

COMMUNICATION FROM THE UNITED STATES

Review of the GATS Annex on Air Transport Services

The following communication has been received from the delegation of the United States with the request that it be circulated to the Members of the Council for Trade in Services.

I. INTRODUCTION

1. The United States presents its views on the mandated review of the Annex on Air Transport Services (Air Annex) and submits information to assist the Council in the further progress of the review.
2. The context of this review has been summarized by the Secretariat in the review sessions and by several Members in earlier papers. WTO Members agreed to exclude most air transport services from the GATS so as not to disturb the familiar system of negotiating rights and obligations in international air transport. The two main components of this system are, first, the multilateral system for governing air navigation and air transport safety and security through the International Civil Aviation Organization (ICAO) and, second, the reciprocity-based system of exchanging air transport economic rights.
3. The reason for the exclusion was deliberate: to promote development and liberalization of the air transport sector. WTO Members believed that the existing international air transport regime, probably more detailed and pervasive than that for any other service sector, would best accomplish this important objective. Thus, WTO Members intentionally agreed to a broad exclusion.
4. Against this background, we can properly understand the mandate to review “developments in the air transport sector and the operation of this Annex with a view to considering the possible further application of the Agreement in this sector.” The basis for any further application of the Agreement should arise from circumstances disclosed by the review of developments in the sector and the operation of the Annex.
5. Essentially, the current review is confronting again the central air transport issue that faced the Group of Negotiations on Services (GNS) in the Uruguay Round -- whether progress in developing and liberalizing international air transport would more likely succeed by further evolution of the existing system of specialized air transport agreements or by bringing some or all facets of air transport into the GATS. As in the Uruguay Round, the central question remains which option will best facilitate liberalization in the air transport sector.

6. As discussed below, the United States believes that the broad exclusion of most air transport services from the GATS was appropriate and foresighted, and has produced significant liberalization to the benefit of consumers and suppliers of these services. The United States further sees evidence of liberalization taking place at an accelerating pace. Accordingly, the United States sees no evidence that this progress would be assisted by any narrowing of the current exclusion; to the contrary, the United States would expect such liberalization to be slowed by changes to the current exclusion.

II. DEVELOPMENTS IN THE AIR TRANSPORT SECTOR - LIBERALIZATION PROGRESS

7. The first aspect of the mandated review is a review of developments in the air transport sector. The evidence of the past five years is striking. Extensive progress in liberalization has been achieved through open-skies agreements, ICAO's facilitating role, and other factors.

A. GROWTH OF OPEN-SKIES AGREEMENTS

8. Research by the Secretariat and information furnished by ICAO have documented the dramatic increase in bilateral air services agreements, in particular, the most liberal form of such agreements, known as "open-skies."

9. According to the Secretariat's October 2000 compilation of S/C/W/163/Add. 2, there were roughly 74 open-skies agreements, more than one-third of which did not involve the United States, and more than two-thirds of which were said by ICAO to be with or between developing countries (see Table 23 of the cited document). Since that paper was issued, the United States alone has negotiated six more bilateral open-skies agreements (with Morocco, Poland, Rwanda, Malta, Benin, and Senegal), in addition to the states identified in Tables 23 and 24.

10. It should again be noted that the substantial majority of these open-skies agreements involve developing countries, many with relatively small airlines. They nonetheless have reaped economic benefits in terms of access to all destinations in the US market and those of other aviation partners. These benefits have been realized both through new services operated by their flag carriers and through cooperative marketing arrangements with other, network airlines.

11. In addition to the full open-skies agreements referred to above, the United States has concluded other significantly liberalized aviation agreements. These include a "transborder open-skies" agreement with Canada, all-cargo open-skies agreements with Australia and Jamaica, and substantially liberalized regimes with France and Japan.

12. As reflected in S/C/W/163/Add. 2, of the many countries that have concluded open-skies or other liberal agreements with aviation partners other than the United States, it is not surprising that among those most often listed are three that have consistently made valuable contributions to this review: Chile, New Zealand, and Singapore. These and other countries continue to announce newly liberalized agreements month after month. At the December 2000 review session, New Zealand reported another agreement. In January 2001, in addition to the US-Senegal agreement, Brazil and Peru announced that they had agreed on open skies. In February 2001, New Zealand reported signing liberal agreements with Denmark, Norway, and Sweden.

13. The reciprocity-based system is not limited to bilateral arrangements, but is also proving adaptable beyond bilateral open-skies. On November 15, 2000, the governments of Brunei, Chile, New Zealand, Singapore, and the United States, meeting with other Asia-Pacific Economic Cooperation (APEC) members in Brunei, announced agreement on the first plurilateral open-skies

agreement, titled “Multilateral Agreement on the Liberalization of International Air Transportation.”¹ The new open-skies text is based on the bilateral open-skies agreements that these countries already have with one another and with other aviation partners, but it also contains several new features. Significantly, the new agreement modifies the traditional bilateral requirement that “substantial ownership” of an airline be held by nationals of the country designating it in order to exercise rights under the agreement. The new agreement substitutes a requirement that the airline be “incorporated in and has its principal place of business in the territory of the Party designating the airline”.²

14. This plurilateral agreement will, after it enters into force, be open to accession by others on terms no less favorable than those of the original signatories. In addition, the open-skies plurilateral is amendable by a simple majority of the signatories, affording substantial opportunity for refinement, expansion, and additional liberalization. For instance, the agreement includes a protocol that establishes a mechanism for adoption of additional liberalizing provisions in the future.

B. FACILITATING ROLE OF ICAO

15. Although the Chicago Convention left the exchange of air transport economic rights among states to the states themselves, ICAO has nonetheless played an important role in facilitating those reciprocal relationships. Over the years, ICAO has encouraged pricing freedom; urged more liberal ownership and control provisions; developed liberal model provisions in such “doing-business” areas as ground handling for bilateral, regional, and plurilateral air transport agreements; and otherwise promoted liberalization in air transport throughout the world.

C. OTHER LIBERALIZING FACTORS

16. Certain other factors have also promoted the liberalization of the air transport sector. First, overflight freedoms are granted multilaterally through the 1944 International Air Services Transit Agreement (IASTA). In the last five years, this agreement was ratified by 17 additional Contracting States, bringing the current total to 118.

17. Second, no list of achievements in air transport would be complete without acknowledgement of the EU integration of its Member States’ cross-border and domestic markets, phased in through 1997 pursuant to its Third Package of air transport liberalization measures.

D. TANGIBLE BENEFITS

18. Wherever constraints on air transportation have been removed, and airline managerial freedom for economic matters substituted, the consumers of air transportation have gained. With a wider array of price and service options available, air travel and air shipments have multiplied. In 1995, the United States had open-skies agreements with 10 countries; that year some 5.8 million passengers travelled by air between those countries and the United States. Five years later, in 2000, those same 10 open-skies countries exchanged more than 10 million passengers with the United States, an average annual growth rate of nearly 12 percent. Meanwhile, 37 additional air transport partners had adopted open-skies, bringing the total open-skies passenger volume in 2000 to 38.8 million. Over the same period, the countries that never concluded an open-skies agreement with the United States averaged only 6.4 percent annual growth in US bilateral traffic.³

¹The full, official text of this agreement is available at www.state.gov/www/issues/economic/tra/001115_apec_opskies.html.

²Article 3(2)(c) of the Agreement.

³US fiscal years ended September 30. Those ten original open-skies partners are Austria, Belgium, Denmark, Finland, Iceland, Luxembourg, the Netherlands, Norway, Sweden, and Switzerland. Traffic data for US and foreign carriers combined are from US DOT T-100 database.

19. The EU Third Package referred to above is often cited for the dramatic changes realized in just the first three years of implementation. In 1996, the European Commission reported the issuance of 800 new operating licenses and a 20 percent increase in traffic attributed to availability of reduced fares.⁴ These are merely illustrative examples that doubtless can be matched or surpassed in other open-skies markets.

III. DEVELOPMENTS IN THE AIR TRANSPORT SECTOR - LIBERALIZATION OUTLOOK

20. The above liberalization efforts and others are continuing. Countries are continuously refining their existing air transport agreements and forging new ones. Facilitated by open-skies agreements, global airline alliances are evolving, offering passengers seamless travel among all points in their growing, aggregated route systems. The mutual open-skies agreement initiated by five APEC members will soon be open for accession by others both within and outside APEC. In addition, APEC as a whole has endorsed eight recommendations on liberalization of air services.⁵ Air transport liberalization in Europe is expanding beyond the EU Third Package in agreements with EFTA states and with Eastern European aviation partners. The OECD is working on a draft, prototype air-cargo open-skies agreement. In that exercise, issues working groups now are established to develop further the aspects that require concentrated effort.

21. Furthermore, ICAO's facilitative work is continuing and expanding. ICAO announced that it is preparing a broad program dealing with significant aspects of air transport liberalization including: intensified promotion of adherence to and implementation of IASTA; a comprehensive study of ownership and control (with designation, right of establishment, inward investment, management, leasing, alliances, code-sharing, franchising and safety aspects); a re-examination of market access issues with emphasis on elements of traffic rights, as cited in the Annex definition; and consideration also of airport access, competition law, and the participation of developing countries.

22. Building on existing material and recent experience, the ICAO Secretariat is also developing a template air services agreement for liberalization, including safety and security as well as market access elements and safeguards, for selective or comprehensive, optional use by States, either bilaterally or multilaterally. ICAO has indicated to this Council that the template is intended to facilitate harmonized evolution and extension of both bilateral and regional agreements. ICAO will convene a conference on the liberalization of international air transport during 2003, "to develop a framework for the progressive liberalization of international air transport, with safeguards to ensure fair competition, safety and security, and including measures to ensure the effective and sustained participation of developing countries."⁶

23. All of the foregoing developments in the air transport sector have taken place and are continuing to evolve under the established system, outside the auspices of the WTO. There is little to suggest that comparable – let alone greater – liberalization would have occurred had the GATS applied to air transport services, and there therefore is no reason to believe that future liberalization could best occur under GATS auspices.

⁴Impact of the Third Package of Air Transport Liberalization Measures, COM(96) 514, October 20, 1996.

⁵ These cover ownership and control, tariffs, doing business matters, air freight, multiple designation, charter services, airline cooperative arrangements, and market access. WT/L/313, September 20, 1999.

⁶ ICAO Working Paper A33-WP/6, June 5, 2001, p. 6.

IV. OPERATION OF THE ANNEX

24. The second aspect of the mandated review is an assessment of the operation of the Annex during the period since entry into force of the GATS. The developments discussed in the preceding sections are directly relevant to such an assessment; that is, they demonstrate that the Annex has successfully facilitated liberalization in the air transport sector by ensuring that venues and mechanisms outside the WTO operate effectively.

25. On the other hand, it is clear that with respect to air transport services covered by the GATS – aircraft repair and maintenance, computer reservation system (CRS) services, and selling and marketing of air transport – there is no appreciable liberalization that can be attributed to the GATS.

26. For aircraft repair and maintenance, S/C/W/59 records that nearly all Members (113) took on MFN obligations, and, of these, 45 countries made market access and/or national treatment commitments on repair/maintenance services. The United States and many other countries that scheduled these commitments bound already-established open access and uniform treatment that did not constitute new liberalization. The United States is not aware of liberalization that has occurred as a result of GATS commitments in this area. In S/C/W/59, the Secretariat notes a general increase in the number of new repair facilities established from 1995 to 1998, but adds, that “this is more likely to result from market growth than from the effects of the GATS.”

27. CRS services and selling and marketing may be considered together, because, as has been pointed out in Council by the Secretariat and several members, CRS and selling and marketing often go hand-in-hand. CRS services have become an essential marketing and booking medium for airlines and travel agencies. ICAO, the European Civil Aviation Conference (ECAC), the EU and many individual countries, including the United States, have adopted guidelines and rules aimed at insuring fair, unbiased depiction of all carriers’ services.⁷ Although CRS services are widely covered by bilateral agreements and also by national laws and international guidelines, many of the 16 WTO Members that listed MFN exemptions for CRS stated, as the condition creating the need for the exemption, “The need for the exemption results from the insufficient development of multilaterally agreed rules for the operation of CRS.” Seventeen Members listed MFN exemptions for selling and marketing of air transport services (two of which did not list exemptions for CRS).⁸ As with aircraft repair and maintenance services, the United States is not aware of liberalization that has occurred as a result of GATS commitments in these areas. On the other hand, parties to dozens of open-skies agreements concluded over the last six years have undertaken strong disciplines for CRS and selling and marketing within those agreements.

28. Thus, the experience of the six years following entry into force of the GATS indicates that the Air Transport Annex has not had a discernible liberalizing influence on trade in the three services to which the Agreement applies. On the other hand, the exclusion of most other air transport services has, in fact, been the foundation for significant and continuing liberalization outside the WTO. Evidence to date – and, the United States believes, evidence likely in the foreseeable future – does not demonstrate that liberalization would be assisted by further application of the GATS in this sector.

V. SCOPE ISSUES

29. Questions have been raised regarding the scope of the Air Annex’s exclusion. Therefore it is useful to recall the reasons why the Annex explicitly excludes traffic rights, “however granted,” and services directly related to the exercise of traffic rights.

⁷ As a practical matter, the United States provides national treatment in these services.

⁸ S/C/W/59, Table 7, page 50.

30. The Secretariat's overview provided in the September session reminds us that the drafters of the Air Annex excluded from the GATS those services for which rights were exchanged in bilateral/multilateral air transport services agreements. The GATS general obligations do not apply to the excluded services, and specific commitments cannot be made regarding such services. This central principle underlies the provisions of the Air Annex and is reflected in the discussion of specific service issues below.

31. As will be recalled, the exclusion of traffic rights was the central feature of the earliest drafts of the Annex before and in the Draft Final Act produced at the end of 1991. The traffic rights definition was therefore given considerable attention because it was expected to be relied upon in years to come.

32. One unified term, "traffic rights," was made to stand for all the air transport operations to be excluded, because there was no reason to add more numerous, specialized air transport terms for purposes of the Air Annex. In early 1992 GNS sectoral meetings, delegates explicitly stated their governments' intentions to exclude from the Agreement ferry flights, without passengers or cargo, and transit flights that would not take up or discharge revenue traffic, so that there would be no confusion or overlap between the GATS and existing bilateral and multilateral agreements.⁹ Because of the degree of consensus on this point, the traffic rights definition was essentially completed by March 1992. In its final form, it reads as follows:

(d) "Traffic rights" mean the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control.

33. This definition contains no qualifications relating to aircraft size, interchange, sub-service, code sharing, or other such criteria. Accordingly, at present, air taxis and commuter services meet the definition, as do wet-lease operations, franchise operations, and code-shares. These services are covered in many bilateral/plurilateral agreements, often under the term "cooperative marketing arrangements." Moreover, they usually require specific approval by the aeronautical authorities of the territories in which they are operated.

34. A few delegations have also raised questions concerning the scope of "services directly related to the exercise of traffic rights." Some delegations have even suggested that ground handling services have become less directly related to traffic rights as airlines, the exercisers of traffic rights, have increasingly divested themselves of such functions and contracted them out.

35. Again, to address these issues, one must recall the intent of the drafters. The original concept of "services directly related to the exercise of traffic rights" was functional. The term referred to services directly related to the exercise of traffic rights regardless of whether performed by carriers themselves or by contractors. During the Uruguay Round, from January 1992 until October 1993, the addition of ground handling services to the list in paragraph 3 was debated at each of seven GNS sectoral meetings, but always under the common understanding that the service was directly related to the exercise of traffic rights. Ground handling was treated in bilateral air transport services agreements then and is even more widely addressed in such agreements now. Then, as now, some such services were performed by the airlines and many were contracted out to specialized service

⁹ In particular, the words "operate and/or carry" were added to include technical stops and positioning or ferry flights without revenue traffic; "from" and "to" covered second, third and fourth freedoms; "within" referred to cabotage, and "over" was added to include first freedom rights.

providers. Some airlines performed the services for one another. There has been no change in the industry or other basis to call into question the well-settled understanding that ground handling services are directly related to the exercise of traffic rights.

36. Finally, some have asserted that air traffic control and airport services could be subject to GATS obligations under certain circumstances. Without entering into a discussion of the various ways in which these services are organized and provided around the world, the United States has no GATS obligations with respect to those services; moreover we foresee no future circumstance in which GATS obligations could be applicable to United States.

VI. CONCLUSION

37. Air transport is not only a significant industry in its own right, but also is one of the most important instruments of international trade. Air transport is an important complement to many aspects of the WTO – promoting interchange of goods, services, and individuals. The United States believes strongly that the WTO, its objectives, and WTO Members will benefit from continued liberalization in this sector. But the United States also believes strongly that in view of the demonstrated success of the traditional, reciprocity-based air transport system, and the numerous promising initiatives ongoing bilaterally, plurilaterally, and multilaterally, the greatest contribution the WTO can make in this sector is to ensure that existing venues and mechanisms for air transport liberalization be allowed to reach their potential.

38. In the view of the United States, no changes should be made to the *status quo* solely in an effort to create an impression of positive change or to resolve what is perceived as anomalous in the GATS context. Nor should any change be undertaken that could produce detriment greater than any improvement that can be assured. The goal for WTO Members should be the further liberalization of the air transport sector, and it is clear that this goal will best be achieved under the current, broad exclusion from the GATS of most activities in this sector.

39. Following completion of the current review, the United States would expect to participate in another review in five years. We expect that many Members whose air transport sectors face significant changes would support maintaining the five-year interval. Meanwhile, it is clear that the present, thoroughly-informed review provides no basis for amending the Annex on Air Transport Services.
