Sustainability of Air Carriers and Assurance of Services

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THE MOST CRITICAL challenges facing international civil aviation are sustaining the air transport industry and assuring its consumers of continuous air transport services. This article will examine possible approaches that the States and their national carriers may consider to overcome these challenges. Of particular interest are consumer confidence, corporate competition, and State involvement in sustaining their carriers. These factors play an integral part in the trade practices of the air transport industry; redoubling efforts in these areas is the industry's best strategy to successfully emerge from the current state of affairs.

In its 2002 State of the U.S. Airline Industry, the Air Transport Association (ATA) advises that the combined impact of the 2001 economic downturn and the steep decline in air travel after September 11 have resulted in devastating losses for the airline industry. The ATA expects the net loss for 2001-2003 to nearly equal the net profit for 1995-2000, with a net loss of $18 billion for 2001-2002, and a projected loss of $5.5 billion this year. Passenger revenues are down, air cargo volumes are trailing, and insurance costs have tripled since the first quarter of 2001.

1 DCL, Ph.D., LL.M, FRAeS, FCIT. The author, who is a senior official at the International Civil Aviation Organization (ICAO), has written this article in his personal capacity. Views expressed herein are the author’s, and do not necessarily reflect the official position of ICAO.


4 Id. at 13, 15, 26.
Of course, the overall picture, which portends a certain inevitable gloom for the air transport industry, is not the exclusive legacy of United States’ carriers. It applies worldwide. The ongoing retaliation by the world community against terrorism has increased the airline passenger’s fear and reluctance to use air transport. Air carriers have cancelled or postponed their new commercial aircraft requisition orders. Many carriers, particularly in developing countries, are revisiting their cost structures and downsizing their human resource bases.

Another serious corollary to the September 11 events is the ripple effect on the aviation insurance industry, which has compounded airlines’ operational costs. To counteract problems, the United States and European governments have pumped billions of dollars in subsidies into their national carriers, even though most of these carriers are private entities. The rationale behind these State subsidies is that air transport is strategic and vital to the economy of every country. But State subsidies are not a permanent solution to the sustainability crisis faced by the global airline industry. A wider, more profound approach is necessary, calling for a need to revisit overall air transport policy. Of course this does not mean that States, particularly those in the developing category, need to coerce their carriers to run head-on towards privatization, participation in alliances, or entrance into regional agreements on a multilateral basis. A sustained, but restrained, strategy appears to be the most prudent approach.

II. RESTORING PASSENGER CONFIDENCE

Although the airline industry suffered a tremendous blow from the September 11 events, it would be disingenuous to blame the economic downturn faced by the airline industry solely on the events of that day. Although admittedly, the financial position of most airlines has been aggravated by the events, it is undeniable that airlines were already losing money through 2001 even before the events of 11 September. For the most part, the airline industry was already affected by unsustainable slot congestion, ineffective management, and unconscionable flight delays, all of which inevitably resulted in some airlines going out of business. This phenomenon is an inevitable corollary of “creative destruction,” an economic concept which describes the notion that, in a free market economy, commercial enterprises will either innovate or perish. This is not inherently bad either way, as ineffectively managed airlines that fail would re-
lease capital to be invested in other ventures. The importance of this economic practice to the airline industry is that, instead of the industry having to tie up capital in moribund air carriers, the capital can be invested in new carriers which could innovate management principles and practices to attract business.

The performance of a successful airline, in terms of attracting passengers and other consumers, could depend on the price and service which should be comparable to those of other larger carriers who may not offer the same efficiency in on time departures and arrivals. Market research has revealed that, when assessing the value of an airline’s services, the consumer no longer considers as valuable what is offered as a part of the transaction, but rather tends to frown upon what is not offered by an airline that is offered by its competitors.

To ensure their sustainability in a volatile market, airlines should also concentrate on ensuring that they get “repeat business,” which is the ineluctable and ultimate goal for any commercial undertaking. Ensuring that customers remain happy after they conclude an air carriage transaction with an airline is a key commercial strategy in modern airline business. An effective customer resource management (CRM) plan is an invaluable and essential commercial airline tool. The most critical factor in CRM is to combine technology and business strategy.

The main thrust of aviation in the dawn of the 21st Century, particularly from the perspective of sustainability of a waning air transport industry, lies in the consideration of the abiding moral, if not legal, responsibility of the airline industry to take steps in converting the contract of carriage from a mere exchange of rights and liabilities to an extended relationship of “give and take” between the carrier and the airline passenger. On the one hand, emerging trends of commercial aviation reflect that, in view of increased competition, airlines have to woo the passenger now more than any time before, with promises of an enchanted journey. On the other, the passenger has to conduct himself better while in the custody of the carrier throughout the journey.

In the new millennium, individual airlines would be compelled to remain competitive, just to survive. They would need to flow with the tide of such commercial trends as privatization, using information technology, removing infrastructure constraints and governmental restraints, and most importantly, changing travel patterns. These trends have given rise to a new phenomenon in the global aviation scene which makes survival
(if not success) of airlines now dependent not on pricing but on service. This new trend calls for the airline product to be similar to one from the entertainment industry, bearing in mind that a passenger spends 70% of his total travel time in the aircraft on long distance flights. To counter strong alliances between countries and airlines, the smaller carriers (as well as the big ones) are now going in more for glamour and in flight luxury to score on the 70% in-flight time. Personal video screens for every seat, satellite assisted telephone facilities and teleconference services are some of the luxuries offered. Indeed, as David Shoenfeld, International Marketing Vice President of Federal Express said in the mid-nineties: “If you view your services as flying between terminals, you miss the point.” This view is true now more than ever before.

The view that “marketing is determined from the view of the customer” is becoming more valuable now more than ever before. To survive, airlines have to build brand recognition. In this context, an International Travel Market Research (INTRAMAR) study conducted in the mid-nineties is one of the best indicators of the key strategic factors towards achieving passenger satisfaction. INTRAMAR measures for each airline a passenger satisfaction (PAX/SAT) index that correlates closely with the major indicators of airline performance.

According to the INTRAMAR survey, there are 12 important factors influencing passenger choice. They are: flight punctuality; excellence of in-flight service; superiority of aircraft; comfortable seats; clean cabin seats and washrooms; good food and beverages; superior first class; superior business class; efficient reservations systems; pricing; good check-in service; and attractive frequent flyer programmes. At least seven of these factors are entirely dependent on the quality of the aircraft.

The foremost important factor—punctuality—cannot be achieved with aged aircraft. The matter becomes more crucial to a relatively small airline, running a small fleet of aircraft where, if one aircraft is grounded for reasons of repair or maintenance, the airline’s entire flight schedule would be in disarray, leading to delays down the line. Connecting services would be disrupted and passengers stranded. It is needless to envisage the effect this catastrophe would have on the airline’s good name. No amount of superior in-flight service would atone for a six-hour delay where a connecting passenger has to sit inside an unknown airport terminal. It is therefore necessary for any air-
line to seriously consider removing one of its most burdensome infrastructural constraints—its aging aircraft.

For the passenger’s part, he should respect the rules of conduct on board an aircraft and refrain from being disruptive of the flight. In a recent survey conducted by the International Air Transport Association, to which 62 airlines responded, it was reported that 1,132 cases of unruly passenger conduct were reported in 1994, which figure rose to 2,036 cases in 1995; 3,512 cases in 1996 and 5,416 cases in 1997. A Secretarial Study Group established by the International Civil Aviation Organization (ICAO) to address issues of unruly passenger conduct, at its fourth meeting in October 2000, developed draft model legislation on offences committed on board civil aircraft by unruly passengers. The delicate balance between the airline and passenger brings to bear the core issue concerning the ultimate consumer in the air transport industry – the passenger.

According to the United Nations Human Development Report, the coming decades will reflect significant changes in the size, location, and characteristics of the world’s population. Global income and consumption will increase, with greater inequality in their distribution. The population will continue to grow, but with smaller families, levelling out by the middle of the 21st century. An aging population will more than double the number of over 60s by 2030. There will be a higher proportion of dependent to productive people, though the wealthier segments will have increased disposable income and more leisure time. Urbanization will spread, and more people will migrate towards these urban centers and away from their native lands.

The U.N. Report also projects continued changes in global markets, economies, and the environment. With further globalization in markets, trade rules will continue to liberalize. Taxation will continue to shift from progressive to regressive and from direct to indirect. The information revolution will redefine the nature of white collar work through teleworking and outsourcing—towards the “virtual office.”

6 Id.
8 Id.
All these factors are indicative of increasing demands on air transport, the provision of which will have to be weighed carefully between conflicting interests of economic demand and social justice. Both the public and private sector enterprises offering air transport to a future world will be required to come to grips with not only supplying demand, but also with fulfilling a moral obligation that necessarily entails enhanced care when one’s client is being hurtled through the atmosphere 35,000 feet in the air. The inherent vulnerability of the passenger, not only in flight, but throughout the airport check-in process, calls for a greater degree of care on the part of the airline manager.

According to the Annual Report of the Council, in 2001 the total scheduled traffic carried by the airlines of the 187 Contracting States of ICAO amounted to a total of about 1,621 million passengers and some 29 million tonnes of freight. Reported monthly figures suggest that up to September 2001 there had been little change in overall passenger/ freight/mail tonne-kilometres performed over the same period in 2000, a small growth in passenger traffic being countered by a significant decrease in freight traffic. However, following the events of September 11, data for the entire year 2001 indicate that total traffic decreased some 4 percent over 2000 and international tonne-kilometres by some 5 percent, the first annual decrease in these figures since 1991. In 2001, the overall capacity was reduced, but at a lower rate than the decrease in traffic. Hence, the average passenger and weight load factors on total scheduled services (domestic plus international) decreased to 69 and 59 percent respectively.

On a regional basis, some 35 percent of the total traffic volume (passengers/freight/mail) was carried by North American airlines. European airlines carried 28 percent, Asia/Pacific airlines 27 percent, Latin American and the Caribbean airlines and Middle East airlines 4 percent each and African airlines 2 percent.

Data for individual countries indicate that in 2001 about 43 percent of the total volume of scheduled passenger, freight and mail traffic was accounted for by the airlines of the United States, Japan and the United Kingdom (32, 6 and 5 percent respectively). On international services, almost 37 per cent of all traffic was carried by the airlines of the United States, the United Kingdom, Germany and Japan (17, 7, 7 and 6 percent respectively). This figure provides some stimulus for reflection as to the enormity of passenger carriage that will be carried out
over the next few decades. It also begs the question as to whether we should be returning to the commercial aviation philosophy of the mid 1980's, explained so eloquently by then President of SAS, Jan Carlzon, that: “Everyone needs to know and feel that he is needed. Everyone wants to be treated as an individual.”

A. SUSTAINABLE THEORIES OF AIRLINE MANAGEMENT

Contrary to popular belief in some quarters that good aviation management is achieved only through experience, and that as long as a passenger is transported from one point to another on time the customer is satisfied, research conducted through a questionnaire shows differing attitudes and approaches to aviation management, particularly between Europe and North America. The purpose of the survey was to gain insight into managers’ attitudes on various items related to the management of a new entrant airline.

Some significant similarities and differences between European and American management attitudes emerged from the survey. European managers agreed strongly, on average, that the board of directors is highly involved in the airline’s affair. Their American counterparts averaged considerably lower. European managers felt more strongly that it was necessary to improve market-share, which indicates that they assume that market-share is important in a competitive environment. Airline managers from both Europe and the United States disagreed that emphasis is placed in their profession on diversification into other industries. American managers had stronger feelings than their European counterparts regarding their airlines providing incentives to employees to encourage extra commitment.; American managers also agreed more readily that important information should be communicated to employees to enable effective decision making. Further, American managers felt that the long-term prospects in their airlines’ primary markets were excellent.

One of the distinctive differences between a highly deregulated American market and a less deregulated European market concerns influencing government policy on aviation. In a fully

regulated economic environment, influencing government policy is a major part of senior management's function if resources and market position are to be secured. This distinction is evident in the greater importance European airlines place on the acquisition of airport slots, and the resulting higher proportion of congestion in European airports than in American airports.

The survey also indicated that European airlines view an alliance with incumbents as an important preparation for increased competition stimulated by the liberalization process. In contrast, America airlines rated higher the importance of delegation. The likely explanation for this trend is the necessity to empower employees in order to maintain the highest possible efficiency level. Incentive programs are also important in the United States to motivate employees and to maximize their worth to the organization. According to the findings of the survey, U.S. carriers have placed much less importance on staff reduction than European carriers. Looking at the significant differences where European managers scored higher, one can see that managers of U.S. new-entrant carriers appear to be more inclined towards their staff than their European counterparts.

Current airline management techniques focus on the customers. The management strategy should ensure that airlines are custom-driven companies. The classic production-oriented company produces or invests by purchasing an aircraft and adapting its operations to equipment. In a customer-driven company, the distribution of roles is radically different. The organization is decentralized, with responsibility delegated to those who until now have comprised the order-obeying bottom level of the pyramid. This strategy places responsibility for ideas, decisions and actions with the people who are the faces of the airline: ticket agents, flight attendants, baggage handlers, and all the other front line employees. The airlines must also have an effective and efficient market survey department; however, once responsibility is successfully passed on to the front line, the airline can reduce the number of market surveys conducted as they are no longer needed. Compared to the production-oriented model, a customer-driven philosophy is usually more successful.

In general, in-flight service, which is one of the most important indicators of successful airline management, is an intangi-

11 Id.
ble. Airlines should not spend an inordinate amount of time researching what passengers think of in-flight offerings, but rather, they should be aware of what the competition is offering. Airlines also have to realize that they are hospitality providers who need to create very strong brand experiences for all passengers and not just for the premium passenger.  

The business passenger offers the most profit to an airline. Although airlines have put enormous investment and effort toward providing adequately for this segment, most airlines do not seem to have fully appreciated that a fast growing segment of the market is female. The United States and Europe account for 22 percent of all travellers by air. Of this figure, 28 percent are female travellers.

Sustainability of an air transport enterprise largely hinges on the manner in which that enterprise would treat its passenger. It is not sufficient to woo the passenger with an attractive package of hospitality. The passenger must be made to feel comfortable, and, above all, that she is cared for from the time she makes her reservation. On the face of it, this is a blanket statement with seemingly no specificity. Upon deeper analysis, however, one realizes that the airline industry, like the automotive industry, has to make publicly known their philosophy toward the client and actively demonstrate their philosophy in practice.

It has been claimed that, in 2020, there would be no more stressed out passengers. There will be more routes to choose from and more flights to more destinations. Flying will become a customized experience with larger seat pitch, more leg room, quieter interiors, and cleaner cabin air quality. Ninety-nine percent of aircraft will arrive on time and depart within 15 minutes of the published schedule. Electronic check-ins will ensure steady passage through the terminal building and advanced automated baggage handling will ensure that you will sleep in your pajamas in the hotel, after landing.

Called the “2020 Vision,” the above facts reflect the manner in which European aerospace professionals see the future. This glowing picture is somewhat tainted by the innumerable complaints which now seem to be arising out of the carriage of pas-

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13 Fariba Alamdari & Julian Burrell, Marketing to Female Business Travelers, 5 J. AIR TRANSP. WORLDWIDE 1, 4-5 (2000).
14 On Track to the EU’s Sixth Framework, INTERAVIA, Mar. 2001, at 15.
sengers by air. In December 2000, an Australian law firm reportedly announced that it would launch a class action suit against several airlines over failure to warn passengers about the risk of health hazards associated with air travel.15

B. ICAO Initiatives

The fundamental premise upon which ICAO’s ongoing work on facilitation of passenger travel is contained in the Convention on International Civil Aviation (Chicago Convention),16 Article 22 of which provides that “each contracting State agrees to adopt all practicable measures... to facilitate and expedite navigation by aircraft... and to prevent unnecessary delays to aircraft, crews, passengers and cargo.”17 Annex 9 to the Chicago Convention, on facilitation, is the operative document providing guidelines to States on alleviating the lot of the passenger. Annex 9 derives its authority from Article 37 of the Chicago Convention, which vests authority in ICAO to adopt and amend from time to time international standards and recommended practices dealing with facilitation. Numerous provisions of the Annex require States to provide services and facilities that would obviate delays and other procedural impediments that would otherwise act to the detriment of the passenger’s journey by air.

Chapter 3 of the Annex commences with the general requirement in Standard 3.1 requiring regulations and procedures applied to persons travelling by air not to be less favourable than those applied to persons travelling by other means of transport. This provision establishes, in limine, a certain parity of status between air transport and surface transport, particularly in relation to passenger clearance at border crossings and entry points. Standard 3.4 requires that Contracting States shall not require from visitors travelling by air any other document of identity other than a valid passport. Although this provision could be perceived as unduly restrictive on the sovereign prerogative of a State to require specific entry documentation from persons, it is not intended to discourage States, who wish to be more liberal, from accepting official documents of identity other than passports. The Annex also contains provisions calculated to simplify

17 Id. art. 22.
travel documents; open access to facilities to obtain a passport; improve quality of passports, visas and other travel documents; make easier the visa obtaining process; expedite entry to and exit from States visited; obviate difficulties of transit through States not intended to be visited; and ensure the rapid return of baggage which becomes separated from the owners in the transportation process.

In support of these objectives, numerous specifications and guidelines have been published by ICAO for the issuance of machine-readable travel documents, including circulars containing guidance material on access to air transport by persons with disabilities, dynamic flight information displays at airports and standardized signs for passengers at airports.18

ICAO has also included valuable guidelines for passengers in its Manual on the Regulation of International Air Transport.19 This guidance material was issued by decision of the Council to assist States in publishing or encouraging the publication of booklets intended to inform air transport users of their rights and obligations. The material was developed with regard for the increasing complexity of tariff rules and conditions and the need expressed by States to ensure that the public is fully informed of the rules and conditions when purchasing air transport services.

In 1992, the Latin American Civil Aviation Commission, a regional inter-governmental aviation organization, produced for the guidance of its members a “Charter of Rights for the Air Transport User.” This included many of the items in the inventories developed by ICAO.

In considering whether information booklets should be developed in their own countries, States are invited by ICAO to take into account the various means by which such booklets might be developed and disseminated, bearing in mind the need to ensure an appropriate balance of public interest and to ensure that any guidance material is brief, readily comprehensible and widely available.


In some countries, such documents have been developed and published as a public service by the government transportation or consumer protection agency concerned, while in other cases, independent consumer action groups have been responsible for the documents, funded by government subsidy or public donations. All of these publications are made available on request, free of charge, to the general public. Government publications generally make it clear that they are for information only, are not binding, and do not override airlines’ approved tariff rules or conditions of carriage.

In some other cases, documents have been developed by individual airlines or freight forwarders and made available free of charge on their own aircraft or in their sales outlets. Further means of development and distribution are through user groups, such as business associations, shipper associations, and commercial publishers.

ICAO Guidelines on economic policy advises:

On most routes, two or more classes of travel and a wide range of fares are available, with descriptions indicating the advantages of normal fares (for example, unlimited stopovers/transfers, indirect routing allowances, no charge for cancellation/change of flight, etc.) and of “restricted” normal economy fares in some markets which retain most of the characteristics historically associated with normal economy fares but have restrictions, for example, on the availability of stopovers or, in some cases, on the ability to interline as well as the price advantages and restrictive conditions attached to special fares (for example, circle trip/round trip requirements, seasonal application, stopover/transfer limitations, minimum and maximum stay periods, advance reservation and payment provisions, cancellation charges and forfeits, group requirements, ground purchase or other additional purchase requirements, etc.). Description of varying availability of discounts for infants, children, students/youth, etc., and of preferential fares.\footnote{Id.}

The ICAO Manual also offers advice on conditions that may apply to checking, in advance of purchase, and where charges or forfeits apply for change in ticket validity or for ticket change/cancellation, whether exceptions are granted (for example, in cases of illness or death), and whether insurance against unforeseen changes in plan is available through the airline and/or directly from the insurance company (and, if so, what it covers).
The ICAO Manual offers further guidance on passenger tickets:

1. In many areas certain taxes or charges (for example, airport service charges) are not included in the price of the ticket; in such cases, they may be added at the time of purchase or collected at the airport prior to departure.

2. The air ticket is the passenger’s evidence of his or her contract with the air carrier or charterer. There are implications when purchasing irregularly issued tickets.

3. The main elements of notation on the ticket are briefly explained (for example, boxes showing passenger’s name, airports, airlines, flight numbers, code-shared flights and their significance for the traveller, class of travel, departure dates and times, status, validity, etc.).

4. A file reference number should be obtained and noted when making a reservation or reconfirmation.

5. Most airlines have established deadlines by which tickets must be paid for in full (and in some cases collected), failing which the reservations concerned are subject to cancellation.

6. Tickets are issued at fares subject to government approval.

7. In many countries fares may be advertised and tickets sold at fares which have yet to receive government approval. Such advertisements and tickets should be clearly annotated that the fares are “subject to government approval.” Purchasers of such tickets should ensure that they are aware of the potential consequences of the unapproved status of the fares (for example, possible non-applicability, possible surcharge, rights to refund).

8. As a general rule, purchased tickets may be subject to surcharge where a fare increase is subsequently approved; however, exceptions to this rule exist in a number of countries.

9. Passengers may have a right to a refund, if they follow the necessary procedures.

10. There are differences between “voluntary” and “involuntary” refunds and refunds for lost or stolen tickets, service charges, periods within which applications must be made, and expectation of delays in processing.

11. Failure to observe airline check-in requirements and consequences can result in cancellation of the reservations for that and any subsequent flights on the itinerary.
12. Different methods of establishing free baggage allowances and excess baggage charges exist under the so-called piece and weight systems. There are airline variations under both systems, and allowances may apply on different sectors of an interline journey or on the return journey.

The Manual also provides valuable information on how best to advance from the airline or its agent the detailed allowances which apply throughout the intended journey, both for carry-on baggage and for checked baggage, cautioning that an airline, at its discretion, may accept excess baggage at charges related to the system being applied and according to its regulations. Attention is also brought to the fact that passengers travelling together may pool their free baggage allowances.

Often, the passenger is unaware that personal effects may be shipped as cargo, generally at lower cost than for shipment as excess baggage, but under more onerous circumstances. One of the most useful items of information could prove to be advice on the existence of limited liability by the airline for lost or damaged baggage, levels of which may be ascertained from the carrier or its agent. Advice on the liability exclusions regarding checked baggage (for example, for certain perishable and valuable items), on the available option of declaring a higher value for baggage on payment of an additional charge or, where available, taking out insurance, are also made available to the passenger.

Under certain circumstances airlines may refuse carriage, based on the conduct, age, or mental or physical state of the passenger. This brings to bear important exigencies as no-shows, over-booking, and compensation for denied boarding.

The ICAO Manual, which includes a description of a “no-show” and how to avoid being a “no-show,” advises that to compensate for no-shows, most airlines often over-book flights. As a result, passengers with confirmed reservations are occasionally denied boarding because of non-availability of seats, and that in certain countries and for certain airlines compensation for such denied boarding is available. Passengers are also encouraged to ascertain their rights at law before accepting compensation where major financial or other losses are incurred as a consequence of denied boarding.

On the subject of delays or cancellation of flights, the passenger is informed that when (due to circumstances beyond their control) airlines cancel or delay a flight or cause a passenger to
miss a connection, most airlines accept the obligation to refund or provide alternative flight arrangements at no further cost to the passenger, but do not generally accept any further liability for any damages incurred as a result (for example, lost vacation or work time). Where major financial or other losses are incurred as a consequence of delay, passengers may wish to ascertain their rights at law.

In case of delay to passengers, most airlines customarily provide certain amenities, such as the free provision or reimbursement of the cost of communications, meals, refreshments, transit taxes and, usually in circumstances of prolonged delay during the night hours, hotel accommodation and ground transportation. In the case of delayed baggage, airlines may, in certain circumstances, provide or reimburse passengers for the purchase of personal necessities.

On reconfirmation of flights, many airlines require reconfirmation of an onward reservation wherever a journey is broken for more than 72 hours. Failure to comply may result in cancellation of the reservation in question, together with those for any subsequent flights in the journey. This is a crucial issue for most passengers, particularly regular travellers who may neglect reconfirmation of flight.

Another key piece of information the ICAO recommends that States disseminate to passengers involves the complaint procedures and avenues for action, including information on differing time periods within which formal claims must be made.

Passengers must be aware of the conditions of carriage. ICAO strongly recommends that passengers (and air carriers or charterers) are made to understand that they are bound by conditions appearing on the ticket, by tariff conditions, by carrier or charterer regulations, and, outside Canada and the United States, by conditions of carriage, all of which should be readily available from the carriers or charterers for reference. All these conditions may vary for different segments of a journey, if provided by more than one airline.

On the issue of liability, a brief summary of limits of liability as provided for by international treaty (supplemented in some instances by other arrangements) are available for reference in summary on the ticket coupon and in detail in air carrier conditions of carriage (air carrier tariffs in Canada and the United States). ICAO also recognizes the need for, and recommends strongly that States make available to the passenger a glossary of descriptions commonly used air carrier terms and abbreviations.
Also considered critical to the passenger is a checklist of non-tariff matters and advice regarding the following:

1. travel documentation—passports (including information on machine readable passports, where applicable), visas, medical certificates, driving licences, diplomatic/consular representation in foreign countries, etc.
2. health-vaccination requirements, medical treatment, health risks and protection
3. insurance
4. foreign currency and currency restrictions, traveller's cheques, use of credit cards
5. general customs requirements and duty-free purchase allowances, dual-channel clearance system
6. facilities, conditions and procedures for carriage of unaccompanied minors, pregnant women, the obese, and sick and/or handicapped persons
7. carriage of pets
8. hotel reservations and car hire
9. in-flight services (meals, including availability of special meals, drinks, entertainment, etc.)
10. seat reservation and selection, including smoking regulations
11. how to pack and label, what to pack in carry-on baggage, what to wear
12. carriage of dangerous goods
13. control of illicit traffic in narcotic drugs
14. facilities available at airports
15. key to flight displays and standard signs at airports
16. check-in and boarding procedures, including security arrangements
17. safety on board
18. procedures for lost baggage
19. effects of alcohol
20. jet lag

C. OTHER INITIATIVES

Recognizing the need to improve airline passenger service, members of the Air Transport Association, the Department of Transportation, and Congress developed the Airline Customer Service Commitment.21 Under the plan, each carrier has devel-

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oped a Customer Service Plan implementing the twelve provisions of the Commitment to demonstrate their ongoing dedication to improving air travel.\textsuperscript{22} As part of the Customer Service Plans, airlines commit to: (1) offer the lowest fair available; (2) notify customers of known delays, cancellations, and diversions; (3) deliver baggage on-time; (4) support an increase in the baggage liability limit; (5) allow reservations to be held or cancelled; (6) provide prompt ticket refunds; (7) accommodate disabled and special needs passengers; (8) meet customers' essential needs during long on-aircraft delays; (9) handle bumped passengers with consistency and fairness; (10) disclose travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration; (11) ensure good customer service from code-share partners; and (12) be more responsive to customer complaints.

ATA carriers will offer the lowest fare available for which the customer is eligible on the airline's telephone reservation system for the date, flight, and class of service requested. In addition, carriers are required to notify customers of known delays, cancellations and diversions by each airline notifying customers at the airport and on board an affected aircraft, in a timely manner, of the best available information regarding known delays, cancellations and diversions. Also, each airline will establish and implement policies for accommodating passengers delayed overnight. A clear and concise statement of airlines' policies in these respects will also be made available to customers.

With regard to on-time baggage delivery, each airline will make every reasonable effort to return checked bags within 24 hours and will attempt to contact any customer whose unclaimed, checked luggage contains a name and address or telephone number. Each airline will allow the customer either to hold a telephone reservation without payment for 24 hours or (at the election of the carrier, to cancel a reservation without penalty for up to 24 hours, in order to give customers an opportunity to check for lower fares through other distribution systems, such as travel agents or the Internet. Also, airlines will

\textsuperscript{22} Id. at 1.
issue refunds for eligible tickets within ___ days for credit card purchases and 20 days for cash purchases and will disclose its policies and procedures for handling special needs' passengers, such as unaccompanied minors, and for accommodating the disabled in an appropriate manner. Airlines are also required to meet customers' essential needs during long on-aircraft delays by making every reasonable effort to provide food, water, restroom facilities and access to medical treatment for passengers aboard an aircraft that is on the ground for an extended period of time without access to the terminal, as consistent with passenger and employee safety and security concerns. Each carrier will prepare contingency plans to address such circumstances and will work with other carriers and the airport to share facilities and make gates available in an emergency. Airlines will handle "bumped" passengers with fairness and consistency. Each airline will establish and disclose to the customer policies and procedures, including any applicable requirements (such as check-in deadlines), for managing the inability to board all passengers with confirmed reservations.

Airlines will also disclose travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration. Each airline will disclose to the customer any change of aircraft on a single flight with the same flight number; cancellation policies involving failures to use each flight segment coupon; rules, restrictions and an annual report on frequent flyer programme redemptions; and upon request, information regarding aircraft configuration, including seat size and pitch.

Another aspect of customer protection and service that ATA recommends is service from code-share partners. Each airline is required to ensure that domestic code-share partners make a commitment to provide comparable consumer plans and policies. Airlines are also expected to be more responsive to customer complaints in that each airline will assign a Customer Service Representative responsible for handling passenger complaints and ensuring that all written complaints are responded to within 60 days.

Airlines are expected to develop and implement a Customer Service Plan for meeting its obligations under the Airline Customer Service Commitment. Customer Service Plans will be completed and published within 90 days and will be fully implemented within 6 months. Airline implementation will include training for airline reservation, customer service and sales personnel to enhance awareness of the responsibilities involved in
implementation of the Customer Service Commitment and Plans.

The airlines will publish and make available their Customer Service Plans on airline Internet web sites; at airports and ticket offices (upon request); and to travel and reservation agents.

Upon completion and publication of the Customer Service Plans, the airlines will notify and provide copies to Congress and the Department of Transportation. The airlines expect and will cooperate fully in any request from Congress for periodic review of compliance with the Customer Service Commitment.

At the 56th IATA Annual General Meeting, held June 4-6, 2000, IATA airlines endorsed a global customer service framework. To this end, IATA adopted a Resolution on Customer Service which endorsed the IATA Customer Service framework as a guide for airlines in developing their own individual or alliance customer service commitments and plans. IATA endorsed the view that the air transport industry is one of the most complex and interdependent industries in the world. The member airlines of IATA were committed to providing a high level of service to their customers. As essential elements of its global customer service framework, IATA airlines recognize the following:

a) Airlines will use their best efforts to offer, through their telephone reservations service, the lowest fare available for the dates and classes of travel requested, for which the customer is eligible. Lower fares may be available through other channels.

b) Airlines may offer passengers an “option period” during which the passengers may determine if they wish to purchase a promotional fare or non-refundable ticket. The duration of this option period will be determined by each individual airline and may vary depending on the special fare to be applied and whether the airline has an agreement with any other carriers involved in the journey. Passengers can use this period to confirm that the fare and conditions attached to it meet their needs and are acceptable to them. A passenger has the right to cancel this reservation within the option period without any penalty. The passenger wishing to confirm this reservation

23 REGULATORY AFFAIRS REVIEW, Apr.-June 2000, at 253.
must do so within the option period or the reservation may be cancelled by the airline.

c) Airlines will endeavour to process passenger refunds as quickly as possible. In publishing their individual customer service commitments and plans, airlines should establish specific performance targets for processing refunds.

d) Airlines will adopt clear policies regarding denied boarding compensation. These policies will always reflect any legislation or other government imposed requirement on the carrier. This information will be made available to the passenger upon request.

Airlines will also have available for their passengers the following information relevant to their journey:

1. any change of aircraft on a single flight with the same flight number; i.e., change of gauge;
2. their refund and cancellation policies;
3. regulations regarding its frequent flyer programme, if any;
4. the aircraft type scheduled to be operated on a route, the cabin configuration and services normally offered on board, i.e. audio/video systems;
5. their alliance or code share partners, and any effect this might have on the passenger's journey;
6. language that makes it clear that the passenger's contract is with the marketing airline (the airline whose designator appears on the flight coupon next to the flight number) and that it is that airline's standards and conditions that apply;
7. whether the ticket purchased can be endorsed for travel on another airline; and
8. other relevant conditions of carriage.

Airlines will have available for the passenger, information concerning their liability for death and injury in the event of an accident.

Airlines will endeavour to keep the passenger informed of any significant delay, cancellation or diversion as soon as this information is known to the carrier. Airlines will do all possible to find accommodation and provide appropriate meals in the event of a prolonged delay.

If the passengers are already on board an aircraft, which will remain on the ground for an extended period and do not have
access to the terminal, the airline will make every reasonable ef-
fort to meet essential needs, such as providing food, water, rest-
room facilities and medical treatment.

Airlines will make their best efforts to accommodate passen-
ger seating requests, except in the case of flights without pre-
assigned seating.

In the interest of the safety and comfort of all passengers and
crews, airlines will implement policies, including involvement of
law enforcement agencies, aimed at preventing disruptive pas-
senger behaviour and at protecting the safety of the crew and
passengers.

Airlines will endeavour to deliver all checked baggage as
quickly as possible following an aircraft’s arrival at an airport. In
their individual customer service commitments and plans, air-
lines should establish performance targets for baggage delivery
times. In the case of mishandled checked bags, the airline will
make every reasonable effort to return them on the next availa-
ble flight. The airline will endeavour to keep passengers in-
formed of the status of their mishandled baggage.

Airlines will have available for passengers information con-
cerning the airlines’ liability limits for baggage lost, damaged or
delayed.

Airlines will respond quickly and responsibly to any passenger
complaint. Each airline will establish a convenient point of pas-
senger contact for all complaints and the address, phone num-
ber and departmental name of this customer service function
will be provided in timetables, on web sites and any other appro-
priate public information source. This information will also be
available at all travel agents accredited by the airlines. Airlines
will develop a clear policy on customer service which specifies
that all written complaints will receive a reply and the maximum
length of time for processing this correspondence.

Airlines will disclose their policies and procedures for han-
dling special needs passengers (such as unaccompanied minors)
and for accommodating the disabled in an appropriate manner.
Airlines will endeavour to accommodate all special needs pas-
sengers, both in the airport and on board the aircraft, if in-
formed in advance of the passenger’s special need or condition
and if this need or condition can be accommodated in a safe
manner on board the aircraft and at the airports concerned.
Airlines will take reasonable measures to accommodate the re-
quirements of special needs passengers during an extended delay.
The European Commission, in early 2000, issued a comprehensive consultative document on consumer protection in air transport. This statement introduced a common air transport policy and raised a number of issues such as the contractual rights of passengers, tariffs, and comfort and health.

This paper mapped out an inventory of passenger rights containing the following:

- **Information about Flights and Reservation of Tickets.** Any passenger has the right to neutral and accurate information.

- **Check-in and Boarding.** European Community rules require that passengers must receive fair treatment and proper compensation when they are denied boarding.

- **Liability in Case of an Accident.** Passengers travelling with an European Community airline will receive full compensation in the case of an accident.

- **Data Protection.** Passengers reserving their tickets in the EC have the right to know what personal details about them are being stored on the computerized reservation systems.

- **Air Travel as Part of a Package Holiday.** Air passengers travelling as part of a package tour or holiday bought in the EC must receive clear and precise information from the organizer about their trip. They also enjoy clear rights concerning the performance of the contract.

- **Enforcing Passenger Rights.** The passenger rights set out above are laid down either directly in EC law or in national laws which have been made to implement EC Directives. Therefore, Airlines, travel agents, tour operators and all other business involved in the provision of air transport services must observe them. In turn, passengers should stand firm in demanding that their rights are respected and complain when they are not.

Harold Caplan analyzed this paper and concludes that “although several parts of the Green paper cite U.S. initiatives, it would be a mistake to regard this as a pale reflection of what the U.S. DoT already does better.” Caplan suggests an air passenger’s charter and defines a charter as “a binding declaration of

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basic principles, [which] is one of the modern methods of re-dressing the unequal bargaining power between users and prov-
iders of public services." He observed that for a modern day charter of passenger rights, regulators should ensure that, at each airport licensed for public air transport, adequate arrange-
ments are in force regarding the following:

a) If checked baggage fails to arrive on the same flight as the passenger and there is no reasonable prospect that the baggage will be delivered to the passenger within one hour of passenger arrival, the aircraft operator shall thereupon issue to the passenger an appropriate claim form including a summary of the passenger’s rights in respect of delayed, lost, or damaged baggage.

b) A non-refundable advance in local currency not exceeding 100 Euro in value which may be taken into account when the passenger’s claim is finally concluded.

c) Aircraft and airport operators shall develop and practice at regular intervals comprehensive contingency plans for dealing with major accidents.

d) Aircraft operators shall use their best endeavors to avoid adverse weather conditions, including forecasting turbulence.

e) Aircraft and airport operators who come into contact with passengers shall be trained to recognize the most common medical emergencies and take appropriate action.

f) On route where it may be impossible to land at a suitable airport within 30 minutes of discovering acute medical emergency in flight, at least two members of the aircraft crew shall be trained and equipped to provide appropriate first aid until professional assistance can be obtained.

g) To ensure the health, comfort, and convenience of passengers, the possibility of an orderly exit within 90 seconds in actual or simulated emergency condition must be met.

h) All publicly available fares and charges by aircraft and airport operators and by States shall be notified to the public in accordance with the passenger information protocol (PIP).

\[26\] Id. at 207.
i) Fares and charges by aircraft and airport operators and by States which are not determined by competition shall not exceed the levels prescribed by the regulator.

j) States shall devise and promote convenient and cost-effective modes of dispute resolution to supplement existing modes of resolution for the exclusive benefit of air passengers.

As a general requirement, Caplan suggests that the rights of passengers in accordance with this charter should be in addition to and not in substitution for all other rights and remedies and that all rights as stipulated in a charter may be directly enforced by passengers.

D. CORPORATE COMPETITIVENESS

Human aspects of airline management traverse the hinges of two key issues for management: economic theory and social justice. Economic theory essentially reflects competitiveness of an airline and how to keep ahead of others in the business, whereas social justice requires that the passenger is cared for in a manner befitting the travel and entertainment business. As the foregoing discussion revealed, branding and identity are important factors.

Corporate prosperity is created, not inherited. Although corporate resources are a company's assets, the prosperity of a company does not necessarily emerge solely from the natural endowments of the company concerned, nor from its labor resources, but rather from a certain localized process which engulfs economic structures, values, culture, and institutions. The essential catalyst to trade is corporate competitiveness. Competitiveness is one of the most critical drivers of successful industry. Some see competitiveness as a macroeconomic phenomenon, driven by variables such as fluctuations in markets, change of demand, and airline passenger flow trends. Others may argue that competitiveness is a function of cheap and abundant labor. This is not an absolute argument in the face of some airlines that are phenomenal successes in places of business where labor is expensive and there are shortages of labor.

More recently, the argument has gained favor that competitiveness is driven by corporate policy. A final popular explanation for competitiveness is differences in management practices, including management-labor relations. The problem, however, is that different industries may require different approaches to
management practices. Those governing small, private, and loosely organized Italian family companies in footwear, textiles, and jewelry, for example, would produce a management disaster if applied to German chemical or auto companies, Swiss pharmaceutical makers, or American aircraft producers. Nor is it possible to generalize about management-labor relations.

Clearly, none of these explanations is fully satisfactory; none is sufficient by itself to rationalize the competitive position of industries. Each contains some truth; but a broader, more complex set of forces seems to be at work.

The lack of a clear explanation signals an even more fundamental question. What is a "competitive" airline in the first place? Is a "competitive" airline nation one where every segment or department is competitive? No airline meets this test.

The only meaningful concept of competitiveness at the airline level is productivity. The principal goal of an airline to produce a high and rising standard of service to its clients. The ability to do so depends on the productivity with which an airline's labor and capital are employed. Productivity is the value of the output produced by a unit of labor or capital. Productivity depends on both the quality and features of products (which determine the prices that they can command) and the efficiency with which they are produced. Productivity is the prime determinant of an entity's long-run standard of business practice. The productivity of human resources determines employee wages; the productivity with which capital is employed determines the return it earns for its holders.

When economic theory relating to competitiveness is blended with social justice, which is the human element of commercial aviation practice, the picture becomes somewhat more subdued from a competition perspective but brings out the importance of social consciousness in commercial practice. Airlines could play a role in being moral watchdogs of the global community in such contemporary threats which manifest themselves as abduction of children by air, abusive conduct of unruly passengers and the smuggling of humans across borders. To achieve this objective, it is necessary for contemporary aviation management practice, as discussed in the outset of this paper, to merge with a clear statement on the rights of the passenger.
III. THE ROLE OF STATES IN SUSTAINING THEIR AIR CARRIERS SERVICES

The Commonwealth Secretariat, in 1985 published a seminal report on the vulnerability of small States faced with globalization. The Secretariat has also carried out sustained research on special characteristics of these small States, which peaked in 1998 with the establishment of the Commonwealth Secretariat/World Bank Joint Task Force. The Joint Task Force assessed the case for countering the vulnerability of small States in the face of economic challenges in globalization. The Task Force considered and addressed policies and opportunities of these States in the future — including such issues as volatility and mitigating vulnerability and disasters — such as catastrophe insurance and commodity risk management, including transition to an evolving global trade structure, particularly in the face of new opportunities from globalization. The essential conclusion emerging from this Task Force’s work was that, in the context of small States, particularly on the issue of sustaining their air carriers, States’ responsibility in supporting their air carriers, remained critical.

Economic aspects of sustainability of air carriers and assurance of continuity of services are complex, in that they are inextricably linked to issues of ownership and control of carriers, market access, commercial alliances between airlines and competition law. These issues have been addressed elsewhere\(^2\) and do not therefore warrant detailed discussion in this article. Besides these issues, the question of whether air carriers should be sustained with State aid remains a critical one. On a very preliminary basis, and \textit{in limine} the answer is in the affirmative, if regulatory practice were to prevail as a primary consideration. The Chicago Convention\(^2\), in Article 6 effectively precludes absolute liberalization by providing that 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. This provision ties in State involvement with commercial competition, implicitly, if not ex-

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28 \emph{Supra.}, note 12.
plicitly obligating States to take responsibility on a bilateral or multilateral basis, for the welfare of their national carriages.29

Article 7 of the Chicago Convention places a certain obligation on States to be concerned with the economic welfare of air transport industry within their territories. For this reason, many States fail to completely deregulate their markets, on the basis that deregulation does not contribute positively toward national welfare. In instances where national welfare is facilitated by liberalization, States may find that the distributional effects of such liberalization might be undesirable for the economy of that State. On the other hand, of course, some States may recognize that deregulation may provide scope for more trade in airline services resulting in improved gains in trade, and therefore encourage open skies agreements with other States. In this context, it is unfortunate that there are several instances where States couch their liberal preferences with overtures toward preserving their domestic markets intact and protected from "invasion" from foreign carriers but provide an opportunity for carriers concerned to "free ride" foreign markets. This approach inevitably results in the stagnating of potentially liberal bilateral air services agreements.

A. National Competitiveness

If States were obligated, as it were, implicitly through the Chicago Convention, to ensure that their national carriers obtain for themselves the best possible market access and opportunities to remain competitive with other carriers, such States would be compelled to be competitive with other States in ensuring the success and continued sustainability of their air carriers. National competitiveness has become one of the central preoccupations of government and industry in every nation. Yet for all the discussion, debate, and writing on the topic, there is still no persuasive theory to explain national competitiveness. What is more, there is not even an accepted definition of the term "competitiveness" as applied to a nation. While the notion of a competitive company is clear, the notion of a competitive nation is not.

29 Id. Article 17, which provides that aircraft have the nationality of the State in which they are registered. This provision explicitly links an aircraft to a State, and implicitly devolving responsibility upon States for activities of aircraft in territories of other States.
Some see national competitiveness as a macroeconomic phenomenon, driven by variables such as exchange rates, interest rates, and government deficits. But Japan, Italy, and South Korea have all enjoyed rapidly rising living standards despite budget deficits; Germany and Switzerland despite appreciating currencies; and Italy and Korea, despite high interest rates.

Others argue that competitiveness is a function of cheap and abundant labor. But Germany, Switzerland, and Sweden have all prospered even with high wages and labor shortages. Another view connects competitiveness with bountiful natural resources. This view seems fundamentally flawed since one cannot explain the success of Germany, Japan, Switzerland, Italy, and South Korea which are countries with limited natural resources.

More recently, the argument has gained favor that competitiveness is driven by government policy: targeting, protection, import promotion, and subsidies have propelled Japanese and South Korean auto, steel, shipbuilding, and semiconductor industries into global preeminence. But a closer look reveals a spotty record. In Italy, government intervention has been ineffective — but Italy has experienced a boom in world export share second only to Japan. In Germany, direct government intervention in exporting industries is rare. And even in Japan and South Korea, government’s role in such important industries as facsimile machines, copiers, robotics, and advanced materials has been modest; some of the most frequently cited examples, such as sewing machines, steel, and shipbuilding are now quite dated.

A final popular explanation for national competitiveness is differences in management practices, including management-labor relations. Despite the commonly held view that powerful unions undermine competitive advantage, unions are strong in Germany and Sweden — and both countries boast internationally preeminent companies.

Clearly, none of these explanations is fully satisfactory; none is sufficient by itself to rationalize the competitive position of industries within a national border. Each contains some truth; but a broader, more complex set of forces seems to be at work.

The lack of a clear explanation signals an even more fundamental question. What is a “competitive” nation in the first place? Is a “competitive” nation one where every company or industry is competitive? No nation meets this test. Even Japan
has large sectors of its economy that fall far behind the world’s best competitors.

Is a “competitive” nation one whose exchange rate makes its goods price competitive in international markets? Both Germany and Japan have enjoyed remarkable gains in their standards of living—and experienced sustained periods of strong currency and rising prices. Is a “competitive” nation one with a large positive balance of trade? Switzerland has roughly balanced trade; Italy has a chronic trade deficit—both nations enjoy strongly rising national income. Is a “competitive” nation one with low labor costs? India and Mexico both have low wages and low labor costs—but neither seems an attractive industrial model.

International trade and foreign investment can both improve a nation’s productivity as well as threaten it. They support rising national productivity by allowing a nation to specialize in those industries and segments of industries where its companies are more productive and to import where its companies are less productive. No nation can be competitive in everything. The ideal is to deploy the nation’s limited pool of human and other resources into the most productive uses. Even those nations with the highest standards of living have many industries in which local companies are uncompetitive.

Yet international trade and foreign investment also can threaten productivity growth. They expose a nation’s industries to the test of international standards of productivity. An industry will lose out if its productivity is not sufficiently higher than foreign rivals’ to offset any advantages in local wage rates. If a nation loses the ability to compete in a range of high-productivity/high-wage industries, its standard of living is threatened.

Defining national competitiveness as achieving a trade surplus or balanced trade per se is inappropriate. The expansion of exports because of low wages and a weak currency, at the same time that the nation imports sophisticated goods that its companies cannot produce competitively, may bring trade into balance or surplus but lowers the nation’s standard of living. Competitiveness also does not mean jobs. It is the type of jobs, not just the ability to employ citizens at low wages, that is decisive for economic prosperity.

Seeking to explain “competitiveness” at the national level, then, is to answer the wrong question. What we must understand instead is the determinants of productivity and the rate of productivity growth. To find answers, we must focus not on the
economy as a whole but on \textit{specific industries and industry segments}. We must understand how and why commercially viable skills and technology are created, which can only be fully understood at the level of particular industries. It is the outcome of the thousands of struggles for competitive advantage against foreign rivals in particular segments and industries, in which products and processes are created and improved, that underpins the process of upgrading national productivity.

When one looks closely at any national economy, there are striking differences among a nation's industries in competitive success. International advantage is often concentrated in particular industry segments. German exports of cars are heavily skewed toward high performance cars, while Korean exports are all compacts and subcompacts. In many industries and segments of industries, the competitors with true international competitive advantage are \textit{based in only a few nations}.

It follows logically from this discussion that one should look for the decisive characteristic of a nation that allows its companies to create and sustain competitive advantage in particular fields—the search is for the competitive advantage of nations. We are particularly concerned with the determinants of international success in technology and skill-intensive segments and industries, which underpin high and rising productivity.

In the continuing debate over the financing of asset based entities, such as airports and air navigation service providers, no topic engenders more argument or creates less understanding than the role of the government. Many see government as an essential helper or supporter of industry, employing a host of policies to contribute directly to the competitive performance of strategic or target industries. Others accept the "free market" view that the operation of the economy should be left to the workings of the invisible hand.

Both views are incorrect. Either, followed to its logical outcome, would lead to the permanent erosion of a country's competitive capabilities. On one hand, advocates of government help for industry frequently propose policies that would actually hurt companies in the long run and only create the demand for more helping. On the other hand, advocates of a diminished government presence ignore the legitimate role that government plays in shaping the context and institutional structure surrounding companies and in creating an environment that stimulates companies to gain competitive advantage.
Government’s proper role is as a catalyst and challenger; it is to encourage—or even push—companies to raise their aspirations and move to higher levels of competitive performance, even though this process may be inherently unpleasant and difficult. Government cannot create competitive industries; only companies can do that. Government plays a role that is inherently partial, and succeeds only when working in tandem with favorable underlying conditions in the diamond. Still, government’s role of transmitting and amplifying the forces of the diamond is a powerful one. Government policies that succeed are those that create an environment in which companies can gain competitive advantage rather than those that involve government directly in the process, except in nations early in the development process. It is an indirect, rather than a direct, role.

A progressive democracy will not only foster internal competition in trade but would also encourage international competition among nations, in order that the citizens of that country would have access to equality and fair distribution of goods and private enterprise within the State would be given a free hand at competition, without interference by the State.

B. Extraterritoriality

Extraterritoriality is one concept which could affect more than one jurisdiction in the application of domestic trade policy. The United States, the European Community, and Germany are proponents of extraterritoriality where competition rules are applied to commercial conduct of foreign enterprises which conduct business in places other than those whose domestic markets are affected by such trade. In the seminal Alcoa case of 1945, the United States courts established the “effects” doctrine whereby commercial conduct carried out overseas but that is intended or calculated to affect the United States would be subject to United States antitrust laws. This doctrine has been followed by the courts in the United States with an unfailing consistency, culminating in recent guidelines on international commercial operations adopted by the United States Justice Department. These guidelines contain principles that give the United States a wide scope of extraterritorial jurisdiction over anti-competitive practices which foreign enterprises follow in countries outside the United States, provided such activities ad-

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30 United States v. Aluminium Co. of Am., 148 F.2d 416 (2d Cir. 1945).
31 See 69 Antitrust & Trade Regulation Report 488-90 (1994).
versely affect the United States’ market in that particular commercial activity. One of the most compelling features of this legislation is its emphasis on “market access” relating to United States’ businesses in foreign countries. A number of hypothetical examples incorporated in these guidelines reflect that the Department of Justice would challenge the conduct of foreign enterprises in foreign countries if such enterprises would hinder United States’ enterprises from using opportunities of exportation of goods to a foreign country or investing in a foreign country.

In the famous Woodpulp case, the Court of Justice of the European Communities decided that the EC competition rules apply to agreements of foreign enterprises which are entered into outside the European Community as long as they are implemented within the common market.32

One cannot deny that in this era of global economy, some degree of extraterritoriality in the enforcement of national competition rules is inevitable. A State would therefore be seen as being justified in applying its competition rules to the conduct of foreign enterprises abroad when conduct which occurs in a foreign country affects its economy adversely, particularly where the State in which such conduct occurs has no competition rules or has no intention to prohibit such conduct. This phenomenon is easily reflected by transnational business entities who may engage in restrictive business practices in a “twilight zone” where no State can fully exercise jurisdiction and yet harmful effects of such restrictive business practices may be felt in one or more States. To say that there should be no extraterritoriality of any kind in the application of competition rules would mean that such transnational entities could engage in anti-competitive conduct with impunity.

There is of course the consideration that an extraterritorial application of competition rules is a costly business both for the enforcement agency and for the foreign defendants and is often a second-best solution to a problem which essentially inquires as to how to cope with transnational anti-competitive conduct. An extraterritorial application of competition rules is often not as effective as it would be if applied domestically. A State which attempts to apply its anti-competitive laws extraterritorially to a defendant enterprise located abroad could always face difficulties of enforcement and considerations of forum and jurisdic-

tion. There could also be disabling legislation in a foreign State which may effectively preclude extraterritoriality.

The *Watchmakers of Switzerland* case of 1955 exemplifies the essential commercial law principle of the United States, that applicability of anti trust laws on foreign enterprises may often entail conflict with legislation of other States. The court in this case held that a watch repair enterprise, conducted in the United States by two Swiss corporations, could be subjected to the domestic laws of the United States. The court further held that in order for a foreign corporation to be present within the jurisdiction of a court for purpose of service of process, there must be proof of continuous local activities and a showing that under all circumstances of the case the forum is not unfairly inconvenient. Even though the two Swiss entities had no property in the United States and did not carry out their activities directly (the business activities of the Swiss corporations were carried out by an American corporation in the United States), since the Swiss corporations determined the prices and terms of the business enterprise, the court further held that the Swiss corporations could be subjected to anti trust statutes and tariff laws of the United States.34

In the watershed case of *Laker Airways Ltd. v. SABENA Belgian World Airlines* it was held that territoriality-based jurisdiction allows states in the United States to regulate conduct or status of individuals or property physically situated within a territory even if effects of conduct are felt outside that territory, and conversely, conduct outside a territory, which is calculated to have a substantial effect on that territory, may also be similarly regulated. It was also held that a state has jurisdiction to prescribe law governing conduct of its nationals whether such conduct takes place inside or outside the territory of that state. Accordingly, the plaintiff—Laker Airways Limited, a British corporation seeking remedy in the United States—whose activities in question took place in countries other than the United States, was deemed to be subject to the United States' antitrust legislation on the basis that such activities gravely impaired United States' interests.36 In deciding upon the contentious question

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34 Id. at 46.
36 Id. at 910.
whether the law of the United Kingdom should apply to the plaintiff, the court compared the diametrically opposed antitrust legislation of the United Kingdom and the United States and held:

We find no indication in either the statutory scheme or prior judicial precedent that jurisdiction (by the United States) should not be exercised. Legitimate United States interests in protecting consumers, providing for vindicating creditors’ rights, and regulating economic consequences of those doing substantial business in our country are all advanced under the congressionally prescribed scheme. These are more than sufficient jurisdictional contacts under *United States v. Aluminium Co. of America* and subsequent case law to support the exercise of prescriptive jurisdiction in this case.  

In the United States, the scope of antitrust legislation and protection thereby extends to those persons who are either directly or indirectly affected adversely by antitrust violations by third parties. The adverse effect on the plaintiff must be one that the laws were written to guard against. An example of this principle can be seen in the uranium antitrust litigation of 1979 where a business entity which indulged in a “tying arrangement” to sell its product was considered a violation of antitrust legislation.  

The tie-in resulted in a drop in demand for the product concerned, giving way to a drop in prices and adversely affecting other competitors of the product in the market.

IV. CONCLUSION

The two critical factors that will carry the sustainability of air carriers and assurance of air services in the years to come will be regulatory control and economic strategy. There is no doubt that the regulatory environment will be a certain cause for uncertainty. In early 2003, the ICAO will be convening the Fifth World Air Transport Conference (ATConf/5) which will consider this issue in its entirety. How ICAO will address the issue

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37 *Laker Airways*, 731 F.2d at 945-46.

38 Westinghouse Elec. Corp. v. Rio Algom Ltd., 473 F. Supp. 393 (N.D. Ill. 1979). A tying arrangement is the sale of one item (the tying product) only on condition that the buyer would take the second item (the tied product) from the same source. Such arrangements are *per se* unreasonable and violative of antitrust laws if the tie-in involves two distinct products, and the party has sufficient economic power in the tying market to impose significant restraints in the tied product market.
of globalization, multilateralism and the creation of a Trans Atlantic Common Aviation Area are yet to be seen.

From an economic perspective, it is inevitable that competition will be between airline alliances rather than individual carriers. Markets will be unstable, and, in the case of individual airlines, only those who go “back to basics” to offer the consumer a service as “value for money” will survive. Ethical and moral consideration of economics, in terms of strategic airline management that provides for quality customer service, will play a major role in airline sustenance. That will be the bottom line for the years to come.

From a trading perspective, both States and their national carriers share equal responsibility to ensure continuity of air transport services. Principles of State responsibility pertaining to the ensuring of continuity of services are embodied in Article 6 of the Chicago Convention and cannot be denied by any Contracting State to that Convention. This obligation 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.

The uniqueness of the operation of air transport services as a trading practice lies in the symbiosis required for its sustenance between State and national carrier. This peculiar relationship requires that a certain responsibility devolves upon States to ensure the prosperity of its air transport industry and to prevent the industry from collapsing. Although air transport may be heavily privatized in some instances, particularly in the developed world, it does not take away the overall regulatory supervisory role of the State and its obligation to support its national carrier in competing aggressively with carriers of other States. This responsibility can only be fulfilled through national competitiveness of a State. To that end, the examples cited in this article provide ample basis for States to identify their role in sustaining their air carriers and assuring the consumer of continued air transport services.