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MARKET ACCESS AND THE GATS AIR TRANSPORT ANNEXURE: POSSIBLE APPROACHES FOR INDIA

USHA BALASUBRAMANIAM*

I. INTRODUCTION

THE FORCES of globalization and liberalization erode the concept of territory and create a borderless regime of trade which can be rightfully called trade without borders. The World Trade Organization ("WTO") is the epicenter of ongoing liberalization for the trade of goods, services, and intellectual property rights. This Paper examines the issue of market access in the air transport annex of the General Agreement on Trade in Services ("GATS") and possible approaches for India. It goes without saying that, time and again, many authors have adequately captured the two approaches to gaining market access, such as negotiating and trading in air traffic rights bilaterally and multilaterally. At present, air traffic rights of scheduled air services are negotiated and exchanged on a strict quid pro quo basis under the framework of the Convention on International Civil Aviation ("the Chicago Convention"), notwithstanding the presence of a multilateral framework under the Convention. The International Air Services Transit Agreement, which allows for exchange of the first two "freedoms of the air," has the support of 121 contracting states. The International Air Transport


1 Article 6 of the Convention on International Civil Aviation states, "No 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." Convention on International Civil Aviation art. 6, Dec. 7, 1944, 61 Stat. (2) 1180, 15 U.N.T.S. 295 [hereinafter CICA].


Agreement, which allows for exchange of the third and the fourth freedoms of the air, also considered the bread-and-butter rights of the airlines, has even fewer takers—it has the support of only eleven contracting states. In light of this, it appears that the model of bilateralism has so far been a more widely and successfully used tool of gaining market access through the exchange of traffic rights vis-à-vis the multilateral avenues available for the same under the Chicago Convention framework. If trading of traffic rights for gaining access via the GATS route were available to contracting nations of the WTO, what would be the outcome? Would a developing country like India gain from making specific commitments with respect to market access under the GATS framework?

II. MARKET ACCESS IN AIR TRANSPORT

The term “market access” has been used widely in many bilateral and multilateral arrangements, including GATS, but there is no concrete definition given to this term in any of the current arrangements covering it. The term “market access” in the air transport sector refers to the cluster of rights that are negotiated, exchanged, or traded under a plethora of bilateral and multilateral arrangements as “air traffic rights,” and includes rights such as capacity, frequency, and routes. In the chapter of his book titled *Liberalized Trading in Air Transport and the ‘Safety Net,*' Dr. Abeyratne has given a broad definition to “market access” by stating that it “covers the basic rights of air carriers in the operation of air transport services with relevant governmental approval and also subsidiary rights such as production distribution ... which are considered ancillary rights.”

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6 Id. A basic market access right is defined as a conditioned or limited right or privilege (usually set out in an international agreement) granted by one State to another State for use by an air carrier or carriers designated by that other State and may consist of agreed: geographic specifications of routes [that] ... the air service may take ...; physical specifications regarding designation of an air carrier or carriers and how a designated carrier may employ aircraft; and physical and/or geographic specifications of what kinds of traffic may be carried. Such rights in total determine the extent of market access granted.

The current bilateral agreements signed among nations deal with market access issues on a fair, equitable, reciprocal, and quid pro quo basis while liberal open sky arrangements that the United States has entered into with many nations, such as the Netherlands, Singapore, India, and others, have more relaxed market access clauses in view of the removal of rigid restrictions on capacity, route, and frequency. Under GATS, specific commitments have to be made in the schedule of the air transport annex by the contracting states with respect to market access for the applicability of GATS. The air transport annex currently only covers three services:

- aircraft repair and maintenance services;
- selling and marketing of air transport services; and
- computer reservation systems.

Conspicuously absent from its ambit are scheduled and unscheduled air transport services, the inclusion of which would allow for trading air traffic rights on the multilateral GATS platform. In the past, many attempts were made to include a host of services—although no consensus was achieved in this regard—by revising and expanding the list of services covered by the air transport Annex. The prime candidates for inclusion in the list of services to be covered under the air transport annex were air cargo services, nonscheduled (charter) services, refueling services, ground handling services, and certain other auxiliary services. To achieve progressive liberalization of the air transport sector, the aforesaid services should be included in the annex before contemplating the inclusion of lucrative and zealously guarded scheduled air traffic services.

III. FACTORS AFFECTING MARKET ACCESS IN THE AIR TRANSPORT SECTOR

It is important to understand the factors that affect market access, which in turn affect how a nation chooses between a bilateral model (bilateral air traffic agreement) and multilateral model (commitment to be made under the GATS Annex on Air

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8 General Agreement on Trade in Services art. XVI, Jan. 1, 1995, 33 I.L.M. 1168 [hereinafter GATS].
9 Id. at Annex on Air Transp. Servs., 3(a)–(e).
10 Id.
Transport Services) in the event that scheduled air traffic services are included in the annex. The main factors affecting market access are:

- onerous cabotage restrictions;
- debilitating ownership and control clauses;
- debilitating state aid programs;
- vexatious slot allocations; and
- environmental restrictions.11

**A. Onerous Cabotage Restrictions**

In many jurisdictions, and especially in the United States, interior routes (domestic routes) are reserved for domestic carriers only. This is a legal barrier that prevents foreign carriers from offering their services within the United States, even if they are willing to offer their services at half the rates of U.S. carriers. Many authors suggest that this is one of the main reasons that the motives of the western nations espousing an "open sky policy" are often doubted. In talks preceding the adoption of an open sky policy between the United States and the United Kingdom, U.K. authorities expressed apprehension that the agreement would give "U.S. carriers access to countries beyond the United Kingdom with full commercial traffic rights . . . whereas U.K. carriers would have no right to fly between destinations in the United States."12 Japan rejected a proposal to sign an open sky agreement with the United States for much the same reason.13 However, the United States has been successful in concluding open sky bilateral agreements with Singapore and India, among others.14 The argument in favor of prohibiting cabotage emanates from labor economics: if foreign carriers, whose crews are paid less than their U.S. counterparts, are allowed to fly within the United States, U.S. carriers would be at a competitive disadvantage.15 But the counter-argument lies in the fact that entry of foreign carriers in the domestic market would increase competition and effectively bring down the fares charged by domestic carriers (U.S. as well as non-U.S.). This would benefit consumers, inducing them to travel more and lead, in turn, to overall improved earnings for airlines and increased employ-

12 Abeyratne, supra note 5, at 50.
13 Id. at 51.
14 Findlay, supra note 7, at 120.
15 Hindley, supra note 11, at 8.
Another strong argument for imposing cabotage restrictions by the United States is the probability of increased safety, as U.S. safety regulations would likely be better enforced when imposed on U.S.-owned carriers. However, in the aftermath of September 11, incident safety is the concern of all nations and it is to be expected that regulations would be adhered to with the same degree of discipline even by non-U.S. owned carriers. I agree with Brian Hindley when he states, "[A] foreign-owned carrier might try legal maneuvers that U.S. carriers have not tried, though that . . . seems unlikely, . . . since both would be subject to the same U.S. laws . . . ."17

B. Debilitating Ownership and Control Clauses

In his article, Robert Ebdon correctly points out that the traditional Chicago-based system for granting market access to airlines for operations to and from their home territory seriously constrains the right to initiate services covered by the fifth and sixth freedoms.18 He states that the ability to operate from a base outside an airline's home territory is effectively denied in almost all instances by ownership and control provisions in bilateral agreements.19 In many nations, including the United States, Canada, and New Zealand, restrictions have been imposed on foreign ownership of national carriers.20 In the European Union, a majority stake must be owned by EU nationals.21 However, in the interest of security and because some jurisdictions allow the military to use civilian aircrafts during emergencies, aircrafts operated within a nation should be nationally owned.22 Further, national ownership of carriers would result in better enforcement of certain functions, such as registration and airworthiness.

There is also the belief that the designation requirement of carriers in open sky agreements and bilateral air agreements almost always favors nationals of the designating state.23 The na-

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16 Id.
17 Id. at 8.
19 Id.
20 HINDLEY, supra note 11, at 7.
21 Id.
22 Id. at 11–12.
23 Assad Kotaite, President of the Council, International Civil Aviation Organization, Keynote Address at the 56th IATA Annual General Meeting: Aviation Regulation: New Millennium – New Direction (June 5, 2000).
tionality requirements lead to the imposition of an artificial barrier to trade in services, though it is highly unlikely that the foreign owner would not be subject to the law of the country where he owns or operates aircraft. Sometimes such a barrier caused by misguided patriotism may also prevent or delay the infusion of much needed capital to revive an ailing carrier. There is a greater challenge involved in liberalizing market access by increasing foreign ownership in order to create a competitive global air transport industry. Countries have limits on foreign ownership which are not uniform. In view of financial pressures that exist in the airline industry, the 2005 World Trade Report recommends that it is important to not only privatize, but it is equally important to ease restrictions on foreign ownership of international carriers. Some steps in the ongoing process of liberalization have been taken, such as the liberalization of the ownership and control rules of the EU common aviation market to the extent that ownership and control can now be exercised by a group of nations constituting the common market, in contrast to the traditional nationalistic approach. Dr. Assad Kotaite, former President of the International Civil Aviation Organization, pointed out that the lack of a global ownership and control clause has led to indirect methods of obtaining market access through code sharing arrangements and the formation of global alliances. There has been an attempt to redefine "control" in the U.S.—EU Agreement, which does not permit non-U.S. ownership of more than 25 percent of U.S. carriers, but gives international investors more say in strategic decisions on such matters as marketing, routing and fleet structures. Further, in 2002 the Asia-Pacific Economic Cooperation decided to liberalize their ownership and control clauses in bilateral and multilateral agreements by authorizing market access for designated air carriers that have their principal place of business and residence in the designating state and have strong links with the designating states.

25 Kotaite, supra note 23.
26 Id.
C. Vexatious Slot Allocation

Airports are imperfectly competitive, generally regarded as natural monopolies, and in most airports there is a constant demand for slots for access to gates and runways.\textsuperscript{29} Typically, in most major of the heavy-duty airports like Heathrow, there is more demand for slots than supply.\textsuperscript{30} So the limited slots have to be allotted efficiently, without any discrimination made between foreign and national carriers in order to make the process fair.\textsuperscript{31} Author Brian Hindley points out that

\begin{quote}
[n]o agreement to liberalize air transport between countries A and B could long survive a belief on the part of A carriers . . . that slots at airports in B [would be] improperly withheld from A carriers and given to B carriers. Slots are essential to doing business, so a denial of slots to A carriers hands business opportunities to B carriers at the expense of A carriers.\textsuperscript{32}
\end{quote}

It is suggested that in certain jurisdictions, such as the United States and EU, quite a lot of administrative discretion is exercised in the allocation of new slots.\textsuperscript{33} “Many slots are de facto owned by existing airlines through historic use, . . . though this is subject to rules on use (‘use it or lose it’).”\textsuperscript{34} Slots can be bought and sold in the United States, and this has been legal since 1983.\textsuperscript{35} The United States has legislation that provides for buying and selling of slots at four of the major airports.\textsuperscript{36}

Some straightforward rules have to be observed in slot allocation by airport regulators.\textsuperscript{37} Specifically, even if an airport has spare capacity, it “should not be allowed to charge a price higher than the marginal cost of using airport facilities.”\textsuperscript{38} This allows charging different prices at different times of the day.\textsuperscript{39}

In 1993, the European Commission set out regulations that deal

\textsuperscript{29} Hindley, \textit{supra} note 11, at 22.
\textsuperscript{30} \textit{Id.} at 20.
\textsuperscript{31} \textit{Id.} at 18.
\textsuperscript{32} \textit{Id.} at 18.
\textsuperscript{33} \textit{Id.} at 19.
\textsuperscript{34} \textit{Id.} at 19.
\textsuperscript{35} \textit{Id.} at 21. Hindley points out, however, that even though it is legal to buy and sell slots in the United States, the exact nature of what is being bought and sold is not clear. \textit{Id.} FAA Regulations treat slots as privileges and not as rights. \textit{Id.}
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.} at 22.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.}
with slot allocation.\textsuperscript{40} However, this is an isolated case. In general, there is a conspicuous absence of universal rules setting out fair and equitable procedures for the allocation of slots between foreign and local/domestic carriers. If such allocation procedures are established by official action, should foreign airlines make allegations of partiality in allocation, those allegations might be justified.\textsuperscript{41} Conceivably, a foreign government responsible for allocating slots could impose high landing charges in order to protect or establish a monopoly of its own carriers.\textsuperscript{42} Ultimately the passengers of the foreign carrier would bear the brunt of high fares.\textsuperscript{43} Hence the allocation of airport slots have serious competition policy implications.

\textbf{D. ENVIRONMENTAL RESTRICTIONS}

Airport expansion is subject to certain limitations—namely, environmental restrictions pertaining to aircraft emissions and noise (the latter being of primary concern to people living near airports).\textsuperscript{44} In their article in the \textit{Handbook of Airline Economics}, Gail Butler and Martin Keller point out that both airlines and airport industries recognize that the effects of their operation must be judged with respect to impact on the environment.\textsuperscript{45} The adoption by the International Civil Aviation Organization of annex 16 to the Chicago Convention, relating to airplane noise and emissions, underscores the growing focus on the impact that the airline industry has on the environment.\textsuperscript{46} The National Environmental Policy Act of 1969\textsuperscript{47} ("NEPA") is the basis for regulating environmental issues that focus on airline construction and management. Since most U.S. airports serving the commercial airline industry are inextricably depen-
dent on funding from the federal government and concomitant grant assurances, the majority of airport projects must jump through NEPA hoops before they can proceed. Apart from NEPA, there are a plethora of state environmental laws in the United States that impose additional hurdles which are not likely to ease in the future. Therefore, careful planning and a cooperative approach are essential from the initial stages of airport development. Such an approach means that in planning for airport expansion, projected costs take into account the costs imposed on people living or working in the vicinity of the airport to be expanded. This could mean that, should people living in the vicinity of an airport take airport authorities to court on any case relating to noise pollution, the cost so borne should be included in the costs of expanding the airport. It could also mean that if people in the vicinity have to be relocated, the costs of such relocation should be considered part of the cost of airport expansion."

Different countries have varying degrees of environmental protection laws, which impede the ongoing process of liberalizing the airline/airport industry. In decades to come, major airports in the world will probably experience traffic clogs and look toward expansion to accommodate increasing traffic and the everlasting need for increased access. Environmental laws and activism are likely to make the road to expansion a long haul for the airlines and airport management.

E. DEBILITATING STATE AID PROGRAMS

European Union carriers are heavily subsidized by the state. According to the European Commission:

Community air transport has been characterized by a high level of State intervention and bilateralism. Although a certain measure of competition between air carriers was not excluded, the potentially distorting effects of State aids were, in the past, outweighed by the economically more important rules on control of fares, market access and in particular capacity sharing which

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48 Id.
49 Id.
50 Id.
51 Hindley, supra note 11, at 23.
were enshrined in restrictive bilateral agreements between Member States. The Council has, however, now completed its liberalization programme for Community air transport. Therefore, in a situation of increased competition within the Community there is a clear need for a stricter application of State aid rules.\(^5\)

This reflects the concern in the EU community regarding the distorting effects of state aid programs. In countries where carriers are heavily subsidized by the state, unsubsidized carriers may feel reluctant to compete, thereby making these destinations unattractive for investment.\(^4\) The degree of governmental intervention in the financial structure of the airline sector will determine whether a foreign air carrier will be able to gain market access through investment.\(^5\) At present, the GATS mechanism does not maintain a tough position on state aid/subsidy programs.\(^6\) Article XV states vaguely that members should "recognize that, in certain circumstances, subsidies may have distorting effects," and it therefore calls upon members to "enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such [distortive] effects."\(^7\) Until GATS establishes a concrete provision on state aid, such aid will continue to impede the efficacy of the GATS free-trade regime.

IV. BILATERALISM VERSUS MULTILATERALISM FOR GAINING MARKET ACCESS

The current trend in aviation is toward multilateralism.\(^8\) Even the traditional markets in Asia are opening up by signing liberal open sky agreements with the United States—specifically, nations in the APEC region like Singapore, Brunei, and Malaysia.\(^9\) On signing an open sky agreement with the United States in April of 2005, the Civil Aviation Minister of India stated, "The new agreement will have no restrictions on the number of flights, offer flexibility in the number of destinations as well as bilateral code-sharing with domestic carriers."\(^6\) Regional agree-

\(^{53}\) Id.
\(^{54}\) HINDLEY, supra note 11, at 14–15.
\(^{55}\) Id.
\(^{56}\) GATS, supra note 8, art. XVI.
\(^{57}\) Id. art. XV.
\(^{58}\) Findlay, supra note 7, at 120.
\(^{59}\) Id.
ments, known as common sky agreements, also abound in the aviation field.\textsuperscript{61} The European Union was the forerunner of regional liberalization, followed by South America with the Andean Pact and Africa with the Banjul Accord.\textsuperscript{62} In 2000, a group of APEC nations (the United States, Brunei, Chile, New Zealand and Singapore) signed a multilateral agreement on the exchange of traffic rights and other matters related to air transport.\textsuperscript{63} These trends are encouraging as many nations begin to experiment with liberalization and have relaxed their market access rules for carriers entering from the same region. This shows an ebbing away of the traditional anxiety about intense competition and a relaxing of market access norms. The trend toward open skies, free trade, and liberalized market access has found support in recent times with the emergence of free trade agreements such as the North American Free Trade Agreement and the European Free Trade Agreement.\textsuperscript{64}

In his speech at the IATA's 56th Annual General Meeting, Dr. Assad Kotaite stated that:

The most promising channel for further liberalization remains the air services agreement, now in regional as well as bilateral form. The most likely scenario at present is for an expanding patchwork of phased in liberalization under the aviation umbrella, both through bilateral agreements and through new or geographically extended regional agreements, all of which may eventually offer opportunities for coalescence.\textsuperscript{65}

The other side of this argument is that traditional bilateral arrangements for the exchange of traffic rights and the granting of market access also have their merits. International aviation agreements are illustrative of the wide range of economic disparities that exist in the aviation sector among the parties to these agreements. Even when the agreements are made on a strict quid pro quo basis, some countries still gain an unfair advantage over others. For example, while India has entered into some 180 bilateral agreements, Indian carriers utilize only thirty-five percent of the available rights and foreign carriers utilize

\textsuperscript{61} World Trade Org., supra note 24, at 247.
\textsuperscript{62} Id. at 248-49.
\textsuperscript{63} Findlay, supra note 79, at 121.
\textsuperscript{64} Abeyratne, supra note 5, at 53.
\textsuperscript{65} Kotaite, supra note 23.
sixty-five percent of these rights. The flights from fifty-one different nations fly to India, but reciprocally, Indian carriers only fly to twenty-five foreign countries. Indian carriers flew a total of over eighteen million passenger-kilometers in 2003 and 2004. By comparison, Lufthansa Regional flies 10.5 million passengers annually.

The aviation sector is zealously guarded by many nations who view their airspace as an inviolable component of sovereignty. Aviation sectors of all nations, irrespective of their level of development, are prime contributors of their nations' economies. Nations seldom encourage or even allow for the liberal exchange of their traffic rights. History is replete with examples of how traffic rights negotiations are highly contested. The Bermuda Agreement and Bermuda II are examples of the significance that states attach to their traffic rights. The multilateral platforms for exchanging bilateral traffic rights, namely the International Air Services Transit and International Air Transport Agreements, had 121 and eleven contracting states ratify them, respectively. Perhaps nations draw comfort from signing separate bilateral agreements with other nations and exchanging traffic rights under the bilateral mode because it preserves the quid pro quo element in the exchange of traffic rights.

Most aviation regimes are not GATS-compatible. They have many regulatory, legal and economic impediments that pose a formidable challenge towards the true attainment of liberalization under the GATS regime. Some examples of these impediments are rigid ownership-control rules, vexatious slot allocation, dilapidated state aid programs, the decrepit state of the aviation infrastructure, and onerous cabotage restrictions that get in the way of gaining market access under the GATS regime. Most of these were discussed as factors affecting market access in the previous section. The unconditional

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67 Id.
70 See generally JOHN O'BRIEN, INTERNATIONAL LAW 456 (2001).
71 See U.S. Dep't of State, supra note 3.
most-favored-nation ("MFN") clause, which is the cornerstone of GATS, does not have international approval. Nations are reluctant to apply the MFN clause for the granting of market access while exchanging traffic rights. Even the most liberal nations discriminate in granting traffic rights in order to counteract the severe restraints that their carriers encounter in foreign markets.\(^72\)

A multilateral regime of free trade under GATS that is uncorroborated by a multilateral competition-policy regime is superfluous. An impartial, fair competition regime within the GATS framework would go a long way towards ensuring fairness in the Air Transport Agreement. If the multilateral regime of air transport were to replace the current bilateral air-service agreements regime, then a state's right to enjoy fair and equal opportunity in air service has to be ensured, especially when the disparities among airlines from the developed and developing countries are fairly high. Although the International Trade Organization ("ITO"), which was the predecessor to GATS, had two chapters devoted to competition issues, the present system has no multilateral policy in place offering protection against anticompetitive activities pursued by the airlines if the trading of rights under the air transport regime were to take place under the GATS regime.\(^73\) Articles 7, 8, and 9\(^74\) of GATS offer some competition safeguards in vague terms, but these provisions are too dismal to attack any mischief.

Eighty WTO members have adopted antitrust laws and have specific laws that deal with such issues as price fixing, predatory

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\(^73\) Id. at 621.

\(^74\) Article 7 states, "Wherever appropriate recognition should be based ... on multilaterally agreed criteria." GATS, supra note 8, art. 7. Alternatively, members may enter into mutual recognition agreements: "For the purposes of the fulfillment ... of its standards or criteria for the authorization, licensing or certification of service suppliers ... a Member may recognize the education or experience obtained, requirements met, or licenses or certification granted in a particular country." Id.

Article 8 states, "If ... a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation." Id. art. 8.

Article 9 addresses business practices that restrict trade in services. Countries are not obligated to end such restrictive business practices, but they are required to consult with a country that complains about such practices and to "accord full and sympathetic consideration" to that country's request. See id. art. 8.
pricing and cartel behavior. But the competition rules need not be the same in all these countries. "Divergence in national competition policies and a lack of co-operation between competition authorities create their own barriers to international trade in uncertainty, complexity and excessive costs."  

What would happen if one kind of corporate behavior is considered appropriate in one country but another country has strict rules prohibiting such behavior? These differences can impede an enterprise in one state seeking access to another state. There is therefore a need to harmonize the competition rules under the WTO to strengthen the argument in favor of switching over to the multilateral regime of GATS. "Trade and competition [has remained] a 'Singapore Issue' and . . . a working group has been studying this since 1997 . . . ."  

A GATS Reference Paper produced by the WTO lays out some competition principles in the Telecom Service Sector Annex that can be adopted as a prototype for creation of similar rules in the Air Transport Annex. The dispute settlement understanding in Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement") can be used as the method for settling disputes covered by the prospective comprehensive WTO competition rules when they are in place.

The reference paper on the GATS telecom annex was adopted in full or in part by sixty-one signatories to the GATS Basic Telecommunications Agreement as commitments in addition to Article 18 of GATS. Although India has adopted some of the Reference paper objectives listed in the Telecom Annex, it has not done so entirely. For example, India has:

- scheduled no commitment to prevent cross-subsidization, thus allowing [the Department of Telecommunications] and [Manana-]

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76 Id.
gar Telephone Nigam Limited], "both federal telecom service providers," to subsidize non-competitive local exchange operations with monopoly revenues from long-distance operations. India's commitments on interconnection provide that interconnection with a major supplier be ensured at points "specified in the license," rather than at "any technically feasible point" as the [Group on Basic Telecommunications] Reference Paper states. More significantly, India did not make binding commitments to Reference Paper principles that ensure interconnection in a timely fashion under terms, conditions, or rates that are transparent, reasonable, economically feasible, nondiscriminatory, or unbundled.

India accepts the Reference Paper's requirement that universal service be defined in a transparent and nondiscriminatory manner but not the obligation to make regulation of universal service competitively neutral or no more burdensome than necessary. Finally, India scheduled no commitments to publish the normal time period for reaching a decision on license applications, to allocate the use of scarce resources in a transparent and nondiscriminatory manner, or to make publicly available the current state of allocated frequency bands.81

Commenting on India's compliance with the Telecommunications Trade Agreement, the U.S. Council for International Business points out that India's Access Deficit Charge Regulation has a discriminatory effect on international service providers and their customers, and that submarine cables are not being made available on a reasonable and nondiscriminatory basis by India, both of which are "inconsistent with India's WTO commitment."82 Thus, even when a sector-specific attempt to forge a cohesive competition policy is made, it fails to win the consensus of all WTO contracting parties. The old controversy involving development of comprehensive competition rules within the global trade framework continues unabated. Thus, it is not difficult to predict that building a sector-specific competition regime for aviation along the lines of the Reference Paper of the Telecom Annex is not a process free from worries as to its acceptability by all members. These worries about acceptability will only become further accentuated by demand for a multilat-

81 Id.

eral regime of comprehensive competition rules under the WTO.

V. ISSUES CONFRONTING INDIA'S AVIATION MARKET AND MARKET ACCESS

Indian aviation is experiencing a privatization boom. Many new low-cost carriers like Air Deccan, Kingfisher Airlines, and Spicejet, among others, are proving to offer stiff competition to the major flag carriers and private jets on most domestic routes.\textsuperscript{83} This strongly indicates that the formation of a hub-and-spoke model in India, paralleling the U.S. hub-and-spoke model, is not unforeseeable, with main private and flag carriers concentrating on international traffic, and domestic low-cost carriers concentrating on the domestic leg of international travel service. Niche carriers like Air Deccan should therefore aim at covering small towns at lower fares and building up a stronger network on that front. If an efficient network can be developed, Indian carriers will compete with competition from abroad. Therefore, signing liberal bilateral agreements would not affect the Indian market.

India's aviation market has become more active than ever due to a steady increase in population, which naturally leads to increased air travel in India as well as an increase in disposal income. However, the boom will have no significance if India does not deal with the dismal state of its infrastructure, which is a major limitation.

Ernst & Young commented:

\[ T \]he challenge is tough as India has poor airport infrastructure, and upgrading it will need U.S. $10 billion. Or else, the newer airlines, which choose to fly out of major hubs of Delhi and Mumbai, may have to park their aircraft overnight at nearby airports like Lucknow or Pune. That would mean higher costs, and getting misaligned with the peak traffic.\textsuperscript{84}

There is steady growth in Indian domestic air traffic—currently nineteen million passengers per day, and it is “poised for an exponential rise by five million a year until 2010, by [which time] India may see 50 million people flying every year. As the Indian aviation market is growing rapidly, the question arises


whether the infrastructure is growing at same pace." Criticism of the infrastructure comes from the airlines at its mercy. Wolfgang Prock-Schauer, CEO of Jet Airways, a leading Indian private airline, commented:

The infrastructure we have here is insufficient for the current volume of traffic and the aircrafts we have in the country. And if you look forward at the growth which we expect, it's clearly insufficient. I would say that lack of adequate infrastructure is the single biggest problem we may face in further developing the air traffic in India.

International air transport is experiencing a capacity shortage in contrast to the local air transport sector, and while India's airport infrastructure and fleet upgrade plans are touted as a priority, there has been no formal implementation.

The Naresh Chandra Committee of December 8, 2003 gave significant recommendations for invigorating the Indian aviation sector. Some of the main recommendations focused on increasing market access through encouragement of privatization, foreign investment, affordability, viability and safety. The main recommendations are as follows:

- Liberalization of the international air transport segment to be pursued in a phased manner. In the first phase, private airlines based in India should be allowed to provide international air transport services to and from India. In the next phase, India should actively pursue the objective of complete liberalization of the international air transport segment through (a) seeking more liberal arrangements under the bilaterals and (b) enhancing full-access to wider market segments by joining a regional or a plurilateral group of countries with a similar agenda of liberalization.

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87 Id.
89 Id.
• Liberalized airports should be allowed to come up irrespective of proximity to existing airports. However the state and central governments should refrain from offering concessions and subsidies to these airports.

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• Privatization of the national carriers - Indian Airlines and Air India - along with the airports in India. In the case of the former, it is recommended that a consortium of domestic financial institutions and foreign institutional investors be created, who would hold the shares of the two national carriers. In the case of the latter, relaxation of the qualification criteria for bidding so as to broaden the number of competent bidders has been proposed.

...  

• Due to increased privatization and the potential abuse of monopoly power by the airport operators, the responsibility of ensuring appropriate levels of regulation should be vested with the proposed Aviation Economic Regulatory Authority ("AERA").

While some of these objectives have already been implemented, India's plans for airport privatization have been met with stiff resistance and have, in effect, been stalled in the past. But there is new blood in this plan with India's decision to adopt a joint-venture model for privatization, allowing for public-private partnership in the area of airport development. India is also planning to upgrade twenty-two airports in the country to develop tourism.

These trends in the Indian market signify the seriousness of India's commitment to liberalize and provide for increased access to its competitive aviation market. Though there are certain policy and infrastructural impediments in India's path of attaining liberalization within the meaning of GATS, India is slowly but progressively embracing liberalization, allowing for 74% foreign direct investment in airport infrastructure, allowing private airlines to fly on unutilized bilateral routes, and planning for fleet upgrades. A more liberalized market calls for increased regulation of the competitive elements of the market. The Naresh Chandra Committee report designates the Compe-

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90 Id.  
92 See id.  
93 Id.
tition Commission of India as the body with oversight of anti-

ticompétitive practices.\textsuperscript{94} Further, "segments of airports and
[Air Traffic Control Corporation] services [are to] be subjected
to independent economic regulation by the proposed [Aviation
Economic Regulatory Authority]."\textsuperscript{95}

VI. CONCLUSION

The air transport industry in India is not in its nascent stage,
though it is in its nascent stage of liberalization. India is pursu-
ing phased liberalization as recommended by the Naresh Chandra
Committee Report and is in the second phase, negotiating
for more liberal bilateral agreements and looking to get full ac-
cess to wider markets by entering into regional and multilateral
agreements with countries with similar liberalization agendas. Acceding to GATS-specific commitments relating to a market ac-
cess regime now might not seem such a distant dream, but it is
still a difficult one to realize because India shows reluctance to
end its protection of flag carriers. It seeks to encourage and
nurture the growth of private enterprise, but not at the cost of
allowing its flag carriers to fall to stiff competition from within
India and abroad. Further, India's aviation market is hobbled
by third-world realities such as the dismal state of its infrastruc-
ture, policy rigidities, and protectionist tendencies towards its
flag carriers. The few bold steps taken in the past to increase
market access will prove to be inconsequential if India does not
adequately address its infrastructural and policy rigidities.
Therefore, unless India confronts these realities soon, it will also
be difficult for it to benefit as much from entering into liberal,
bilateral or multilateral arrangements with other nations.

\textsuperscript{94} Nishith Desai Assocs., \textit{supra} note 88.
\textsuperscript{95} \textit{Id.}