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SOMMARIO

The long and lonely road from a regulated air transport industry to multilateral liberalisation: Bilateralism versus WTO principles

*by Pablo Mendes de Leon**

Air transport is the only sector which is not regulated under the general Agreement on Trade in Services (GATS), of the World Trade organisation (WTO). This short essay discusses the obstacles which the air transport industry faces when it will move from the current restrictive framework to a free regime, as shaped by the WTO/GATS.

Attention will be paid to liberalisation efforts undertaken so far, especially through Open Skies agreements, and the efforts undertaken by the European Community. I will examine the question, why it takes so long to take the next step, that is, taking the provision of air transport services under the GATS.

1. The current regime of the GATS with special reference to air transport

The GATS is based upon the so called

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L'italia aderisce al protocollo del 2003 alla convenzione internazionale iopc fund del 1992

*di Enrico-Maria Pujia**

Con la legge n. 130 del 12 luglio 2005, pubblicata sulla G.U. del 13 luglio 2005, è stata ratificata l'adesione dell'Italia al Protocollo del 2003 alla Convenzione internazionale IOPC Fund del 1992, relativo all'istituzione di un Fondo complementare internazionale per il risarcimento dei danni causati dall'inquinamento da idrocarburi, fatto a Londra il 16 maggio 2003.
Questa norma conferisce piena ed intera esecuzione al predetto Protocollo a decorrere dalla data della sua entrata in vigore, in conformità a quanto disposto dall'articolo 21, paragrafo 2, del Protocollo stesso.
Adempimenti più importanti di detto protocollo, come per la Convenzione originaria, sono quelli che coinvolgono direttamente i destinatari di idrocarburi e quindi il Ministero delle Attività Produttive che ai sensi degli articoli 12, e 13, del Protocollo, e sulla base degli articoli 9 e 10 del decreto del Presidente della Repubblica 27 maggio 1978, n. 504, è tenuto a trasmette le informazioni previste dall'ar-

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* Ministero delle Infrastrutture e dei Trasporti.

La Navigazione satellitare: Galileo e i Programmi applicativi della Agenzia Spaziale Italiana

*di Mario Caporale**

Sommario **- La Navigazione satellitare già permea con le sue notevoli potenzialità molteplici attività della vita umana. Le potenzialità applicative del Programma Galileo e del suo precursore, il Programma EGNOS, vengono sottolineate dai programmi applicativi della Agenzia Spaziale Italiana, volti a favorire l'innovazione tecnologica di applicazioni e servizi, preparando la via all'uso del sistema Galileo.**

Indici **- Navigazione Satellitare, GPS, Galileo, EGNOS, GLONASS, Integrità, Garanzia del servizio.**

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SEZIONE
ECONOMICA

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(The long and loney road ...)

Most Favoured National – henceforth: MFN - principle which is formulated as follows:

"With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other member state treatment no less favourable than it accords to like services and service suppliers of any other country."[1]

In other words, rights granted to one trading partner are automatically granted to all trading partners subscribing the GATS, unless they have made a reservation with respect to the application of this principle when signing the agreement. However, there are several methods to mitigate this so called "bonus effect" of the MFN principle, one of which is to make the grant of a concession on a MFN basis dependant from reciprocal concessions (as to which see further below).

Another basic principle of WTO/GATS is the provision of *national treatment*. As opposed to MFN, which places all foreign contracting states at the same level, national treatment grants the same advantages to foreign operators as to domestic operators. "National Treatment" provides an even higher level of market access. Here again, contracting states may make reservations when signing the agreement.

The EC Treaty introduces national treatment for all operators having an establishment in the European Community. I will briefly allude to national treatment in the context of air transport (*see below*).

Interestingly, the General Agreement on Tariffs and Trade (GATT of 1947) contains one provision which applies to the provision of air services. Under the heading of *Freedom of transit*, the agreement provides that the said principle (of freedom of transit) shall "not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage)." Hence, this provision may have implications for the operation of all-cargo aircraft. However, it has hardly or never been invoked. As far as I know, its effect has not been discussed in air transport circles.

The GATS Annex on air transport services excludes the provision of air transport services from the scope of the GATS regime. Such services pertain to the operation of traffic rights and services directly related with the operation of such rights, including but not limited to transit rights and ground handling.

Via a rather complication legal construction and under somewhat cryptically formulated definitions, the following so called ancillary services may be made subject to the provisions of the GATS. They are:

(a) *aircraft repair and maintenance services*,[2] accounting for approximately 10 per cent of an airline's operating costs, and usually carried out by airlines or subsidiaries set up for that purpose;

(b) *the selling and marketing of air transport services*,[3] which includes such activities as ticket sales and promotional activities but excludes activities performed through CRS;

(c) *computerised reservation system* (CRS) *services*, which are defined as "services provided by a computerised system that contains information about carriers' schedule, availability, fares and fare rules, for which reservations can be made or tickets may be issued."

In total, 40 countries made commitments in at least one of the three air transport services mentioned above (33 for maintenance, 26 for selling and distribution, and 23 for CRS). Twenty eight countries took MFN exemptions with respected to at least one of the three activities, including the EU on behalf of its Member states.[4] France even tried to remove CRS from the GATS Annex. The most successful steps – in terms of liberalisation through MFN – have been taken in the field of aircraft maintenance and repair, be it that most countries require that foreign service suppliers hire local personnel.

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[1] See Article II(1) of the GATS, which can be found at the web site of the WTO: http://www.wto.org/english/docs_e/legal_e/legal_e.htm - last visited on 12 September 2005.

[2] Meaning "... such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance."

[3] Defined as "... opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include pricing of air transport services or the applicable conditions."

[4] See UNCTAD Secretariat, *Air Transport Services*: *the positive agenda for developing countries*, TD/B/COM.1/EM.9/2.

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All in all, it is not easy to determine the degree of liberalisation of the above ancillary air services. The subject matter is as complicated as inconveniently arranged. In order to assess whether or not commitments have been made, one has to examine the concessions, laid down in schemes, and the reservations thereto.

In 2000, WTO launched a new round of trade negotiations, including GATS 2000. A number of papers made by the US Department of Transportation (DoT), the Association of European Airlines (AEA) and academics clarify positions.[5] The US Dot and AEA do not appear to favour a fundamental change of the current bilateral system through GATS, and the application of MFN to air transport services. Instead, AEA promotes liberalisation of a number of air services, namely, transit rights, wet leasing of aircraft, ground handling, airport and air navigation charges and air cargo services, through inclusion thereof in the GATS 2000 agenda. DoT takes a very reserved stance towards the inclusion of aviation issues in GATS. The US position holds that such inclusion raises myriad problems and questions. More importantly perhaps, (unconditional) MFN would allow non-US operators access to the valuable US aviation market.

Curiously enough, the Commission has not an outspoken standpoint on the above question. This is notable as the EC treaty promotes "an open market with free competition."[6] Consequently, it could be argued, that the Commission, as the guardian of the treaty principles, should lead the way towards the achievement of this objective.

However, the Commission has another agenda for liberalising air services. This agenda is briefly explained in section 3 of this short essay.

Five years later, we must conclude that there are no results. As to air transport, GATS has the same coverage as before 2000. The next section will examine how MFN relates to the bilateral system, and explain why GATS 2000 did not make progress in the area of air transport.

2. The incompatibility between MFN and reciprocity

Bilateral air services agreements regulate trade in air services between pairs of countries. There are some 3500 of such agreements world wide, creating markets – that is, essentially the operation of routes – between the countries party to the agreement. In exceptional cases, such as the European Community,[7] markets are established on a regional, multilateral basis.
Concessions with respect to market access are negotiated bilaterally, on a *quid pro quo* basis; in other words, pursuant to *reciprocity*. In short, bilateral agreements regulate trade whereas GATS deregulates trade.

This systems contrasts sharply with the world trade system set up by the WTO, especially so if the "unconditional"[8] MFN is applied in multilateral trade deals.
If applied to the air transport sector, application of the "unconditional" MFN would mean that traffic rights granted to one party to the – multilateral – agreement, as then covered by the GATS Annex on air transport services – would imply that all parties to the agreement would enjoy the same benefits or rights.

To put it more concretely, if the EC Member States would have to accord the privileges they exchanged under the Third Aviation package of 1992 to non-EC operators designated by or belonging to states subscribing to MFN in the air transport sector, such non-Community air carriers would be entitled to operated fifth, sixth and seventh Freedom rights between points in the Community – on the same footing as Community air carriers.

This is one of the fears of the US DoT with respect to the GATS approach: under certain post-1992 Open Skies agreements, the US granted seventh Freedom cargo rights to cargo carriers designated by its bilateral – "Open Skies" – partners. If the US – under an MFN principle – would be required to accord the seventh Freedom privilege to all its trading, or even "Open Skies" partners, a restrictive foreign state would not be stimulated to enhance market access.
It would enjoy a *free rider* treatment, while being able to retain its protectionist policy.

If "national treatment" were to be applied to air transport, foreign suppliers of air services – air carriers –

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[5] Office of International Aviation of the US Department of Transportation, *Aviation Issues in GATS 2000 and Other Fora*, July 1999; AEA, Position Paper on *GATS 2000 and air transport*, Christopher Findly, Air Transport, paper prepared for East Asia Conference, *Options for the WTO 2000 Negotiations*, PECC/TPF and World Bank, Manila, July 19-20, 1999; the Economic Commission of ICAO, Report of the 33rd Session of the Assembly, Montreal, 25 September – 5 October 2001 Doc 9798, A33-EC, and the Address made the OECD Secretary general Donald J. Johnston, *Options for Liberalisation in International Air Transportation*, IATA World Transport Summit "*Globalisation the Way Forward*", Madrid 27-29 May 2001, and the UK Department of Trade and Industry, *Liberalising trade in services*, A consultative document on the "GATS 2000" negotiations in the World Trade Organization and forthcoming bilateral negotiations (not dated).

[6] See Article 4(2).

[7] Through the application of Regulations 2407/92 on *licensing of Community air carriers*, Regulation 2408/92 on *market access* and 2409/92 on *fares and rates for air services* (see OJ L 240 (1992)).

[8] The term "unconditional" meaning that concessions are granted to all parties to the agreement without reservations or conditions attached to such grant.

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might claim the operation of domestic routes in another state – just like domestic carriers. Most national legislations forbid this.
The Chicago Convention leaves the door open to the exchange of cabotage rights, under a provision which by some commentators has been explained as an MFN clause.[9]

Hence, both from a legal and from an air policy perspective it is not easy if not a huge challenge to harmonise the current bilateral system prevailing in international civil aviation with multilateral trade principles of the GATS. MFN and even more so national treatment are a "no go" for the current state of affairs in the air transport sector.

A few lonely voices world wide, such as Singapore, and academics[10] promote this fundamentally innovative approach towards the operation of air services internationally.
In the meantime, a more cautious, step-by-step policy appears to be more realistic.

[9] The provision in question is Article 7(2) of the Chicago Convention which reads: "Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State." In the 1960s, the Scandinavian countries having established SAS feared that they might be forced to grant cabotage rights to all states party to the Chicago Convention u8nder the above provision (Article 7(2)), as they allowed SAS to fly domestic routes in any Scandinavian country. Cf. ICAO Doc. C-WP/4406 of 26 March, 26 May and 26 September 1966, and the Minutes of the 7th Plenary Meeting of the Sixteenth Session of the ICAO Assembly, Doc. 8775 A16-Min.P/1-9.
[10] See H.A. Wassenbergh, *International Air Transport as a Trade in Services*, Lloyd's of London Press, Speaker's Papers of the International Civil Aviation Conference # 4, New York City, 10-11 June 1982, at 92-106, and, by the same author: *The Application of International Trade Principles to Air Transport*, XII(2) Air Law 84-93 (1987).

3. Intermediate or alternative tracks on the way to liberalisation of air services

Absent a global trade regime freeing air transport from its *a priori* restrictions, the following steps may produce relaxation of such restrictions.

3.1 Moving away from bilateral restrictions on the operation of the international services

This is the US policy as conducted under *Open Skies* Agreements. In 2005, more than 60 of such agreements have been concluded world wide. They provide for:

– the operation of the first Six Freedoms of the Air, and, in some cases, the Seventh Freedom of the Air for all cargo operations (as to which see above);
– Multiple designation on each side;
– Free pricing, which is subject to *a posteriori* control by competition authorities (rather than *a priori* governmental approval);
– The offer of free capacity in the provision of the agreed international air services, again without clauses designed to limit capacity operated by the designated air carriers;
– The freedom to code share and franchise on the agreed international routes;
– Liberal provisions with respect to the provision of ground handling services.[11]

However, nationality conditions based on ownership and control continue to limit market access to the operators of the two parties to the bilateral agreement.
Limited market access between foreign points is granted by virtue of the mentioned Seventh Freedom rights. Eighth and ninth Freedom rights, also referred to as *cabotage* and briefly discussed above, are not part of the US inspired Open Skies Agreements. Other Open Skies agreements, for instance, the one concluded between Uruguay and Chilli in 2003, provide for the grant of eight Freedom rights (in this case by Chilli to carriers designated by Uruguay).

3.2 Application of competition regime to international air services

WTO knows a competition regime, prohibiting export subsidies.[12]
This objective can be assured by and a dispute resolution system,[13] under which so called 'panels' may be established of consultations and other means of diplomatic and political instruments, such as conciliation and mediation fail.

On 31 May 2005, the Washington Post reported that the U.S. had issued a statement calling for the WTO to appoint as panel of judges to examine the claim made by the U.S. government that European governments were illegally subsidising Airbus industry.[14] The EU states to have a counter claim against the US on the same grounds – that is, illegal export

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[11] See Annex 1 to this article.

[12] See Article 3 of the Uruguay Round Subsidies Agreement, which can be found at the web site of the WTO: http://www.wto.org/english/docs_e/legal_e/legal_e.htm - last visited on 12 September 2005.
[13] See Article 6 of Annex 2 to the WTO Agreement, see the web site of the WTO: http://www.wto.org/english/docs_e/legal_e/legal_e.htm - last visited on 12 September 2005.
[14] See, Paul Blustein, *Aircraft subsidy battle is Going Back to WTO*, Washington Post of 31 May 2005.

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subsidies regarding Boeing.[15] Obviously, the dispute between the two is not based upon the GATS or infringements thereof, but on the EC-US *Agreement on Trade in Large Aircraft* of 1992,[16] dealing with the limitation of direct and indirect government aid.

The application of a competition regime to international air services may be more complicated than moving away from the above restrictions on the operation of international air services, as such application introduces a new element into the regulatory framework of air transport services. Competition regimes can be applied in a bilateral, regional and multilateral context, *if* there is agreement between the parties to a bilateral, regional, plurilateral or multilateral agreement which competition regime applies, absent a global competition regime – as the WTO does not apply to this sector.

To apply competition regimes to the operation of international air services means leaving *a priori* economic regulation in terms of pricing, capacity and other market restrictions behind us. Far from all states are in favour of such a drastic move as it could jeopardise the position of "their" national airlines.

If Open Skies agreements form the US initiative for greater liberalisation, the application of a competition regime could be the European contribution thereto.
This appears to be especially indicated since the coming into force of Regulation 1/2003 which came into force on 1 May 2003. Under the new regulation:

(1) air transport lost its "special status" of exemptions under the previous regimes;

(2) all air services, including those from and to third states, fall under its scope;

(3) airlines do not notify their agreements to the Commission anymore for review and clearance but they have to justify an interline agreement on consumer benefits grounds in a "self assessment" test.

The big question is which competition regime will apply to air services between two different jurisdictions – which is not uncommon in the air transport sector.
So far, the air transport sector – as opposed to the manufacturing sector, as to which see the reference to the Boeing/Airbus dispute above – has not suffered from complicated proceedings, leaving aside the Skytrain quarrel in the 1980s.[17]
The US government appears to take the position that policy considerations – translated into the willingness of the other party to engage into an Open Skies agreement – prevail over competition concerns.
The grant of anti-trust immunity to Transatlantic alliances is a testimony of this policy. The Skyteam alliance, requesting antitrust immunity, inert alia, because of the accession of Air France/KLM to this alliance, may prove to be a test case for the continuity of this balance between external relations and competition policy made by the US government.

The European side has not yet acted. There is a regime, laid down in Regulation 1/2003, but when and how it will be applied to the operation of international air services is as yet uncertain. A problem may be formed by bilateral clauses which may not be made subject to this regime as states, party to the bilateral agreements, are not "undertakings" under the completion articles of the EC Treaty.

In any case, if competition authorities wish to apply competition law to potentially anti-competitive practices such as price fixing, capacity restrictions and dumping, they must agree which regime applies. The EC-US *Agreement on Cooperation in the Field of Competition*, providing for "positive comity" may thereby serve as an example.[18]

3.3 Introduction of the Freedom to establishment

This is not an easy way either to achieve a liberalised environment for air transport – perhaps even less so than the previous one as the air transport sector is not familiar with Freedom of establishment principles. However, the European Court of Justice, in its decision of 5 November 2002,[19] found that this principle should be ap-

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[15] See also Edward Alden, *EU Retaliates Against US over Airline Subsidies*, Financial Times of 31 May 2005.
[16] See again, http://www.wto.org/english/docs_e/legal_e/legal_e.htm - last visited on 12 September 2005.

[17] As referred to in the Conference organised by the Dean Rusk Center of the University of Georgia Law Center in the proceedings of the Conference: *The Trans-Atlantic Relationship – Aviation Policy*: *Clearing the way to a More Open Market* (2003), to be found at: www.asil.org/pdfs/Avaiation_policy.pdf - last visited on 12 September 2005.

[18] The Agreement can be found on: http://www.ftc.gov/bc/us-ec-pc.htm - as last visited on 12 September 2005.
[19] See, for instance, the case of the *Commission* versus the *Federal Republic of Germany*, in the matter of Germany's Open Skies agreement with the US, Case C-476/98, par. 144-162, available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61998J0476.

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plied to the operation of international air services – including the operation of air services but Community air carriers from and to a point in the Community – as a matter of principle: Freedom of establishment removes restricting practices and clauses in bilateral agreements based on nationality conditions.

The ECJ decision determined the agenda of the Commission in the years to follow.[20]
The Commission fought hard to exploit the effects of the Freedom of establishment by insisting that it should be mandated not only to replace nationality conditions by "Community law-based" conditions in so-called *horizontal mandates*, but also to conclude overall air services agreements, including traffic rights, via so-called *vertical agreements*.

To apply the Freedom of establishment to the air transport sector is as tempting for further liberalisation as complicated for the sector. There are no uniform definitions of what and "establishment" means, or under which circumstances an airline can be held to have a 'principal place of business'.
A related and even more essential question is which state or authority is going to exercise regulatory control of safety, security and environmental standards with respect to an airline established in that state or in a certain jurisdiction.

When these – and other – questions have been resolved, it seems to me that the freedom of establishment can give an extra impetus to the liberalisation of air services. Among the other questions are labour concerns which also play a role in other approaches towards liberalisation, as this may imply a shake out and a reshaping of the industry.

In addition, it has to be decided which traffic rights may be operated from an establishment in another jurisdiction. Such schemes seem to be too far away to discuss within the scope of this brief essay.

4. Concluding remarks

As briefly outlined above there are various roads to achieve liberalisation in the air transport sector. One way is more realistic than the other.

The "GATS approach" would mean a too radical reform of the current regime. The aviation world does not seem ready for it.

The most tried tool is Open Skies, but the name of the concept deceives. An Open Skies policy, at least as formulated by the US government, has its limits. The next step must be an Open Skies plurilateral agreement, also called an Open Aviation Area, which may shape Transatlantic traffic. Other states or areas may follow suit.

Within such Open Aviation Areas, which is marked by the absence of *a priori* restrictions upon the operation of air services operated within the area, competition must be regulated. Absent an overall competition law regime, the participating states must decide on jurisdiction in the context of competition. The 'effects' doctrine,[21] in combination with the principle of 'positive comity' could provide solutions for the time being – that is, until consensus is reached on a converged or harmonised competition regime.

Finally, true liberalisation must be accompanied by the implementation of the Freedom of establishment. However, since the air transport sector is not familiar with the regulatory and practical effects of this principle, its introduction should be made subject to further examination and scrutiny.

[20] See, EC Commission, Communication from the Commission, *Developing the agenda for the Community's external aviation policy*, Brussels, 11 March 2005, COM(2005) 79 final.

[21] As Article 81 of the EC Treaty does not require that the "undertakings" have an "EC nationality" or that they have an establishment with the Community area: the principal condition for application of the said article is that trade between Member States is affected, irrespective of nationality criteria, as confirmed by the ECJ in the so called '*Wood Pulp*' cases: Cases 89/85, 114/85, 116-117/85, 125-129/85, *A. Ahlström Osakeyhtiö* v. *Commission* (Wood Pulp), Decision of 27 September 1988.

SEZIONE
INGEGNERIA

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(La Navigazione satellitare ...)

Satellite navigation has already permeated our lives and in particular the potential applications of the Galileo Program and its predecessor, the EGNOS Program, are evidenced by the Italian Space Agency's application programs which aim to promote technological innovation of applications and services and prepare the way for use of the Galileo system. The programs which are discussed in this article include: Three Macro projects in the framework of Transport safety for Transport of Dangerous Goods, Maritime and Aeronautical Transport; Three "short term Development" Projects aimed at demonstrating the effectiveness of navigation systems when combined with other technologies for applications such as road transport, territorial and citizen safety and mobility of the disabled; a "Software radio" terminal Development project; and a geographic Test Bed.

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