

**MULTILATERAL TRADE
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**Implications for Application of Concepts, Principles
and Rules for the Transportation Sector**

The following communication is circulated at the request of the delegation of the United States to the members of the Group of Negotiations on Services.

Implications for Application of Concepts, Principles
and Rules for the Transportation Sector

Introduction

1. In this comment, the United States examines the implications and applicability for the transportation sector of the concepts, principles and rules contained in the Montreal declaration. Its purpose is to assist the testing discussion by illuminating the logical consequences of applying the concepts, principles and rules to transportation.

2. Given the short amount of time allocated to "testing" of transportation, this comment is limited to the aviation, maritime and trucking transportation sectors. Nothing in this comment prejudices the eventual position of the United States with regard to decisions on sectors to be covered by a GATT services agreements.

Background

3. Aviation and maritime transportation are viewed uniquely by many countries, owing to the close association of these sectors with national sovereignty. In addition, these industries are heavily regulated to ensure compliance with stringent environmental and safety standards.

4. International aviation service rights are generally accorded worldwide through bilateral (country-to-country) air transport agreements under the framework of the Convention on International Civil Aviation (Chicago Convention). The result is an extensive, complex, yet functional, network of bilateral aviation agreements that most GATT members states -- as well as non-member states -- participate in and support. As a general rule, airlines have no right to offer service between two countries unless the countries involved have signed a bilateral agreement that specifically defines each side's rights and obligations. (Absent a bilateral agreement, airline operations are based on a comity and reciprocity regime). Carriage of local traffic between points in a single country (cabotage) is almost universally limited to aircraft owned and operated by a nation's own citizens, a sovereignty practice incorporated into the Chicago Convention and reflected in the domestic laws of many countries, including the United States (see also safeguards and exceptions).

5. Bilateral aviation relations govern provision of the basic transport services as well as related issues of ground handling, currency conversion and remittance, computer reservation systems measures, and other so-called "doing business" items. There is a general trend toward the negotiation of more liberal bilateral international aviation agreements. For example, over the last decade the United States and many of its agreement partners have concluded bilateral agreements with fewer restrictions on entry,

pricing, frequency, and capacity. In addition, numerous "doing business" problems have been resolved within the bilateral framework.

6. In contrast to civil aviation, shipping lines of one nation are, as a rule, free to offer service to all other nations unless a country prohibits or restricts such service. Nevertheless, a significant number of countries have chosen to restrict access to shipping markets either through domestic law, especially through the reservation of a portion of foreign trade to national flag vessels, or through adherence to certain international regimes or through measures that inhibit the ability of foreign carriers to carry cargo. In addition, some countries choose to own or subsidize merchant shipping. As in aviation, domestic shipping (cabotage) -- inland and coastwise -- is nearly always limited to vessels owned and operated by a nation's own citizens. Such market access limitations have been adopted for long-standing public policy reasons, which for the United States and other countries derive from national security requirements (see safeguards and exceptions).

7. International liner shipping historically has been organized around liner shipping conference, groups of shipping companies that jointly determine such matters as tariffs, sailing frequencies, and capacity within a geographic area. In recent years, however, shipping lines have increasingly operated outside the conference system as "independents." Moreover, liner conferences do not exist in most trades involving state trading countries. Shippers often organize themselves into cooperative organizations called shippers' councils or associations, which espouse the shippers' points of view to liner conferences. The bulk shipment of commodities and other nonscheduled services are not organized into conferences and are relatively free of government restrictions.

8. The form that liner shipping conferences may take varies. In "open" international liner shipping conferences, including those operating to and from the United States, any carrier is free to join the conference. Moreover, in "open conferences" operating to and from the United States a conference carrier may on short notice operate apart from a conference (that is, it may file independent tariffs that differ from conference member tariffs). "Closed" liner shipping conferences restrict members to incumbent shipping lines and others that the existing conference members agree should be permitted to join. The right to file independent tariffs does not exist in "closed" conferences. Shipping conferences have not traditionally addressed transportation concerns such as storage (warehousing) and trucking (local and otherwise) that are peripheral to the ocean leg of liner shipping services, but which are essential elements of modern shipping operations. However, some conferences do file multi-modal tariffs.

9. Liner shipping also may be subject to a general system of

bilateral cargo sharing, such as that contained in the U.N. Code of Conduct for Liner Conferences (Liner Code). Agreements under the Liner Code usually reserve a major portion of the bilateral trade for the trading partners' national-flag fleets and a lesser portion for all others. Many countries have subscribed to all or part of the obligations of the Liner Code, including those affecting cargo allocation. Other countries, including the United States, strongly oppose the bilateral cargo sharing provisions of the Liner Code.

10. Systems for providing trucking services vary widely. Some parties have no restrictions on foreign investment in the trucking industry, while others do not allow any foreign investment in this sector. Cross-border access for trucking also varies widely from unrestricted access, to reciprocal access, to almost total bans on foreign provision of cross-border trucking services.

11. Facilities and services associated with airports and ports are often owned or controlled by governmental entities. State ownership or affiliation also characterizes shipping and aviation companies in many countries. There is less state ownership or affiliation of trucking companies around the world.

Transparency

12. In a number of countries, information on existing/impending changes to national laws, regulations, and administrative guidelines that directly or indirectly affect transportation are routinely available to interested parties. Government regulatory changes are published in a national official journal and private standards organizations conform to open notification procedures. In such countries, transparency is thus already the rule. In some other countries, particularly those with state-controlled economies, on the other hand, similar open notification procedures do not exist and/or traditional operating procedures are not formalized.

13. Application of transparency to the transportation sector would require that for all countries, all national laws, regulations, and administrative guidelines that directly or indirectly affect transportation would have to be available on a routine basis to interested parties. In general, all government regulatory changes would have to be published in a national official journal. Private standards organizations would have to conform to open notification procedures. Some opportunity for interested parties to comment on new rules or regulations could be required. Transparency, as it applies to notification and cross-notification procedures in GATT, might require countries, where asked, to provide the details of bilateral arrangements reached under the UN Liner Code or other bilateral maritime agreements. The Chicago Convention currently requires bilateral civil aviation agreements to be filed with the International

Civil Aviation Organization, although not all countries currently comply fully.

Progressive Liberalization

14. As the following paragraphs indicate, application of the Montreal principles to the transportation sector would have a profound effect on the existing rules, especially those governing trade in aviation and maritime services. Given the totally new regimes which would have to be created, determining how progressive liberalization could be achieved in this sector is highly speculative. Until countries have fully assessed the changes in the structure of these industries and the resulting economic, commercial and national security effects of these changes, discussion of progressive liberalization, as defined in the Montreal text, is premature. The difficulty in foreseeing at this stage how progressive liberalization could apply to the transportation sector is true for countries in all stages of development.

15. Application of the Montreal concepts, principles and rules to transportation would require that all existing regimes, many of which are long-standing and strongly supported, would have to be subordinated to the principles of the framework. The result would be an environment of open skies (as provided through MFN), the absence of all shipping cargo allocation regimes, and the availability of domestic markets currently protected by cabotage restrictions to foreign flag carriers. The resulting effect on the health of domestic industries and on related policies (see safeguards and exceptions) would have to be carefully evaluated by each country.

National Treatment

16. For international aviation and liner shipping, the concept of national treatment must be examined in the context of widespread prohibitions on access by foreign carriers to countries' domestic trades (cabotage). Restrictions on cabotage are particularly incompatible with the national treatment concept, assuming the Montreal language is adopted, since national treatment extends the obligations to foreign providers of services within the market of the host country. National treatment would apply to other, inseparable aspects of aviation services currently addressed under bilateral aviation agreements; for example, groundside handling, access to airport and airspace slots, access to computer reservations systems, and access for carriers as computer reservation system vendors.

17. Many countries believe that transportation is critical to national security. As a condition of licensing as a U.S. carrier, for example, owners of merchant vessels and air carriers agree that their vessels and aircraft are subject to requisition,

and that their crews are subject to being pressed into service by the flag country in time of war or national emergency. Many other countries have similar requirements. For national treatment to apply, these obligations of citizenship would have to flow with the corresponding benefits of national treatment extended through a trade agreement. In addition, foreign owned carriers operating in domestic trades would have to comply with domestic country safety and environmental regulations, which may differ substantially from their flag state standards or those included in IMO and ICAO Conventions. They would also have to comply with any special requirements relating to potential military employment.

18. Many countries reserve military and other government-impelled cargoes to national flag air and ocean carriers. In the United States the amount of such cargo is limited to goods purchased or donated by the government and the movement of governmental personnel and effects. In some other countries, the traffic covered by preference rules also includes that generated by local and regional governments, state-owned firms, and mixed-economy enterprises. Application of national treatment would require lifting of cargo reservations to allow foreign carriers to compete equally for the transportation of this cargo.

19. In many countries, foreign trucking companies are denied the ability to compete alongside domestic trucking companies on an equal basis. National treatment would require that foreign trucking firms could obtain permission to carry freight on the same basis as domestic carriers. National treatment would apply for shipping across the border to a final destination within the importing country as well as to foreign trucking firms which had established within a country to provide shipping services between two points in that country.

Most-Favored-Nation (MFN)/Non-Discrimination

20. This principle raises a fundamental question relating to Punta del Este Declaration commencing the services negotiations where the parties are required to "take into account" international understandings affecting services industries. Shipping and aviation operate under international regimes, both of which are generally incompatible with the principle of most-favored-nation treatment. Since these regimes deal with central features of air and marine transport, the question is whether it is possible for a services trade regime, which embodies the MFN principle, to co-exist with Chicago Convention Bilaterals and all cargo sharing arrangements.

21. The principle of MFN/nondiscrimination is basically incompatible with the existing bilateral treaty structure of international aviation under the Chicago Convention. Application of MFN/Nondiscrimination to aviation services would require dismantling the bilateral treaties. MFN would apply to other,

inseparable aspects of aviation services currently addressed under bilateral aviation agreements; for example, groundside handling, access to airport and airspace slots, access to computer reservations systems, and access for carriers as computer reservation system vendors. Even under an open skies regime, however, new entry might be constrained by infrastructure limitations (e.g., airport slots and air traffic control capacity), especially on desirable, heavily traveled routes.

22. In the case of international shipping, long-standing treaties of friendship, commerce, and navigation provide MFN treatment with respect to the carriage of bilateral cargo between signatory countries. Clearly, the principle is incompatible with the cargo sharing provisions of the UN Liner Code. Application of MFN to maritime shipping would require dismantling of the Liner Code.

23. Application of MFN treatment to trucking would require less dramatic changes in the status quo than in the aviation or maritime industries. Barriers to liberalized trade in trucking services tend to occur more in the form of market access problems rather than discrimination.

Market Access

24. The Montreal text addresses market access in terms of having the ability to supply services according to an exporter's "preferred mode of delivery". This suggests the possibility of requiring open regimes for both the movement of persons as well as the ability to invest in the host country. Countries must take into account the existing situation in the shipping and aviation industries where there are limitations imposed in both areas. In most countries, including the United States, control and substantial ownership of flag carriers are reserved for nationals. The movement of personnel is restricted by immigration regimes and by requirements that nationals alone must provide the labor for the flag of each ship. Thus, the fulfillment of the market access language would entail significant alteration of the investment and immigration policies of most trading countries.

25. Multi-modal transportation raises a number of important market access issues. Providing door-to-door service (rather than port-to-port services) would require that carriers have access to local distribution networks. To operate such services efficiently and competitively, carriers would need to be able to own or lease warehouses and trucks, unencumbered by restrictions that classify any shipping within a country's borders as domestic cabotage despite its prior or subsequent movement by air or sea.

26. When access to the market is available, various forms of commercial presence should be permitted to foreign services providers. Representatives offices to solicit business are essential to most transportation services. Trucking firms may

have to establish in a foreign country in order to provide services between two points within that country. An important feature of the ability to compete is the availability of open distribution networks, which in transportation includes the ability to warehouse, to own necessary facilities associated with foreign ports, to be able to use local telecom networks for the efficient use of their transportation network, and to have the choice to use their own nationals or to hire local citizens who can arrange for the movement of goods by way of one form of transportation or another.

27. Access to the market for essential suppliers of labor is important in the transportation sector. Crew of aircraft and maritime vessels must be able to enter foreign countries on a temporary basis until their vessels again depart the port. On the other hand, since the skills of most seamen would not be regarded by immigration authorities as highly technical, specialized, or unique, a services framework agreement would entail substantial changes to the immigration regimes of the countries of registry to permit non-national seamen as services suppliers on vessels registered in the those countries.

Increasing Participation of Developing Countries

28. The Montreal Declaration places emphasis on the increasing participation of developing countries in world services markets and strengthening their efficiency and competitiveness. For many developing countries, it is clear that the relative scarcity of resources in these countries inhibits their ability to compete in the global marketplace. Moreover, the bilateralization of shipping and cargo allocation under instruments such as the Liner Code creates mismatches between existing transportation resources and those shippers and receivers who demand transportation services. At the same time there is experience to indicate that the net effect of liberalization efforts, such as those undertaken in bilateral aviation agreements and through the deregulation of domestic transportation systems such as trucking, has been to provide a better match between existing transportation resources and the shippers and receivers who demand transportation services.

29. The Montreal text also refers to the need to improve access to distribution channels and information networks for developing countries. Examples of such improved access are included in paragraph 26. While such improved access would be of benefit to the development of developing countries, obligations for improving access should be undertaken by all signatories to a services framework.

Safeguards and Exceptions

30. Many countries view their flag carriers as a manifestation of their sovereignty. Many countries, including the United States, view maintenance of adequate sea-lift and air-lift capacity by privately-owned and commercially operated companies for use in time of emergency as vital to their national security interests. These emergency capabilities include the need for carriers, conveyances and shipyard construction and repair facilities that are owned, controlled and manned by nationals. Accordingly, many countries employ measures to insure that adequate sea-lift and air-lift capacity is available in times of national emergency. The special status of transportation among the service sectors is furthermore reflected in the continued flag state jurisdiction under international law over vessels and aircraft in and over international waters and in foreign territory.

Regulatory Situation

31. Regulations providing for safe operation of transportation carriers are extensive and necessary. Many countries subscribe to international regimes governing safety certification of aircraft and vessels established by the Chicago Convention and IMO Convention. These regimes are flag-based, meaning that countries recognize the safety certificate issued by the flag state, provided it complies with international standards. However, if access to domestic trades were provided to foreign flag carriers, the carriers would face domestic requirements (enforced by domestic authorities) that may differ from their own flag-based regimes.

Other Principles -- Subsidies

32. Countries often employ various subsidies to support their national-flag shipping companies and aviation carriers. These may take the form of direct operational or capital subsidies, as well as other forms of assistance such as special tax incentives or concessional financing. These subsidies may or may not be transparent. Many state-owned transport companies receive subsidies, particularly in instances where governments provide cash infusions to make up losses, as well as other preferences accorded solely to the state-owned firm. Expansion of trade under conditions of transparency and progressive liberalization to promote economic growth and development could require removal of subsidies for maritime and aviation services.

Auxiliary Services

33. A separate question that must be addressed relates to auxiliary services such as those listed in the Secretariat Note (MTN/GNS/W/50), (namely customs processing, cargo handling, storage and warehousing, and port services), that are fundamental

to transportation services. In many cases such functions, particularly customs processing and even cargo handling, storage and warehousing, and port services, are considered a government prerogative and are provided on a monopoly basis by national or local governmental authorities. These services can also be provided by privately commissioned entities. Competition from other domestic or foreign companies is not permitted, nor are transportation services providers permitted to invest in or own and provide such services for themselves. Where such monopoly situations exist, disciplines on the monopolies will be necessary to ensure that the monopoly providers offer the services on the basis of national treatment. In addition, whenever capacity is limited, auxiliary services are sometimes regulated such that access for new entrants may be limited; access to the transport market as a whole can thus be denied where it should be provided.