CHAPTER VI

CONCLUSION

With the end of the Cold War by 1990, the international economic relations received a powerful impetus, while the political relations took a back seat. The globalisation trends and the concomitant liberalisation policies are the basic features of the emerging New World Order. These have overtaken many facets of international trade, including trade in services, prominent among which is air transportation.

The earlier endeavours to provide a legal regime for the operation of international air services had been dominated by the considerations of national security, defence, and the need to protect the domestic industry. Consequently, air transportation had been brought under the shadow of state sovereignty. As a result, the operation of air services is subjected to
the consent of state. Many a time, states had resolved to provide uniform rules at global level to govern civil aviation relations, and convened various international conferences for the purpose.

The success of these conferences is broadly attributed to technical aspects rather than commercial aspects of civil aviation. However, at the Chicago Conference, 1944, the commercial aspects were for the first time highlighted. Though at this Conference states succeeded in establishing an institutional framework, the efforts to provide a multilateral solution for the exchange of traffic rights scarcely received support. The operation of international air services had thus been retained under state control, subject to the consent of states. Consequently, the post-Second World War witnessed a host of bilateral agreements between individual countries exchanging this consent. The bilateral regulatory system, not only recognised state control over the national airspace as
sanctified under the Chicago Convention, but also legalised the national control of the air traffic market.

Discontented with this development, states supporting the laissez-faire theory, chiefly from the developed world, sought to provide a free market for airline operations with little or no restrictions in the exchange of traffic rights. The underlying assumption was that the international air traffic market constituted a single unit that transcended all boundaries, and any attempt to impose restrictions would impede the growth of the industry. It followed, therefore, that the choice of whether to exercise control over national traffic or to internationalise the world aviation market, could be attributed to two factors:

(a) the national economic interests, and the changing demand for air transportation and

(b) the characteristics of airline Operations.
Varying ideological perceptions among states engendered differences of opinion on these issues. The variance in positions, further exacerbated due to ambiguous provisions of the Chicago Convention 1944 regarding commercial air transport, resulted in unilateral interpretation of the vaguely worded Bermuda principles, which were agreed upon in 1946 as a compromise between the US views and the conservative UK views.

Under bilateral air services negotiations, the traffic rights exchanged on a *quid pro quo* basis, are chiefly based on the doctrine of equitable sharing of economic benefits and the principle of equal opportunity to operate air services. The implementation of these principles, however, is at variance in practice. The explicit controversy here lies in the interpretation of these principles, reflecting corresponding traffic potential of states' and
carrier's strength. The effort to assure a share of the benefits to one's own carriers, against mere opportunity to carry traffic, not only from points of origin and destination in the home country on the agreed route(s) but also between points on such route(s) as the traffic demands, gave rise to serious conflicts and restrictions. Though the ICAO in its successive Air Transport Conferences of 1977, 1980, 1985 and 1994, developed the criterion of the effective participation, the implementation of these efforts sadly lacked a uniformity of approach.

It is suggested that carriers while exercising, or states while exchanging, traffic rights, should refrain from adopting policies based on unilateral interpretations of issues which are not explicitly provided for in the relevant international conventions or agreements, because such interpretations tend to promote only the individual interests of states to the detriment of multilateral global aviation regulation.
The post-Second World War international civil aviation was governed by a web of bilateral agreements with heterogeneous sets of rules of conduct. The "freedom of the air" versus the "order of the air" introduced an element of perpetual chaos into the existing bilateral regulatory regime.

The subsequent developments in air transport threw up the credo that bilateralism became an 'archaic relic' of the past, and that in the long term it impeded the growth of the international airline industry as well as the ability of carriers in reciprocal exchange of traffic rights.

This change in the situation motivated states to embark on the path of liberalisation of international trade in air services. Radical measures of deregulation initiated by the United States in the domestic market brought forth mixed results. No doubt, it has introduced a new element of competition in the
market with a range of choice and benefits to the travelling public. However, it is highly erroneous to hail deregulation as a complete success. Wastage of resources, cut-throat competition, heavy pricing discrimination, service deterioration to small communities and decrease in safety standards are the ominous results of the total deregulation experience in the United States.

The immediate response of the US government to the above problems has been incentives in the form of subsidies to airlines operating to small communities and setting limits by re-regulation, at least, to prevent pricing discrimination. This clearly implies, on the international plane, that the expected benefits of deregulation will be confined to a few chosen countries and the public, who are privileged to be travelling on lucrative routes. Under the free-trade regime, social obligations, cease to exist and the airline industry is no longer considered to be a public utility service, since it assumes the status of a
pure commercial economic activity.

As the aforesaid adverse effects of deregulation are confined to domestic operations, the US Government respond in the form of subsidies, without much difficulty under Section 419 of the Airline Deregulation Act and the Antitrust Laws. Since such rules do not exist at the global level, deregulation with similar consequences is not an accepted solution to the problems besetting international air transportation. Just as the world is divided into the rich, the poor and the poorest, the global aviation market too can likewise be categorised into various categories of markets on the basis of potential profitability. The theory of free competition has an inherent tendency of promoting either a monopoly or an oligopoly. Therefore, fair competition becomes a distant reality, under the rule of the predator. In such a situation, countries having huge capital resources, technology, comparatively stable markets and a
competitive airline industry, will no doubt have an added advantage over the economically weaker ones. The theory of comparative advantage, further leads to uneven distribution of economic growth, due to economic unattractiveness of less profitable and non-profitable routes. It is not difficult, therefore, to understand and foresee the consequences of deregulation (free-competition) of international air transportation: where the strong will survive and the weak will perish!

[A significant development in the process of liberalisation, however, is the regionalisation of air transport.] Regionalisation has the advantage of strengthening the weak and protecting the regional national interests, by providing an easy market access into the regional community. The leverage provided by higher bargaining potential of the regional group as a single unit ensures maximum access to international market. Nevertheless,
regionalisation inherently suffers from the tendency to form trade blocs, thereby effectively inhibiting, if not preventing, market access for foreign airlines within the region. Although such an arrangement has no explicit legal prohibition, it may, in spirit, foster confrontation rather than cooperation. Notwithstanding such incidental shortcomings, regionalism may effectively substitute traditional bilateralism in regions where states are willing to join hands.

The privatisation move triggered by the process of liberalisation has helped the carriers in becoming more competitive and financially self-supportive and also eased the burden of governmental subsidies. This eventually led to the acceptance of foreign investment, despite compromising the national ownership and control policy which constituted a cornerstone of bilateralism.
Yet another development that arises from the ongoing process of liberalisation is the formation of commercial alliances, which provide increased returns by minimising operational costs and maximising market access. In addition to this, such arrangements help to overcome the difficulties attached to the exercise of the fifth and the sixth freedom rights under the existing bilateral regime.

As a prelude to a multilateral aviation regime, States at the recently concluded Uruguay Round of the GATT negotiations, urged active consideration of the advantages of the GATT rules also covering trade in international air services, albeit confined so far to a very narrow range of activities relating to ancillary rights. As far as "hard" traffic rights are concerned, no identifiable common ground for a multilateral arrangement is discernible. The suitability of the GATT/WTO framework for multilateralism of air transport regulation, calls for a special assessment. The GATT
provides an umbrella multilateral agreement which leads to bilateral or plurilateral negotiations to ensure benefits being extended to all the contracting parties through an unconditional MFN clause. As GATT is the only existing global trade framework, which seeks to ensure sufficient flexibility to accommodate both bilateral and multilateral interests, the initiative to incorporate the air service sector within its ambit is to be welcomed. However, GATT shows certain inherent defects that have led to dissatisfaction and a sense of inequitable treatment among the developing countries. Against this backdrop, it is submitted that any move to incorporate air services under the GATT framework, must warrant an indepth review of the existing principles which are not suitable for the services sector and those which work patently adversely against the interests of the developing countries.

With the growing opposition to incorporate the air transport services sector under the GATT
framework, the opportunity may be utilised to recast the fundamental trading principles as applied to trade-in-goods, so as to ensure flexibility, commercial viability and equitable distribution of trade in air services, even as a special category.

The developments at global level have significant implications over the future growth of air transportation for the developing countries. More particularly, an analysis of the Indian situation reveals that the Indian carriers are currently in a hapless state despite having a high market potential. Despite the initiation of liberalisation process since 1989, misplaced priorities and ad hoc, if not inconsistent, policies, have seriously distorted the growth prospects of the Indian airline industry. With the opening up of the skies there is an urgent need for the government to adopt a more holistic and professional outlook, basing its policy on sound commercial principles.
The deregulation of the airline industry is a high risk venture. Since deregulation brings increasing competition, the survival of an airline depends on its competitive strength to face the eventual challenges posed by deregulation. As the Indian carriers are under serious financial constraints, it is submitted that the air services be privatised partially if not completely. Such a move, self-supportive in nature, would generate more resources and make the enterprise financially viable. Eventually, the national airline should gear up to the new challenges to make it more responsible to the ongoing global developments.

There is an increased hiatus in international air transport between "protectionism" under bilateralism and "freedom" under multilateralism. In recent years, the ICAO once again assumed the responsibility to look into the issue of bilateralism.
versus multilateralism. The 1992 the ICAO International Colloquium and the 1994 Air Transport Conference on future regulation of air transport have witnessed a sharp division between states advocating protectionism and those in favour of a free-trade multilateralism on nearly the same lines as in the 1944 submitted at Chicago Conference. The basic paradox remains, if a liberal multilateral regime is indeed more beneficial to the aviation industry than the bilateral existing system. The arguments of states opposing multilateralism would lose the power to convince.

There are good reasons for States, particularly the developing countries, not to trust a worldwide multilateralism as a possible alternative to the international regulation of air transportation. A glaring example is IATA, one of the most significant non-governmental multilateral bodies in international air transport playing the pivotal, fixing tariffs. Since the fixing of tariffs is linked to operational
costs, at least in some countries, the outcome of IATA determinations led to comparatively high fares, even where low operational costs had previously prevailed. Thus the very purpose of a multilateral forum was projected as anti-competitive and deprived of efficacy. In all probability, any efforts to a world-wide multilateral framework to agree on commercial aspects would meet with the same treatment, if states failed to assess the existing competitive advantages as well as disadvantages under a regime of free competition.

In this context, there are two possible alternatives to accommodate the changing picture in a scenario for global air transportation. One, either a regional multilateral approach between like minded countries, to which other States may accede later on, to overcome the limitations inherent in the existing labyrinth of bilateralism. The other, obviously is liberal bilateralism for States which still believe in free competition as immutably the best approach,
to cater for the traffic demand rather than protecting
the national airlines.

Thus the ongoing conflict of interests served by bilateralism and multilateralism may be challenging but not insurmountable. The U.S. type deregulation or free-competition in international air transportation is, of course, not a panacea for the on-going conflict between bilateralism and multilateralism. The necessity for minimal regulations are essential to achieve a fair and healthy competition, which is the prime thrust of liberalisation of international air transport. In consequence, absolute bilateralism may not be an appropriate approach to exchange traffic rights where it unduly restricts the competition. Although multilateralism is an accepted system or basis for the exchange of technical and operational aspects, it has little relevance in commercial aspects. Even under bilateralism the Bermuda standard capacity clauses have multilateral effect, but the reluctance to accept multilateralism in exchange of traffic rights clearly
shows the ambivalence of states in accepting international air transport as a global activity. The present day air transport activity i.e., carriage of international traffic, is no longer an exclusive natural resource of the concerned state. In the same vein, would multilateralism for exchange of traffic rights at global level be a viable alternative to effective bilateral regulation? The answer would be in the negative; because multilateralism at global level as it is generally defined, means "an agreement on the lowest level of freedom which a participant is prepared to accept". It definitely goes against the spirit of liberalisation of air transport. It is therefore, imperative for states to adopt multilateralism among like-minded countries i.e., plurilateralism either at regional level or beyond one region for an effective trading environment for international air transport. On a global level, unless there is concerted action and encouragement of all participating states with assurances of mutual accommodations, any attempt to
achieve multilateralism would be in vain because of the prevailing socio-economic disparities among nations. The formation of regional Free Trade areas, if these do not turn into "fortresses" may simply amount to a global inter-region "bilateralism" between blocs of states.

The international aviation has came a big way since the Chicago-Bermuda I. The issue of multilateralism versus bilateralism has assumed new dimensions both in substantive and geographical terms, since 1944-1946. But apprehensions against "open skies" remain genuine. Unless these apprehensions are removed from the existing scenario of inequality, there can be no scope for global acceptance of multilateralism pure and simple. "Between Black and White, there are numerous shades of grey", said Pandit Jawaharlal Nehru in another ideological context!