European Community Cabotage†

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I. INTRODUCTION

According to the Single European Act of 1986,[1] the internal market in the European Community was to be completed by January 1, 1993. Article 8A of this Act states that the "internal market shall comprise a market without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty."[2] The development of a common transport policy is listed in the Treaty as among the measures necessary to create the in-

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1. Single European Act, Feb. 28, 1986, 30 O.J. Eur. Comm. (No. L 169) 1 (June 29, 1987)(effective July 1, 1987).

2. *Id.* at Art. 8A.

ternal market.[3] As part of this common transport policy the Commission has sought to create a Community cabotage[4] area[5] in the field of aviation. A Community cabotage area would mean that all the traffic within and between member states would be considered the equivalent of cabotage and therefore reserved to Community carriers.[6]

There are two legal problems with this plan. First, it raises issues under Article 7 of the Chicago Convention[7], and second the creation of a Community cabotage area means that existing Fifth Freedom rights[8] of third countries, which are currently handled by bilateral agreements, would be extinguished and would have to be renegotiated. In Part I of this paper, I will look at the rules in the European Community concerning air transport. In Part II, I will assess the legality of the cabotage area under the Chicago Convention, including possible counter-arguments of the European Community. In Part III, I will look at the U.S. remedies to the violation of the Chicago Convention, as well as remedies under bilateral agreements with various member states. Finally, in Part IV, I will look at the merits of the various ways this problem can be resolved.

II. EC RULES CONCERNING AIR TRANSPORT

Only one provision in the Treaty of Rome explicitly deals with the air transport field. Article 84(2) of the EEC Treaty provides that the "Council may, acting by a qualified majority, decide whether, to what extent, and

3. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 3(e) (stating that the activities of the Community shall include "the adoption of a common policy in the sphere of transport").

4. The term "cabotage" is generally defined as the "carriage of passengers, cargo and mail between two points within the territory of the same nation for compensation or hire." W.M. Sheeenan, Comment, *Air Cabotage and the Chicago Convention*, 63 HARV. L. REV. 1157, 1157 (1950).

5. GREAVES, TRANSPORT LAW OF THE EUROPEAN COMMUNITY, 172 (1991)(noting "[t]he 1989 civil aviation package seeks to create a community cabotage area").

6. *Id.* In the maritime field similar cabotage provisions generally reserve coastal commerce within a state to vessels operated under that state's flag. Similar liberalization measures are currently being undertaken in the maritime field, where EC-flag vessels will eventually be allowed to compete for domestic coastal trade anywhere in the Community. *See* Barnard, *EC Nears Accord to Liberalize Coastal Shipping*, JOURNAL OF COMMERCE, April 8, 1992. It will be interesting, however, to see whether the EC treats maritime cabotage differently than aviation cabotage with respect to non-EC carriers. In maritime, there are no international agreements, like the scheme of bilateral agreements in aviation, to constrain the EC from excluding all non-EC carriers. Unfortunately, the maritime field is outside the scope of this paper.

7. Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, art. 7, ICAO Doc. 7300/6, 15 U.N.T.S. 6605 (commonly known as the "Chicago Convention"). All twelve members of E.C. as well as the United States are parties to the Convention.

8. Fifth Freedom rights concern the right to transport passengers, mail, or cargo between another contracting state and a third country (for example, the right of a U.S. carrier to fly passengers between Paris and Rome). *See also infra* note 47 (concerning the extent of U.S. Fifth Freedom rights in Europe).

by what procedure appropriate provisions may be laid down for sea and air transport."[9] Because individual member states of the European Community had differing views on the role of a common transport policy, the proposals of the EC Commission concerning the establishment of a competitive air transport system amounted to nothing, or were constantly postponed by the Council, until 1983.[10] In 1983, the European Parliament brought an Article 175[11] action against the Council for its failure to act in the area of transport policy. In 1985, the European Court of Justice found that Article 75(1)(a) and (b) of the Treaty were sufficiently clear to require the Council of Ministers to take appropriate actions to implement a policy of intra-community transportation and to regulate cabotage rights.[12] The Court granted the Council a "reasonable period of time" to take appropriate action.[13]

While this case was being decided, the European Commission published its Second Memorandum on Civil Aviation.[14] This memorandum laid out the major features of a common transport policy in the European Community. It dealt mainly with the regulation and creation of conditions for a competitive market for scheduled air transport, and was aimed at the liberalization of the existing bilateral air transport agreements, but only between member states and not third countries.[15] This memorandum, combined with the Transport Policy case,[16] led to the adoption of the First Phase of the process of liberalizing air transport within the European Community.[17]

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9. *See* EEC TREATY *supra* note 3, art. 84(2). Note, however, that Article 75 also deals with transportation in general, stating in part that "the Council shall, acting by qualified majority, lay down, on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly, (a) common rules applicable to international transport . . . [and] (b) the conditions under which non-resident carriers may operate transport services within a Member State."

10. Werner F. Ebke & Georg W. Wenglorz, *Liberalizing Scheduled Air Transport Within the European Community: From the First Phase to the Second and Beyond*, 19 TRANSP. L.J. 417, 427 (1991).

11. *See* EEC TREATY *supra* note 3, art. 175, which states, in relevant part, that "[S]hould the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established."

12. *See* Case 13/83, European Parliment v. Council, 5 E.C.R. 1513 (1985).

13. *Id.* at 1600.

14. Civil Aviation Memorandum No. 2—Progress Toward the Development of Community Air Transport Policy, 1984 O.J. (C 182) 1 [hereinafter Second Memorandum]. The Commission's first Memorandum dealing with civil aviation was published in 1979.

15. *Id.* at 28-40.

16. *See supra* Note 12.

17. For a full description of this phase *see* Ebke & Wenglorz *supra* note 10, at 418, n. 8.

The First Phase of liberalization[18] consisted of: a Council Directive on tariffs, a Council Decision on capacity sharing and market access, a Council Regulation on the application of the EC antitrust laws to the air transport sector, and a Council Regulation concerning exemptions from EC antitrust laws.[19] However, as with the EC Commission's Second Memorandum, the First Phase dealt only with flights between member states by member state aircraft and did not apply to domestic flights within member states (i.e., cabotage), nor did it apply to non-EC carrier flights between member states. Nothing major was accomplished by the First Phase of liberalization, probably due to the fact that the changes it provided were accompanied by significant antitrust exemptions for EC carriers.

Due to the lack of serious change contained in the First Phase in September 1989, the Commission published proposals for the Second Phase of liberalization of EC scheduled air transport.[20] The proposal dealt with relaxation of tariffs, capacity sharing, and market access. Based on this proposal, the Council of EC Transport Ministers agreed upon the Second Phase of liberalization in June of 1990. Notably, the Council did not adopt the Commission's cabotage rights proposal. If adopted, this proposal would have required the member states to introduce, starting in 1990, cabotage rights for Community airlines to a limited extent. Still, the Council stated that it would include the introduction of cabotage rights in further liberalization measures by June 30, 1992. The third and most far-reaching package of liberalization measures has yet to get off the ground.[21] EC transport commissioner Karel Van Miert, has stated that "I think there will be a decision by transport ministers in June [of 1992] that we will make a start, and have a transitional period in which 'consecutive cabotage'[22] is allowed."[23] Nonetheless, it is clear that whether or not cabotage liberalization between the EC states is adopted all at once or progressively, it will eventually be adopted, if not

18. It has been commented that "[L]iberalization means the reduction of constraints imposed upon the existing actors in the marketplace . . . whereas deregulation refers to the abolition of all restrictions dominating the air traffic marketplace, thus providing free access to international air transport." Weinberg, *Liberalization of Air Transport: Time For The EEC to Fasten Its Seatbelt*, 12 U. PA. J. INT'L BUS. L. 433, 435, n. 9 (1991).

19. *See* Ebke & Wenglorz, *supra* note 10, at 418 n.8.

20. *See* COM(89) 373 final and COM(89) 417 final.

21. Goldsmith, *The Sky is Falling in Europe: EC Plan to Loosen Air Travel Gains Speed*, INTERNATIONAL HERALD TRIBUNE, March 26, 1992.

22. An example of "consecutive cabotage" would be Air France flying from Paris to London to Manchester.

23. *See* Goldsmith, *supra* note 21.

by January 1, 1993, then some time in the relatively near future.[24] Because the creation of a Community cabotage area may well violate Article 7 of the Chicago Convention, it is useful to look at this article and the background of the Chicago Convention.

III. CHICAGO CONVENTION

As the close of World War II approached, it became evident that a new legal framework would have to be developed to deal with world air transport. The United States invited a number of countries to a conference in Chicago to discuss what this framework would look like.[25] Unfortunately, a comprehensive agreement could not be reached due to the differing views of mainly two parties.[26] The United States took a very liberal view, while the United Kingdom was protectionist.[27] Therefore, agreement was reached only on the first two, of the then five, "Freedoms of the Air."[28] Still, two important organizations were created as a result of the Chicago Convention. First, an intergovernmental agency was set up, known as the International Civil Aviation Organization, or ICAO, to provide a forum for the contracting States to continue the discussion of any matters relating to international civil aviation.[29] As was the intention, ICAO has mainly dealt with technical, legal, and operational matters, e.g., standardization of equipment, liability of air carriers, and air traffic control procedures.[30] Second, following the adoption of the Chicago Convention in 1944, it was decided that an inter-airline organization should be set up to establish international air rates or tariffs.[31] So in 1945, airline executives met in Havana and created the International Air

24. It is interesting to note that the EC governments are divided over how much time is needed to introduce cabotage. While Britain and the Netherlands felt it could be accomplished by 1995, France wanted to wait. Reuters; December 16, 1991.

25. BETSY GIDWITZ, THE POLITICS OF INTERNATIONAL AIR TRANSPORT 46, 1981.

26. *Id.* at 48.

27. *Id.* The U.S. wanted unrestricted international operating rights with market forces determining frequencies and fares, while the U.K. proposed the organization of a world regulatory body which would distribute routes and determine frequencies and fares.

28. The First Freedom is "the right to fly across the territory of a foreign country without landing." The Second Freedom is "the right to land for non-commercial purposes (technical operations relating to the aircraft, the crew, refueling, etc.) in the territory of a foreign country." The Third Freedom is the right of an air carrier licensed in one state to put down, in the territory of another state, passengers, freight and mail taken up in the state in which it is licensed. The Fourth Freedom is the right of an air carrier licensed in one state to take on, in the territory of another state, passengers, freight and mail for off-loading in the state in which it is licensed. The Fifth Freedom is the right of an air carrier to undertake the air transport of passengers, freight and mail between two states other than the state in which it is licensed. *See* GIDWITZ, *supra* note 25, at 50.

29. *Id.* at 50.

30. *Id.*

31. *Id.* at 51.

Transport Association, or IATA, with a membership of 60 airlines.[32] The main objective of IATA was twofold — first, to coordinate (i.e. set) international air fares and, second, to establish a clearinghouse to balance interairline accountings.

Unfortunately, the failure to agree on a multilateral agreement concerning air transport rights resulted in the creation of a system of bilateral agreements which remains the basis of the current air transport system today. The form of bilateral agreements has been greatly influenced by the standard Form of Agreement for provisional air routes adopted in 1944 at the Chicago Convention and, more importantly, as to economic provisions, by the bilateral air transport agreement signed between the United States and the United Kingdom in Bermuda in 1946, known today as "Bermuda I."[33] Bermuda I authorized airlines to utilize IATA for the coordination of rates subject to the final approval of both governments.[34] Also, besides legitimizing IATA, Bermuda I dealt with the granting of commercial privileges of entry and departure to discharge and pick up traffic (i.e., Third, Fourth, and Fifth Freedoms).[35] However, these privileges were only valid at designated airports, routes, in accordance with certain other traffic principles and limitations.[36]

The parties to the Chicago Convention did, however, agree to a provision concerning cabotage. Article 7 states:

> Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or airline of any other State, and not to obtain any such exclusive privilege from any other State.[37]

This broad definition of cabotage is partly attributable to the circumstances surrounding the Chicago Convention. Probably because World War II was still going on, nationalistic concern prevailed over international goals. The argument was made that air transportation must remain totally under domestic control to guarantee adequate protection of national interests.[38] Moreover, because the commercial aviation indus-

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32. *Id.*

33. Joseph Z. Gertler, *Obsolescence of Bilateral Air Transport Agreements: A Problem and a Challenge*, 13 Annals Air & Space L. 39, 42 (1988).

34. Martin Dresner & Michael W. Tretheway, *The Changing Role of IATA: Prospects for the Future*, 13 Annals Air & Space L. 3, 5-6 (1988).

35. Christoper N. Shawcross & Kenneth M. Beaumont, Air Law, Volume I, IV/29 (1977 & Supp. 1991).

36. *Id.*

37. *See* Chicago Convention, *supra* note 7, art. 7.

38. *See* Douglas R. Lewis, Comment, *Air Cabotage: Historical and Modern-Day Perspective*, 45 J. Air L. & Com. 1059, 1063 (1980).

try was virtually in its infancy, it was felt that extensive cabotage rights were necessary to insulate carriers from competition and thereby assure their continuing financial viability.[39]

While the first sentence of Article 7 is fairly straightforward, the second sentence has been open to interpretation.[40] The meaning of the restriction contained in the second sentence has been clouded due to the ambiguous terms "specifically" and "on an exclusive basis." Two interpretations of this language have been posited by legal scholars.[41] The first approach, referred to as the strict approach, places the emphasis on the phrase "on an exclusive basis." Under this approach, cabotage privileges can only be granted on a non-exclusive basis, creating an absolute prohibition against discriminatory grants. This means that cabotage rights may either be granted to no other State, or to all States who request such rights. The second approach, deemed the flexible approach, places the emphasis on the phrase "specifically." Under this approach, cabotage rights can be granted on an exclusive basis where it is not stipulated that they are exclusive, without third states having the right to demand similar privileges. The agreement would have to leave open the possibility that other states could receive similar cabotage rights. Under this approach, therefore, states may make agreements granting cabotage rights to other states so long as the agreement does not explicitly state that the rights are exclusive. This latter approach has been criticized as reducing the cabotage provision to a "paper tiger, [as] the burden placed on the plaintiff State of proving that certain cabotage rights were granted on the basis of exclusivity, would be insuperable in most, if not all, instances.[42]

The European Community could attempt to make an argument along the lines of the flexible approach. A number of bilateral grants of cabotage privileges have occurred in the past, and have been viewed as compatible with the second sentence of Article 7. For instance, in 1951, Sweden, Norway, and Denmark created Scandinavian Airlines System (SAS) and granted each other cabotage rights.[43] As part of the cabotage arrangement, they included a safeguard clause to the effect that the arrangement would lapse if third states also claimed cabotage rights.[44] After the ICAO debated this arrangement, it was regarded by ICAO

39. *Id.*

40. *Id.*

41. *Id.* at 1062-65.

42. George S. Robinson, *Changing Concepts of Cabotage: A Challenge to the Status of United States' Carriers in International Civil Aviation?* 34 J. AIR L. & COM. 553, 562 (1968).

43. Ludwig Weber, *External Aspects of EEC Air Transport Liberalization*, 15 AIR LAW 277, 283 (1990).

44. *Id.*

member states as compatible with Article 7.[45] Also, although a number of other similar cabotage arrangements have since been reached,[46] in practice there has been no intervention by a third state demanding similar privileges. It is arguable, however, that third state intervention did not occur in these cases because the routes at issue were not deemed commercially attractive by third states, or possibly because no Fifth Freedom rights were affected. In the European Community, on the other hand, a substantial number of commercially attractive cabotage routes already exist,[47] currently taking the form of Fifth Freedom rights for third countries. For this reason, it is entirely possible that the other non-EC members of ICAO will not be willing to accept the establishment of a Community cabotage area under the flexible approach just outlined. Furthermore, the argument that lack of protest to usage of the flexible approach has amounted to a customary international rule,[48] or that it has become accepted international practice would likely also fail. As one author points out, "[t]he absence of protests is due to a lack of interest in the issue rather than a tacit acceptance of the discarding of the second sentence of Article 7."[49]

It has also been argued, under the flexible approach, that even though Article 7 of the Chicago Convention seems to allow third countries to demand similar cabotage privileges, this in no way means that

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45. *Id.*

46. For example, cabotage policies have been adopted by the Arab region, the South American countries — minus Chile, and the ten African states that constitute Air Afrique. *See* Jan Ernst C. de Groot, *Cabotage Liberalization in the European Economic Community and Article 7 of the Chicago Convention*, 14 ANNALS AIR & SPACE L. 139, 179 (1989).

47. *See, e.g.*, U.S. bilateral agreement with France which grants the U.S. routes via intermediate points over the North Atlantic and Spain to Marseille and Nice and beyond via Rome, Budapest, etc. The routes from Spain to Marseille and Nice and the beyond route from France to Rome are all Fifth Freedom rights available to U.S. carriers. It is important to note, however, that these Fifth Freedom rights involving Spain and Italy must also be provided for in their respective bilateral agreements. An example of a more liberal bilateral agreement is the U.S. bilateral with Germany. The German bilateral allows for U.S. routes from the United States via intermediate points to points in Germany, and beyond to any points outside Germany, without any directional limitation. Although the German bilateral provides for seemingly unlimited routes, Fifth Freedom rights involving other countries must allow for these rights. For instance, because Germany allows unlimited beyond rights, a route could be flown through Germany to France, because the French bilateral provides for routes via intermediate points over the North Atlantic. An excellent summary of U.S. bilateral agreements can be found in *Air Service Rights in U.S. International Air Transport Agreements — A Compilation of Scheduled and Charter Service Rights Contained in U.S. Bilateral Aviation*, Office of the General Counsel of the Air Transport Association of America (1990).

48. Customary international law has been defined as law which "results from a general and consistent practice of states followed by them from a sense of legal obligation." THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 22 (1990).

49. *See* de Groot, *supra* note 46, at 162.

they will be given.[50] In other words, requests by third countries for similar cabotage privileges will only be granted when, for example, comparable benefits are offered in exchange.[51] Besides being based on the questionable flexible approach,[52] this idea ignores the fact that in the Community cabotage scenario, substantial Fifth Freedom rights are already being granted by third countries. To ask countries to give up cabotage rights within their own countries for rights they already have under existing bilateral agreements is absurd. Moreover, a number of U.S. organizations are diametrically opposed to the idea of opening U.S. cabotage traffic to foreign countries.[53]

Therefore, it seems clear that the creation of a Community cabotage area would cause problems under the second sentence of Article 7. However, there may be a way for the Community to justify its cabotage area under the Chicago Convention. The argument is based on Article 1 of the Convention, which states, "[t]he Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."[54] This argument is essentially that the Community should be considered a "State" for purposes of Article 1. As one author has argued:

> If States . . . wish to pool their sovereign rights as to internal domestic aviation interests, and let the dictation of those interests rest with a mutually established international organization, it could hardly derogate that justifying facet of Article 7 which was intended to protect those States from attempted outside domination.[55]

Under this argument, the Community would have a legitimate right under Article 7 to reserve cabotage traffic to "Community" carriers. The question then becomes whether the gradual transfer of sovereign rights, responsibilities, tasks, and powers in the air transport sector from the member states who are subject to Article 1, to the Community (an institution not bound by the Chicago Convention) is compatible with Article 1. It is interesting to note that the United States has, at least in theory, agreed to the concept that a group of States could exchange cabotage if

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50. *Id.* at 158.

51. *Id.*

52. *See* Robinson, *supra* note 42. Moreover, we noted the ICAO would be unlikely to adopt this approach.

53. For instance, Capt. Randy Babbitt, President of the Air Line Pilots Association has stated that he is vehemently opposed to the argument and feels that "if Fifth Freedom rights suddenly became cabotage, we somehow would have to come up with 29 routes to give to European airlines operating in the U.S. to match what U.S. carriers fly in Europe." Babbitt also reaffirmed his belief that if you "are talking about open-skies cabotage, then I would have no trouble gathering support for a strike." Robert W. Moorman, *Capt. Randy Babbitt, ALPA President (Air Line Pilots Association)*, 28 AIR TRANSPORT WORLD 62 (1991).

54. *See* Chicago Convention, *supra* note 7, art. 1.

55. *See* Robinson, *supra* note 42, at 563.

significant integration has taken place between them. In a 1967 ICAO Conference concerning nationality and registration of aircraft, the Chairman of the United States delegation to that Conference stated that "there could be no objection to the creation of a cabotage area between the States participating in an international or joint system of registration,[56] if those States took the far more significant step of establishing a federal union similar to that of the United States."[57]

It is arguable that this transfer of authority from the member states to the Community would not be incompatible with Article 1, so long as the Community is considered legally bound to the Convention, and so long as the other ICAO signatories recognize the transfer. Regarding the first requirement, the Community has never formally signed or acceded to the Convention. Still, there is authority for the proposition that where the Community gradually involves itself in a matter formerly handled by the member states, the Community becomes legally bound to the Agreement to the extent that it actually exercises tasks and powers previously exercised by member states.[58]

However, the Community does not yet have exclusive powers to deal with the external aviation relations of any of its member states.[59] It could be argued that this is a critical element in the transfer of sovereignty. Still, the Commission has adopted a new policy objective to have negotiations with third countries in matters of commercial air policy treated as part of the common commercial policy.[60] Whether the Commission can claim the right under the common commercial policy[61] or must get a specific delegation from the Council of Ministers is an issue

56. It is interesting to note that the Chicago Convention, in Article 77, provides for the creation of Joint Operating Organizations and states in relevant part that "[n]othing in this Convention shall prevent two or more contracting States from constituting joint air transport operating organizations or international operating agencies and from pooling their air services on any routes or in any regions, but such organizations or agencies and such pooled services shall be subject to all the provisions of this Convention . . ." Besides the fact that EC Member States do not appear to be designing any sort of joint operating organizations, they will still all operate different airlines, and even if they did form a joint operating organization they would still be subject "to all the provisions of this Convention," including Article 7 dealing with cabotage.

57. *See* de Groot, *supra* note 46, at 172, n.123.

58. *See* Cases 21-24/72, International Fruit Co. v. Produktschap voor Groenten en Fruit, 2 E.C.R. 1219 (1972), where the Community gradually involved itself in trade matters and was held legally bound to the GATT to the extent it exercised tasks and powers previously exercised by the Member States.

59. *See infra* note 60.

60. *See* Community Relations with Third Countries in Aviation Matters, COM(90) 17 final.

61. The Commission believes that it has the competence to negotiate all commercial aspects of air transport (e.g. access to the market, capacity, and fares) under Article 113 of the EEC Treaty, while social matters, environment, and safety should be dealt with by Article 84(2), which gives the Council authority to lay down provisions in the transportation field. *See* Greaves, *supra* note 5 at 171.

one author finds unnecessary to resolve.[62] According to this author, that issue will either be resolved by the completion of the single transport market or by specific legislation conferring power on the Commission.[63] This author believes the real issue to be "not *whether* but *when* the Commission will be in a position to exercise this competence in practice."[64]

Another author points out that even assuming the Commission does have the legal authority to deal in this area, it may lack the expertise to handle this field;[65] and even assuming it gains this expertise, it will still need to establish an appropriate policy framework for its actions.[66] This author notes that a policy framework is lacking and "there appears to be no consensus among member states as to what it should be."[67]

As to the second requirement, whether the ICAO signatories would recognize the transfer, any such transfer would necessarily require recognition and acceptance to the extent that the relations of third countries with Member States are affected, (i.e., Fifth Freedom rights). Article 234 of the Treaty of Rome recognizes generally the need for acceptance by third countries of the transfer of tasks and powers, where such transfers affect existing international agreements, and states:

> The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member States or States concerned shall take appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.[68]

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62. *See* Stephen Whatcroft, *The Worries of Non-EC Airlines*, 11 BRUSSELS AVIATION REPORT 2 (1992).

63. *Id.*

64. *Id.*

65. *See also* Arthur Reed, *Liberalization on Pace: Single Market Now, Cabotage Later — EC Transport Commissioner Karl Van Miert Pleased With Progress*, 29 AIR TRANSPORT WORLD 62 (1992). (Van Miert, in response to the question of what expertise in the civil aviation field his department, has responded, "[w]e have people in our service, but it is a very limited service . . . But once such responsibility is given us, we will have the involvement of national administrations who are used to this kind of negotiation. This will be not only on behalf of the 12 individual member states, but on behalf of the Community as a whole.")

66. *See* Ray Colegate, *EC Civil Aviation Relations With Third World Countries After 1992*, 9 BRUSSELS AVIATION REPORT 5 (1991).

67. *Id.*

68. *See* EEC TREATY, *supra* note 3, art. 234. As one author has stated, "[a]s far as non-member states are concerned, it seems also clear that the provisions of the Chicago Convention would prevail in the case of any conflict with the provisions of the Treaty: while member states are obliged to take the appropriate steps to eliminate incompatibilities, the effectiveness of any such steps would of course depend on the concurrence of one or more non-member states, which are under no obligation to concur." SHAWCROSS & BEAUMONT, *supra* note 35, at IX/22-23.

Therefore, so far as concerns the transfer of relations to the Community, recognition and acceptance by non-EC ICAO members, in the context of Article 1 of the Chicago Convention, would be a requirement for the compatibility of the new arrangement with Article 1. Because the external effect of cabotage is significant, it is likely that the matter of a possible Article 1 argument might be put to the ICAO Assembly for discussion and clarification.

From all this, it is clear the argument that the Community should be considered a "State" for purposes of Article 1 of the Chicago Convention is far from perfect. Until the Community exercises effective competence and authority in the external aviation relations of its member states, it can hardly be seen to constitute a "State" for purposes of the Chicago Convention.

The Council may well be putting off introduction of a Community cabotage area for the very reason that the Commission is awaiting the authority to act on behalf of the member states. Still, it seems apparent from Article 234 that third countries would have to agree to the change in legal status accompanied by the transfer of authority to the Community. As stated before, this would likely become a question dealt with by an ICAO panel of government representatives. Since third countries have substantial Fifth Freedom rights[69] in the Community — which would be destroyed by the creation of a Community cabotage area — it is likely that they would not be readily amenable to allowing the Community an Article 1 exception. Also, since the creation of the Community cabotage area will likely be challenged under Article 7, even under the flexible approach, it is likely that the issue will have to be debated in some or several international fora.

IV. POSSIBLE U.S. REMEDIES

As noted at the outset, there are basically two legal problems with the creation of a Community cabotage area. First, the area would more than likely violate Article 7 of the Chicago Convention. Second, the area destroys existing Fifth Freedom rights in the Community held by non-EC members, especially the United States. Since there are two legal problems, the United States may attempt to pursue a legal remedy in two separate ways. So far as concerns the alleged violation of the Chicago Convention, Article 84 of the Convention[70] provides that any disagreement relating to its interpretation or application, which cannot be settled

69. *See supra* note 47.

70. *See* Chicago Convention, *supra* note 7, art. 84.

by negotiation,[71] is to be decided by the ICAO Council upon the application of any state concerned. To aid it in the resolution of disputes, the Council has adopted rules of procedure.[72] Counterclaims are permitted and the jurisdiction of the Council can be attacked by preliminary objections. Moreover, there are provisions for inviting or directing negotiations to settle the dispute. Furthermore, a committee of five members may be appointed to make an investigation and report to the entire Council. The proceedings are written, but on special application the Council may agree to receive oral testimony. Decisions of the Council must be made by a majority of its members and are binding. Of course, no member may vote on a dispute to which it is a party. The decision of the Council must contain its conclusions and reasons for reaching them, and there may be appeals from it to the ICJ or an ad hoc tribunal.

As for enforcement procedures, assuming the Community cabotage area is found to violate Article 7, there are different penalties for nonconformity with the decision by airlines and states. With respect to airlines, each contracting state undertakes not to allow the operation of an airline of a contracting state through the airspace of its territory if the Council decides that the airline is not conforming to the decision.[73] As regards states, the Assembly of the ICAO shall suspend the voting power in the Assembly and Council of any contracting state found in default.[74] So the remedies under the Chicago Convention are quite severe, and since they elicit the assistance of the other contracting parties to provide leverage to force the nonconforming party to change his practice, these remedies would likely be very effective. Compare this with the other possible way the United States might pursue a remedy against the Community cabotage area.[75] For example, the Bermuda agreement between the United Kingdom and the United States provides that disagreements which cannot be settled by negotiation be referred to an arbitral tribunal, whose members are appointed by the President of the ICJ, where either contracting party fails to name an arbitrator.[76] However, there have only been two international aviation disputes submitted to arbitral tribunals: between the United States and France concerning routes flown by United States carriers from Paris to the Near East, and between the United States and Italy over the allowance of all-cargo ser-

71. The amount of negotiation required is not that extensive; the discussion can be very short, to the point where one of the parties is unable to agree or refuses to give way. *See* SHAWCROSS & BEAUMONT, *supra* note 35 at I(67), n. 2.

72. *Id.*

73. *See* Chicago Convention, *supra* note 7, art. 87.

74. *See* Chicago Convention, *supra* note 7, art. 88.

75. *See* SHAWCROSS & BEAUMONT, *supra* note 35, at I(70).

76. *Id.*

vice.[77] The United States-Italy tribunal points out one of the major problems with arbitral proceedings — the enforcement of the award. Italy failed to comply with the decision and eventually renounced the agreement. So while the Chicago Convention may provide a remedy that has the support of a number of members of the ICAO, the enforcement of an arbitral award depends on the losing party alone, and leaves the party with an unsatisfied judgment with only unilateral retaliation. Therefore, the best course for the United States would likely be to bring the violation of Article 7 before the ICAO Council and argue that the Community cabotage area violates the Chicago Convention. In order to avoid such an outcome, a number of solutions to this problem have been proposed.

V. POSSIBLE SOLUTIONS

One proposed solution is for the European Community to grandfather the existing Fifth Freedom rights of third countries. A grandfather clause is defined as "[a]n exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction."[78] The main purpose of such clauses is to preserve "existing" rights. In our case, the European Community could grant "grandfather rights" to Fifth Freedom rights existing in bilateral agreements between the member states and third countries. In this way, existing Fifth Freedom rights would not be destroyed by the creation of a Community cabotage area.

One very important consideration with respect to grandfathering rights is the problem of timing. It is normal for the cutoff date for the creation of grandfather rights to be the date of the treaty.[79] This raises issues in the Community cabotage situation. First, it is not clear when the European Community will actually create the Community cabotage area. Second, if the Community grants cabotage privileges on a gradual basis, the question arises at what date the cutoff for grandfather rights should be set, at the start or finish of the transition. It would make sense for the European Community to establish an earlier rather than a later date, due to the commotion a later date might cause. If third countries are told, for instance, that in three years their existing Fifth Freedom rights will be grandfathered, there might be a deluge of countries coming to the Community seeking to renegotiate their bilateral agreements to obtain Fifth Freedom rights. In order to avoid this problem the Commu-

77. *Id.*

78. BLACK'S LAW DICTIONARY 699 (6th ed. 1990).

79. Marc Hansen & Edwin Vermulst *The GATT Protocol of Provisional Application: A Dying Grandfather?*, 27 COLUM. J. TRANSNAT'L L. 263, 264 n.5 (1989).

nity should set the cutoff date on the same day it announces its decision to institute grandfather rights.

A second issue that arises with respect to grandfather rights is what constitutes an "existing" right. For example, if a country is authorized under a bilateral agreement to operate five Fifth Freedom rights through a EC member state, but is only actually operating two of those five, the question arises whether the unused rights would also be grandfathered; or, what if a country once used all five, subsequently reduced this to two, but then wished to retain or resume all five? As one author has noted in the context of the General Agreement on Trade and Tariffs, "[i]f one were to assume that the purpose of the grandfather clause was not to create a permanent preference, but rather to avoid the need for immediate amendment of inconsistent legislation, it could be argued that amending or recasting the offending legislation at a later date removes the justification for the exception."[80] Although it is not clear that changing utilization of Fifth Freedom rights is an amendment or recasting of existing legislation, it is obviously uncertain how these politically significant commercial changes would be handled in a grandfather cabotage context. In order to avoid the problems the GATT Contracting Parties have had in determining what constitutes "existing" legislation,[81] therefore, the European Community should make it clear whether changes in utilization would eliminate any grandfather protection afforded under and by a bilateral agreement.

Aside from the problems in implementing a system of grandfather rights, there is the question whether this system would solve the cabotage problem or just provide a temporary solution. It is likely that the latter is true. To the extent that airlines wish to change the scope and extent of their rights existing under current bilateral agreements, grandfather rights could be a very short term solution. Moreover, this solution still leaves the problem of the Community cabotage areas' violation of Article 7 of the Chicago Convention unresolved. Also, it leaves the bilateral system for the most part intact. Therefore, it does not seem to give the European Community much leverage to exert their newly united bargaining power, which could be better exerted in the context of multilateral solution. For all these reasons, it is unlikely that the Community would adopt the grandfathering approach.

Another proposed solution is for the European Community to try and get a qualified majority[82] in ICAO to amend[83] or delete the second sentence of Article 7. Such a proposal has been attempted in the past. In

80. *Id.* at 277.
81. *Id.* at 266-67.
82. *See* Chicago Convention, *supra* note 7, art. 94(a), which requires a two-third majority for an amendment to the Convention.

1966, Sweden asked the ICAO Council to adopt its interpretation that a contracting state may legitimately grant cabotage privileges to another contracting state provided that the applicable air transport agreement or operating permit did not stipulate that the privileges were granted on an exclusive basis.[84] Then in 1967, Sweden asked the assembly to delete the second sentence of Article 7 because it restricted sovereignty and was ambiguous.[85] At its 1968 and 1971 sessions, the ICAO Assembly considered the Swedish proposals concerning Article 7. At both sessions the proposals failed because they did not obtain the necessary two-thirds majority, as required by Article 94(a) of the Convention.

It has been argued that the main reason for the failure of the proposals was " 'that there was little, if any, evidence to prove that the alleged ambiguity of Article 7 had caused difficulties to any contracting state except Sweden and no specific difficulties had been brought to the Council's attention in the two years it had the matter under consideration.' "[86] Because the proposals did not meet the criteria of having been "proved necessary by experience" or of being "demonstrably desirable or useful," the Council decided that it was unnecessary to engage in the "long and complicated process involved in the adoption and ratification of an amendment."[87]

This same indifference to a proposal would likely not exist today, considering the possible effects of the removal of the second sentence of Article 7 on third countries with significant Fifth Freedom rights in jeopardy in the Community. It seems likely, therefore, that a proposal to amend Article 7 would probably fail to meet the required two-third majority vote only because of the substantial rights endangered by the legitimization of a Community cabotage area.

Moreover, this does not seem to be the path the Community intends to take. Instead, as one author notes, "it is clear that the Community hopes to persuade the parties to the Chicago Convention to adopt a multilateral approach . . . gradually replacing the traditional bilateral framework with a multilateral approach on traffic rights."[88] Scholars seem to agree with this view and have commented: "[t]he cabotage issue is only one symptom of the obsolescence of bilateralism . . . [and] this political

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83. One commentator notes that although the Chicago Convention has been subject to numerous amendments, "[a]ll the amendments adopted so far have been of a mostly cosmetic nature and did not touch the real substance of the provisions drafted during the Chicago Conference in 1944." Michael Milde, *The Chicago Convention — After Forty Years*, 9 ANNALS AIR & SPACE L. 119, 124 (1984).

84. *See* SHAWCROSS & BEAUMONT, *supra* note 35, at IV(13).

85. *Id.*

86. *See* de Groot, *supra* note 46, at 162.

87. *Id.*

88. *See* GREAVES, *supra* note 5, at 171.

discussion should be seized upon not only to rethink the traditional concept of cabotage, but to adapt the entire regulatory framework to modern-day needs and conditions, i.e., rethinking the bilateral system."[89] If correct, the eventual legal problems of a Community cabotage area could well force the adoption of a multilateral solution.

One proposal to adopt a multilateral solution is to convene another Chicago Convention.[90] United States Representative James Oberstar (D-Minn.), chairman of the House Public Works and Transportation's Subcommittee on Aviation, has called for a new Chicago Convention to replace the current system of bilateral agreements with a multilateral regime.[91] Oberstar proposed that each country "designate special negotiators, high-level in their own governments, and different from those who currently negotiate bilateral agreements to avoid having liberalization become a side line to traditional bilateral matters."[92]

One of the possible benefits of convening another Chicago Convention is that it could work to avoid some of the problems inherent in the proposal to include trade in services, the so-called "GATS" (General Agreement on Trade in Services) system.[93] It would avoid the protracted negotiations that are taking place within the GATT framework (i.e., the current Uruguay Round has been on the table since 1986). It could also work to avoid mixing aviation issues with other trade issues so that aviation rights are not "traded off for soybeans or something else."[94] This approach seems like an even better idea when we consider some of the drawbacks of the GATS approach later on. Moreover, one commentator has proposed a very simple way to amend the Chicago Convention, beyond just Article 7, to make it a multilateral solution. Former KLM Senior Vice President H.A. Wassenbergh has recommended converting the Chicago Convention into a multilateral document.[95] He believes all that is necessary is the elimination of Articles 6[96] and 7[97] and amendment of

89. *See* de Groot, *supra* note 46, at 188.

90. It might even be possible for this to be handled under the auspices of the ICAO since, as one author notes, "[t]he Organization represents a suitable forum for the contracting States to discuss any matters relating to international civil aviation and in the recent period more and more economic issues are being discussed at various Panels, Air Transport Conferences and Assembly Sessions to reconcile conflicting economic and political views and the differing national interests at stake." *See* Milde, *supra* note 83, at 122.

91. *Oberstar Calls for New Chicago Convention To End Bilateralism*, AVIATION DAILY, June 21, 1991, at 565.

92. *Id.* at 565.

93. *See infra* note 103.

94. *Id.*

95. Joan M. Feldman, *On Getting from Here to There; International Aviation Structure is Becoming Obsolete*, AIR TRANSPORT WORLD, July 1990, at 23.

96. *See* Chicago Convention, *supra* note 7, art. 6, which states, "[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with

Article 5[98] to make it applicable to scheduled air service.[99] Still, Wassenbergh feels that, similar to the problems we noted with amending Article 7, "[o]btaining a majority vote for open skies would be no easier today [because] [d]eveloping nations, which would have to support it in order to achieve a majority vote, probably would be opposed."[100] Variations on this sort of multilateral approach, which may be easier to implement, are discussed below.[101]

Another significant proposal for a multilateral solution is the discussion of the creation of a General Agreement on Trade in Services (GATS) — the basic idea being to introduce free trade principles from the General Agreement on Trade and Tariffs (GATT) into the aviation sector. In September 1986, the United States convinced the Contracting Parties to the GATT to include in the Declaration of the Eighth Round in Uruguay, the so-called "Uruguay Round," the possibility of creating a trade agreement dealing with services.[102] In an attempt to bring the Uruguay Round to a close, on December 20, 1991, Arthur Dunkel, the director general of the GATT, published a "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations."[103] This draft is Mr. Dunkel's proposal on how the current Uruguay Round should be completed and was submitted on a "take it or leave it" basis, meaning no single provision of the Draft can be considered effective until the entire package is acted upon. Annex II of this proposal deals with a General Agreement on Trade in Services, including a specific Annex on Air Transport Services.[104]

The European Community favors this approach because as one author observes, "[i]ts great commercial weight will enable it more easily to

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the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."

97. *See supra* note 7, at art. 7.

98. *See* Chicago Convention, *supra* note 7, art. 5, which states in relevant part, "[e]ach contracting State agrees that all aircraft of the other contracting States . . . not engaged in scheduled international air services shall have the right . . . to make flights into or in transit nonstop across its territory and to make stops for non-traffic purposes . . ." The second paragraph of Article 5 goes on to state, "[s]uch aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable."

99. *Id.*

100. *See* Feldman, *supra* note 95, at 23.

101. Paul V. Mifsud, *New Proposals for New Directions: 1992 and the GATT Approach to Air Transport Services*, 13 Air Law 154, 167 (1988).

102. *Id.* at 154-65.

103. Arthur Dunkel, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (Dec. 20, 1991).

104. *Id.* at 1.

obtain concessions from third countries on traffic rights."[105] This argument also seems to validate the Commission's position that it should have competence to deal with member states' aviation matters. There has also been support in the United States for a GATS system, due to the fact that a large proportion of the United States GNP now comes from the provision of services as opposed to the production of goods.[106] As one author notes: "[s]o important has this issue become to the U.S., that even though the U.S. is the primary beneficiary of the present bilateral air transport regime, its negotiators have let it be known that they were prepared to include even air transport in order to obtain a GATT service provision."[107] Thus, the U.S. has had to include aviation in the GATS discussion in order to achieve its goals in other areas. There has been heavy criticism of the proposed inclusion of aviation in the GATS system by a number of U.S. organizations.

In order to understand how this proposed system works, it is useful to look at the actual structure of the GATS system, because it differs considerably from the GATT system. The GATS, with respect to aviation, is composed of basically three main sections.[108] The first section describes the Articles of Agreement. It is broken down into two general categories: general obligations and specific obligations. Included in the general obligations, which are applicable to all parties to the agreement, is Article II, an unconditional Most Favoured-Nation Treatment provision (MFN). However, while MFN is a general obligation, there is the possibility to exempt non-conforming measures from this obligation prior to the entry into force of the agreement. As far as specific obligations, these are to be applied only if specific commitments are negotiated bilaterally between countries, and set out in schedules attached to the Agreement. Included in the section on specific commitments are provisions concerning market access and national treatment. Still, liberalization undertakings with respect to market access and national treatment are to be extended to other parties to the GATS through the application of the MFN provision.[109] Aside from general and specific obligations, the first section also contains institutional and final provisions, of which the dispute settlement and the relationship with other international organizations[110] are noteworthy in the air transport field.

105. G.L. Close, *External Competence for Air Policy in the Third Phase — Trade Policy or Transport Policy*, 15 AIR LAW 295, 302 (1990).

106. *See* Mifsud, *supra* note 101, at 165.

107. *Id.*

108. *See* Dunkel, *supra* note 103, at Annex II, Annex of Air Transport Services, at 45.

109. International Civil Aviation Organization, World-Wide Air Transport Colloquium (Montreal, April 6-10, 1992) sec. 3.13, at 3.

110. *See* Article XXVII, which states that "[t]he parties shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as

The second main section of the GATS deals with the negotiation and scheduling of commitments to liberalize trade in services. Without this section the specific provisions of the first section and the sectoral annex in the third section would have little meaning. Parties to the agreement have been negotiating offers and requests to liberalize trade in services on a bilateral trade since the latter part of 1990.[111] These liberalization commitments are to be placed in national schedules and entered into force as part of the GATS. Thereafter, subsequent negotiations between parties would be undertaken to reduce or eliminate measures that restrict trade in service by the progressive abolition of unequal market access and unequitable operating conditions. Heavy service-oriented countries have already come forward with offers to liberalize trade in all major sectors of the services trade, including civil aviation, and other countries are preparing such offers.[112]

The third main section of the GATS contains the sectoral Annex on Air Transport Services.[113] This Annex is important as it limits the scope of the agreement. It states the Agreement shall *not* apply to measures affecting traffic rights covered by the Chicago Convention, bilateral air service agreements, or directly related activities.[114] The third paragraph states that only measures affecting aircraft repair and maintenance, selling and marketing, and computer reservation services are subject to the *general* obligations under the GATS. Therefore, market access and national treatment commitments have to be negotiated by governments.[115] Moreover, paragraph 5 states that dispute settlement procedures under the GATS are not applied to traffic rights and directly related activities, but are only applied to air transport service disputes *after* procedures specified in bilateral and other multilateral regimes have been exhausted. So, procedures under bilateral agreements and the Chicago Convention would have to be exhausted before the dispute settlement procedure of the GATS kicks in.

Unfortunately, there have been a number of valid criticisms of the structure of the proposed GATS system. First, the value of introducing a Most Favored Nation concept (i.e., the obligation to provide treatment no less favorable than that accorded to like services of any other country)

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with other inter-governmental organizations concerned with services." *See* Dunkel, *supra* note 103, at Art. XXVII. Recall that ICAO is a specialized UN agency. Also, it has been noted that "[a]t the institutional level, there has been active involvement of ICAO in GNS deliberations on air transportation as well as through regular exchanges of information at the secretariat level." *See* ICAO document, *supra* note 109, at 5.

111. *See* ICAO document, *supra* note 109, sec. 3.13, at 3.

112. *Id.*

113. *See* Dunkel, *supra* note 103, at 45.

114. *Id.* at ¶ 2.

115. *Id.* at ¶ 3.

into the aviation field has been criticized. The problem with MFN in the aviation field is that MFN does not force better trade to occur. It simply mandates that everyone must be treated the same, whether this treatment is good or bad. A MFN clause alone, without a national treatment provision, means that nothing prevents domestic products from being treated more favorably than foreign goods. As one commentator puts it: "[a] most-favored-nation obligation is simply insufficient."[116] He goes on to note that, "[w]orse, a multilateral agreement predicated on MFN would engender excessive caution on the part of governments otherwise inclined to be generous in extending market access opportunities to like-minded trading partners."[117] He adds "[w]orse still, much of the existing and potential discrimination against foreign carrier services in some countries would be unaffected by the need to provide MFN treatment."[118] Presumably, this existing and potential discrimination would be taken care of by market access and national treatment provisions. Unfortunately, as we have seen, these provisions are only to be granted on a specific basis after bilateral negotiations. This would be fine except that the MFN clause kicks in and forces countries to grant negotiated commitments to the rest of the parties to the agreement. Also, the Annex exempts traffic rights from the Agreement, so MFN would not apply to them, and the current bilateral system would be untouched unless specific commitments were made.

A second criticism of the GATS occurs in the area concerning market access and national treatment just mentioned. According to the GATS market access and national treatment provisions, commitments by countries are not mandatory unless undertaken by a country. One author has stated: "[m]arket access involves the development of a market equally open to foreign as well as domestic suppliers, except in cases of national security or exceptional balance of payments problems."[119] The problem with leaving market access to separate negotiations is that governmental imposition of restrictions to market access is highly pervasive. Market access also involves sensitive areas of foreign ownership and investment.[120] It has been noted that due to the

116. Comments of Jeffrey Shane, *see* ICAO document, *supra* note 109, sec. 1.15, at 3.

117. *Id.* An alternative to unconditional MFN is conditional MFN under which countries that mutually agree to accept higher levels of obligation should not be required to extend the same treatment to countries which were unwilling to do so. However, it has been argued that a conditional approach would ignore the needs of smaller, poorer, and less interesting countries, and degenerate into limited arrangements among "like-minded" countries. Jeffrey Shane seems to indirectly support conditional MFN in his criticism of the unconditional MFN provision. *Id.*

118. *Id.*

119. Jack W. Flader, Jr., *A Call for a General Agreement on Trade in Services*, 3 TRANSNAT'L LAW. 661, 688 (1990).

120. *Id.*

entrenched monopoly position of the service sector[121] in many countries, "[g]iven the almost universal opposition to any discussion of market access in the aviation talks in Geneva, it was clear from the outset that the GATS would not be a market opening instrument."[122] Similar problems exist in the area of national treatment,[123] as the internal regulation of services in most countries exceeds regulations on goods.[124] Moreover, national treatment and market access go hand in hand, and national treatment is the *sine qua non* of market access. MFN is therefore worthless without both market access provisions *and* national treatment provisions.

Furthermore, it has been noted that the concept of national treatment really has no place in the service sector. This is because in the goods sector the national treatment concept is applied in a subsidiary manner as relating to internal protective measures rather than tariffs, which are a legitimate instrument of protection under the GATT.[125] Without the basic level of protection afforded by tariffs, national treatment changes from a subsidiary principle to a provision entailing the elimination of any protection.[126] Since most developing countries have not reached the stage where they are able to utilize this reciprocity in national treatment, this requirement would have a negative impact on the infant and growing enterprises of developing countries.[127] As the immediate introduction of national treatment would mean the elimination of all protection, it is likely that the introduction of this principle would occur over a long time period.[128]

From these provisions, it is easy to see that the GATS system would not be a great liberalizer of trade in aviation services. The proposals under the GATS system have been criticized by United States industry as well. These criticisms probably arise from the fact that the United States is the primary beneficiary of the bilateral system. As Jeffrey Shane stated: "[i]n focusing on the weaknesses of the bilateral system, I

121. One author points out that "[e]verywhere, there are major national vested interests in services, including those of the entrenched regulators; often nationalized or monopolistic or oligopolistic businesses and those who perceive services as too important or too special to be subjected to the rigors of competition." *See* Mifsud, *supra* note 101, at 166.

122. *See* Comments of Jeffrey Shane, *supra* note 116, at 3.

123. National treatment ensures the equality of treatment between foreigners and nationals and between products and services of foreign and indigenous origin. *See* Murray Gibbs and Mina Mashayekhi, *Elements of a Multilateral Framework for Trade in Services*, 14 N.C.J. INT'L L. & COM. REG. 1, 29 (1989).

124. *Id.* at 30.

125. *Id.* at 33.

126. *Id.*

127. *Id.*

128. *Id.*

hasten to point out the U.S. probably has extracted more benefit from it than most other countries."[129]

It has been argued by United States industry that the GATS system would conflict with the ability of the United States to negotiate bilateral agreements and its ability to generally negotiate service liberalizing agreements.[130] However, in the Annex of Air Transport Services to the GATT, a number of interesting exceptions are made affecting this argument. The Annex specifically addresses the problem of conflict with negotiating ability.[131] It states that no provision of the Agreement shall apply to "traffic rights covered by the Chicago Convention, including the five freedoms of the air, and by bilateral air services agreements; (b) directly related activities which would limit or affect the ability of parties to negotiate, to grant or to receive traffic rights, or which would have the effect of limiting their exercise."[132] So, it appears the concern of United States industry with respect to negotiating ability is unfounded. The real concern of United States industry is that they will likely lose the dominant negotiating position it now enjoys under the bilateral system, if a new multilateral system is employed. Still, we are left with the problem that the GATS system is not likely to be a trade liberalizer for the reasons we have noted. Also, as previously stated, placing trade in services under the GATT regime subjects services to the vagaries of trade disputes in the area of goods. Moreover, it is not clear when, or if, the Uruguay Round of the GATT will be completed, so services may be jumping aboard a sinking ship.[133]

It is apparent from the dispute over cabotage rights, however, that some sort of new agreement will have to be reached in order to accommodate the growing demands of the European Community as a single entity. For this reason, it is useful to look at some of the multilateral approaches proposed outside the GATT framework. Professor John Jackson believes that the GATT should not be shouldered with the burden of taking on a services agreement because it lacks the proper institutional support (i.e., supervisory body, voting structure, rule making procedures, secretariat, institutional dispute settlement, and membership provisions).[134] Professor Jackson believes that because unanimity

129. *See* Comments of Jeffrey Shane, *supra* note 116, at 3.

130. *See, e.g.*, Letter from Donald C. Comlish, Vice President, International Affairs, Air Transport Association, to the Honorable Julius L. Katz, Deputy United States Trade Representative (Oct. 24, 1990).

131. *See* Annex on Air Transport Services, *supra* note 108, at 45.

132. *Id.*

133. *See* David Dodwell, *GATT Wobbles on the Brink: the Failure of the Deadlocked Uruguay Round is Almost Unthinkable, but It is Looming Dangerously Near*, THE FINANCIAL POST, April 3, 1992, at 39.

134. *See* Mifsud, *supra* note 101, at 166-67.

is unattainable an "Umbrella Agreement" should be pursued that establishes a basic organization which seeks the broadest possible consensus.[135] According to Jackson, different layers of agreement could be subscribed to by parties on an optional basis so that "like-minded nations forge ahead with sets of obligations which not all 'members' are yet prepared to accept."[136] The idea of forming a "core" group of like-minded countries has been advocated by a number of groups.[137]

One scholar, for example, proposes taking the text of the Transport Agreement[138] as a starting point for a new effort.[139] A new agreement would then be based on two components. First, the core would represent the minimum, which would have to be accepted by all participants. Second, the periphery would, in each segment, consist of graduated steps, down from the maximum and open to reservations by which the participants would define the scope of application according to their individual needs. For example, in the area of market access the minimum would be First and Second Freedom rights, the maximum would be unlimited First through Fifth Freedom rights, and the intermediate would contain First through Fourth Freedom rights. Inherent in this idea is the principle that no participating government could request from any other government more than what it would grant itself under its terms.

Although an independent multilateral approach would have to be adopted slowly over time, it might be more acceptable than the GATS solution, which, as we have seen, provides little incentive to liberalize trade, is subject to the vagaries of trade disputes under the GATT framework, and may be forestalled by the failure of the Uruguay Round. Still, this approach is similar to a conditional MFN approach, which, as noted earlier, ignores the needs of smaller, poorer, and less interesting countries. For this reason, the idea of convening another Chicago Convention sounds more appealing, for it avoids the problems of the GATS system and allows the lesser developed countries to have a voice in the shaping of a new multilateral system. How a solution is eventually found to the narrow problem of a Community cabotage area, and to the broader problem of what a workable multilateral regime might look like, will ultimately be left to the whims of the political process. However, with

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135. *Id.* at 167.

136. *Id.*

137. For example, Singapore Airlines' Deputy Managing Director Michael Tan has stated that "[y]ou can't get 100 countries together and sign a multilateral agreement. We find that the practical approach could be a number of countries getting together to conclude a multilateral agreement, which acts like a catalyst." John Bailey, *Toward Open Skies*, FLIGHT INT'L, Feb. 19, 1992, at 36.

138. The Transport Agreement was a proposal by the United States for "open skies" and contained the first five freedoms of the air. *See* Gidwitz, *supra* note 25, at 50.

139. Guildman, *The Market Regulation of International Air Transport*, at 121, 127.

the arrival of the European Community as a substantial economic power, it is likely that the United States will have to give up the favorable position it has enjoyed through the outdated system of bilateral agreements, and open up its domestic air traffic in order to keep air routes abroad.