

Liberalisation of International Civil Aviation

Charting the Legal Flightpath

18

Discussion Paper 2015 • 18

Antigoni Lykotrafiti
International Transport Forum,
Paris, France

Liberalisation of International Civil Aviation – Charting the Legal Flightpath

Discussion Paper No. 2015-18

Antigoni LYKOTRAFITI
International Transport Forum, Paris, France

September 2015

THE INTERNATIONAL TRANSPORT FORUM

The International Transport Forum at the OECD is an intergovernmental organisation with 57 member countries. It acts as a strategic think-tank, with the objective of helping shape the transport policy agenda on a global level and ensuring that it contributes to economic growth, environmental protection, social inclusion and the preservation of human life and well-being. The International Transport Forum organises an Annual Summit of ministers along with leading representatives from industry, civil society and academia.

The International Transport Forum was created under a Declaration issued by the Council of Ministers of the ECMT (European Conference of Ministers of Transport) at its Ministerial Session in May 2006 under the legal authority of the Protocol of the ECMT, signed in Brussels on 17 October 1953, and legal instruments of the OECD.

The Members of the Forum are: Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Chile, China (People's Republic of), Croatia, Czech Republic, Denmark, Estonia, Finland, France, Former Yugoslav Republic of Macedonia, Georgia, Germany, Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Morocco, Republic of Moldova, Montenegro, Morocco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and United States.

The International Transport Forum's Research Centre gathers statistics and conducts co-operative research programmes addressing all modes of transport. Its findings are widely disseminated and support policymaking in member countries as well as contributing to the Annual Summit.

Discussion Papers

The International Transport Forum's Discussion Paper Series makes economic research, commissioned or carried out at its Research Centre, available to researchers and practitioners. The aim is to contribute to the understanding of the transport sector and to provide inputs to transport policy design.

ITF Discussion Papers should not be reported as representing the official views of the ITF or of its member countries. The opinions expressed and arguments employed are those of the authors.

Discussion Papers describe preliminary results or research in progress by the author(s) and are published to stimulate discussion on a broad range of issues on which the ITF works. Comments on Discussion Papers are welcomed, and may be sent to: International Transport Forum/OECD, 2 rue André-Pascal, 75775 Paris Cedex 16, France.

For further information on the Discussion Papers and other JTRC activities, please email: itf.contact@oecd.org

The Discussion Papers can be downloaded from:
www.internationaltransportforum.org/jtrc/DiscussionPapers/jtrcpapers.html

The International Transport Forum's website is at: www.internationaltransportforum.org

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

A more elaborate version of this paper has been published in Transport Policy 43 (2015) 85-95. To access the published version, visit: <http://dx.doi.org/10.1016/j.tranpol.2015.05.008>.

Table of Contents

1. Introduction	5
2. In search of air transport's identity – economic activity, public utility and public security considerations	7
3. Legal paths to liberalisation of international civil aviation	11
3.1. Including market access in the WTO GATS Annex on Air Transport Services	11
3.2. Amendment of the Chicago Convention	13
3.3. Waivers of nationality clauses	15
3.3.1. Unilateral waivers granted on the basis of reciprocity	15
3.3.2. Multilateral waivers	16
3.4. Inter-regional Air Transport Agreements	17
4. Conclusion	22

1. Introduction

The debate on the need to liberalise international civil aviation is not novel. The regulation of international civil aviation has been a contentious issue from the outset, when the Chicago Convention was still in the making.¹ The Chicago Convention is the outcome of a policy disagreement between the powers of the day over how liberal or restrictive the regulation of international civil aviation should be.² This dilemma has persisted throughout the years, resulting in regulatory change in international civil aviation being modest and driven, mainly, by liberalisation at national level.

The resilience of the Chicago regime to change might point to the fact that it has served the aviation community well over the years. The bilateral regime has protected the industry from flags of convenience and free riders, whilst achieving an exceptional level of safety and security. At the same time, the requirement for “equality of opportunity” in the provision of international air transport services has safeguarded connectivity - what the Chicago Convention has described as the need to “[m]eet the needs of the peoples of the world for safe, regular, efficient and economical air transport”.³

Seventy years after the signing of the Chicago Convention a very different geopolitical, social and economic landscape has emerged. Technological progress, marked by the advent of the internet, has catalysed change, inaugurating an era of globalisation. Considering that aviation is cosmopolitan by nature, operating under conditions of globalisation of competition should not come as a surprise or entail a radical market and regulatory reconfiguration. Yet, the industry’s *modus operandi* points to a different reality.

Globalisation of the economy creates the need for access to international capital markets. In aviation, cross-border investment has been discouraged due to the requirement (prescribed in the States’ national laws and reiterated in bilateral air services agreements) that airlines be majority owned and effectively controlled by the country of designation. Nationality restrictions have prevented the industry from consolidating out of fear that traffic rights, negotiated bilaterally between sovereign States, might be jeopardised. This fear has led to the creation of international airline alliances, which, depending on the intensity of airline cooperation, have, on various occasions, been granted antitrust immunity by the competition authorities.

Tapping into international capital markets necessitates a reconsideration of the regulation of international civil aviation; so does the modern world’s increased need for connectivity. The momentum the issue of liberalisation has gained is best illustrated within ICAO, where the 38th session of the Assembly requested the Council to develop and adopt a long-term vision for international air transport liberalisation, including examination of an international agreement by which States could liberalise market access.⁴

The question that arises is how best to modernise the regulation of international civil aviation without jeopardising the merits of the Chicago regime, but instead capitalising on and magnifying them.

1 Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr. 7, 1947).

2 See Dempsey, P., (2008). The Evolution of Air Transport Agreements. *Ann. Air Sp. Law* 33, 127-193.

3 See the Preamble to the Convention, in conjunction with Article 44(d). *Supra* note 1.

4 See Resolution A38-14, Appendix A, Section I, para. 13 and para. 14, in Resolutions adopted at the 38th Session of the ICAO Assembly (24 September-4 October 2013), Provisional Edition, November 2013, available at: <http://www.icao.int/Meetings/a38/Pages/resolutions.aspx>.

This paper approaches this question from a legal perspective. Its objective is to lay out the main legal options available to achieve liberalisation, outlining their strengths and weaknesses. Through this process, the paper aspires to inform the discussion about the optimal path to liberalisation.

2. In search of air transport's identity – Economic activity, public utility and public security considerations

Liberalisation is associated with the opening up of sectors of the economy to market forces. Since these sectors are traditionally protected from competition by means of regulation, liberalisation is often referred to as deregulation. The sectors that are being liberalised are normally concerned with economic activities, that is to say with the provision of goods and/or services on the market.⁵ Activities linked to the exercise of State prerogatives, such as the maintenance and improvement of air navigation safety, security and air traffic control, typically fall outside the ambit of economic activities.⁶ Determining the nature of air transport activities in particular as economic or non-economic as the case may be calls for an examination of the historical regulation of civil aviation.

The first codification of public international air law occurred in 1919, when the Convention Relating to the Regulation of Aerial Navigation (the so-called, Paris Convention) was adopted.⁷ The second codification occurred in 1944, when the Convention on International Civil Aviation (the so-called Chicago Convention) was adopted.⁸ Both Conventions enshrine, in their very first article, the principle of national sovereignty, i.e. that every state has complete and exclusive sovereignty over the airspace above its territory. The rationale behind this provision is to be sought in the security and defence considerations prevailing in the aftermath of the First and Second World Wars, when these Conventions were adopted.

The nexus between civil aviation and public security has been sketched out in the Preamble to the Chicago Convention, which, in its opening statement, provides: “[w]hereas the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security;...”. The Preamble goes on to state that the Convention has been concluded in the light of these considerations “in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically”. The criteria established in the Preamble have been fleshed out in Article 44 of the Convention, regarding the objectives of the International Civil Aviation Organisation (ICAO). Article 44(d) in particular entrusts ICAO with the objective of fostering the planning and development of international air transport so as to meet the needs of the peoples of the world for safe, regular, efficient and economical air transport.

The established interconnection between public security on the one hand and safety, regularity of service, operational efficiency and economic efficiency on the other hand may hint at the fact that air transport is not a conventional economic activity, but is bound to operate within a sensitive environment,

5 What constitutes an economic activity is a recurrent issue in competition law. See, for instance, the case law of the European Courts in Case 118/85, *Commission v Italy*, [1987] ECR 2599, paragraph 7; Case C-35/96, *Commission v Italy*, [1998] ECR I-3851, paragraph 36.

6 See, for instance, the European Court's ruling in Case C-364/92, *SAT/Eurocontrol*, [1994] ECR I-43, paragraph 27 and Case C-113/07 P, *Selex Sistemi Integrati v Commission*, [2009] ECR I-2207, paragraph 71. See also the European Commission's Decisions in case N 309/2002 of 19 March 2003, Aviation security – compensation for costs incurred following the attacks of 11 September 2001, OJ C 148, 25.6.2003, and in case N 438/2002 of 16 October 2002, Aid in support of public authority functions in the Belgian sector, OJ C 284, 21.11.2002, available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_N438_2002.

7 Convention Relating to the Regulation of Aerial Navigation, *opened for signature* Oct. 13, 1919, 11 L.N.T.S. 173.

8 *Supra* note 1.

while possessing also the characteristics of a public utility. The Chicago Convention provision on which States have relied to implement these criteria is Article 6. Article 6 translates the principle of national sovereignty into the context of market access, providing for the principle of economic sovereignty. Article 6 reads: “[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization”.

The principle of economic sovereignty culminated in what appears to be the main obstacle to liberalisation, namely, the nationality restrictions embedded in national legislation and air services agreements. Capping foreign investment in and restricting foreign control of national airlines to ensure that the latter remain majority owned and effectively controlled by the country of airline establishment and designation has been the means by which the States have addressed the aforementioned criteria of security, safety, regularity and efficiency.⁹ The *acquis* of controlling market access along these lines is Chicago bilateralism.

Looking first at the criterion of safety, the requirement that the country of airline designation be the country of airline establishment renders the country of designation responsible for the safety oversight of its designated airlines. This nexus between country of designation and designated airline has resulted in civil aviation having achieved an exceptional standard of safety. Thus, the problem of flags of convenience, which has been endemic in maritime transport, is a non-issue in air transport. Although, by virtue of the nationality restrictions, the country of designation happens to be also the country in which the designated airline’s majority ownership and effective (i.e. economic) control are vested, these requirements do not appear to be necessary conditions for safety oversight to be effectively exercised. So long as safety oversight and designation remain with the country of airline establishment, or, in other words, so long as the country of designation maintains effective regulatory control over the designated airline, the industry’s standards of safety can be preserved.¹⁰ Therefore, liberalisation by means of relaxing the nationality restrictions does not stand in the way of safety.

When it comes to the criterion of regularity of service, the situation seems to be more ambiguous. Nationality restrictions have resulted in the establishment of national flag carriers, which, by virtue of the bilateral exchange of traffic rights on the basis of reciprocal advantage, enjoy a fair and equal opportunity to compete. Although bilateralism does not create an obligation on States to participate in the provision of air services by establishing a national flag carrier which can be designated to fly to the destinations agreed upon in bilateral air services agreements, in practice, a country is rarely disconnected or serviced only by foreign airlines due to the non-existence of a national flag carrier. The presence of national airlines, fostered by the nationality restrictions, has, therefore, improved connectivity.

Under normal market conditions, connectivity and regularity of service are a function of demand. This entails that, in the absence of demand, connectivity is disrupted, whilst demand fluctuations affect continuity of service. This can prove problematic in cases where a State’s geographical remoteness, insularity or other peculiarity does not justify the provision of services on commercial grounds. In such cases, connectivity and regularity of service can only be safeguarded by means of public service obligations imposed on airlines for the provision of services of general economic interest. Although public service obligations can be imposed on national and foreign airlines alike, the likelihood cannot be excluded that the provision of air transport services is altogether disrupted in a State, even temporarily, for instance

9 The genesis of the ownership and control requirement must be sought in Article I, para. 5 of the International Air Services Transit Agreement (IASTA) and Article I, para.6 of the International Air Transport Agreement, both produced at the Chicago Conference. See Dempsey, *supra* note 2.

10 See Mendes de Leon, P., 2009. Establishment of air transport undertakings – Towards a more holistic approach. *J. Air Transp. Manag.* 15, 96-101.

due to airline bankruptcies or at periods of hostilities. States, therefore, might have a strong interest in the permanent presence and operation of a national airline on which they can rely for the provision of services of general economic interest. It has been argued that the requirement for continuity of services goes to the extent of creating a moral responsibility on States to provide aid and subsidies for their national carriers in order to ensure their sustainability. It also impels States to act as reinsurers of their airlines in order to keep them operating air services without being grounded for lack of insurance coverage.¹¹ The public utility characteristics of civil aviation may, therefore, provide a reason behind the States' attachment to nationality restrictions.

The criterion of operational and economic efficiency provides perhaps the most compelling argument in favour of liberalisation. Economic theory and empirical evidence have demonstrated the efficiencies normally achieved when the market is opened up to competition. From a consumer welfare perspective, these efficiencies translate into enhanced connectivity (more routes and frequencies), better quality of service, new products and services and lower prices. From a producer welfare perspective, cross-border airline investment amounts to lower costs and higher profits as an outcome of consolidation and rationalisation.

The economic rationale behind liberalisation has to be seen in the light of the criterion of public security. The association drawn in the Preamble to the Chicago Convention between international civil aviation and public security is perhaps what has mattered most in the States' determination of the regulation and deregulation of the industry. For a long period of time, the discussion was centred around whether the relaxation of nationality restrictions could, in a time of war, deprive States from having access to civilian aircraft to increase the military's airlift capacity - a possibility avoided by programmes such as the US Civil Reserve Air Fleet (CRAF) programme.¹² Current economic reality seems to have softened these concerns, shifting the focus to connectivity and fair competition. Nevertheless, considering that the issue of liberalisation will eventually be decided at political level, the public utility characteristics of civil aviation are expected to influence the path to liberalisation. Keeping these considerations in mind, it is worth examining how the law could best accommodate liberalisation of international civil aviation.

11 Abeyratne, R., 2003. Implications of the Yamoussoukro Decision on African Aviation. *Air Sp. Law* 28(6), 280-293. See also Abeyratne, R., 2005/2006. Competition in Air Transport – The Need for a Shift in Focus. *Transp. Law J.* 33, 29-110.

12 See, for instance, Patel, B., 2008. A Flight Plan towards Financial Stability – The History and Future of Foreign Ownership Restrictions in the United States Aviation Industry. *J. Air Law Commer.* 73, 487-525.

3. Legal paths to liberalisation of international civil aviation

3.1. Including market access in the WTO GATS Annex on Air Transport Services

The dual nature of air transport as a public utility and a commercial activity raises the question of whether market access in air transport should be brought under the purview of the WTO General Agreement on Trade in Services (GATS). The GATS took effect in 1995 and is incorporated as one of the Annexes to the Agreement Establishing the World Trade Organisation (WTO). Air services are governed by a specific Annex of GATS, the Annex on Air Transport Services. The Annex excludes from its scope the largest part of air transport services, namely traffic rights and services directly related to the exercise of traffic rights. Its application is limited to three ancillary services, namely, aircraft repair and maintenance, selling and marketing of air transport and computer reservation systems.¹³

The reasons behind the very limited coverage of air transport services by the GATS, when the latter was finalised in late 1994, are linked to the historical regulation of the industry within the parameters of Chicago bilateralism. At the time of the negotiations, it was recognised that the bilateral exchange of traffic rights on the basis of reciprocal advantage had served the needs of international civil aviation well. Moreover, it was considered that a fundamental principle of the GATS system, namely the most-favoured nation (MFN) treatment principle, was at odds with bilateral reciprocity. Under the MFN principle, each GATS Member State would have to accord immediately and unconditionally to services and service suppliers of any other Member State treatment no less favourable than it accorded to like services and service suppliers of any other country.¹⁴

Although the MFN principle appears to be an effective mechanism to spread liberalisation, since it universalises the most liberal concessions made to any other Member State of the GATS, in reality, if applied in a strict fashion, it has the opposite effect. This is because of the “free rider” problem.¹⁵ Without the requirement of reciprocity, free riders avail themselves of the most liberal concessions whilst keeping their own markets closed. Since the most liberal countries cannot use the concessions made as a bargaining chip to obtain reciprocal treatment, liberalisation is stalled. What is more, liberalisation is stalled even between like-minded States, which are obliged to settle for the lowest common denominator, as determined by the most conservative States.

To tackle the “free rider” problem, the GATS provided for a mechanism of exemptions from strict application of the MFN treatment principle. Member States were afforded the right to maintain measures inconsistent with the MFN treatment principle, provided that such measures were covered in the lists of exemptions filed by each State at the conclusion of the Uruguay Round negotiations.¹⁶ The MFN exemption mechanism appears to strike a balance between the free rider problem and the objective of trade liberalisation. By limiting the time when exemptions can be filed to the date of entry into force of the Agreement (or the date of accession, for newly acceding States), the GATS aims to establish a baseline of liberalisation below which Member States are not permitted to go by introducing more restrictive

13 For an account of how air transport got into GATS in the first place, see Havel, B., 2009. *Beyond Open Skies – A New Regime for International Aviation*. Wolters Kluwer, The Netherlands. Chapter 6, p. 526, footnote 34.

14 See Article II (1) of the GATS.

15 *Supra* note 13, Chapter 6, Part III C.

16 See Article II (2) of the GATS.

measures. In this sense, the GATS is a “standstill” agreement.¹⁷ In practice, however, the exemption mechanism is less rigid. For instance, the very narrow scope of the GATS Annex on Air Transport Services implies that, if additional measures are brought under its purview, States will be entitled to file new MFN exemptions.¹⁸ Thus, rather than setting the pace for market access liberalisation, the GATS admits of progressive liberalisation, whereby Member States are free to adjust liberalisation to their own circumstances.

The same logic runs through another fundamental principle of the GATS, namely the national treatment (NT) principle. Under the NT principle, Member States shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that which they accord to their own services and service suppliers.¹⁹ Unlike the MFN treatment principle, which applies across the board, the NT principle applies only to the sectors singled out by the Member States. Moreover, NT is subject to the Member States’ conditions and qualifications, which normally reflect existing restrictions in national legislation, such as ownership and control limitations. The assumption of NT commitments along these lines prevents the Member States from introducing stricter measures in the future, therefore embedding a liberalisation *acquis*.

The GATS system appears to accommodate the Member States’ wish to be in control of the pace of liberalisation, whilst leaving room for liberalisation to occur in an organic manner. The legal stability and clarity achieved in this way favours market transactions, something which, in turn, induces liberalisation. This implies that, were market access in air transport to be brought under the purview of the GATS, liberalisation would be achieved in an incremental, as opposed to an automatic, way. Where a sector is covered by the GATS, Member States are authorised to make specific commitments with respect to market access, by virtue of the GATS market access principle.²⁰ The GATS market access principle is an application of the NT principle in the area of market access. Therefore, market access is governed by the underlying GATS logic of progressive liberalisation. However, in areas falling outside the GATS market access and NT provisions (e.g. competition), the Member States are free to undertake additional commitments. A proactive Member State approach in areas where there is scope for regulatory convergence induces market access liberalisation, but remains, ultimately, an issue of Member State discretion.

The appropriateness and effectiveness of the GATS system to achieve globalisation of trade in air transport must be examined in the light of the existing regulatory framework. The longevity of the Chicago regime suggests that the transition to a new framework, or the co-existence of the two frameworks, would have to overcome a number of obstacles. The main obstacle stems from the conflicting philosophies of the two systems. Market access under the Chicago regime is an issue of economic sovereignty.²¹ This has resulted in a bilateral system, whereby market access is provided on the basis of reciprocity. Under the GATS system, market access is conceptually part of the NT principle. Although the flexibility of NT commitments (and MFN exemptions) enables Member States to offer market access under conditions that mirror Chicago bilateralism, the spirit of the GATS, subsumed in its fundamental principles of MFN, NT and market access, requires States to give commitments to all signatories alike, i.e. multilaterally. The

17 For a demystification of the WTO/GATS as a potential forum for a multilateral air transport regime, see Havel, B., *supra* note 13, Chapter 6, Part III, B and C.

18 Ibid. Contrast Havel’s analysis with Abeyratne’s analysis in: Abeyratne, R., 2013a. Trade in Air Transport: Have We Lost Our Way?. J. World Trade 47(3), 633-673.

19 See Article XVII of the GATS.

20 See also Article XVI of the GATS.

21 See Mendes de Leon, P., 1992. Cabotage in Air Transport Regulation. Martinus Nijhoff Publishers, The Netherlands, at 101, referring to the so-called Ferreira doctrine. According to this doctrine, “international air traffic” is regarded, at least in Latin American countries, as an “estate”. Such traffic belongs to the countries between which the traffic is carried on a third and fourth freedom basis, these freedoms being viewed as natural traffic rights.

transition from bilateralism to multilateralism requires Member States to cease regarding international air traffic as national property, regarding it instead as international property.²²

The signatories of the Chicago Convention have undertaken not to enter into any obligations and understandings between them, which are inconsistent with the terms of the Convention.²³ This entails that, insofar as the obligations the Member States have assumed under the GATS are consistent with the Chicago Convention, States could stay under both systems. If a State elected to follow the GATS system to the exclusion of the Chicago system, it would have to denounce the Chicago Convention, an unrealistic proposition, considering that the Chicago Convention is binding upon virtually the entirety of the aviation community.²⁴ Staying under both systems of course begs the question of whether their different philosophies are mutually exclusive (something which would rule out *a priori* any discussion of co-existence) or whether purely commercial air transport services could be hived off from bilateral air services agreements and rolled into the GATS to be dealt with multilaterally. Considering that the answer to this question will eventually be reached at political level, the objective of the following sections is to inform the discussion about the optimal path to liberalisation.

3.2. Amendment of the Chicago Convention

The Chicago Convention constitutes the most important primary source of public international law, being binding upon 191 signatories. The most straightforward and effective way to liberalise international civil aviation would therefore be to amend the Chicago Convention. The provision which seems to obstruct liberalisation is Article 6 of the Convention. Article 6 places the principle of national sovereignty in the area of market access. In essence, it provides that all commercial international air passenger transport services are forbidden except to the extent that they are permitted.²⁵ This axiom should be seen against the historical backdrop prevailing at the time of the conclusion of the Chicago Convention. Since then, the concept of national sovereignty has evolved considerably, so much so that, within certain “regional or subregional economic groupings”, the ICAO principle of community of interest has taken precedence.²⁶ ICAO has acknowledged that the strict application of the criterion of substantial ownership and effective control could deny many States a fair and equal opportunity to operate international air services. For this reason, it has urged States to recognise the concept of community of interest as a valid basis for airline designation.²⁷

ICAO has emphasised the economic dimension of regional integration, referring to “regional or subregional *economic* groupings”.²⁸ Moreover, it has emphasised the affinity and community of interest

22 Ibid.

23 See Article 82 of the Convention.

24 See Article 95 of the Convention.

25 Thaine, C., 1985. The Way Ahead from Memo 2: The Need for More Competition A Better Deal for Europe. AIR Law 10, 91.

26 See Resolution A38-14, Appendix A, Section II, *supra* note 4. See also Article 3B of the Air Transport Agreement concluded between the associate members of the Association of Caribbean States (ACS), entitled “Community of Interest”: “The right of each Party to designate an airline or airlines shall include designation in accordance with the Principle of Community of Interest as established by the international Civil Aviation Organisation (ICAO)”, available at: <http://www.acs-aec.org/sites/default/files/Final_ATA_En.pdf>.

27 See Resolution A38-14, Appendix A, Section II, paragraph 5, providing that the Assembly “[U]rges Member States to recognize the concept of community of interest within regional or subregional economic groupings as a valid basis for the designation by one developing State or States of an airline of another developing State or States within the same regional economic grouping where such airline is substantially owned and effectively controlled by such other developing State or States or its or their nationals”, *supra* note 4.

28 See Introduction to Section II and paragraphs 3 and 5, *ibid*.

shared, in particular, among *developing* States, belonging to such groupings.²⁹ However, regional integration reaches beyond economic integration to culminate in political Unions with a single legal personality. The European Union is the most prominent example of such a Union composed of developed States.³⁰ The relevance of the principle of community of interest for developing and developed States alike implies the need to revisit the concept of national sovereignty. As pointed out above, State sovereignty is, in the modern context of globalisation, more a responsibility to the global community than an exclusive right to enforce protectionism.³¹

ICAO has set the “Economic Development of Air Transport” as one of its strategic objectives for the 2014-2016 triennium.³² To further this objective, it has recommended assessing, in cooperation with States, the value of a possible new Annex to the Chicago Convention on sustainable economic development of air transport.³³ A new Annex to the Convention on issues of economic governance appears an appropriate place to undertake a topical interpretation of the concept of national sovereignty.³⁴ Given that such an interpretation would have to be translated into the area of market access, Article 6 of the Convention would have to be revisited. Any action to liberalise market access should strike the right balance between air transport as a commercial activity and air transport as a public utility. Providing unrestricted market access in principle, whilst preserving the States’ privilege to refuse such access where and when justified appears a reasonable step to take.³⁵

A revision of the Chicago Convention along these lines would at least assuage the conflict between the philosophies of the GATS system and the Chicago system, facilitating a coordinated approach between WTO and ICAO. Chicago bilateralism would guarantee the mission of air transport as a public utility, while GATS multilateralism would support its development as a commercial activity. Despite their differences, both systems are predicated on the principle of non-discrimination as applied to both States and service suppliers. Relaxing the wording of Article 6 of the Chicago Convention to make room for division of labour between the Chicago Convention and the GATS would bridge the gap between non-discrimination at bilateral level and non-discrimination at multilateral level.

Amendment of the Chicago Convention to achieve liberalisation, however effective that might appear, will be confronted with a number of political and legal obstacles. The most conspicuous one appears to be the level of consensus which is required within ICAO for an amendment to take effect. Pursuant to Article 94(a) of the Convention, “[a]ny proposed amendment... must be approved by a two-thirds vote of the Assembly and shall then come into force in respect of States which have ratified such amendment when ratified by ... [no]... less than two-thirds of the total number of contracting States”. The

29 See Introduction to Section II and paragraphs 3, 4 and 5, *ibid*.

30 See Article 47 of the Treaty on European Union, which provides that the Union shall have legal personality. Consolidated Version of the Treaty on the European Union, OJ 326/13, 26.10.2012.

31 Abeyratne, R., 2013b. Reinventing ICAO’s Role in Economic Regulation – A Compelling Need. *Issues Aviat. Law Policy* 13(1), 9-29.

32 Visit: <<http://www.icao.int/about-icao/Pages/Strategic-Objectives.aspx>>.

33 See ICAO Working Paper No. A38-WP/56, EC/6, July 31, 2013, Recommendation 2.8/1, Implementation of ICAO Policies and Guidance B-4.

34 This suggestion has been put forward also by Abeyratne in: *Trade in Air Transport: Have We Lost Our Way?*, *supra* note 18.

35 Abeyratne has suggested amending Article 6, from its negative position to a positive one, where the provision could permit airlines of States to freely operate air services into the territories of each other, subject to the requirement that States whose airlines are seeking to operate services should convince the State which agrees for such operation that such services would benefit all concerned, including the consumer, while at the same time giving the latter the right to refuse if there is no convincing for such operations. *Supra* notes 18 and 31.

required volume of ratifications suggests that ICAO's leadership in orchestrating the process of revision is indispensable. Reaching consensus within ICAO has always been challenging in view of the volume of its membership. The leadership role ICAO is called upon to play points to what might be the core obstacle, namely ICAO's competence (or lack thereof) in the area of economic regulation.

Looking back to the time when the Chicago Convention was adopted, the decision of the States to exchange traffic rights bilaterally, that is to say, to reserve to themselves the economic and commercial aspects of international civil aviation, resulted in the Convention regulating only technical and operational aspects. As a result, ICAO, established by the Chicago Convention, has mainly operated as a technical standard-setting body. The intention of the signatories not to delegate any regulatory power in the economic field to ICAO is reflected in the wording of Article 44, which lays down ICAO's objectives. Thus, in contrast with the area of international air navigation, where the aims and objectives of ICAO are *to develop* the relevant principles and techniques, when it comes to the planning and development of international air transport so as to meet the needs of the peoples of the world for safe, regular and economical air transport, ICAO's aims and objectives are merely *to foster* this planning and development.

The fostering role reserved for ICAO in the area of economic regulation generates doubts about its ability to orchestrate the process of revision of the Chicago Convention and ensure the required number of ratifications to achieve liberalisation. Unlike the technical field, where ICAO plays a leadership role, in the area of economic regulation, it has not been particularly proactive.³⁶ A way around ICAO's limited competence in the economic field may reside in the Chicago Convention itself. Article 55(d) authorises the Council to study any matters affecting the organisation and operation of international air transport, including the international ownership and operation of international air services on trunk routes, and submit to the Assembly plans in relation thereto. This provision offers a sound legal basis for ICAO to spearhead the liberalisation of international civil aviation.³⁷ What is more, it seems to welcome a fresh take on ICAO's fostering role, implying the need to re-interpret Article 44 in a positive, enabling, spirit, as opposed to the prevailing negative, disabling, spirit.

3.3. Waivers of nationality clauses

3.3.1. Unilateral waivers granted on the basis of reciprocity

The creation of a new order in the regulation of international civil aviation through an amendment of the Chicago Convention is a laborious task. The question, therefore, arises as to whether liberalisation can be achieved outside the framework of the Chicago Convention. The main obstacle to opening up market access is the nationality restrictions provided for in national laws and reiterated, in the form of ownership and control clauses, in air services agreements. A typical nationality clause reads: "[E]ither Party may revoke, suspend or limit the operating authorizations or technical permissions of an airline designated by the other Party where substantial ownership and effective control of that airline are not vested in the other Party, the Party's nationals, or both".³⁸ Nationality clauses create a right of revocation, which may or may not be exercised. The discretion conferred on the Parties implies a right not to revoke. This has given rise to the idea of waivers of nationality clauses, pioneered by the International Air Transport Association (IATA).

36 On this point, see Abeyratne, R., 2009. The Role of the International Civil Aviation Organisation (ICAO) in the Twenty First Century. *Ann. Air Sp. Law* 34, 529-544. See also, *supra* note 31.

37 See Abeyratne, *supra* note 31.

38 See 4(1) (a) of the US-South Korea Air Transport Agreement of June 9, 1998, available at: <http://www.state.gov/e/eb/rls/othr/ata/k/ks/index.htm>.

The idea of waivers of nationality clauses is part of IATA's Agenda for Freedom initiative.³⁹ Since IATA represents the airline industry, Agenda for Freedom is a bottom-up initiative to mobilise governments around the world to liberalise international civil aviation. First launched at IATA's 2008 Annual General Meeting, it culminated in a "Statement of Policy Principles regarding the Implementation of Bilateral Air Services Agreements", adopted in 2009, at Montebello, Canada.⁴⁰ The Statement is a non-legally binding instrument, signed so far by twelve countries, including the United States, and endorsed by the European Commission. On the basis of reciprocity, and in the absence of valid social or public policy concerns, States expressed their will to waive or otherwise refrain from exercising rights stemming from the nationality clauses agreed in their bilaterals and to eliminate, replace or otherwise reduce the negative effects of nationality clauses when negotiating new or amended air services agreements.⁴¹

The most obvious weakness of the Montebello Statement of Principles is its legal effect. Signature of the Statement creates no legal obligation on the signatories.⁴² The non-binding nature of the Statement implies that it is not enforceable. However, the ambition of the Statement is to be accompanied by public statements made by the signatories' competent authorities that they will refrain from enforcing the nationality clauses in their bilaterals with countries which agree to do the same. Even though such public declarations have a certain legal standing under public international law, they are not strong enough to bind States, if they are not implemented. As a result, they remain unenforceable.⁴³

The effectiveness of waiving the nationality clauses on the basis of unilateral reciprocity could also be questioned. On the face of it, reciprocal waivers encourage consolidation among the airlines of waiving countries. Were waivers to be granted on a non-reciprocal basis, free riders could avail themselves of unreciprocated benefits – the same problem the WTO MFN exemption mechanism tries to tackle. Yet, by limiting the free flow of capital within waiving countries, airline consolidation can hardly be encouraged even among waiving countries' airlines for the additional reason that non-waiving countries can always enforce the nationality clauses in their bilaterals with waiving countries each time an airline from a waiving country, whose ownership and control have changed as a result of a merger or acquisition by nationals of another waiving state, is designated.

Although unilateral reciprocity is not the answer to the problem of access to international capital markets, its dynamic to bring about a reform in the system of airline ownership and control is not negligible. IATA's bottom-up initiative generated a top-down reaction, which is an indicator of the momentum the issue of liberalisation has gained. Even if the integrity of the intentions expressed in the Montebello Statement is questioned by its non-binding effect, the Statement remains a preparatory step in the liberalisation process.

3.3.2. Multilateral waivers

The States signing the Montebello Statement have not been oblivious to the limited ability of the unilateral waivers to liberalise access to capital markets. Instead, they expressed their will to give "sympathetic consideration" to the possibility of a multilateral agreement to accomplish the same goal.⁴⁴ A draft of a Multilateral Convention on Foreign Investment in Airlines was discussed at the 37th Session of

39 See Agenda for Freedom, FAQs, available at: <<http://www.iata.org/policy/liberalization/agenda-freedom/pages/index.aspx>>.

40 Statement available at: <<http://www.iata.org/policy/liberalization/agenda-freedom/pages/index.aspx>>.

41 See section 1 of the Statement of Policy Principles on Freedom to access capital markets, available at: <<http://www.iata.org/policy/liberalization/agenda-freedom/pages/index.aspx>>.

42 See Section 5 of the Statement on Legal Effect. *Ibid.*

43 On this point, see Havel B., Sanchez, G., 2010-2011. The Emerging Lex Aviatica. *Georgetown J. Int. Law* 42, 639-672.

44 See Section 1(c) of the Statement. *Supra* note 40.

the ICAO Assembly (2010).⁴⁵ The 38th Session of the ICAO Assembly (2013) requested the Council to initiate work on an international agreement to liberalise air carrier ownership and control.⁴⁶

The draft Multilateral Convention discussed at the 37th Session of the ICAO Assembly proposes two possible scenarios. The first scenario is based on lists of partner States, which States submit to the Depositary at the time of ratification of the Convention.⁴⁷ This scenario accounts for waivers of nationality clauses in the following cases: i. cases where third country airlines become owned and controlled by nationals of other third countries and are designated by the latter;⁴⁸ ii. cases where third country airlines become owned and controlled by a State's own nationals and are designated by these third countries;⁴⁹ and, iii. cases where a State's own airlines become owned and controlled by third country nationals.⁵⁰ In all three cases, waivers are subject to the condition that all Parties involved have included each other on the relevant partner lists. The second scenario does away with partner lists and multilateralises the waivers among all the Convention's signatories.⁵¹

Attempting an assessment of these scenarios, partner lists serve the purpose of preventing free riders. Moreover, they are sensitive to aeropolitics in that they enable Parties to choose the States with which they wish to have liberal aviation relations. Multilateral waivers among all the Convention's signatories do not offer the same protection, since Parties can control the signatories' identity only at the time of signature. Non-signatory States acceding to the Convention at later stages would escape such control, unless further conditions were to be introduced. Signatories could, for instance, offer their waivers only to acceding States with whom they have concluded liberal air services agreements.

A multilateral treaty to waive nationality restrictions provides legal certainty concerning its binding force and enforceability. In contrast to unilateral waivers by means of political declarations, a multilateral treaty is ratified in accordance with public international law and is governed by the Vienna Convention on the Law of Treaties, should an issue of interpretation arise.⁵² From an effectiveness point of view, ratification by a large volume of States or by aeropolitically influential States can trigger further ratifications. Although the draft Convention discussed at the 37th Session of the ICAO Assembly provides that Parties are not required to permit foreign ownership or control of their own airlines, arguably, mass adherence to the Convention could lead to States amending their national laws to permit foreign ownership or control of their airlines.⁵³ Regulatory reform at national level would catalyse the amendment of the Chicago Convention, offering the States the opportunity to determine the WTO/GATS role in the regulation of international civil aviation. Therefore, multilateral waivers have the potential to trigger the transition from bilateralism to multilateralism.

3.4. Inter-regional Air Transport Agreements

In an exceedingly globalised world, cooperation is a condition of survival. The establishment of Communities or Unions of States sharing common interests is a phenomenon that has manifested itself in

45 See Working Paper A 37-WP/190, EC/12, 13.09.2010, Agenda Item 49: Liberalisation of international air transport services, Facilitating Airline Access to International Capital Markets, available at: <http://www.icao.int/Meetings/AMC/Assembly37/Working%20Papers%20by%20Number/wp190_en.pdf>.

46 *Supra* note 4.

47 Article 4(1) of the draft Convention.

48 Article 2(1) of the draft Convention.

49 Article 2(2) of the draft Convention.

50 Article 3 of the draft Convention.

51 Article 4(3) of the draft Convention.

52 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

53 Article 5 of the draft Convention.

all continents. Regional integration amounts to convergence of national policies and legislations, culminating in Unions with a single legal personality. Cooperation among such Unions, or among such Unions and countries of considerable size and might, is naturally extended to air transportation. The potential of inter-regional air transport agreements to drive liberalisation of international civil aviation merits attention.

The 2007 US-EU Air Transport Agreement constitutes the archetype of an inter-regional air transport agreement.⁵⁴ The air transport markets in the United States and the European Union combine to generate approximately 50% of world traffic, a factor which is in itself sufficient to catalyse air transport liberalisation in other parts of the world.⁵⁵ This is especially so in view of the extensive market access and other commercial opportunities opened up for EU and US airlines (i.e. unlimited 3rd, 4th and 5th freedom rights for US and EU carriers alike, limited 7th freedom passenger rights and unlimited all-cargo rights for EU carriers, unrestricted capacity and frequency and free pricing). Air transport being international by nature, the need for a level playing field, that is to say for uniform conditions of competition, incentivises States to liberalise, in order to afford to their carriers a fair and equal opportunity to compete.

The Agreement is important not only for creating a large liberalised airspace, but mainly for illustrating the interplay between regional integration, inter-regional relations and liberalisation. The creation of a single European air transport market in the 1990s entailed the right of EU airlines to exercise the EU freedom of establishment.⁵⁶ The US-EU Air Transport Agreement facilitated intra-EU airline consolidation by acknowledging the concept of an “EU carrier”, that is to say, an airline with substantial ownership and effective control vested in a Member State or States, nationals of such a State or States, or both, an EU license and principal place of business in the territory of the EU.⁵⁷ This is so because the Agreement removed the fear that mergers and acquisitions would put the traffic rights agreed in the Member States’ bilaterals with the United States at risk. The US endorsement of the concept of “EU carriers” strengthened the EU Member States and the European Commission in their effort to convince third countries to replace the nationality clauses in their bilateral agreements with EU Member States with “EU clauses”. The combined effect of this sequence of actions is a strong incentive to liberalisation.

The liberalising force of the US-EU Air Transport Agreement is further exemplified by the fact that it has been devised as a plurilateral agreement, that is to say, an agreement that is open to third (not necessarily adjacent) countries to accede⁵⁸ - an option already exercised by Norway and Iceland.⁵⁹ The Parties have further manifested their will to expand the scope of the Agreement by undertaking not to disallow the designation of third country-airlines substantially owned and effectively controlled by either EU or US nationals by invoking their air services agreement with the third-country concerned.⁶⁰ Moreover, the United States has unilaterally assumed the obligation not to oppose the designation of airlines of Liechtenstein, Switzerland, the European Common Aviation Area, or any African country that has entered into an open skies agreement with the United States on the grounds that their effective control is vested in

54 US-EU Air Transport Agreement (May 25, 2007, OJ L 134/4, 2007), as amended by Protocol of March 25, 2010 (OJ L 223/3, 2010).

55 See European Commission Press Release IP/10/371, 25.03.2010.

56 Article 49 TFEU.

57 See Article 4 (b) of the 2007 US-EU Air Transport Agreement, *supra* note 54.

58 See Article 5(5) of the 2010 Amending Protocol, *ibid*.

59 See Ancillary Agreement Between the European Union and its Member States, of the first part, Iceland, of the second part, and the Kingdom of Norway, of the third part, on the application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part, OJ L 283/16, 29.10.2011.

60 This undertaking is subject to an (anti-)free-rider proviso, which is that the third country in question has established a record of cooperation in air services relations with both Parties. See Annex 6, paragraphs 1, 2 and 3 of the 2010 Amending Protocol, *supra* note 54.

EU interests.⁶¹ This undertaking is aligned with the EU External Aviation Policy, a clear sign of the interplay between regional integration, inter-regional relations and liberalisation.⁶²

This interplay can be traced also in a context where regional integration is still work in progress. The case of the Association of Southeast Asian Nations (ASEAN) comes to mind. ASEAN has set the objective of establishing an Economic Community by the year 2015, a component of which is the ASEAN Single Aviation Market (SAM), meant to be in place by the same year. In pursuance of a SAM, ASEAN has adopted two agreements, i.e. the 2008 Multilateral Agreement on Air Services and the 2010 Multilateral Agreement on the Full Liberalisation of Passenger Air Services, each composed of a number of Implementing Protocols.⁶³ The Agreements and their Implementing Protocols allow for progressive liberalisation in an effort to increase their acceptance by the ASEAN States.⁶⁴

The ASEAN approach to air transport liberalisation resembles in some respects the approach espoused by the European Union. Both ASEAN and the EU opted for phased liberalisation with the adoption of packages of measures coming into force over a period of time. The EU/ASEAN model of progressive liberalisation has to be seen in the light of the broader objective of economic integration. In Europe, the establishment of a single air transport market was part of the establishment of a single market, both scheduled for the year 1992 (although air transport liberalisation was completed in 1997 with the adoption of cabotage). In ASEAN, the establishment of a single aviation market is meant to happen concomitantly with the establishment of an Economic Community. Progressive liberalisation accounts for the uneven development among the Member States, allowing time for adaptation and convergence.

Despite these similarities, air transport liberalisation in ASEAN and the EU differs in a number of respects. The first is the scope of liberalisation which, whilst in Europe it extends to the freedom to provide cabotage, in ASEAN it is limited to 3rd, 4th and 5th freedom rights, with the provision of 7th freedom rights and cabotage being left for an undefined future time. The second is the concept of a Union or Community carrier, referring mainly to a carrier majority owned and effectively controlled by one or more Member State and/or its nationals.⁶⁵ Whilst in Europe the concept of an “EU carrier” is part of the liberalisation *acquis*, in that it establishes an obligation for Member States to accept designations of “EU carriers”, in ASEAN, the designation of “Community carriers” is subject to the acceptance of the Member State receiving the application of a designated airline. Most importantly, whilst the European Union’s institutional and constitutional architecture affords it a supranational status under public international law, ASEAN’s lack of representative legislative, executive and judiciary bodies affords it more of an intergovernmental status.

Despite the uneven level of integration achieved in Europe and ASEAN, the two trading blocs have proposed commencing negotiations over a comprehensive air transport agreement.⁶⁶ The interplay

61 See Annex 6, para. 2 of the 2010 Amending Protocol, *ibid*.

62 See Commission Communication: The EU’s External Aviation Policy – Addressing Future challenges, COM(2012) 556 final, 27.09.2012.

63 ASEAN Agreement on Multilateral Air Services (MAAS), adopted on May, 20, 2009 and ASEAN Multilateral Agreement on the Full Liberalisation of Passenger Air Services (MAFLPAS), adopted on November, 12, 2010, available at: < <http://www.asean.org/communities/asean-economic-community/category/agreements-on-transportation-and-communication>>.

64 For an analysis of the ASEAN SAM, see Tan, A., 2010. The ASEAN Multilateral Agreement on Air Services: En Route to Open Skies? *J. Air Transp. Manag.* 16, 289-294.

65 See Article 2(11), in conjunction with Article 3(1) and Article 4 of Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community (Recast) OJ L293/6, 31.10.2008 and Article 3(2)(a)(ii) of the 2008 ASEAN Multilateral Agreement on Air Services, *supra* note 63.

66 Commission Press Release IP/14/133, 12.02.2014.

between regional integration, inter-regional relations and liberalisation is encapsulated in a statement of the Chairman of the ASEAN Transport Ministers, made at the 2014 EU-ASEAN Aviation Summit, that *a bloc-to-bloc agreement would facilitate further intra-ASEAN integration by allowing ASEAN to learn from the EU's experience in developing a Single Aviation Market.*⁶⁷ *ASEAN's readiness to enter into inter-regional air transport agreements, notwithstanding that its single internal market is still a work in progress, can be traced in the 2010 ASEAN–China Air Transport Agreement.*⁶⁸

The 2010 ASEAN-China Air Transport Agreement provides for unlimited 3rd/4th freedom access between the ASEAN States and China. What is more, it recognises the concept of an “ASEAN Community Carrier”, that is to say, an airline which is incorporated in and has its principal place of business in the designating State, is substantially owned and effectively controlled by one or more Member State and/or its nationals, and the designating State has effective regulatory control.⁶⁹ Despite the reciprocal exchange of 3rd and 4th freedom rights, the Parties do not enjoy similar market access opportunities. The fact that ASEAN has not yet created a single air transport market (where freedom of establishment entails a legal obligation for the Member States to accept the designation of ASEAN Community carriers) results in an asymmetry of market access opportunities between Chinese airlines and ASEAN airlines. This is because, whilst Chinese airlines can connect any point in China to any point in ASEAN, ASEAN airlines can connect any point in their home country to any point in China.⁷⁰

The fact that freedom of establishment in ASEAN has been subject to the condition that Member States accept designations of Community carriers has given rise to legal uncertainty. As a result, there have not been any ASEAN Community carriers as yet, within the meaning of the law. Instead, what the ASEAN market has experienced is the emergence of overseas Low Cost Carrier (LCC) subsidiaries, a model pioneered by AirAsia Group. In an effort to get around the regulatory restrictions, ASEAN LCCs have made the most of ASEAN Member States' relaxed approach towards the “effective control” requirement. Specifically, they have set up overseas joint ventures in other ASEAN countries, which, although they remain majority-owned by local interests, are effectively controlled by the foreign mother company.⁷¹ *De facto* liberalisation achieved in ASEAN in this circuitous manner has manifested itself also in China, where foreign LLCs have been tolerated to the extent that they do not compete with Chinese network carriers.⁷²

The examples of the US-EU Air Transport Agreement and the ASEAN-China Air Transport Agreement illustrate the potential of inter-regional agreements to bring about regulatory convergence and pave the way for liberalisation of international civil aviation. The main obstacle to liberalisation is the States' conflicting aeropolitical interests, fuelled also by the variance in regulatory approaches on issues such as safety, security, competition, employment and the environment. If consensus within ICAO has traditionally been challenging, this is because of the size of its membership. Regional integration creates Unions of States with single representation. Cooperation among such Unions, or among such Unions and countries with a large air transport market, results in consolidated airspaces defined by common rules. The

67 Ibid.

68 Agreement available at:

<<http://www.asean.org/archive/transport/Air%20Transport%20Agreement%20between%20ASEAN+China.pdf>>.

69 See Article 3(2)(a)(ii) of the 2008 ASEAN Multilateral Agreement on Air Services, *supra* note 63.

70 See Tan, A., 2012. The 2010 ASEAN China Air Transport Agreement: Placing the Cart before the Horse? *Air Sp. Law* 37(1), 35-50.

71 See Tan, A. (2015) Assessing the Prospects for an E.U. - ASEAN Air Transport Agreement, International Transport Forum/Organisation for Economic Cooperation and Development Discussion Paper No. 2015-02, available at: <<http://internationaltransportforum.org/jtrc/aviation/index.html>>.

72 For an analysis of the Chinese market, see Fu, X. and Oum, T. (2015) Dominant Carrier Performance and International Liberalisation – the Case of North East Asia, , International Transport Forum/Organisation for Economic Cooperation and Development Discussion Paper No. 2015-03, available at: <<http://internationaltransportforum.org/jtrc/aviation/index.html>>.

combined effect of regional integration and inter-regional agreements is a dramatic decrease in the variance of voices expressed within ICAO and an equally dramatic increase in the chances of reaching consensus on air transport liberalisation.

It is not inconceivable that the establishment of Unions with legal personality will gradually decrease the volume of ICAO membership. Unions with legal personality have the ability to negotiate international agreements in accordance with their external commitments, become a member of international organisations and join international conventions. In 2002, the European Commission proposed to the EU Council of Ministers that it formally start negotiations on Community membership in ICAO with a view to establishing a single EU representation.⁷³ Since then, the European Community has merged with the European Union, leaving only the European Union, which enjoys legal personality. Nevertheless, Article 92 of the Chicago Convention reserves adherence to “States”.⁷⁴ Therefore, for the European Union to become a full member of ICAO, an amendment of the Convention is necessary.⁷⁵ However futuristic this scenario might appear, globalisation suggests that regional integration is not a trend, but a direction. Envisioning Unions of States with single representation within ICAO implies flexibility with regard to decision-making. If the last nail in the coffin of bilateralism has to be driven in by means of amendment of the Chicago Convention, the interplay between regional integration, inter-regional relations and liberalisation appears to catalyse this outcome.

73 Recommendation from the Commission to the Council in order to authorise the Commission to open and conduct negotiations with the International Civil Aviation Organization (ICAO) on the conditions and arrangements for accession by the European Community, SEC/2002/0381 final, 09.04.2002.

74 Article 92(a) reads: “This Convention shall be open for adherence by members of the United Nations and States associated with them, and States which remained neutral during the present world conflict”.

75 The European Union is a full member of the Food and Agriculture Organisation (FAO), the oldest of the UN’s specialised agencies, since 1991. For more information, visit: <
http://www.eas.europa.eu/delegations/rome/eu_united_nations/work_with_fao/ec_status_fao/index_en.htm>.

4. Conclusion

This paper approached the issue of liberalisation of international civil aviation from a legal perspective, laying out a number of legal options available to States to implement liberalisation. Starting from the premise that liberalisation will eventually be decided at political level, the paper aspired to identify the optimal legal path to liberalisation. Examination of the strengths and weaknesses of the most prominent legal options in hand suggests that there is no single way to achieve liberalisation nor is there a shortcut. Instead, it appears that what catalyses liberalisation is the combined effect of the interplay between the various legal options. Therefore, arrival at the final destination, that is to say, amending the Chicago Convention, presupposes a number of intermediary stops, such as an international agreement to liberalise market access – an idea currently discussed within ICAO.

However accommodating the law might be for the purposes of liberalisation of international civil aviation, change will come as an outcome of the new conditions brought about by globalisation. Regional integration moves the centre of gravity away from state sovereignty towards the principle of “community of interest”. This entails the need to re-consider the criteria of airline designation, as well as the airline ownership and control regime. Globalisation of competition, for its part, creates a need for market consolidation and rationalisation, an outcome that presupposes access to foreign capital markets, currently obstructed by nationality restrictions. At the same time, globalisation creates security concerns, an issue typically linked with State sovereignty, yet increasingly addressed at regional level via the establishment of common security policies. It seems that for liberalisation of international civil aviation to occur, economics and politics must merge, an outcome a long way down the road, but certainly not out of sight.

International Transport Forum

2 rue André Pascal

75775 Paris Cedex 16

itf.contact@oecd.org

www.internationaltransportforum.org
