millions of lives in these nations.

Finally, air cargo transport reform through GATS offers to pave the way for passenger air transport reform.¹¹⁹ Air cargo reform has served as a regulatory pilot fish for passenger air transport in the past, and could indeed serve a similar role in the future. Although the hardships inflicted upon the new air cargo business models such as integrators, express couriers and logistics services providers are particularly acute, the passenger air transport system is suffering from restrictive, outdated regulation as well. As it has in the past, passenger air transport reform has lagged behind air cargo reform in part because of a sense of dread over how difficult the process will be. Air cargo transport reform through GATS will help to flesh out all the issues that will be encountered in passenger air transport reform, and offer a sense of hope that these issues are indeed reconcilable. Successful air cargo transport reform may also lead to a sense of inevitability of broader reform, further streamlining the path of passenger air transport reform through GATS.

D.2. The Objectives of Air Cargo Transport Reform

The objective of air cargo transport reform through GATS would be to create a regulatory environment in which air cargo transport, particularly the newly developed services such as those offered by integrators, express couriers, and logistics services providers, could offer their services

117. WORLD TRADE ORGANIZATION, *supra* note 16, at 6. ("Over three-quarters of WTO members are developing or least-developed countries. Special provisions for these members are included in all the WTO agreements.")

118. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 1, at 2. ("Transport, together with financial services and telecommunications, form the key elements of the international business infrastructure.")

119. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 10, at 2. ("Successful regulatory reform in the air cargo sector will most likely pave the way for similar progress in air transportation as a whole.")

to customers unconstrained by restrictive government regulation. This ideal regulatory environment would allow for:

- free route design and network optimization, allowing for cargo hubbing operations to be established according to economic and market based criteria;
- free pricing authority according to economic considerations such as service characteristics and market structure;
- free determination of carrier ownership and control structure according to capital needs and marketing policies; this free determination would imply the unimpeded ability to invest in or merge with foreign carriers;
- freedom to pursue multi-modal operations, including surface operations, either by contract or under a carrier's own name;
- efficient and transparent customs and ground-handling procedures; and
- transparent, non-discriminatory allocation of environmental externalities caused by air cargo services such as aircraft noise and pollution.¹²⁰

An air cargo transport regulatory system based upon the above principles would allow such system to reach its full potential within integrated world economies. Routes and networks would be designed based upon purely economic considerations, including market conditions and the cost of serving those markets. Hubbing operations would be established according to the ability to most effectively and efficiently serve existing and potential new markets. No longer having to rely on a patchwork of bilateral traffic right authorizations, networks would become much more efficient and cost-effective, savings which would be passed on to the consumer in the form of improved services and lower prices.

Carriers would be able to invest in remote operational infrastructures, such as warehouses and distribution centers, surface transport operations and even foreign air carriers without fear of violating restrictive national and bilateral regulations. This would effect the most efficient allocation of capital, and facilitate the investments required to serve established and emerging markets. Cross-border mergers would be facilitated, allowing efficient consolidation of complementary operations. Competition regulation would govern subsequent combinations to ensure the proper functioning of the marketplace and prevent competition abuses. Environmental costs of air cargo operations would be borne by appropriate parties, including the air carrier operations themselves in appropriate circumstances.

D.3. The Legal Framework

Air cargo transport reform through GATS would be accomplished by amending the existing GATS Annex on Air Transport Services to in-

120. *Id.* at 8-9.

clude air cargo transport and related services, coupled with national commitments in these areas. This is the traditional approach of trade reform through the WTO and GATS. This approach relies on the cumulative effect of national market liberalizations, aided by MFN and national treatment principles, to effect, over time, an open and free market in services. In order to effect meaningful air cargo transport reform, important elements such as traffic rights, ownership and control regulations, multimodal regulations, ground handling regulations and other regulations affecting the provision of air cargo services would have to be added to the Annex and open to commitments by member states. States would then be free to make specific commitments in these areas, and be expected to undertake negotiations for further commitments in subsequent negotiating rounds.

The above description represents the basic legal framework for air cargo transport reform through GATS. It is no different from other sectoral reforms undertaken within the GATS framework. However, air cargo transport reform would present some unique issues that would have to be addressed by reformers. For one, the Annex would have to specify the types of carriers to which these reforms would apply.¹²¹ Although some jurisdictions no longer make a regulatory distinction between cargo and passenger carriers, most do. Air cargo is carried by an ever widening array of air carriers, including traditional combination carriers, all-cargo carriers, integrated cargo carriers, forwarders – sometimes known as indirect air carriers, and others. The scope of regulatory reform chosen could provide an advantage to certain carriers over others. A reform affecting only all-cargo carriers could seriously disadvantage combination carriers, for example. On the other hand, reform affecting all types of cargo carriers would implicate the passenger operations of combinations carriers, and could stall or derail the entire reform process. Either way, any reform effort would have to address the differences among types of cargo carriers, and provide for a regulatory solution that compensates for any disparate regulatory treatment.

All-cargo reform is most likely to meet with immediate success. All-cargo reform is simpler to undertake, as it does not implicate the complex and emotional passenger air transport issues. All-cargo reform has the further advantage of addressing the most pressing reform needs, those faced by the new types of air cargo carriers, the integrators, express couriers and logistics services suppliers. The versatile nature of the GATS sys-

121. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT WORKSHOP, ON REGULATORY REFORM IN INTERNATIONAL AIR CARGO TRANSPORTATION, CHAIRMAN'S SUMMARY 2 (1999). ("Any regulatory reform should take into account the need to establish a regime which enables all categories of service providers to respond to the needs of the market, which is increasingly driven by shippers and cargo owners.")

tem could play a role in mitigating the effects of selecting only all-cargo operations for reform, as concessions in other service sectors could be made to help offset any lingering disadvantage suffered by combination carriers. For example, concessions in the passenger carrier wet-leasing market would bring benefits to combination carriers that may help to offset the negative competitive effects of all-cargo reform. The timing of reform could also help offset any harm suffered by combination carriers, by building in a transition period to allow combination carriers to adapt to a new regulatory environment. Combination carriers could adjust their structure and operation to minimize the reform's impact on their business, or capitalize on such reform by reorganizing or forming a separate subsidiary to take advantage of the opportunities created by such reform.

D.4. Problems With GATS Air Cargo Transport Reform

In a pure GATS reform, traffic rights and other regulations would be liberalized on a MFN basis. As we have seen, the very nature of MFN treatment is such that states may be required to offer a set of benefits that other states do not offer in return. In other words, MFN treatment may result in situations in which benefits are not offered on the basis of mirror reciprocity between states. For example, in a MFN situation, if state A were to offer liberalized traffic rights to and within its territory, it would be required to make these rights available to state B, which offers similarly open traffic rights benefits, as well as state C, whose borders are closed to foreign traffic.¹²² This disparity is acknowledged by proponents of MFN and the WTO trading system, who accept this as the price of trade reform. These proponents would also point out that trade reform is not a static enterprise, and that state C would be obligated to periodically undertake trade liberalizations efforts in good faith in subsequent negotiation rounds.

For many in the air transport world, however, even reformers, this disparity represents a serious obstacle to reform. Even air transport reformers acknowledge that international air transport regulation has traditionally been undertaken on the basis of a reciprocal exchange of benefits, and that such tradition may be impossible to overcome. States simply may not be willing to allow a disparity between the rights and privileges afforded their own air carriers and those of their trading partners. This despite the fact that such objections would be based on carrier interests and not consumer interests, reflecting a very outdated regula-

122. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 1, at 6.

tory philosophy.¹²³ In the example given above, state A may simply not tolerate the restrictive treatment of its own carriers by state C, when the carriers of state C are allowed open access to their own state A. The carriers of State A would certainly complain that their government has not provided a regulatory environment in which they could effectively compete, and that they are placed at a disadvantage in relation to foreign carriers. This last argument, if made by politically powerful carriers and their equally powerful trade unions, would surely doom any undertaking to reform air cargo transport through GATS based upon a pure application of MFN treatment.

For this reason a modified MFN concept, known as conditional or reciprocal MFN, has been proposed for air cargo transport reform through GATS, one based on reciprocal MFN treatment.¹²⁴ In the example given above, conditional or reciprocal MFN treatment would require State A to offer State B free and open access to its market because State B has offered the same to State A. State A would only be required to offer free and open access to its market to State C, however, if State C were to reform its regulations and offer free and open access to other states, including State A. Reciprocal MFN treatment would require states to offer its most liberal air transport regulatory treatment to every state that offered such treatment in return. A state would be required to determine the most liberal air transport regulation package, including the degree of market access, foreign ownership and control, double disapproval pricing, etc, that it would be prepared to offer to all comers. It would not be able to deny this package or any elements of it to any other state, provided that that state offers the same package in return.

Despite their apparent similarity, conditional MFN is different from traditional bilateral air transport regulation. Traditional bilateral air transport regulation allows a state to select the partners with whom it chooses to undertake a liberal air transport arrangement, and those with whom it chooses to undertake a restrictive arrangement. This selection may be undertaken according to carefully prescribed criteria or arbitrarily. While such choices may be based on rational economic or political impulses, disparate treatment of trading partners amounts to trade discrimination. Reciprocal MFN does not allow this choice.¹²⁵ The only

123. *Id.* at 4. ("It is worth noting that, in this case, the argument against MFN is based on carrier, not consumer, interests.")

124. *Id.* ("The MFN principle ought therefore to apply to the most favorable equal exchange of inbound and outbound access to trans-border markets which a country is prepared to make. In other words, the MFN principle would be applied in such a way that every WTO member should be required to offer to all members the elements of its most favorable bilateral agreement, on the basis of mirror reciprocity.")

125. *Id.* at 5. ("A country could no longer choose to be liberal with some partners and illiberal with others, or partly liberal in exchange for completely liberal access.")

choice a state may make is the degree of air transport liberalization it is prepared to offer to all comers. Once that choice is made, the air transport package it represents may not be offered on a discriminatory basis. It must be offered on even terms to all potential partners willing to offer the same package. In this sense, reciprocal MFN represents an improvement on traditional bilateral air transport regulation. Although not as powerful as an unfettered MFN treatment, reciprocal MFN represents a more realistic approach to air cargo transport reform, and would still result in progressive multilateral liberalization, leading eventually to a true reformed multilateral air cargo transport regulatory system.

CONCLUSION

A. SIGNIFICANCE OF GATS REFORM OF AIR CARGO TRANSPORT REGULATION

Air cargo transport reform through GATS would reflect a preference for the GATS vehicle of reform above all others. A variety of reform vehicles have been proposed, including single-issue bilateral reform, comprehensive bilateral reform incorporating a detailed air cargo annex, regional reform, plurilateral reform, combining islands of regional reform, multilateral reform through existing instruments and multilateral reform through new instruments. All offer the prospect of reform, but a preference for GATS reflects its unique suitability to the complex nature of air cargo transport that makes it the ideal vehicle for reform.

GATS is a forward-looking trading system designed to address the needs of integrated, global economies well into the future. The choice of GATS reform of the air cargo transport system would not only achieve meaningful, substantive reform, but would forever identify air cargo transport with the regulatory framework likely to govern the course of world trade far into the future. More than a simple choice of reform vehicles, the preference for GATS reform of air cargo transport would be symbolic expression of air cargo transport's accession to the modern global trading system.

B. EFFECTS OF GATS REFORM OF AIR CARGO TRANSPORT REGULATION ON PASSENGER AIR TRANSPORT REGULATION AND WORLD TRADE GENERALLY

The preference for GATS reform of air cargo transport would also have ripple effects across other aspects of air transport, and world trade in general. Air cargo transport reform through GATS virtually guarantees that passenger air transport reform will be undertaken though the GATS framework as well. More than simply paving the way for passenger air transport reform, GATS air cargo transport reform pre-ordains

the regulatory vehicle to be used to achieve passenger air transport reform. Preferring GATS reform of air cargo transport will not only shape the substantive debate, but dictate the legal framework in which passenger air transport reform will be undertaken.

Finally, air cargo transport reform through GATS, especially if followed by passenger air transport reform, sounds a note of confidence in the WTO, the GATS framework and the principles upon which they are based. Sure to be difficult, contentious reform efforts, if the GATS framework can successfully accommodate the complexities and passions which air transport reform encompasses, it surely can accommodate any subsequent sectoral reform efforts. Air transport reform through GATS demonstrates the vehicle's flexibility, versatility and strength, building confidence in its institutions and the principles upon which it is based. With a success like air transport reform under its belt, GATS and the WTO would surely be seen as the preferred vehicle for regulatory reform for generations to come.