CHAPTER I
INTRODUCTION

Aviation industry and the development of the State are closely related, since air transport is one of the essential prerequisites of the overall economic development of any State. However, the economic significance of air transport has only been realised lately. Although the motives for promotion of a national aviation industry vary over a period of time, from protection of the national carrier against the threat of competition and ultimately to the provision of free competition for further expansion into the foreign markets, states systematically narrowed down the opportunities for cooperation and coordination which is essential for operation of international air services. The early stages of development of air transportation were influenced by the direct exercise of national government control. This was mainly due to two basic reasons. First, the concept of sovereignty which forms the cornerstone of public international law and second, the sensitiveness of states to security and defence
considerations, strongly influenced the beginning of aviation law.

The invention of aerial vehicles (balloons) lighter than air, compelled states to develop international aviation law to regulate the use of such vehicles. As an early effort in this direction, a discussion on the nature of air space was initiated on the basis of the 'freedom of the air' theory - as air is not susceptible of anybody's possession, states have no physical control over it. However, this theory was over taken by the recognition of the 'closed sky concept'; emphasising the airspace as a medium and part of a state's territory. Airspace above land was thus brought under the exclusive jurisdiction of states and the concept of sovereignty became firmly entrenched in shaping the legal regime for global aviation and figured prominently in various international conventions such as the Paris Convention of 1919 and the Chicago Convention of 1944.\(^1\)

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National security interests during the inter-war period and the beginning of competition to dominate the commercial aviation horizon of Europe encouraged states to seek greater control over international air transportation. Against this background, countries meeting in Chicago in 1944 addressed the economic and political problems of commercial aviation that would arise after the Second World War. The conference, like its predecessors, recognised the exclusive sovereignty of a state on the airspace over its territory and reserved full rights to determine the conditions under which airlines of other states would use it. The basic objective of the Convention on International Civil Aviation, signed at Chicago, was to ensure the safety of flight and enable participation of all states in commercial air transportation on the basis of equality of opportunity. As a result, the exchange of commercial rights in international air transportation depended on the extent to which states were mutually willing to allow foreign aircraft in their sovereign air

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space. The failure of the Chicago Conference to achieve a multilateral solution to economic problems in international aviation, was due to incompatible national interests of the states, arising from their varying domestic aviation potential. Thus the "order of the air" is an outcome of Chicago convention rather than "freedom of the air i.e. the freedom of air transportation". 3

The operation of international air services was made feasible through bilateral negotiations between states: to exchange commercial rights and to agree on methods of regulating capacity, tariff and such other matters, with the hope that what could not be achieved for want of agreement on multilateralism, could be achieved through bilateralism. The Bermuda Agreement in 1946, between the US and the UK was one significant

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3 The "order in the air" as it was said "would be a product of Organisation (ICAO), active promotion of the planning and development of international air transport with a view to ensuring, inter alia, regular, efficient and economical air transport, prevention of unreasonable competition and a fair opportunity for every State to operate international airlines". For a detailed analysis see E. Joseph Gertler, "Order in the Air and the Problem of Real and False Options", Annals of Air and Space Law, vol.IV (1979), pp.93-124. The "Freedom of the air" was described as, "in the modern sense means, based on present and future situations and the present and future requirements of both the airline industry and the public. In essence it is an opportunity to compete which leads to economic management and a maximum economic progress and technological development". cf. H.A. Wassenbergh, Aspects of Air Law and Civil Air Policy in the Seventies (Dordrecht Martinus Nijhoff Publications, 1970), pp.6-8.
bilateral air agreement which became a model for subsequent air agreements which governed the post World War II international aviation relations. Since then the regulatory system under the Chicago-Bermuda regime has been the hallmark for operation of international air services.

In the post-war period, air transport has become one of the most important infrastructure industry. Moreover, it has been perceived as a unique industry imbued with a particular public interest subjected to economic regulation. Because of their interventionist role, states had no difficulty in keeping air transport away from their general market-oriented policy. A chaotic situation prevailed in the regulation of air transport, especially in areas of entry, pricing, frequency and capacity of airline operations on the one hand, and protection of the consumer, and fulfillment of public and social obligations on the other. Consequently, varied interpretations of several
principles in various bilateral agreements all over the world followed the Chicago-Bermuda regime. The crux of the controversy still is whether to lift restrictions on operation of scheduled air services or to protect the national carrier from the domination of foreign carriers.

States in favour of a liberal approach contended that a protectionist regulatory system denies the passenger the range of prices and array of service options which would be available under a liberal regime. Also, the industry was subjected to misallocation of resources under protectionism. The liberal argument was also based on the technology spin-offs which brought rapid changes in the operation of flights and growth of the air traffic market. It was urged that national aviation policies should focus on global interests rather than individual, short-term self-interests of the state, which would hamper the growth of a global

The following are some of the principles listed in Article 44 of the Chicago Convention, 1944, have undergone various interpretations since they are closely related to several economic regulatory aspects:

(a) fair and equal opportunity to operate international airlines;
(b) prevent economic waste caused by unreasonable competition;
(c) safe, regular, efficient and economical air transport; and
(d) avoid discrimination between contracting states.
aviation industry. 5

Countries having comparatively less competent airlines and with poor financial resources took the opposite stand under the cloud of protectionist philosophy, reaffirming their faith in the existing bilateral regulatory regime. They perceived that liberalisation would result in their being swamped by foreign airlines in their markets, leaving no place in the sky for their own national carrier. 6

The operation of international air services today revolves around a choice between "Protectionism" and "Liberalism". It does not equate 'protectionism' with the concept of 'sovereignty' or 'liberalism' with free-trade. In the post cold war period the concept of "State" has apparently weakened as political boundaries have been rapidly dismantled to forge economic integration, both at the regional and the global levels.


6 See Aruna Mascarenhas' Presentation to the World-wide Air Transport Colloquium, (Montreal), 6-10 April 1992, ICAO DOC.WATC.1.16.
It would however, be erroneous to regard the concept of sovereignty as obsolete. Sovereignty of a state today, as in traditional international law, continues to be relevant for its most essential attribute. A state is sovereign both in its internal and external aspects, but the former is more complete than the latter.

Commercial air transportation in the 1990 is perceived more as a normal private profit making enterprise rather than as a "public utility" service and, therefore, it is not totally subject to controls in many states. On the other hand, "liberalism" at least theoretically postulates that states would withdraw control over the economic activities in the wake of globalisation of the world economy. However, free-competition, to be attained through liberalism may not ultimately realise its objectives as freedom would obviously result in unfair competition, and consequently, the benefits of free competition would not accrue as perceived. Under international law, nothing prevents states from compromising their sovereignty provided the benefits accruing in the process of
liberalisation outweighs the loss of freedom in the exercise of sovereignty. However, since the consequences of deregulatory experiences are different, states remain enmeshed in the web of bilateral regulatory regimes.

In recent years, a series of events, at the domestic and international levels, has altered the general outlook of global air transportation. They brought about a remarkable change in the attitudes of states towards international civil aviation regulation, which has resulted in a much restrained interventionist role being adopted by the State. This process has been termed, varyingly, as deregulation [US]\(^7\), gradual liberalisation [EEC]\(^8\), regulatory reform [UK]\(^9\) and preferential regulation [Australia]\(^10\). These look-alike terms are not synonymous, though they carry more or less a similar meaning with little variations.

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The first major step in this process was initiated in the US by terminating the economic regulation of the domestic airline industry. It was anticipated that it would remove the artificial barriers to entry and would open the market for new carriers, new routes, unprecedented competition, considerably low air-fares and better quality of service. Experience soon demonstrated that the outcome was a mixed bag. However, it is still not possible to identify the ultimate beneficiaries and losers in this process, primarily because perceptions regarding this change and the conclusions drawn from available statistics are subject to variant interpretations.11

Unlike the U.S. experience, the EU went in for gradual liberalisation of air transport services at the regional level. This gave rise to the concept of 'regionalism' in air transport. The EU arrangement involves a congregation of independent member states hence any changes within the region would, quite likely, affect the existing Chicago-Bermuda regime, as well as

relations with third countries. Moreover, the prevailing bilateral system lost its value in its internal application after the 'common-market' became a reality. Laxity on part of the member states and the inability of the European Commission to act as a supranational authority, tend to lead to legal confrontation between the EC Competition Law and the existing external regulatory regime. The community approach to external aviation relations and 'multilateralism' as a solution to resolve the deadlock on the said issues, continues to preoccupy European debates about future air transport regulation.¹² Developments in the US and EU certainly influenced other regions such as Asia-Pacific (APEC and ASEAN etc), Latin America (Mercosur, Andean Pact, etc.) and Africa (Yamassoukro Declaration, etc.).¹³ The outcome of these developments is still uncertain but it is quite likely to usher in structural as well as functional changes in international air transport.


The trend of liberalisation is radically changing the international aviation scenario and may bring about "globalisation" of the air transport business. Developments of special interest include airline ownership and foreign investment, privatisation, global marketing alliances, and interline arrangements, which illustrate the shifting trend towards globalisation.\(^{14}\)

To review the ongoing developments and the anticipated changes in the global aviation industry, the International Civil Aviation Organisation (ICAO) called for an international colloquium in 1992 and Fourth Air Transport Conference in 1994. However, it admitted that a majority of the States bore allegiance towards the bilateral regulatory system rather than to the multilateralism of the chosen few. Having thus failed to reach a consensus on liberal multilateral agreement, the protagonists of multilateralism such as the U.S., Singapore and the Netherlands preferred to break away from the traditional forum of the ICAO and align themselves with a forum which is concerned mainly with

\(^{14}\) See IATA DOC., n.10, pp.15-24.
the abolition of trade restrictions, i.e., the General Agreement on Tariffs and Trade (GATT). They sought to justify their action on the premise that, though ICAO could be the best organisation to secure technical and operational (i.e., safety) cooperation and coordination in world air transport, it is an unsuitable forum for discussing economic issues of the industry and is unlikely to achieve agreement on these changes. The GATT forum has been strongly rejected by other countries saying that the world was fortunate in having ICAO as the specialised UN agency, dealing with international air transport and that there was no reason for choosing GATT.

The GATT-system is primarily meant for removing tariff and non tariff barriers in the expansion and globalisation of trade in goods. Owing to special characteristics inherent in service sectors, in general, and civil aviation in particular, the GATT system is not an appropriate forum to apply free-trade principles to

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16 ibid., p.18.
air services. In view of these difficulties the International Chamber of Commerce [ICC] strongly felt the need for ICAO to play the central role in liberalising air transport services. It also urged ICAO "to take necessary steps in this direction so that fair trading and flexible operating conditions can be established for international air transport." 

The process of liberalisation that has been pursued at a varying pace in different countries and regions, has apparently resulted in a domino effect, causing other countries to follow. The case of Indian civil aviation and the changes in its domestic aviation policy have been herein studied to underscore the implications of the aforesaid changes for smaller and weaker airlines. Taking a cue from economic liberalisation measures, the Civil Aviation Ministry of the Government of India announced an open skies policy for the domestic air transport sector. As a sequel, the Indian Air


Corporations Act, 1953, which conferred monopoly rights on Indian Airlines in the domestic market, was repealed. The open skies policy, while leading to the introduction of private airline operations in the domestic sector, has brought forth little changes in the external aviation relations. Moreover, the policy neither provides freedom to domestic airlines to operate internationally nor opens the Indian markets to any foreign airlines. To cope with the new challenges much is being done to develop new economic initiatives and try new marketing approaches.

The present study is organised into six chapters.

The current chapter contains an introductory overview of the study with a brief account of the recent developments in international civil aviation. It provides the setting and the scope of the study and explains how developments in international air transport systematically underline the need to create a universal framework of regulation, particularly in operating commercial air services.

The current legal regime governing international
air transport is based on the principle of sovereignty and has been expressed in various bilateral agreements. The options of States and their arguments backed by a set of ideological considerations covering the need to operate own international air services, will constitute the core of the second chapter.

The third chapter throws light on the growing dissatisfaction of states (which perceived bilateral negotiations as a power struggle on a quid pro quo basis) with the existing regulatory regime in the wake of new developments such as the deregulation of the U.S. airline industry and liberalisation in the EU air transport and other regional developments.

The fourth chapter will focus on the application of international free trade concepts [GATT principles] to air transport. The arguments and counter-arguments for inclusion of air services under GATT/GATS, the definitional aspects of what constitutes an export or import in air service and a critical evaluation of the General Agreement on Trade in Air Services are dwelt upon in this chapter.
The process of liberalisation of air services is an international activity having global implications. The fifth chapter exclusively covers these changes in the context of Indian civil aviation. It also sheds light on the recent announcement of an open-sky policy in the domestic airline industry and the possibilities of applying the new changes to international operations as a subsequent move towards further liberalisation.

The main aim of this study is to delve into the current developments of civil aviation in a global perspective which brings about the need for changes in the air policies of states. The study also highlights the merits and demerits of the Chicago-Bermuda regime vis a vis the proposed economic multilateralism. The chapter on the applicability of GATT/GATS principles to air transport is not an empirical study. It does not include the global air navigation systems, as the study is confined only to policy aspects of commercial civil aviation. In essence the entire work has developed about and around liberalisation and globalisation of civil aviation services.