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BILATERAL AIR TRANSPORT AGREEMENTS — 1913–1980

*P.P.C. Haanappel**

Bilateral air transport agreements are international trade agreements¹ in which governmental authorities of two sovereign States attempt to regulate the performance of air services between their respective territories² and beyond,³ in some cases. Most bilateral air transport agreements deal only with scheduled international air services, although in more recent years non-scheduled or charter air services, have increasingly been included in bilateral agreements. The agreements have been either in separate charter bilaterals, or together with scheduled air services in the same agreement.⁴

Pre-World War II international air services were not always performed pursuant to bilateral agreements. Often, services were performed without any formal understanding. Governments sometimes gave concessions directly to foreign airlines in order to increase service. An example would be the case of Pan American's services to Latin America.

The phenomenon of bilateralism in international civil aviation was in existence as early as 1913 when France and Germany had entered into a bilateral agreement relating to aerial navigation.⁵ Most pre-World War II bilateral air transport agreements, however, were made after the signing of the Paris Convention⁶ in 1919 and were concurrent with the development of scheduled international air services. The first regular scheduled international air service in the world was inaugurated on March 22, 1919 between Paris and Brussels. At first, most of the agreements were those made by the signatory nations with nations not party to the Paris, Madrid⁷ and Havana

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1. Bilateral air transport agreements may take the form of treaties, executive agreements or be effectuated by an exchange of diplomatic notes. *See infra* at 263–64.

2. Most bilateral air transport agreements define "territory" in approximately the same fashion or by mere reference to Article 2 of the Chicago Convention (Convention on International Civil Aviation, Dec. 7, 1944, ICAO Doc. 2187, 39).

3. "and beyond" is added for those bilateral air transport agreements which exchange fifth freedom traffic rights. *See p. 244 infra*.

4. *See p. 244 infra*.

5. Cf. Rolland, *L'Accord Franco-Allemand du 26 juillet 1913 relatif à la navigation aérienne*, 20 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 697 (1913).

6. Convention Relating to the Regulation of Aerial Navigation (1919).

7. Ibero-American Convention Relating to Aerial Navigation (1926).

Conventions.⁸ They explicitly or implicitly granted rights for the carriage by air of persons and goods from one country to another.⁹ At that time, and in view of the liberal terms of Article 15 of the Paris Convention, the possibility was still open that nations might adopt an open-port policy for international civil aviation just as they did and still do today for maritime shipping.

Gradually, the formation of bilateral air transport agreements proliferated between the contracting parties to the Paris, Madrid and Havana multilateral conventions. By the latter part of the 1930s, traffic rights were often exchanged by these parties only on the basis of reciprocity.¹⁰ An illustration of this development of agreements and relations between nations may be drawn from pre-war U.S.-Canadian aviation relations.

The first formal Canadian-American agreement opening the possibility for air transport services between the two countries was signed in 1929.¹¹ The agreement was wide in scope and covered not only the admission of civil aircraft, but also the issuance of pilots' licenses and the acceptance of certificates of air worthiness for aircraft imported as merchandise. With regard to the admission of civil aircraft, Clause 6 of the agreement laid down the rule that if Canadian aircraft were licensed to carry passengers and/or cargo in Canada, they might do so also between Canada and the United States, but not between points within the United States. Similarly, American aircraft licensed in the United States might carry traffic between the United States and Canada, but not between two Canadian points. No route schedule was attached to the agreement. Without such a schedule, Clause 6 constituted a very general and extensive exchange of traffic rights. At the time of the 1929 agreement, however, the provisions of this clause were rarely used.

The 1929 agreement was replaced by a much more restrictive one in 1938: the Agreement Relating to Air Navigation.¹² Article III of the 1938 Agreement provided that the establishment and operation of regular air routes or services between the territories of the contracting parties were

8. Convention on Commercial Aviation (1928).

9. Cf. Gibson, *Bi-Partite Agreements on Aerial Navigation*, 6 TEMPLE L. Q. 57 (1931-32).

10. Cf. Cribbitt, *Some International Aspects of Air Transport*, 54 J. OF THE ROYAL AERONAUTICAL SOC'Y 669 (1950).

11. Canada Treaty Series 1929 No. 13. For pre-1929 civil aviation relations between Canada and the United States, see Latchford, *Aviation Relations Between the United States and Canada Prior to Negotiation of the Air Navigation Arrangement of 1929*, 2 J. OF AIR L. 335 (1931). Canada was a party to the Paris Convention and the United States to the Havana Convention. See *supra* notes 6 and 8.

12. Canada Treaty Series 1938 No. 8.

subject to the consent of such parties. For routes or services of American carriers, Canadian consent had to be obtained and for those of Canadian carriers, U.S. consent had to be obtained. Air transport enterprises applying for permission to operate routes or services between Canada and the United States were required to submit their applications through diplomatic channels. Again, no route schedule was attached to the agreement. The agreement itself was supplemented by another agreement: the 1939 Agreement Relating to Air Transport Services.¹³ Unlike the two previous agreements in 1929, Article III of this agreement provided that operating rights for Canadian and American carriers were to be exchanged on the basis of reciprocity. The agreement, whose validity was of a limited duration, was renewed in 1940 and 1943.¹⁴

EVENTS LEADING TO THE BERMUDA AGREEMENT OF 1946: 1944-1946

The Bermuda Agreement of February 1946,¹⁵ [hereinafter referred to as Bermuda 1], was the bilateral air transport agreement between the United States and the United Kingdom which would become the model for the world's bilateral air transport agreements for a period of some thirty years until Bermuda 2 replaced it in 1977. The two most significant events in the period from 1944 to 1946, which paved the way for Bermuda 1, were the Chicago Conference of late 1944¹⁶ and the founding of the International Air Transport Association [hereinafter referred to as IATA] in April 1945.¹⁷

Discussions on the economics of post-World War II civil aviation at the Chicago Conference were dominated by a profound difference of opinion between the two big aviation powers at the time: the United States and the United Kingdom. The latter, whose extensive pre-war air fleet had largely been destroyed during the war, was in favor of a system of intergovernmental economic regulation of civil aviation in order to give every nation a "fair share" of the international air transport market. The former, whose air fleet was strong at the end of the war, advocated a system of free competition. No compromise could be worked out and the Chicago Convention,¹⁸ the principal product of the Conference, would eventually provide that "no scheduled international air service may be operated over or into the territory of a

13. Canada Treaty Series 1939 No. 10.

14. Canada Treaty Series 1940 No. 13 and 1943 No. 4.

15. T.I.A.S. 1507.

16. See *supra* note 2 and text at 243-47.

17. International Air Transport Operators Conference, Havana (April 16-19, 1945).

18. See *supra* note 2.

contracting State, except with the special permission or other authorization of that State.¹⁹ With respect to non-scheduled international air services, however, the Chicago Convention was somewhat more liberal. For these services, the rights of overflight and stops for non-traffic purposes — the so-called first two freedoms of the air — were exchanged multilaterally between contracting states.²⁰ A further exchange of commercial traffic rights for such non-scheduled air services, relatively infrequent in practice at the time of the Chicago Conference, was also included in the Convention, but never became a reality due to the restrictive interpretation given by contracting states to the relevant provision in the Convention.²¹

In addition to the Convention, the Conference also produced the International Air Services Transit Agreement²² and the International Air Transport Agreement.²³ The Transit Agreement, like the Convention itself, widely ratified by nations, exchanged the first two freedoms of the air for scheduled international air services.²⁴ The Transport Agreement, drafted mainly upon American insistence, was virtually a dead letter due to lack of ratification. The United States itself withdrew from the Agreement in 1946.²⁵ The Transport Agreement exchanged all five freedoms of the air for scheduled international air services. In addition to the technical rights of overflight and non-traffic stops (freedoms one and two), the following commercial rights were exchanged multilaterally: the privilege to put down passengers, mail and cargo in a contracting state which were taken on in the territory of the state whose nationality the aircraft possessed²⁶ (third freedom; out-bound traffic); the privilege to take on passengers, mail and cargo in a contracting state destined for the territory of the state whose nationality the aircraft possessed²⁷ (fourth freedom; in-bound traffic); and the privilege to take on passengers, mail and cargo in a contracting state destined for the territory of any other contracting state as well as the privilege to put down passengers, mail and cargo in a contracting state which was coming from any such territory²⁸ (fifth freedom; and beyond transit traffic).

19. Article 6.

20. Article 5(1).

21. Article 5(2). See p. 257 *infra*. See also Haanappel, *The International Air Transport Association "IATA" and the International Charter Airlines*, 3 ANNALS OF AIR AND SPACE L. 143, 144 (1978).

22. See *supra* note 2, at 67. [Hereinafter referred to as Transit Agreement.]

23. See *supra* note 2, at 71. [Hereinafter referred to as Transport Agreement.]

24. Article I, s.1.

25. Dept. of State Press Release No. 510 (July 25, 1946).

26. Article I, s.1(3).

27. Article I, s.1(4).

28. Article I, s.1(5).

Due to lack of ratification of the Transport Agreement, the sum total of the impact of the Chicago Conference in the economic field consisted of a multilateral exchange of the first two freedoms of the air, for scheduled air services in the Transit Agreement and for non-scheduled air services in the Convention itself. Important matters such as capacity of traffic, frequency of flights and air tariffs were left open, even in the aborted Transport Agreement. Soon after the Chicago Conference, the airlines themselves took the initiative and created IATA for the international regulation of rates and fares. IATA, the follow-up organization to the pre-war International Air Traffic Association, was founded as an association of scheduled international airlines in April 1945,²⁹ equipped with the machinery for the determination of scheduled international air fares and rates (the IATA Traffic Conferences) by IATA's first Annual General Meeting of September 1945,³⁰ and incorporated as a Canadian corporation in December 1945.³¹

The Standard Form of Agreement for Provisional Air Routes is a noteworthy product of the Chicago Conference which also contributed to preparing the way for the Bermuda Agreement of 1946. This early agreement, sometimes referred to as the Standard "Chicago" Agreement, was drafted by the Chicago Conference as a non-binding model for bilateral air transport agreements between sovereign states.³² The main feature of a Standard "Chicago" Agreement is the bilateral exchange of air traffic rights between two nations on specific routes, laid down in an annex to the agreement. The agreement and its annex, however, are silent on the questions of capacity, frequencies and tariffs, leaving these matters to free competition between the airlines duly designated under the agreement by the contracting parties to perform the agreed air services. It is evident that such bilateral exchange of traffic rights on specific routes, without further economic restrictions, was attractive to the United States, competition-minded as it was at the time of the Chicago Conference. It is therefore not surprising that shortly after the Conference the United States entered into a number of such liberal Standard "Chicago" Agreements, most of which were to be abrogated soon after the conclusion of the Bermuda Agreement of 1946, which then became the model for United States, as well as other, bilateral air transport agreements. In their annexes, all except one of the Standard

29. See *supra* note 17.

30. "Provisions for the Regulation and Conduct of the IATA Traffic Conferences." For further details on the Chicago Conference and the creation of IATA, See Haanappel, *Ratemaking in International Air Transport. A Legal Analysis of International Air Fares and Rates*, Kluwer, The Netherlands, (1978).

31. 9-10 Geo. VI, c.51 (1945), amended by 23 Eliz. II, c.26 (1977).

32. See *supra* note 2, at 19.

"Chicago" Agreements concluded by the United States exchanged all five freedoms of the air. The sole exception was the agreement of 1945³³ between the United States and Canada, which only exchanged the first four freedoms of the air. It only contained in its annex U.S.-Canada routes without traffic rights to points beyond the territories of the contracting parties. At the time of the conclusion of the U.S.-Canada agreement of 1945, Newfoundland, then an essential link in any U.S.-Europe route, did not yet form part of the Canadian Confederation. When, in 1949, Newfoundland became a Canadian Province, a new agreement — and this time a Bermuda-type, U.S.-Canada bilateral agreement — was signed. The agreement included *inter alia* a U.S. route to Gander, Newfoundland, with traffic rights to points beyond.³⁴ Some of the ancillary provisions of the Standard "Chicago" Agreement reappeared in the Bermuda 1 and Bermuda-type agreements. They are evident in the provisions on designation of air carriers; charges for the use of airport and other facilities, importation of fuel, lubricating oils and spare parts; recognition of certificates of air worthiness, competency and licensing; application of laws and regulations of one contracting party to the aircraft of the other; registration of the agreement with the [Provisional] International Civil Aviation Organization [hereinafter [P]ICAO];³⁵ termination of the agreement upon one year's notice; and substantial ownership and effective control of an airline by the nationals of its state of registration.³⁶

BERMUDA 1

On the eve of the Bermuda Agreement of February 1946, between the United States and the United Kingdom, the stage was set for change. The Chicago Conference had been unable to resolve many economic issues of international civil aviation, such as the exchange of third, fourth and, in particular, fifth freedom traffic rights, capacity, frequencies and tariffs. The airlines themselves had founded IATA and given it a ratemaking machinery through the Traffic Conferences. Finally, the United States had entered into a number of liberal Standard "Chicago" Agreements, but with less important aviation powers than the United Kingdom or France. The final events which brought Britain and the United States to the negotiating table at Bermuda were the desire of American carriers to increase their frequencies to London

33. Canada Treaty Series 1945 No. 2.

34. Canada Treaty Series 1949 No. 14.

35. See *supra* note 2 (Article 83).

36. The "substantial ownership and effective control" provision of bilateral air transport agreements avoids the "flags of convenience" problems which have plagued international shipping over the years.

beyond the limits allowed by the pre-war bilateral arrangements still in force in early 1946³⁷ and, in the fall of 1945, the announcement by Pan Am of its intention to cut considerably fares from the United States to Britain and France. These intentions had met with fierce French and British resistance. Under these circumstances, a compromise was reached whereby the Americans accepted governmental tariff control, which they had been unwilling to do at Chicago in 1944, and whereby the British accepted the idea that airlines themselves would fix capacity and frequencies of flights, instead of following the system which they had proposed in 1944 and which involved intergovernmental pre-determination of capacity and frequencies. Some say that the compromise was perfectly acceptable to both parties. Others say that it had only become possible by the promise of an American loan to rebuild the British aviation industry. Wherever the truth may lie, and it probably lies in the middle, in the long run, Bermuda 1 proved to be satisfactory to both the Americans and the British. On September 19, 1946, they issued a joint statement proclaiming the Bermuda Agreement as the model for all bilateral air transport agreements to be concluded by the two countries. In practice, however, the Americans remained faithful to the Bermuda principles longer than the British.³⁸

Much has been written on Bermuda 1.³⁹ The agreement itself in articles 2 to 14 which repeats, and somewhat elaborates, upon the ancillary Standard "Chicago" Agreement provisions mentioned earlier. Article 1 of the agreement exchanges traffic rights between the contracting parties.

The annexes to the agreement reveal what this exchange of traffic rights involves. Annex 1 defines the rights exchanged as rights of transit, stops for non-traffic purposes, commercial entry and departure for international traffic in passengers, cargo and mail. These rights are exchanged on the air routes as specified in Annex III or as amended in accordance with Annex IV. Annex II contains the agreement's ratemaking provisions. The Final Act of the agreement includes a resolution on capacity and frequency.⁴⁰ The Bermuda 1 innovations and most important provisions are to be found in the Annexes and in the Final Act rather than in the agreement itself.

37. For the prewar American-British bilateral air transport agreements, see SHAW, CROSS AND BEAUMONT AIR LAW, 69 (1945).

38. See note 67 *infra*.

39. See Baker, *The Bermuda Plan as the Basis for a Multilateral Agreement*, lecture delivered at McGill Univ., April 18, 1947, reprinted in part in CHAYES, EHRLICH AND LOWENFELD, I INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE 498 (1968).

40. Annex V deals with the technical matter of "change of gauge."

Annex III shows a large number of scheduled air routes between the United States and the United Kingdom. This is not surprising in view of the fact that at the time of the Bermuda Agreement Britain still possessed many colonies. The considerable number of intermediate points with traffic rights and fifth freedom routes can easily be explained by the fact that aircraft in 1946 were only capable of relatively short-haul flights and that third countries with little aviation potential were more readily willing to grant permission to British and American carriers to serve their countries without restrictions than they are today.

Annex II on rates and fares is rather complicated. Paragraph (a) contains the principle that fares and rates for traffic between the United States and the United Kingdom are subject to the approval of American and British aeronautical authorities. To that end, fares and rates must, pursuant to paragraph (c), be filed by the carriers with the aeronautical authorities of the two countries at least thirty days before their proposed date of introduction. According to paragraph (b), carriers may, in determining their fares and rates, use the ratemaking machinery of the newly-created IATA which, pursuant to the same paragraph, the U.S. Civil Aeronautics Board (CAB) approved for a one year period on February 19, 1946.⁴¹ This approval relieved the machinery from the operation of the U.S. antitrust laws and the approval was renewed on a year to year basis until 1955, when it was made permanent.⁴² This permanent approval is still valid, except for the North Atlantic region, where it was withdrawn for U.S. carriers in 1979,⁴³ after proceedings in the so-called CAB Show Cause Order.⁴⁴ In those proceedings, the CAB had announced it would withdraw all antitrust immunity from IATA's ratemaking machinery, unless interested parties would come forward with convincing arguments to the contrary. A final decision on the Show Cause Order, and in fact, on the survival of the IATA ratemaking machinery, is not expected until 1981.⁴⁵ The true importance of paragraph (b), repeated in slightly different words in most of the world's bilateral air transport agreements, is a governmental delegation of ratemaking power to IATA, subject to government approval of individual IATA fares and rates. In determining rates and fares to be filed with aeronautical authorities, the rule of reason as to tariff levels of paragraph (h) of Annex II must be followed. In the event of governmental disapproval of fares and rates, inability on the part of IATA to agree on fares and rates, or nonavailability of the IATA

41. CAB Reports 639 (1946).

42. CAB Order E-9305 (1955).

43. CAB Order announced on Dec. 5, 1979, CAB Order 80-4-113, April 15, 1980.

44. CAB Order 78-6-78, June 12, 1978.

45. See p. 266 *infra*.

ratemaking machinery due to government disapproval of the machinery or otherwise (paragraph (d)), Annex II contains two alternate procedures: the paragraph (e) procedure applicable in the event of full CAB power to fix international air tariffs, and the paragraph (f) procedure applicable in the event of less than full CAB international ratemaking power. Although in paragraph (j) of Annex II the U.S. government promised to do its best to give the CAB full international ratemaking power, this promise never materialized and it has always been paragraph (f) that was applicable. In fact, the CAB never received more from Congress than the power to *suspend* and *reject* international air tariffs. It did not receive the power to *fix* them. The suspension and rejection power was only granted in 1972.⁴⁶ Paragraph (f) gives a contracting state in the event of tariff disputes the power "to take such steps as it may consider necessary to prevent the inauguration or continuation of the service in question at the rate complained of." Post-Bermuda 1 U.S. bilaterals often only contain the paragraph (f) type procedure and then sometimes add to the above quote: "provided, however, that the contracting Party raising the objection shall not require the charging of a rate higher than the lowest rate charged by its own airline or airlines for comparable services between the same points."

The strong language of paragraph (f) is, in fact, a paper tiger on the side of the United States since it is held that this provision does not in and of itself give the CAB the power to intervene in international fare disputes. That power must be derived from U.S. domestic legislation, such as the Federal Aviation Act,⁴⁷ which, as seen earlier, never gave the CAB more power than the suspension and rejection of international air tariffs.⁴⁸ Finally, paragraph (g) of Annex II gives contracting parties the possibility to submit their disputes to [P]ICAO for an advisory report.

46. Pub. L. No. 92-259, 86 Stat. 95 (1972), adding sub-section (j) to Section 1002 of the Federal Aviation Act. Before 1972, the CAB only had power in relation to discriminatory international air tariffs: See § 1002(f) of the Federal Aviation Act. The CAB's full tariff powers in relation to domestic aviation, see § 1002(d) of the Federal Aviation Act, were severely curtailed in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. The CAB's powers over international air tariffs have in their turn been diminished by the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 34. See AVIATION WEEK & SPACE TECHNOLOGY 27 (Feb. 11, 1980).

47. See *supra* note 46.

48. How limited CAB power was over international air tariffs before the granting of the suspension and rejection authority in 1972 is evidenced by the so-called Chandler Fare Controversy over North Atlantic tariffs in 1962-63. See LOWENFELD, 3 AVIATION LAW 31-78 (1972).

The capacity resolution of the Final Act of Bermuda 1 is well-known and can be found repeated almost literally in many of the post-Bermuda 1 bilateral air transport agreements:

1. Air transport facilities available to the travelling public must bear a close relationship to the requirements of the public for air transport (paragraph 3);

2. there must be fair and equal opportunity for the carriers to operate on the agreed air routes (paragraph 4);

3. carriers of one country shall take into consideration the interests of the carriers of the other country so as not to affect unduly each other's services (paragraph 5); and

4. the primary objective of the provision of capacity is to meet traffic demands between the country of nationality of the air carrier and the country of ultimate destination of the traffic (mostly third and fourth freedom traffic), with subsidiary fifth freedom traffic capacity related to the traffic requirements between the country of origin and the country of destination of air traffic, requirements of through airline operation and traffic requirements of the area through which the airlines pass after taking account of local and regional services (paragraph 6). The vagueness of these provisions is striking. The drafters of Bermuda 1 certainly did not have the intention of dividing traffic between American and British carriers on a 50-50 percent basis. It was more truly unfair competition between the carriers of the two nations that they wished to avoid. In the event of governmental dissatisfaction with capacity as offered by the air carrier, a system of regular and frequent consultation between the aeronautical authorities involved is provided for in paragraph 9, in addition to the consultation, dispute and denunciation provisions of articles 8, 9 and 14 of the agreement. This consultation mechanism is the so-called *ex post facto* review procedure of capacity which is often cited as one of the essential elements of Bermuda 1. In many post-Bermuda 1, U.S. bilaterals, it has become necessary to somewhat clarify and elaborate upon this mechanism. It is often provided that contracting parties may not unilaterally impose any restriction on capacity, frequency, scheduling or type of aircraft to be used on the agreed air routes. It is also often provided that consultation may be requested to review operations in order to establish whether they are in conformity with the Bermuda 1 principles and for that purpose, statistics will be maintained by the aeronautical authorities of the contracting parties.⁴⁹

49. Cf. Stoffel, *American Bilateral Air Transport Agreements on the Threshold of the Jet Transport Age*, 26 J. OF AIR L. AND COM. 119, 126, (1959); McCarroll, *The Bermuda Capacity Clauses in the Jet Age*, 29 J. OF AIR L. AND COM. 115, 118 (1963).

IMPORTANT DEVELOPMENTS IN THE FIELD OF BILATERAL
AIR TRANSPORT AGREEMENTS FOLLOWING
BERMUDA 1: 1946-1977

In September 1946, the Americans and British issued a joint statement proclaiming Bermuda 1 as the model for their future bilateral air transport agreements. A large number of third states followed suit in the years after 1946 by concluding Bermuda-type agreements. Bermuda 1 soon became the accepted standard bilateral air transport agreement in the post-World War II period. As shall be seen later,⁵⁰ most deviations from the Bermuda model occurred in the field of capacity and frequency clauses. The United States, at least until Bermuda 2 in 1977, stayed faithful to the original Bermuda principles. One of the major exceptions is the U.S.-U.S.S.R. agreement of 1966,⁵¹ where all commercial aspects of air services between the two countries, including capacity and tariffs, were made subject to a prior agreement between the designated airlines (Pan Am and Aeroflot) which, in turn, was subject to prior governmental approval.⁵²

When compared with Bermuda 1, post-Bermuda agreements appear considerably streamlined. All substantive provisions can usually be found in the body of the agreement and only the route schedule is contained in an annex. Route schedules with increasingly more precise routes for each nation's carriers have remained a feature of almost all post-war bilaterals. Only during the negotiations leading to the 1974 revision of the U.S.-Canada bilateral agreement of 1966⁵³ was a new and interesting system proposed. That proposal was never implemented. The system would have provided for the *automatic* introduction of new routes, once traffic potential would warrant them.⁵⁴ The United States and Canada remained faithful to the traditional route schedule system. The only peculiarity was the gradual introduction of new routes over a period of five years.⁵⁵

50. See p. 253 *infra*.

51. *Civil Air Transport Agreement between the Government of the U.S.A. and the Government of the U.S.S.R.*, DEP'T OF STATE BULL, 791 (Nov. 21, 1966).

52. Articles 2-4.

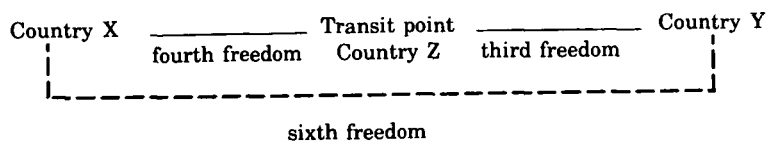
53. *Air Transport Agreement between the Government of the U.S.A. and the Government of Canada* (Ottawa, Jan. 17, 1966), amended by Exchange of Notes, (May 8, 1974), TIAS 7824.

54. *Cf. Proceedings of the Standing Senate (Canada) Comm. on Foreign Affairs*, 3 FOREIGN AFF. 26-43 (1974).

55. See *supra* note 53. At the same time as the revision of the 1966 agreement (like the 1949 agreement, see *supra* note 34 and text thereto, a Bermuda - type agreement), Canada and the United States entered into a Non-Scheduled Air Service Agreement and a customs and immigration Preclearance Agreement. See T.I.A.S. 7824.

The original Bermuda agreement, like the Standard "Chicago" Agreement, had provided for a system of multiple designation. Multiple designation permits each nation to designate one or more carriers to perform air services under the air transport agreement. Many post-Bermuda agreements contain the system of single designation. As its name suggests, this system allows each nation to choose one carrier to perform the air services in question. Generally speaking, nations with more than one international air carrier, including the United States, insist upon multiple designation. In agreements between nations with only one international carrier each, the system of single designation is prevalent. Some countries with more than one international airline, however, have divided the world geographically between their carriers; the nations can easily agree to a system of single designation since there will be only one international carrier flying to a particular country. This is the case for Canada. Canada has divided the world into "spheres of influence" for Air Canada and CP Air,⁵⁶ respectively.

Post-Bermuda route schedules also show a gradual disappearance of intermediate points, due to the development of long range aircraft, and a similar disappearance of fifth freedom routes, due to the creation of international airlines in most of the world's nations. Sixth freedom traffic, not specifically provided for in most Bermuda-type agreements, has often caused major problems in bilateral aviation relations. Sixth freedom traffic is that kind of fifth freedom traffic which an airline picks up abroad, transports to its own country and then transports onwards, in transit, to third countries. Sixth freedom traffic can also be regarded as a combination of third and fourth freedom traffic under two different bilateral agreements.⁵⁷



58

On some occasions the United States has attempted to limit the volume of sixth freedom traffic, carried by foreign air carriers out of the United States to the home country of the foreign airline involved and beyond, in transit, to

56. *Statement on Air Policy* (Nov. 23, 1973) (principles 6, 7 and 8).

57. For the definition of third, fourth and fifth freedom traffic, see *supra* at 244.

58. If sixth freedom traffic is carried between two countries without stopping at the transit point, it is sometimes called the seventh freedom traffic. Such is, for instance, the case for non-stop flights by the Icelandic carrier between New York/Chicago and Luxemburg.

points in third countries. Under the U.S.-Canada agreement, for instance, sixth freedom traffic potential may only be advertised by the airlines involved under certain conditions.⁵⁹ Furthermore, under a 1969 amendment to the 1957 U.S.-Netherlands agreement⁶⁰ and a 1966 amendment to the 1944 U.S.-Sweden agreement,⁶¹ it was stipulated that the primary objective of capacity provision only included sixth freedom traffic, if such traffic stopped over at the transit point in the home country of the carrier involved for twelve hours or more.

With respect to post-Bermuda route schedules, one should also mention the gradual appearance of all-cargo routes. The original Bermuda 1 had provided for specific air routes for the carriage of passengers, cargo and mail.⁶² Generally, this has been interpreted⁶³ or specified in subsequent agreements as meaning passengers, cargo and mail, "separately or in combination." The development of all-cargo planes, however, has sometimes led to the inclusion of separate all-cargo routes in schedules to bilateral agreements.⁶⁴

The original Bermuda agreement provided for non-binding arbitration through [P]ICAO in the event of disputes.⁶⁵ Many subsequent agreements provide for [non-]binding arbitration through *ad hoc* tribunals, composed of three arbitrators — one to be appointed by each contracting party, and the third by the two arbitrators so appointed or, if they cannot agree, but either the President of the International Court of Justice or the President of the ICAO Council.

CAPACITY AND FREQUENCY⁶⁶

The United States has generally remained faithful to the liberal Bermuda 1 capacity clauses. Many other nations, often including the United Kingdom,⁶⁷ have not remained faithful. Many nations have, in fact, turned

59. See *supra* note 53 (Article 3(d)).

60. T.I.A.S. 6796. See Haanappel, *Background of the Dutch-American Aviation Conflict*, 1 ANNALS OF AIR AND SPACE L. 63, 69 (1976).

61. CATC (55) 195 c.

62. See *supra* note 15 (Annex I).

63. Cf. Italy-U.S. Air Transport Arbitration: Advisory Opinion of the Arbitral Tribunal (Given at Geneva, July 17, 1965) Constituted in Virtue of the Compromise Signed at Rome on June 30, 1964 by the Governments of the U.S.A. and of the Italian Republic, reprinted in 4 INT'L LEGAL MATS. 974 (1965).

64. Cf. Wassenbergh, *Aspects of Air Law and Civil Air Policy in the Seventies* 59 Nijhoff, The Hague (1970).

65. See *supra* note 15. (Article 9).

66. See generally *Handbook on Capacity Clauses in Bilateral Air Transport Agreements*, ICAO Circ. 72-AT/9 (1965).

67. See *British Air Transport in the Seventies*, Report of the Committee of Inquiry into Civil Air Transport, Appendix 5 (The Edwards Report 1969).

away from the liberal Bermuda capacity provisions and replaced them, in one form or another, by the system of predetermination of capacity. Every predetermination system requires prior governmental approval of capacity before air services can commence. Sometimes this approval is limited to total capacity only. More often the approval relates not only to total capacity, but also to frequency of flights, scheduling of flights and/or types of aircraft to be used. Predetermination clauses can take one of two forms: the bilateral air transport agreement which repeats the Bermuda capacity principles, but makes them subject to *a priori* rather than *ex post facto* governmental review;⁶⁸ or, the bilateral agreement which contains some other capacity principle, such as reciprocity,⁶⁹ subject to prior governmental approval. The system of governmental approval itself can also take one of two forms: individual airlines must seek prior governmental approval of capacity and frequency; or the designated airlines must reach an inter-carrier agreement on capacity and related matters, subject to prior governmental approval.

Where bilateral air transport agreements require an inter-carrier agreement on capacity (and related matters), they sometimes go further and require, encourage or permit a commercial pooling agreement between the designated airlines. Such a pooling agreement, in its simplest form, can be described as an agreement for the sharing of revenues derived from the joint operation of an air route or air routes by two or more carriers. At the heart of every pooling agreement, there is a capacity agreement between airlines. On the basis of that capacity agreement, it is then further agreed between the participating airlines that they will put revenues derived from the joint operation of an air route or air routes into one and the same fund, to be

68. See, e.g., *Australian Standard Draft (1975) Agreement*, Article 8, in *2 Review of Australia's International Civil Aviation Policy* 310-11 (Australian Government Publishing Service, 1978).

69. Reciprocity is insisted upon by, for instance, many Latin American States. The reciprocity principle can sometimes be found in Europe. European bilaterals, like Canadian ones, show little uniformity with respect to capacity clauses. Particular agreements seem to be related to particular aviation relations. Generally, however, one can say that Canadian bilaterals become more and more pre-determination minded, whereas in Europe *Grosso modo*, Scandinavia and the Netherlands are in favour of liberal capacity provisions, Central Western European countries have a mixed system of liberal and predetermination capacity provisions, and Southern European countries usually adhere to protectionist (predetermination) capacity principles. Some uniformity in European bilateral air transport agreements has arisen from the European Civil Aviation Conference (ECAC) Standard Clauses for Bilateral Agreements. ECAC adopted these clauses in 1959 and recommended them to member states for use in their future bilateral agreements. The clauses, however, are silent on the questions of capacity and frequency. For their text, see *Handbook on Administrative Clauses in Bilateral Air Transport Agreements*, ICAO Circ. 63-AT/6, 116 (1962).

divided between the carriers in accordance with a predetermined formula.⁷⁰ Commercial pooling, whether compulsory or authorized under bilateral agreements or even without authorization in the bilateral agreement, is very common in all parts of the world, with one exception, namely, on air routes within, to, from, or via the United States. The CAB has consistently held commercial pooling to be anti-competitive, adverse to the public interest and has not wanted to relieve it from the operation of the U.S. antitrust laws under Sections 412 and 414 of the Federal Aviation Act.⁷¹

Capacity control through a system of governmental predetermination and/or through pooling between airlines severely limits free competition in international air transport. In fact, when capacity control is coupled with tariff control, as it most often is,⁷² there is almost no competition left between airlines. This loss of competition may have an adverse influence on the level of service offered to the travelling public. Such an influence adverse to the interests of the public is one of the reasons why the United States has always resisted capacity control and more recently, questioned tariff control.⁷³ In Europe, where capacity and tariff control have very often been combined, the Commission of the European Economic Community (EEC) is now engaged in a study on the liberalization of air transport regulation.⁷⁴

TARIFFS

In the field of tariff clauses, most nations have stayed more faithful to the Bermuda 1 principles than they have with respect to capacity and frequency. Most bilateral air transport agreements make tariffs subject to prior governmental approval and delegate the determination of tariffs in the first instance to the carriers involved. A majority of bilateral agreements then stipulates further that carriers, in determining their tariffs to be submitted to aeronautical authorities for approval, may use or shall use "wherever possible" the ratemaking machinery of IATA. A smaller group of bilaterals does not mention IATA specifically. Instead, this group refers more generally to "an association" of international airlines to be used by the

70. On pooling agreements, see *Summary of Material Collected on Co-Operative Agreements and Arrangements*, ICAO Circ. 84-AT/14 (1967).

71. See *supra* note 46. As an emergency measure in times of fuel shortage, the CAB has in the past often approved capacity reduction agreements between airlines. These agreements, however, did not provide for the sharing of revenues. For capacity agreements in U.S. domestic and international air transport, see CAB Order 75-7-98, July 21, 1975.

72. See p. 262 *infra*.

73. See p. 261 *infra*.

74. Bulletin of the European Communities, Suppl. 5/79.

carriers for the determination of their tariffs. A minority of bilateral agreements delegates ratemaking simply to the designated airlines involved, subject to prior governmental approval. This is particularly true for those few countries whose national carrier(s) is not affiliated with IATA.⁷⁵

It is most fortunate that very few bilateral air transport agreements have made the use of IATA's Traffic Conferences compulsory. Usually recourse to IATA's ratemaking machinery is optional. Bilateral agreements provide for alternate ratemaking procedures in the event of a breakdown of the IATA machinery, non-availability of the machinery or governmental disapproval of IATA tariffs.⁷⁶ This may not have been of paramount importance in the early days of post-Bermuda 1 bilaterals, when IATA was generally able to agree on worldwide fares and rates acceptable to a majority of governmental authorities. It did, however, become important in the 60s and the 70s, when IATA became increasingly unable to agree on tariffs internally and to convince governmental authorities of the validity of the tariffs which it did adopt. In the 60s, IATA's main problem was to cope with non-IATA charter competition. In the 70s, the problems were the fuel crises (shortage and price increases), temporary overcapacity resulting from the introduction of wide-bodied jets and the U.S. drive towards a more competitive system of airline pricing.⁷⁷

In the international tariff field, one multilateral agreement was concluded — the 1967 International Agreement on the procedure for the establishment of tariffs for scheduled air services.⁷⁸ The Agreement was reached within the framework of the European Civil Aviation Conference (hereinafter referred to as ECAC), but is open for accession by any member state of the United Nations or any of its specialized agencies.⁷⁹ For contracting parties, the provisions of the Agreement override tariff provisions in existing bilateral agreements.⁸⁰ In general, the Agreement repeats the Bermuda 1 tariff clauses and gives strong endorsement, both in the preamble and in the body of the agreement,⁸¹ to the ratemaking procedures of IATA. Unlike many agreements, and the early bilateral agreements in particular, the ECAC's agreement specifically defined the term "tariff."⁸² Provision was

75. Cf. Haanappel, *supra* note 30, p. 18.

76. For the standard U.S. clauses, see *supra* at 245.

77. Cf. Haanappel, *supra* note 30, at 133.

78. Signed at Paris, July 10, 1967, ICAO Doc. 8681.

79. Article 8.

80. Article 1.

81. Article 2(3).

82. Article 2(1). Tariff means "prices to be paid for the carriage of passengers, baggage and freight and the conditions under which those prices apply, including prices and conditions for agency and other auxiliary services, but excluding remuneration or conditions for the carriage of mail."

made for implicit or explicit⁸³ government approval of tariffs. An interesting detail of the agreements is that, in the event of governmental disputes over tariffs, old tariffs shall remain in force until new ones have been established or until twelve months after the date on which they would normally have expired, whichever is sooner.⁸⁴ This last provision can be found not only in the 1967 Agreement, but also in many bilateral air transport agreements all over the world. It differs from the U.S. standard clause that in the event of disputes, every contracting state can "take such steps as it may consider necessary. . . ."⁸⁵

CHARTERS⁸⁶

The first paragraph of Article 5 of the Chicago Convention⁸⁷ contains a multilateral exchange of the first two freedoms of the air for non-scheduled (charter) international air services. The second paragraph exchanges multilaterally the three remaining freedoms of the air — the commercial ones — for non-scheduled international air services, but adds that any state may impose "such regulations, conditions or limitations" upon this exchange "as it may consider desirable." States have, in fact, used this limitations clause so extensively that in practice prior permission for commercial charter flights is almost always required. In this fashion, Article 5(2) has become virtually inoperative, limiting the importance of Article 5 as a whole to the multilateral exchange of freedoms one and two. Not only is there a lack of multilateral exchange of commercial rights for international charter air services,⁸⁸ there is also a lack of bilateral exchange of such rights. Bilateral air transport agreements, with the exception of some recent U.S. agreements,⁸⁹ only cover scheduled international air services. In the absence of a multilateral or bilateral regime, international charter flights are governed both by the administrative rules of the country of origin of the charter air

83. Article 2(5). "[A]pproval may be given expressly. If neither of the aeronautical authorities has expressed disapproval . . . tariffs shall be considered as approved."

84. Article 2(8).

85. See *supra* at xx. Many provisions of the 1967 Agreement, see *supra* note 78 and text thereto, go back to Article 7 of the ECAC Standard Clauses. See *supra* note 69.

86. See generally Haanappel, *supra* note 21.

87. See *supra* note 2.

88. With the exception of two regional multilateral charter agreements of limited practical importance: Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, Paris, 1956, IACO Doc. 7695; Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services Among the Association of South East Asian Nations, Manila, 1971 (Agreement not registered with ICAO). The League of Arab States is preparing a similar regional charter agreement (draft agreement adopted at Tunis, Dec. 13, 1978).

89. See p. 259 *infra*.

traffic and by those of the country of destination. In practice the more restrictive of these two sets of regulations will prevail.

At the time of the Chicago Conference and for a good number of years thereafter, the importance of international air charters was limited. They were usually special charters ("single-entity" charters) for the transportation of groups such as military personnel, immigrants and pilgrims. Only during the latter part of the 50s, but especially during the 60s and early 70s,⁹⁰ did non-scheduled international air transport develop to become a true alternative to scheduled international air transport for the pleasure traveler. In the 50s and 60s, the predominant charter types were the affinity charter⁹¹ and the Inclusive Tour Charter (ITC).⁹² The former prevailed on the North Atlantic vacation market, the latter on the North-South European vacation market. To a large extent, regulations were developed by IATA⁹³ and as such, only meant to apply to the charter services of scheduled IATA member airlines. Most governments of the world, however, by means of administrative rules and regulations, made the affinity charter and the ITC their own national charter types, thus applicable to *all* carriers, whether scheduled or charter only ("supplemental airlines"), whether members of IATA or not.⁹⁴ In the early 70s, states began to realize that the affinity charter, with its artificial "interest group" requirement and the enforcement problems inherent thereto, had become outdated, especially on the North Atlantic. In October 1972, the United States, Canada and ECAC member states decided to replace, totally or partially, the affinity charter by the Advance Booking Charter (hereinafter referred to as ABC).⁹⁵ This charter type is open to all members of the public who buy their tickets through intermediaries (tour organizers) rather than directly from the airlines involved, and must book and pay well in advance of the date of travel (originally ninety days; now generally thirty days). In the United States, the ABC was preceded by the Travel Group Charter (hereinafter referred to as TGC), whose rules were slightly more restrictive than those of the ABC. At the present time, the ABC has been replaced by

90. The peak was reached in the early 70s, when almost thirty percent of total international air traffic was carried on charter flights.

91. In order to be eligible for an affinity charter, a passenger has to be member in good standing of an affinity group, *i.e.*, an organization with principal aims and purposes *other* than travel.

92. In order to be eligible for an ITC, a passenger has to buy ground arrangements (hotel, meals, excursions, etc.) in addition to air travel.

93. IATA Traffic Conference Resolution 045.

94. *See, e.g.*, the 1950s editions of Part 207 of the CAB's *Economic Regulations*, 14 C.F.R. Part 207.

95. Text of Agreed Principles for North Atlantic Charter Flights (*Ottawa Declaration*, Oct. 21, 1972), 68 DEPT' OF STATE BULL. 20 (1973).

the very liberal public charter, for which there are *no* advance booking and payment requirements and which is distinguishable from a scheduled air service only in that tickets are not sold directly by the airlines, but rather by tour organizers.⁹⁶

With U.S. charter rules becoming more liberal than those of many other countries, the United States, in the early 70s,⁹⁷ started a policy of concluding bilateral arrangements on international charters. These arrangements were first in the form of memoranda of understandings on non-scheduled air services⁹⁸ or in the form of more formal bilateral non-scheduled air services agreements,⁹⁹ but later charter provisions were included in bilateral air transport agreements, covering both scheduled and non-scheduled air services. This latter development started with Bermuda 2 in 1977.¹⁰⁰ ECAC has always objected to its member States entering into bilateral charter agreements with the United States. ECAC favors the conclusion of a multilateral agreement on North Atlantic charters. Such a multilateral agreement has as yet not materialized, and notwithstanding ECAC opposition, many European nations have concluded bilateral charter arrangements with the United States.¹⁰¹

Whether in the form of separate charter bilaterals and memoranda of understanding or in the form of bilateral agreements covering both scheduled and non-scheduled flights, the underlying rule in a recent U.S. charter policy has always been the "country of origin" rule. Under that rule, eligibility for charter air transportation is determined exclusively by the regulations of the country where the charter traffic originates. Charter passengers originating in the United States are thus governed by the liberal rules of the United States only and not by the often more restrictive rules of the country of destination.

With the U.S. charter policy becoming increasingly liberal and the country of origin rule applicable between the United States and many other nations, it is somewhat paradoxical that the volume of international charter air traffic has been dropping considerably since 1975. Cheap fares on scheduled international air services, in large part the result of liberal

96. See CAB Docket 32242.

97. U.S. Statement on International Air Transportation Policy (*Nixon Statement*, June 22, 1970) 63 DEP'T OF STATE BULL. 86 (July 20, 1970).

98. Such memoranda of understanding were concluded with many European nations.

99. Agreements between the United States and Canada (T.I.A.S. 7824), United States and Jordan (T.I.A.S. 7954), United States and Yugoslavia (T.I.A.S. 7819).

100. See p. 260 *infra*.

101. See *supra* note 98; see also p. 262 *infra*.

post-Bermuda 2 bilateral air transport agreements,¹⁰² are primarily responsible for the reduced volume.

BERMUDA 2 AND POST-BERMUDA 2 AGREEMENTS

On June 22, 1976, the United Kingdom announced its denunciation of the Bermuda Agreement of 1946. The termination of Bermuda 1 was to take effect one year later, on June 22, 1977, the day on which the United States and the United Kingdom were to reach an agreement on a new bilateral air transport agreement, Bermuda 2. The new agreement was signed and entered into force on July 23, 1977.¹⁰³

The British denunciation of Bermuda 1 had been inspired by dissatisfaction over capacity, as offered by American and British air carriers over the North Atlantic. The United Kingdom claimed that the traffic share of Pan Am and TWA by far exceeded that of British Airways. At the outset of the negotiations leading up to the conclusion of Bermuda 2, the British aimed at a new agreement, splitting U.S.-United Kingdom air traffic equally between American and British carriers. In this attempt, the British were unsuccessful. Article 11 of Bermuda 2 would repeat the liberal capacity provisions of Bermuda 1.¹⁰⁴ More generally, one can say that in the key areas of capacity, frequency and tariffs Bermuda 2 reiterates Bermuda 1 with some elaborations and minor restrictions. As to capacity, attention is drawn to the obligation of the contracting parties to avoid overcapacity and undercapacity¹⁰⁵ and to the consultative mechanism to deal with overcapacity on the North Atlantic.¹⁰⁶ With respect to tariffs, Article 12 of Bermuda 2 sanctions the system of governmental approval of tariffs and the use of the IATA ratemaking machinery. In the event of governmental dispute over tariffs and failure of consultation thereon, contracting parties may take action to continue in force the existing tariffs beyond the date on which they would otherwise have expired.¹⁰⁷ A Working Group on tariff matters surveys the application of the tariff provisions of the agreement.¹⁰⁸

102. See p. 262 *infra*.

103. Air Services Agreement between the Government of the U.S.A. and the Government of the U.K. (July 23, 1977). See Haanappel, *Bermuda 2: A First Impression*, 2 ANNALS OF AIR AND SPACE L. 139 (1977).

104. See *supra* at 246.

105. Article 11(5).

106. Annex 2.

107. Article 12(7). Cf. the Bermuda 1 tariff clauses, see *supra* at 248.

108. Annex 3.

The provisions of Bermuda 2 dealing with designation of airlines are quite complicated.¹⁰⁹ In principle, there is a system of multiple designation.¹¹⁰ On North Atlantic routes, however, there is single designation per route, *i.e.*, on each particular route there shall only be one carrier of each nation, with the exception of two routes, where there may be multiple designation by each nation.¹¹¹ It is especially on this matter of designation of carriers that Britain got an advantage over the United States in Bermuda 2.

Bermuda 2 is innovative in that the agreement included provisions on charter air services.¹¹² The development of cheap charter air services is encouraged¹¹³ and the existing U.S.-United Kingdom Memorandum of Understanding on Passenger Charter Air Services of April 1977 is incorporated into the agreement.¹¹⁴

After the conclusion of Bermuda 2, it was sometimes expected that the agreement would take the road of its predecessor, Bermuda 1, and become the model for modern worldwide bilateral air transport agreements. This expectation has not materialized for two reasons. In the first place, Bermuda 2 with its often very detailed provisions proved to be geared almost exclusively to the U.S.-United Kingdom market.¹¹⁵ Secondly and more importantly, the new administration in Washington, D.C., the Carter Administration, became heavily committed to a more freely competitive international aviation policy than the one expressed in Bermuda 2. Whereas Bermuda 2 espouses a policy which is perhaps slightly more restrictive than that of Bermuda 1, the Carter administration's policy is infinitely more liberal than was Bermuda 1. Under this policy of "deregulation," governments play a minimal role in the economic regulation of air transport. Economic decisions and policies are left to the determination of individual airlines and to the free forces of the marketplace.

Under this so-called "deregulation" policy, eleven new bilateral air transport agreements or amendments to existing agreements have been entered into by the United States in the period 1978-80.¹¹⁶ The first of these

109. Article 3.

110. Article 3(1)(a).

111. Article 3(2)(a)(b). Other exceptions to single designation per route are found in Article 3(2)(b)(i)(ii). For all-cargo services, see Article 3(3).

112. See *supra* at 259.

113. Article 14.

114. Annex 4.

115. At the present time, U.S.-U.K. negotiations are being held to liberalize some of the Bermuda 2 provisions; see AVIATION WEEK & SPACE TECHNOLOGY 34 (Febr. 11, 1980).

116. See AVIATION WEEK & SPACE TECHNOLOGY 20-21 (Dec. 31, 1979).

very liberal post-Bermuda 2 agreements was reached with the Netherlands on March 10, 1978. Since then have followed such countries as Australia, Belgium, Fiji, Finland, West Germany, Iceland, Israel, Jamaica, Papua New Guinea and Singapore.

Post-Bermuda 2 U.S. bilateral air transport agreements generally have the following characteristics:

1. unlimited multiple designation of airlines;
2. a liberal route structure, *i.e.*, U.S. airlines may serve foreign countries from any point in the U.S., via any intermediate point and to any beyond point;
3. free determination by the designated airlines of capacity, frequencies and types of aircraft to be used unhindered by the Bermuda 1 capacity clauses;¹¹⁷
4. no limitation on the carriage of sixth freedom traffic;
5. encouragement of low tariffs, set by individual airlines on the basis of the forces of the marketplace without reference to the ratemaking machinery of IATA;
6. minimal governmental interference in tariff matters;¹¹⁸ and
7. inclusion of provisions on charter flights, *i.e.*, the availability of cheap charter air services is encouraged and charterworthiness is governed by the country of origin rule.¹¹⁹

Many nations which have entered into this new kind of bilateral air transport agreement with the United States have done so for a price. Sometimes that price has been an exchange for a larger number of gateways for their carriers in the United States, especially in the sunbelt (*i.e.*, Atlanta, Los Angeles, Miami). It seems fair to assume that foreign governments will only enter into liberal post-Bermuda 2 type agreements if such action is to their advantage. Not only do foreign carriers receive additional gateways in the United States, they also manage to get an extremely large share of the air transport market. It seems, for instance, that the Dutch carrier KLM has close to ninety percent of the total U.S.-Netherlands market and that the remaining ten percent is shared between several U.S. carriers. The United States may have enunciated its liberal deregulation policy for largely

117. *See supra* at 250.

118. Some minor form of governmental control over tariffs has been retained. Under the early version of post-Bermuda 2 agreements, the country of origin rule is applied to tariffs (both scheduled and non-scheduled), *i.e.*, tariffs can only be disapproved by the aeronautical authorities of the country where the traffic originates. Under the later version the system of dual or mutual disapproval is applied, *i.e.*, tariffs determined by individual airlines can only be invalidated by disapproval of the aeronautical authorities of *both* contracting parties.

119. *See supra* at 259.

consumer-oriented purposes. The main thrust of these purposes is to make international air transport available to the public as extensively and as cheaply as possible. Those foreign governments accepting this policy seem to have done so not so much for ideological purposes, but more for the commercial benefit of their flag carriers.

NEGOTIATION AND IMPLEMENTATION

Bilateral air transport negotiations are usually held by negotiating teams composed of representatives from such ministries as the foreign affairs ministry¹²⁰ and the transportation ministry of the respective government,¹²¹ with interested carriers either as observers¹²² or as full-fledged delegation members. In many countries, the carriers often do the groundwork for bilateral negotiations with governmental authorities only stepping in at a later stage.

In principle, bilateral air transport negotiations are conducted for the purpose of serving civil aviation interests. In practice, however, many other considerations often enter into the negotiating process. These other considerations may be political, military or economic in nature.¹²³ Also, in the negotiation of bilateral air transport agreements, many nations have their bilateral agreements, which usually are registered with ICAO¹²⁴ and thus in the public domain, accompanied by secret memoranda of understanding. This is a highly undesirable practice. These secret memoranda often totally change the meaning of a bilateral air transport agreement, for instance, from a Bermuda 1 type agreement into a predetermination type agreement.

The implementation of bilateral air transport agreements into domestic law is done in accordance with the constitutional laws of each contracting party.¹²⁵ In countries where bilateral agreements have the status of treaties — this is the exception rather than the rule — and are ratified by Parliament, they either form part of domestic law automatically (the civil law tradition) or they do so once implementing legislation has been passed (the

120. In the United States, the State Department is the equivalent of the foreign affairs ministry.

121. In the United States, the Department of Transportation is the equivalent. In the United States, representatives of the CAB also participate in bilateral negotiations.

122. In the United States, the carriers are represented through observers appointed by their trade associations: ATA (Air Transport Association of America) for scheduled airlines; NACA (National Air Carrier Association) for supplemental airlines.

123. See, e.g., Haanappel, *supra* note 60, at 75.

124. See *supra* note 2 (Article 83).

125. See generally Gertler, *Bilateral Air Transport Agreements: Non-Bermuda Reflections*, 42 J. OF AIR L. AND COM. 779, 807 (1976).

British tradition). In the United States, bilateral air transport agreements have the status of executive agreements, signed under the executive power of the President and not submitted to the Senate for advice and consent.

In all those countries — and they are a majority — where bilateral air transport agreements do not take the form of inter-state treaties, but rather the form of intergovernmental agreements, one needs (a) domestic aviation legislation which is consistent with the bilateral agreements and *vice versa*, and (b) domestic legislation which is strong enough to give aeronautical authorities the power to implement the provisions of bilateral agreements. In the absence of enabling domestic legislation, powers conferred upon aeronautical authorities in bilateral agreements often cannot be exercised.¹²⁶ As Lord Denning, M.R., remarked in an English Court of Appeal decision regarding Bermuda 1²⁷: “[The Bermuda agreement] is a useful illustration as to what Governments have agreed between [sic] themselves,” but it forms no part of British municipal law.¹²⁸

ICAO STUDIES

Since the beginning of the 70s and especially upon the insistence of developing nations, ICAO has been actively engaged in a large number of studies on the economic aspects of international civil aviation.¹²⁹ In addition to undertaking studies,¹³⁰ the organization has set up a Panel of Experts on the Regulation of Air Transport Services¹³¹ and a Panel of Experts on the Machinery for the Establishment of International Fares and Rates.¹³² It has also convened two worldwide Special Air Transport Conferences, the first of which was held in 1977¹³³ and the second in February 1980.¹³⁴

126. Cf. *supra* note 48 and text thereto.

127. *Pan-American World Airways v. Department of Trade* [1976] 1 Lloyd's L.R. 257.

128. *Id.* at 260.

129. On ICAO in general, see BUERGENTHAL, *LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION* (1969).

130. See, e.g., *Survey of International Air Transport Fares and Rates*, ICAO Circ. 123-AT/33 (1974); *Policy Concerning Non-Scheduled Air Transport*, ICAO Circ. 136-AT/42 (1977); *Regulation of Capacity in International Air Transport Services*, ICAO Circ. 137-AT/43 (1977); *Tariff Enforcement*, ICAO Circ. 135-AT/41 (1977); *Regional Differences in Fares, Rates and Costs for International Air Transport*, ICAO Circ. 144-AT/49 (1977).

131. For the Panel's latest report, see ATRP/3-Report (1979).

132. For the Panel's latest report, see FRP/4-Report (1979).

133. *Special Air Transport Conference Report*, ICAO Doc. 9199, SATC (1977).

134. See ICAO, AT Conf. 2, *Second Air Transport Conference, Montreal, 12-28 February 1980, Documentation*.

The main topics of concern to ICAO member states have been the following: the relationship between scheduled and non-scheduled international air services; capacity regulation in international air transport; international ratemaking procedures, through IATA or otherwise; and tariff enforcement.¹³⁵ Since the Second Air Transport Conference of 1980, aviation fuel scarcity and sharply rising fuel prices can be added to this list.

Although the several Panels and Conferences have adopted numerous recommendations and resolutions, very little concrete action has emerged from ICAO's efforts. The Panels and Conferences seem to function more as a worldwide forum, where developed and developing, Western and socialist nations can air their often diametrically opposed views. In itself, of course, this may be extremely helpful.

In the field of bilateral air transport agreements, the only really tangible result of ICAO's recent economic work has been the adoption by the ICAO Council of a Standard Bilateral Tariff Clause.¹³⁶ The Clause is for guidance of ICAO member states in the conclusion of their bilateral air transport agreements. In many ways, the Clause comes close to the 1967 International Agreement on the procedure for the establishment of tariffs for scheduled air services.¹³⁷ There are, however, important differences. First of all, the Clause is drafted in such terms that it could conceivably be applied not only to scheduled but also to non-scheduled international air services. Furthermore, there is no explicit reference to IATA, but rather an implicit one:

(3) The tariffs . . . shall, if possible, be agreed by the designated airlines of both Contracting Parties, after discussion with their respective governments and consultation, if applicable, with other airlines.

(4) Such agreement . . . shall, wherever possible, be reached by the use of the appropriate international rate fixing mechanism.

The traditional system of filing and governmental approval of tariffs is maintained.¹³⁸ Governmental approval may be express or tacit.¹³⁹ Tariffs, once approved and in force, remain in force until new ones have been established or until twelve months after the date on which they otherwise would have expired.¹⁴⁰ Finally, contracting parties are under an obligation to investigate

135. See also the titles of the studies, *supra* note 130.

136. ICAO Doc. 9228-c/1036 (1978).

137. See *supra* at p. 256.

138. Paragraphs (5) and (6).

139. There are two alternatives in paragraph (6); the first for express approval and disapproval; the second for implicit approval. Cf. *supra* note 83 and text thereto.

140. Cf. *supra* note 84 and text thereto.

and punish tariff violations (rebates) by airlines, agents, tour organizers and freight forwarders.¹⁴¹

It is clear that this ICAO tariff clause has been drafted without regard for the country of origin pricing rule or the dual tariff disapproval rule, as contained in U.S. post-Bermuda 2 bilateral air transport agreements.¹⁴² More generally, at the Second Air Transport Conference of 1980, a majority of nations has shown itself to be somewhat uneasy about the recent liberal trend in U.S. international civil aviation policy. The CAB Show Cause Order which might eventually take all antitrust immunity away from IATA ratemaking activities,¹⁴³ has come under attack and strong support has been shown for the survival of IATA. In relation to capacity, the new U.S. "free determination" policy¹⁴⁴ has received a lukewarm reception, states generally being inclined to give preference to either a predetermination type capacity regulation or a Bermuda 1-type capacity regulation.

CONCLUSION

Bilateral air transport agreements can be looked upon as international trade agreements in which sovereign states attempt to secure a fair share of the international air transport market for their flag carriers. Such a "fair exchange" approach would militate in favor of Bermuda 1-type agreements or even in favor of predetermination type agreements. The picture, however, may change somewhat if one takes into consideration the "public utility" aspect of international civil aviation.¹⁴⁵ Under that generally accepted concept, sovereign states try to promote safe, cheap and efficient air transport for the entire world public. Such a goal is most often served best by a policy of regulated competition. Carriers compete under governmentally-issued rules and under governmental supervision. This attitude, it is suggested, would advocate Bermuda 1-type agreements. Some of the world's air transport markets, however, have become so "mature" in approaching a perfect market situation with a large number of suppliers (airlines) that the public may be better served by a policy of free competition. At the present time, this seems to be the case only for U.S. domestic air transport, for the North Atlantic market and possibly for the intra-European market. In "mature" international markets, experiments with post-Bermuda 2-type free competition bilaterals seem to be warranted. In all other markets, however, where there are few

141. Paragraph (10).

142. See *supra* note 118 and text thereto.

143. See *supra* notes 43-44 and text thereto.

144. See *supra* at 253.

145. Cf. PILLAI, *THE AIR NET. THE CASE AGAINST THE WORLD AVIATION CARTEL 2* (1969).

suppliers (airlines) and where the market situation approached an oligopoly, the public may be better served by a system of governmentally-regulated competition in the form of Bermuda 1-type agreements.¹⁴⁶ Stringent predetermination type agreements seem to be justified only for a number of developing nations wishing to protect their young carriers from too much foreign airline competition.

146. Australia's new international civil aviation policy contains an interesting new system: capacity, frequency and type of aircraft to be used come under a system of governmental predetermination. Low non-IATA tariffs are allowed for point-to-point transportation by third and fourth freedom carriers. *See supra* note 68, at 1.