ATConf/5
2003

Aviation in Transition:

Challenges & Opportunities of Liberalization

Session 6: General Agreement on Trade in Services

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Seminar prior to the 5th Worldwide Air Transport Conference,
'Aviation in Transition: Challenges and Liberalisation', 22 & 23 Mar 02
Session 6: General Agreement on Trade in Services
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I understand from some comments yesterday afternoon that I am espousing a heresy in what I have to say. My particular heresy is to argue that the General Agreement on Trade in Services (the GATS) is an effective future option for liberalising trade in international air services. The GATS offers the opportunity for individual countries to adopt a phased approach to international aviation reform, which respects ICAO member states' different levels of readiness for a liberalised approach.

In contrast (and I suspect this may be an additional heresy), the other options available for liberalising international air services, bilateral 'open skies' agreements, and multilateral or regional agreements, have several distinct disadvantages.

Australia's view is that this week's Conference must be prepared to embrace GATS as an option if it is to genuinely achieve its aim of considering 'how to' and not 'whether to' liberalise international air transport services. This not just because all states are entitled to be fully informed about the various options available to them. It is also because the current review of the GATS Annex on Air Transport Services will proceed, whether or not the conclusions and recommendations of the Conference support it.

As the specialist agency of the United Nations dealing with air transport, ICAO has a duty to take a leadership role in considering how the GATS option can be applied further to international air services. In fact, this is something ICAO is committed to do in accordance with a Resolution adopted by the last Session of the Assembly in 2001.

GATS is an effective option

So to my first proposition: the GATS is an effective option.

The GATS has several distinct advantages. Under the GATS, members are able to control the pace and degree of liberalisation in trade in services. Through a process

of offer and acceptance, members can choose to negotiate commitments to open specific service sectors to foreign competition, and to afford foreign suppliers the same treatment as domestic suppliers. Members can also make commitments about the operation of their domestic regulation of services. (In passing, I note that this may also provide an opportunity to start addressing the key issue of competition regulation.)

GATS members are therefore able to control the progressive liberalisation of access to and from their own markets, in a way that permits important national and regional concerns to be sensibly and responsibly considered.

The architecture of the Agreement specifically takes into account the needs of developing countries. According to GATS Article XIX paragraph 2:

> The process of liberalisation shall take place with due respect for … the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing Member countries for opening fewer sectors, liberalising fewer types of transactions, [and] progressively extending market access in line with their development situation.

The architecture of the Agreement also allows for trade-offs between all goods, services, forms of trading and almost all countries. In contrast, bilateral international aviation agreements are sector-specific and country-specific. Nearly all entitlements are negotiated between pairs of countries and the benefits accrued are restricted to those countries.

It is important to add in this context that any decision to extend the GATS Annex on Air Transport Services would not oblige Members to liberalise, nor would it mean the deregulation of the air transport sector. Each member would remain free to control the pace of liberalisation. If, during the course of the review of the Annex, members agree to include an expanded set of additional air transport services, this extended coverage will simply give members the option of making commitments on those services. Subsequent reviews, as mandated by the Annex, would provide members an opportunity to consider any further expansions.

What other options do we have?

To better appreciate the advantages of the GATS, it is useful to contrast the Agreement with the two liberalising options currently available to the international civil aviation community: bilateral agreements; and multilateral or plurilateral arrangements. Both of these mechanisms have distinct disadvantages in delivering progressive liberalisation.

i)Bilateral air services agreements

The first available option is bilateral agreements. In recent years, a number of governments have successfully negotiated bilateral 'open skies' agreements, which have removed restrictions on capacity and frequency, points of access, codesharing and other matters. This has allowed airlines to respond more quickly to market opportunities and pressures, and enabled governments to manage the pace and direction of market liberalisation.

However, even 'open skies' agreements, in whatever form the parties have settled on, continue to impose market access and inward investment restrictions, limiting the economic benefits these agreements might otherwise deliver.

In particular, ownership and control restrictions create a clear advantage for airlines designated by countries with strong domestic capital markets. Many airlines, especially but not exclusively those from economies with less developed capital markets, are forced by ownership and control restrictions to rely on high levels of debt or on government subsidy to fund their operations and equipment. Local equity investors, other than the government, can be difficult, if not impossible, to find, and high debt exposure decreases any attractiveness to foreign investors.

The Air Transport Regulation Panel's Working Group on Air Carrier Ownership and Control has pointed out that ownership and control provisions in bilateral agreements could still be liberalised. Such an outcome relies, however, on individual states choosing to waive their rights to exercise foreign ownership and control restrictions

both on their own airlines, and in accepting the designation of foreign airlines. The Working Group also noted that the risk of others not waiving their rights over ownership and control could be sufficient to prevent States liberalising their own rules and thus stop their airlines from seeking foreign investment.

Although some States might be more willing to relax ownership and control provisions if there was were a critical mass of bilateral partners who had also taken this decision, this is unlikely to happen in the absence of co-ordinated action. Clearly, liberalising ownership and control provisions in bilateral agreements is difficult to achieve.

An attractive alternative method for liberalising ownership and control would be to extend the GATS Annex on Air Transport Services. Ownership and control could then be progressively liberalised through the process of offer and acceptance, as set out in the architecture of the Agreement.

ii)Regional and plurilateral agreements

The second option for liberalising trade in international air services is through regional or plurilateral agreements. Since the last Worldwide Air Transport Conference in 1994, several of these types of arrangements have been finalised. As outlined by Mr Kiser yesterday, in Australia's own region, plurilateral reform is being openly canvassed at APEC, and to date six member economies have signed on to a 'plurilateral' open skies text.

While it is clearly advantageous to pursue regional and plurilateral arrangements if they are more liberal than the ones they replace, the problem is that, in the longer run, they can prove difficult to amend.

Once membership has reached a 'critical mass', consensus on amending the agreement can become virtually impossible to obtain, thereby permanently locking in any barriers to market access or restrictions on ownership and control. Non-founding members, especially those with limited negotiating advantages, are unlikely to be able to influence the construction of the core arrangements, including the terms on which they can become members.

The difficulty of amending a multilateral treaty is borne out by the experience of ICAO itself. In its more than 50 year history, the Chicago Convention has only been amended a small number of times and substantive amendments can be counted on the fingers of one hand.

GATS, the Air Transport Conference and ICAO.

I now want to return to a point that I made at the beginning of my presentation: what role should tomorrow's Conference, and in its wake ICAO itself, play in considering how the GATS might be applied to international air services?

In outlining the purpose of the Fifth Worldwide Air Transport Conference, ICAO has said that its aim will be to establish 'how to', not 'whether to', liberalise.

As Dr Kotaite himself often reminds us, ICAO actively supports the process of progressive liberalisation, and at the time of the last Assembly, no fewer than 159 of ICAO's then 187 member states were said to be involved in some form of liberalisation of international air services.

However, the current ICAO position on the extension of the GATS Annex on Air Transport Services is, at best, ambivalent in acknowledging that the GATS is a viable option.

Australia strongly believes any serious commitment to considering all reasonable and responsible approaches to liberalisation must include consider GATS as a viable and positive option.

This is for two reasons. First, because States are entitled to be fully informed about the various options for liberalisation, before they make a decision on how to liberalise in a way that maximises their national interest. And for all of the reasons I have outlined, the GATS has clear advantages over the other options for liberalisation.

Second, the review of the Annex on Air Transport Services will inevitably proceed. If ICAO fails to identify and advance GATS as an option, its ability and prerogative to influence whatever system the World Trade Organisation ultimately adopts will be seriously compromised.

Beyond simply accepting the GATS approach as an option, Australia also believes that ICAO needs to exercise active leadership on this particular issue, precisely because there is an apparent 'lack of global consensus' in this area.

In order for GATS to be implemented, several issues need to be resolved. The first of these is a definitional issue: what services are actually excluded from coverage under the Annex?

The Annex defines the exclusion as 'traffic rights, however granted', and 'services directly related to the exercise of traffic rights'. At present, WTO members themselves have different interpretations as to what constitutes services directly related to the exercise of traffic rights.

The debate falls essentially into two groups. The first argues that the Annex excludes most air transport services from the GATS, which was the objective at the time the Agreement was negotiated. The second group argues that the Annex only excludes the activities of service providers whose market access is guaranteed under the reciprocity-based system – that is, the airlines.

This is a dispute that affects the GATS at a fundamental level, and one that, in Australia's view, has lead to an unacceptable impasse. No interpretation of the Annex, whether it defines services directly related to the exercise of traffic rights narrowly or broadly, can be assumed as the default position. And this, in our view too, is a matter on which there is an urgent need for ICAO to develop guidance for the benefit of its members.

The other issue that also needs to be addressed is how the principle of 'most favoured nation' (MFN) can be applied to the aviation sector.

Some WTO members have suggested that an expanded GATS Annex on Air Transport Services would need to recognise the legitimacy of country-to-country trade in air services as it applies to the bilateral system. Others have suggested making use of conditional MFN, that is, allowing exemptions for certain air transport services.

Australia's view is that MFN is a core obligation of the multilateral trading system and deviations from it should be avoided. We recognise that the potential application of MFN to air transport services is a complex issue, and one that invites robust, constructive debate.

Conclusion

If the Air Transport Conference is to achieve its objective of shedding useful light on 'how to', and not 'whether to', liberalise, then we all must be prepared, not only to consider GATS as an option, but to address what types of services are excluded by its Annex on Air Transport Services, and how the architecture of the Agreement might be effectively applied to our sector.

The GATS allows states to control the pace and direction of liberalisation, while taking into account the needs of developing countries. It allows for trade-offs between all goods, services, forms of trading and almost all countries, instead of between pairs of countries. Importantly, any decision to extend the Annex would not oblige members to liberalise, nor would it mean the deregulation of the sector. States would still be able to control the pace and degree of liberalisation.

In contrast to this, the other options for liberalising trade in international air services, bilateral and multilateral or regional agreements, have distinct disadvantages, especially for developing countries.

In Australia's view, the absence of a global consensus on these crucial questions should not be invoked as a reason why the issues cannot or should not be addressed. On the contrary, ICAO, as the principal United Nations organisation dealing with air

transport, has a significant obligation to provide international leadership on this issue.

I look forward to the start of the Conference tomorrow, where I urge delegates, other participants and the Secretariat alike to reassert and reassume our commitment to consider the application of the GATS to the aviation sector seriously, actively, objectively and for the benefit of all.