THE REGULATION OF NON-SCHEDULED AIR SERVICES UNDER BILATERAL AIR TRANSPORT AGREEMENTS

by

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ABSTRACT

Many nations, except the United States, have long regulated non-scheduled air services under their bilateral air transport agreements. Though inconstant and largely superficial, this regulation has served to alleviate the constrictive effects of multifarious laws and regulations, enacted to keep charter expansion in check.

The (mainly) unilateral, diverse legal regimes charters have had to face have not stopped their growth. The late 1960s saw their worth: inter alia, their low fares facilitated tourism, filled empty aircraft seats, and injected some competition into a highly regulated industry.

The Americans then realised that, absent the legal uncertainty that continuously plagued charters, and fueled by free-enterprise concepts, non-scheduled US carriers, to their benefit, could move substantial national traffic. Legal certainty and competition, assured by bilateral treaties, led the United States to begin substantial bilateral regulation of charter services.

This evolution of non-scheduled air services, through bilateralism, is traced in this thesis.

RÉSUMÉ

Depuis longtemps déjà, plusieurs pays, mis à part les États-Unis, réglementent les services aériens non-réguliers par l'entremise de leurs accords bilatéraux portant sur le transport aérien. Cette méthode de réglementer, bien que parfois inconséquente et souvent superficielle, a tout de même su atténuer la rigueur des multiples lois et règlements adoptés dans le but de limiter l'expansion du secteur des services non-réguliers.

Les caractères unilatéral et diversifié des règles applicables aux services non-réguliers n'ont pas réussi à freiner leur croissance. La fin des années 1960 témoigna de leur utilité: entre autres, leurs tarifs réduits stimulaient le tourisme, comblaient les sièges vides et lançaient la concurrence dans une industrie fortement réglementée.

Par la suite, les Américains se sont aperçus que s'ils remédiaient à l'incertitude juridique dans ce secteur et s'ils permettaient la libre concurrence, les transporteurs américains de vols non-réguliers pourraient, à leur bénéfice, transporter de nombreux passagers. La certitude juridique et la concurrence, assurées par les accords bilatéraux, ont poussé les États-Unis à débuter la réglementation des services non-réguliers au niveau bilatéral.

Cette évolution des services non-réguliers à travers les accords bilatéraux sera l'objet d'étude de cette thèse.

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Finally, the last, but not least, my Dad and Brother, for ..., for ... *everything*!

LIST OF ABBREVIATIONS

A	Assembly (of ICAO)
ABC	Advance Booking Charter
C	Council (of ICAO)
CAB	Civil Aeronautics Board (United States)
Can.T.S.	Canadian Treaty Series
CATC	Commonwealth Air Transport Council
CFR	Code of Federal Regulations (United States)
CLP	Current Legal Problems
Cmd	Command (United Kingdom)
CRASL	Centre for Research in Air and Space Law (McGill University)
Doc.	Document
DOSB	Department of State Bulletin (United States)
ECAC	European Civil Aviation Conference
HMSO	Her Majesty's Stationery Office (U.K.)
IASL	Institute of Air and Space Law (McGill University)
IATA	International Air Transport Association
ICAO	1. The International Civil Aviation Organization; 2. With respect to a bilateral air transport agreement registered with the Organization, its Registration No.
ITC	Inclusive Tour Charter
Int'l Legal Mat.	International Legal Materials
JALC	Journal of Air Law and Commerce
MOU	Memorandum of Understanding
LGB	Legal Bureau (of ICAO)
NCC	National Consumer Council (United Kingdom)
OTC	One-Stop Inclusive Tour Charter
SEC	Special Event Charter
TGC	Travel Group Charter
TIAS	Treaties and Other International Acts Series
UKTS	United Kingdom Treaty Series
UNTS	United Nations Treaty Series
U.S.C.	United States Code
WP	Working Paper (presented at an ICAO Assembly)

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INTRODUCTION

The promise that aircraft have, as instruments of war, was amply demonstrated during the two Great Wars. But that aircraft have an even greater promise, as carriers of peace, was reason enough for Statesmen to gather at Chicago, in December 1944, to ponder upon the kind of legal framework, that post-World War II international civil aviation should have. What we now have, as a result of these deliberations, is the Convention on International Civil Aviation (the "Chicago Convention").

As will be seen in the first chapter, civil aviation, at the time of the Conference, mainly consisted of air services that were run at regular intervals, on the basis of fixed time-tables. These air services had proven their worth, prior to the War, in keeping empires intact. In addition, these regular, reliable, so-called "scheduled" services, were expected to play a large part in re-building countries, after the War. Therefore, some States were reluctant to leave this important mode of air transport to multilateral regulation. States wanted to keep, in their own hands, control of their own air commerce. It was important, at the same time, to ensure that a glut of "foreign"

air carriers did not hinder the economic development of national aviation industries.

Therefore, amongst other things, States decided, and the Convention thereby declares, in its sixth Article, that "no scheduled international air service may be operated over or into the territory of a contracting State", except with the permission of that State. This came to be understood as meaning that scheduled air services were to be bilaterally regulated. A brief overview of scheduled services and bilateral air transport agreements is given in Chapter 2.

Other air services, distinct from "scheduled" services, also existed in 1944. However, these were irregular in nature, not operated according to any fixed schedule. They were ad hoc, "on the spur-of-the-moment", flights. These "non-scheduled" flights were considered economically too unimportant to be of any national concern. But, international non-scheduled flights did take place, and these had to be regulated. No danger was seen in having these insignificant services regulated multilaterally. Article 5 of the Chicago Convention hence lays down the multilateral regime that governs non-scheduled international flights. Prudence, however, dictated that States ought have some individual control over non-scheduled air commerce. Thus, they have been given a right, in Article 5 itself, to

impose "regulations, conditions or limitations" on these flights, as they see fit.

Little did the Statesmen at Chicago realise that these insignificant non-scheduled flights would gradually become economically important enough to oblige States to impose, on them, all kinds of regulations, conditions and limitations. How these non-scheduled air services grew, and how State regulations all but nullified the provisions of Article 5, is traced in the latter part of Chapter 2.

Although States professed multilateralism for non-scheduled services (in Article 5), they were not unwilling to have these services also regulated bilaterally. It is this non-scheduled bilateral regulation that forms the subject-matter of this thesis.

This thesis, though principally a legal study of the regulation of non-scheduled air services under bilateral air transport agreements, is also a historical study. Thus, to the extent possible, these agreements are discussed in chronological order. The agreements of the United States ("US-Agreements") are surveyed apart, in chapter 4, from "non-US" agreements. The fact that the US was late off the mark, when it came to regulating non-scheduled services under bilateral agreements, is one reason for this distinction. Another reason is that US agreements are much more thorough when it comes to charter regulation, and it

thus makes sense to discuss them separately. Finally, a reasonably detailed look was required to be taken at US charter policy with respect to bilateral regulation, and this, too, dictated the need of a distinct chapter.

This thesis, of course, does not claim to be the last word on this subject; nor is it an exhaustive examination on the topic of non-scheduled services. Lack of time, and space, has obliged the author either to omit discussion of, or to discuss superficially, events or literature that do not necessarily relate to the subject-matter at hand.

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CHAPTER 1

THE REGULATION OF INTERNATIONAL CIVIL AVIATION: PART I

1.1 INTERNATIONAL CIVIL AVIATION: ITS BEGINNINGS

1.1.1 Introduction

1.1.1.1 The Wright Brothers

International civil aviation has come a long way since that fateful day, 17 December 1903, at Kitty Hawk, North Carolina. The world's first successfully powered flight was made by the Wright Brothers. From this one short hop in the air, Humankind eventually was to progress to mighty leaps across large continents, high mountains, and broad oceans.

1.1.1.2 Growth of International Flight

The growth, and progress, of international flight was rapid. In 1909 Louis Blériot made the first international flight. He flew from Calais, in France, to Dover, in England; the sea was no longer a barrier![1] The Germans began the first regular airship service in 1910.[2] World War I intervened. The potential of aircraft in warfare was amply demonstrated and affirmed.[3]

1.1.1.3 The Wonder Year of Civil Aviation

The year of peace, 1919, was also the "wonder year" of civil aviation: several "airlines" were formed on the model of shipping lines; two English pilots first flew across the North Atlantic from Newfoundland to Ireland; the French Farman company could claim to be the first international airline, flying between London and Paris and Brussels and Paris; and, in August, the first daily international scheduled service was begun, between Hounslow Heath, in London, and Le Bourget, near Paris.[4]

1.1.2 The Paris Convention, 1919[5]

1.1.2.1 First Multilateral Legal Framework

The year 1919 also saw the creation of the first multilateral legal framework for the regulation of aerial navigation. The States gathered at Paris recognised that "the establishment of regulations of universal application [would] be to the interest of all", and that they desired "to encourage the peaceful intercourse of nations by means of aerial communications".[6] The Convention had its imperfections. However, its influence was manifested when its contracting Parties sought to harmonise their national laws with its provisions, so as "to avoid conflicting solutions for similar problems."[7]

1.1.2.2 State Sovereignty Over Airspace

The Convention is no longer in force.[8] Nevertheless, its lasting impact lies in the fact that its Article 1 codified what is now the most basic rule of international aviation law, that of the sovereignty of a State over the airspace above its territory.[9] The principle confirmed State practice during the First World War, and denied, once and for all, the notion of "freedom of the air".[10]

1.1.3 Other Conventions

The Paris Convention served as a model for other aviation Conventions which were signed, soon after. With a few exceptions, most of the provisions of the latter Conventions were similar to those of the Paris Convention.[11] The Ibero-American Convention Relating to Air Navigation (The "Madrid Convention") of 1926, never entered into force. The Pan-American Convention on Commercial Aviation (The "Havana Convention") of 1928, provided for international air commerce, but the protectionist policies of its member-States rendered the provisions ineffective.[12] Three more Conventions: the Buenos Aires (1935), Bucharest (1936) and Zemun (1937) Conventions followed. The Zemun Agreement

(between Italy, Romania and Yugoslavia), was the first multilateral agreement to deal with the operation of scheduled air routes.[13]

1.2 INTERNATIONAL CIVIL AVIATION: ITS GROWTH

1.2.1 Origins of the Concept of "Scheduled" Air Services

1.2.1.1 Aviation: Its Value

The English, French, Dutch, and other European States, with their overseas colonies, began to establish air links to connect themselves with these Empires.[14] The English saw aviation as "the greatest factor in linking up" and "uniting the scattered countries" of the Empire;[15] thus began the air routes to far away India, South Africa, Australia, New Zealand, and Hong Kong. Civil aviation was seen by Holland and Belgium as a means for smaller nations from escaping "from their confines" and a "critical instrument for a small trading nation".[16]

1.2.1.2 Importance of Regularity

Civil aviation grew. The various airlines became instruments serving "national interests and ambitions".[17] They were heavily subsidized by their Governments, whose aim was to promote regular services.[18] At that time, speed

was not considered important in air transport: regularity was. An aircraft was expected, "day after day", to follow "its timetable with the precision of a pre-war express train".[19]

1.2.1.3 State Practice

During this period, the concept of "regularity" in air transport came to be reflected in State practice, especially in multilateral[20] and bilateral[21] aviation agreements. This practice continued. Even today it is not unusual to come across such a reference in a bilateral air transport agreement.[22]

1.2.1.4 Scheduled Air Service

Flying was expensive. Airlines could not survive without government help in the form of subsidies, or mail contracts.[23] Moreover, to attract business, an air transport company had to "run on a schedule" and "advertise that schedule as widely as possible".[24] A "schedule", in this sense, was meant "timetable". An example of such a timetable is reproduced in the Appendix, at page 2[illegible]. Regular daily and weekly flights began to evolve,[25] run on "schedules". Thus, essentially, "scheduled" air services existed prior to the Second World War,[26] offering regular services.

1.2.2 Origins of the Concept of "Non-Scheduled" Air Services

1.2.2.1 Early Charters

At the beginning of 1919, a businessman hired an ex-World War I bomber to fly him to a business meeting.[27] This is one of the earliest instances of "charter" or "non-scheduled" air transport.

1.2.2.2 Special Flights

The early years of civil aviation saw governments promoting regular air services.[28] These regular services became highly organised, running to fixed schedules. Regular airlines, however, were often called upon to provide services, outside of their normal schedules. These services were of a special kind: transporting money or gold, embarking on rescue operations, and even taking tourists on sight-seeing trips.[29] However, these "special flight arrangements", were more expensive than the government-subsidized "regular" services,[30] little in demand,[31] and infrequent.[32]

1.2.2.3 Regular v. Ad hoc Flights

Thus, on the one hand, there existed those government sponsored, regular services, running according to time-

tables, at, hence, uniform intervals. These criteria (uniformity, pre-established timetables, regularity, government approval) were applied, even after the Second World War, in several bilateral air transport agreements, as the elements of a "regular" (scheduled) air service.[33]

On the other hand, there existed the 'ad hoc' infrequent special flights, not running to any timetable. These eventually came to be known as "non-scheduled", to distinguish them from the first (scheduled) type.

1.2.2.4 World War II

On 1 September 1939, the Second World War began. It came to an end on 14 August 1945. However, on 1 November 1944, States gathered at Chicago, Illinois, to establish a legal framework for post-War international civil aviation. By the time the Conference ended on 7 December 1944, the two types of air services, as described above, had formally and firmly been divided into "Scheduled" and "Non-Scheduled" Air Services. Henceforth, international civil aviation was to be built on these two pillars.

1.3 INTERNATIONAL AIR COMMERCE: ITS TWO PILLARS

1.3.1 The Chicago Conference: Introduction

1.3.1.1 Aviation: Economic Reconstruction

The War left most of the world's economies in shambles. However, while the conflict was still in progress, the importance of aviation, to economic reconstruction world-wide, was recognized by the Allies.[34] Aviation was seen as a lifeline to trade and security[35] and a vital means of communications.[36] So, in November 1944, 54 States gathered at Chicago "to design a blueprint for worldwide regulation of post-war international civil aviation."[37] A multilateral regulatory framework for economic, navigational and technical matters, was sought by the Assembly.[38]

1.3.1.2 Multilateral Rules: Technical Matters

The International Civil Aviation Conference[39] succeeded in formulating a multilateral regulatory framework for navigational and technical matters. Principally, these matters are regulated by:

(i) the provisions of Part I of the Chicago Convention,[40] the main document created by the Conference;

(ii) the so-called "Annexes" to the Chicago Convention, which now number eighteen,[41] from an initial eleven;[42] and,

(iii) other air navigation regulations which, "for one reason or another, [are] not fit for inclusion in an Annex."[43] These are the "Procedures for Air Navigation Services" (PANS) and "Regional Supplementary Procedures" (SUPPS).

1.3.1.3 Multilateral Rules: Economic Matters

(1) Exchange of Rights: Freedom of the Air Doctrine

In the economic field, the Chicago Conference aimed at a multilateral agreement on the exchange of commercial rights for international civil aviation.[44] Exchange of commercial aviation rights is based on the "Freedom of the Air" doctrine.[45] The doctrine can be interpreted as meaning political "freedom of the air", and as commercial "freedom of the air".[46]

(2) Freedom of the Air: Political Sense

In the political sense, "freedom" of the air does not exist. It has long been declared that air is not

free.[47] This customary rule of international law[48] was re-iterated in Article 1 of the Chicago Convention:

> "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."

This provision is the foundation on which (international) air law is based.[49] In practical terms this means that an aircraft can be flown over the territory of a State only under the terms and conditions set by that State. Thus it can, if it so wishes, close its airspace to aircraft, thereby prohibiting air commerce with other nations.[50] Alternatively, it can unilaterally, bilaterally, or multilaterally lay down regulations for the use of its airspace. Hence, air commerce can take place only within the framework of Article 1.[51]

(3) Freedom of the Air: Commercial Sense

The doctrine of "Freedom of the Air" in the commercial sense means that "countries and aircraft which are prepared to observe certain principles agreed internationally shall not be prevented by other countries from enjoying certain minimum rights essential to operation."[52] These "minimum rights essential to operation" have been termed the "Five Freedoms" of the air, these being supplemented by three more, to give a total of eight such "freedoms".[53]

The first two freedoms are generally known as the "technical rights".[54] The remainder are the "traffic rights".[55]

(4) The "Freedoms of the Air": Effect of a Multilateral Exchange

As seen above (at 1.3.1.3.1), the aim of the Conference was to obtain a multilateral exchange of commercial rights, i.e. the Freedoms of the Air. In general, such an exchange would have allowed the airline(s) of one State unrestricted access to the air markets of all other States, parties to the agreement. As will be seen below, this did not come to pass.

1.3.2 The Chicago Conference: The Result

1.3.2.1 "Open" v. "Closed" Skies

Two opposite views regarding the economic regulation of post-war international civil aviation were put forth. The United States advocated its "Open Skies" policy. The United Kingdom, on the other hand, championed the "Closed Skies" principle. These differences of opinion had their roots in the War. During the War, in order to get all they could from available resources, the Allies decided that the United Kingdom would build fighters and bombers, whilst

the United States built transport planes.[56] The closing stages of the War found the United States with a fleet that could easily be converted to civilian use. Its aviation industry, in addition, had hardly been touched by war. Naturally, the United States pursued a policy of almost unrestricted economic freedom for international civil aviation, with air routes to be bilaterally negotiated.[57]

The United Kingdom opposed this suggestion. Its own aviation industry had been almost destroyed by the War. So it feared the domination of air transportation by the airlines of the United States.[58] In order to protect its undeveloped industry, it fought for the "closed skies" principle[59] and for "order in the air" through an international regulatory machinery which would "give each country a 'fair share' of international air traffic."[60]

1.3.2.2 The Economic Results

The United States and the United Kingdom could not reconcile their differences. The issue of fifth freedom traffic (should it be multilaterally regulated? how should its capacity be determined?) was the main reason why a multilateral exchange of commercial rights was not agreed to at the Conference.[61]

However, as seen above, Article 1 had been laid down as the foundation on which international civil aviation

was to be built. The immediate consequence of Article 1 is that multilateral or bilateral agreements between States are necessary for them to exchange commercial air rights.[62] The Conference could not agree on a comprehensive multilateral exchange of economic air rights. It did, however, agree to a multilateral exchange of commercial rights for NON-SCHEDULED air services, in Article 5 of the Convention.[63] It will be seen later that, in practice, the traffic rights granted under Article 5 have almost become inoperative.

The Convention lays down, in Article 6, the agreement the Conference reached as regards SCHEDULED air services:

> "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."

This provision has been regarded as requiring States, wanting to exchange commercial air rights, to conclude a bilateral agreement.[64]

Thus, Article 1 is the foundation, with Article 5 and Articles 6 the two pillars, on which international civil aviation is built. The following chapter will be a discussion on how international civil aviation was built with the

support of these two pillars and to what extent the distinction that was drawn between these two types of services, has been eroded.

ENDNOTES - Chapter 1

1. A. SAMPSON, Empires of the Sky: The Politics, Contests and Cartels of World Airlines (London: Hodder and Stoughton, 1984) at 27 [hereinafter, SAMPSON].

2. Ibid., at 41.

3. N.M. MATTE, Treatise on Air-Aeronautical Law (Toronto: The Carswell Co. Ltd., 1981) at 96 [hereinafter, MATTE].

4. SAMPSON, supra, note 1 at 28-32.

5. Convention Relating to the Regulation of Aerial Navigation, opened for signature at Paris, 13 October 1919 (Cmd. 670, London:HMSO, 1920) [hereinafter, PARIS CONVENTION, 1919].

6. Ibid., at the Preamble.

7. F.N. VIDELA ESCALADA, Aeronautical Law (Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff International Publishers B.V., 1979) at 32.

8. Article 80, Convention on International Civil Aviation, 7/12/1944, ICAO Doc. 7300/6 [hereinafter, CHICAGO CONVENTION].

9. PARIS CONVENTION, 1919, supra, note 5 at Article 1, paragraph 1. Note, however, that an exception to this rule was provided for in Article 2, paragraph 1:
   "Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States...."

10. SAMPSON, supra, note 1 at 28.

11. MATTE, supra, note 3 at 119 et seq.

12. Ibid., at 121. The Havana Convention is no longer in force.

13. Ibid., at 123.

14. SAMPSON, supra, note 1 at 29 et seq.

15. Ibid., at 32, quoting Sir Sefton Brancker, and at 33, quoting Sir Samuel Hoare, respectively.

16. Ibid., at 38.

17. Ibid., at 29.

18. J.W.F. SUNDBERG, Air Charter: A Study in Legal Development (Stockholm: P.A. Norstedt & Soners Forlag, 1961) at 12 (emphasis provided) [hereinafter, SUNDBERG].

19. SAMPSON, supra, note 1 at 35, quoting Sir Samuel Hoare.

20. Article 15 of the Paris Convention, 1919 (as amended on 15 June 1919), reads, in part:

> "Every contracting State may make conditional on its prior authorisation the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory" (emphasis provided).

The Paris Convention, 1919, as amended, is reproduced in I. VLASIC, Public International Air Law I (Montreal: IASL, McGill University, 1982) at 390.

21. For example:
   i) The Netherlands-Germany, 24/7/1922
   Article 12 tells us that "[t]he establishment of airlines and the working of a regular air service ... may be subjected to special authorisation." (emphasis provided).
   ii) France-Spain, 22/3/1928
   Articles 1 and 2 talk of "regular air routes".

Both agreements are reproduced in I.A. VLASIC & M.A. BRADLEY, The Public International Law of Air Transport: Materials and Documents, Vol. 1 (Montreal, IASL, McGill University, 1974) at 36, 38.

22. For example:
    i) Argentina-Portugal, 7/3/1947, CATC(49)67, at the Preamble and Art. 1.
    ii) Austria-Romania, 14/7/1975, CATC(83)231, at the Preamble.
    iii) Austria-Switzerland, 19/12/1949, CATC(49)244, at the Preamble.
    iv) Barbados-Trinidad & Tobago, 5/4/1987, CATC(88)46, at the Preamble.
    v) Belgium-Cameroon, 25/11/1971, CATC(88)34, at the Preamble.
    vi) Belgium-Hungary, 1/6/1957, CATC(57)160, at Art. 1.
    vii) Brazil-The Federal Republic of Germany, 29/8/1957, CATC(57)197, at the Preamble.
    viii) Bulgaria-U.A.R., 9/7/1959, CATC(60)151, at the Preamble and Art. 1.
    ix) Chile-Brazil, 4/7/1947, CATC(51)119, at the Preamble.
    x) Denmark-Brazil, 18/3/1969, CATC(69)256, at the Preamble.
    xi) France-Argentina, 30/1/1948, CATC(48)166, at the Preamble and Art. 1.
    xii) Guatemala-The Netherlands, 15/12/1977, CATC(80)309, at Art. 2.
    xiii) Jordan-Iraq, 4/11/1953, CATC(54)42, at the Preamble, Art. 2 and Art. 13.
    xiv) Mali-Guinea, 17/11/1961, CATC(63)105, at the Preamble.
    xv) The Netherlands-Mexico, 24/8/1961, CATC(62)56, at the Preamble.
    xvi) Switzerland-Sweden, 8/10/1950, CATC(51)5, at the Preamble.

23. SAMPSON, supra, note 1 at 28.

24. B. CHENG, The Law of International Air Transport (London: Stevens & Sons Ltd., 1962) at 9 [hereinafter, CHENG].

25. SAMPSON, supra, note 1 at 44.

26. CHENG, supra, note 24 at 9.

27. P. JACKSON, The Sky Tramps: The Story of Air Charter (London: Souvenir Press, 1965) at 12 [hereinafter, JACKSON].

28. Supra, section 1.2.1.

29. SUNDBERG, supra, note 18 at 11.

30. Ibid., at 11-12.

31. CHENG, supra, note 24 at 9.

32. M.K. MOURSY, Trends in the Economic Regulation of International Air Transport in the Aftermath of Bermuda II (D.C.L. Thesis, IASL, McGill University, 1986) (unpublished) at 304 [hereinafter, MOURSY].

33. Examples:

i) Brazil-Argentina, 2/6/1948, CATC(49)77, at Article 15(8).
ii) Brazil-Denmark, 14/11/1947, CATC(49)63, at Article 2(c).
iii) Brazil-The Netherlands, 6/11/1947, CATC(48)6, at Article 11(c).
iv) Brazil-Norway, 14/11/1947, CATC(49)64, at Article 11(c).
v) Brazil-Spain, 28/11/1949, CATC(52)60, at Article 3(c).
vi) Brazil-Switzerland, 10/8/1948, CATC(49)200, at Article 11(3).
vii) Brazil-Uruguay, 28/12/1956, CATC(57)155, at Article 3(j).
viii) Chile-Argentina, 14/12/1948, CATC(50)256, at Article 15(8).
ix) Paraguay-Chile, 1/6/1957, CATC(57)103, at Article 14(3).
x) Paraguay-Uruguay, 19/3/1957, CATC(59)97, at Article 14(3).

34. A.F. LOWENFELD, "A New Takeoff for International Air Transport" (1975) 54 Foreign Affairs 36 at 36 [hereinafter, LOWENFELD].

35. SAMPSON, supra, note 1 at 71.

36. MOURSY, supra, note 32 at 183.

37. P.P.C. HAANAPPEL, Pricing and Capacity Determination in International Air Transport: A Legal Analysis (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1984) at 9 [hereinafter, HAANAPPEL].

38. MOURSY, supra, note 32 at 25.

39. The proceedings of the Conference have been published as: Proceedings of the International Civil Aviation Conference, Chicago, Ill., November 1-December 7, 1944, Vols. 1 & 2 (Washington, D.C.: United States Government Printing Office, 1948).

40. CHICAGO CONVENTION, supra, note 8. Part I consists of Articles 1-42 (both inclusive), in Six Chapters.

41. ICAO Publication Catalogue (Montreal: International Civil Aviation Organization, 1989) at 10.

42. CHICAGO CONVENTION, supra, note 8 at Article 37.

43. T. BUERGENTHAL, Law-Making in the International Civil Aviation Organization (Syracuse, N.Y.: Syracuse University Press, 1969) at 115.

44. HAANAPPEL, supra, note 37 at 10.

45. G. CRIBBETT, "Some International Aspects of Air Transport", (1950) J. of the Royal Aeron. Soc. 669 at 675 [hereinafter, CRIBBETT].

46. HAANAPPEL, supra, note 37 at 10.

47. See the Paris Convention, 1919, supra, sec. 1.1.2.

48. O.J. LISSITZYN, "Freedom of the Air: Scheduled and Non-Scheduled Air Services" in, E. McWHINNEY & M.A. BRADLEY (eds.), The Freedom of the Air (Leyden: A.W. Sijthoff, 1968) 89 at 89 [hereinafter, LISSITZYN].

49. NATIONAL CONSUMER COUNCIL, Air Transport and the Consumer - A Need for Change? (London: Her Majesty's Stationery Office, 1986) at 135 [hereinafter, NCC].

50. HAANAPPEL, supra, note 37 at 11.

51. Ibid., at 11.

52. CRIBBETT, supra, note 45 at 674.

53. HAANAPPEL, supra, note 37 at 11-12.

54. "For the aircraft of State A, these (technical) freedoms are:
(1) The privilege of flying over the territory of State B without landing.
(2) The privilege of landing in State B for technical reasons only, i.e. for such purposes as refuelling but not to pick up or set down passengers, cargo or mail."

- HAANAPPEL, supra, note 37 at 11.

55. For the aircraft of State A, the principal traffic rights (i.e., Freedoms 3, 4 and 5) would be:
(3) "The privilege to set down in State B traffic (i.e. passengers, cargo or mail) picked up in State A (outbound traffic)."
(4) "The privilege of picking up in State B traffic destined for State A (inbound traffic). Third and fourth freedom traffic are closely linked and together form inter-partes traffic."
(5) "The privilege of picking up or setting down in State B traffic which is destined for or has come from State C (extra-national traffic)."

The remaining traffic rights are:
(6) Sixth freedom traffic is "that type of traffic which passes from one foreign country to another via the country of nationality of the aircraft". This would be traffic carried by a carrier of State A, from State B to State C, via State A.

(7) Seventh freedom traffic would be traffic carried by a carrier of State A, from State B to State C, but without a stop at State A.

(8) Domestic traffic ("cabotage" traffic) carried by a foreign aircraft would be the Eighth freedom.

- HAANAPPEL, supra, note 37 at 11-12.

56. CHENG, supra, note 24 at 6.

57. HAANAPPEL, supra, note 37 at 13.

58. H. CRUSH, "The Market Place of Cheap International Air Travel in Europe" (1989) 17 Int. Bus. Lawyer 21 at 21 [hereinafter, CRUSH].

59. CHENG, supra, note 24 at viii.

60. HAANAPPEL, supra, note 37 at 13.

61. Ibid., at 14.

62. Ibid., at 14.

63. Article 5 states:

> "Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are unaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.
>
> Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable."

64. MATTE, supra, note 3 at 141.

ARRANGEMENT OF TOPICS

CHAPTER 2

THE REGULATION OF INTERNATIONAL CIVIL AVIATION: PART II

2.1 AIR COMMERCE: A DISTINCTION MADE

2.1.i Introduction

2.1.1.1 Broad Framework

As seen above, the Chicago Conference agreed to a multilateral regulation of the technical aspects of international civil aviation; however, the Conference could not agree on a set of multilateral rules to regulate international air commerce.[1] It was agreed, nevertheless, that a (broad) framework, within which commercial air operations could be regulated, be set up. Articles 5, 6 and 7 of the Chicago Convention describe this framework.[2]

2.1.1.2 Dual Nature

Article 5 ("non-scheduled flight") and Article 6 ("scheduled air services") are the two pillars on which modern air commerce is built. Article 5 can also be said - along with the "Transit" and "Transport" Agreements[3] - to be an expression, remnant of the determination of the Chicago Conference, to multilaterally regulate commercial

air transport. One might wonder at this dual (scheduled/ non-scheduled) nature of air transport. It reflects the history of pre-War aviation and the civil aviation environment as perceived in 1944.[4]

2 1.2 Post-War Aviation Plans

2.1.2.1 Pre-War Aviation

Pre-War aviation consisted mainly of government subsidized carriers providing a regular (scheduled) air service; 'ad hoc' or special flights were performed by these, or other, carriers on a non-regular basis.[5] Those who planned post-War international civil aviation saw it as a continuation of this system. They also visualized it as being based on the structure of maritime transport.[6]

2.1.2.2 Maritime Transport: The Model

Maritime transport has had a dual nature. On the one hand, there has been regular, scheduled shipping, run on specific, fixed routes; on the other hand, there has been "tramp" shipping, operating on 'ad hoc' bases, depending on the availability of cargo, and, neither having any regular, scheduled frequency, nor any specific, fixed routes.[7] The first ("regular") aspect of shipping was seen to be more important. The establishment of regular markets, a growing

demand for transport, and a growth in the military importance of mercantile navigation (which interested governments), were some of the factors that called for a regular service.[8] Regular services thus formed a major part of world shipping after the War.[9]

2.1.2.3 Air Transport: The Image

Aviation, from the very beginning, interested governments. It came to be considered an instrument of national policy.[10] Regular air services were considered important.[11] Irregular flights were considered irrelevant and of no importance.[12] Therefore, it was visualised that national air enterprises would operate a regular (scheduled) network of services (similar to the regular 'network' of shipping services). Regular services would then be supplemented by the irregular, 'ad hoc' flights (like 'tramp' shipping supplemented 'regular' shipping). Each 'ad hoc' flight would be "treated as a separate and different operation for different purposes and under different conditions."[13] Thus, these flights came to be known as "non-scheduled" flights, to differentiate them from the "scheduled" services.

2.1.3 The Distinction

In this manner, two pillars, on which commercial international civil aviation was to be built and regulated, were created in Articles 5 and 6 of the Chicago Convention. The essence of both Articles has been neatly summarised in one sentence:

> "Without an express governmental yes, a foreign carrier cannot operate a scheduled service; without an express governmental no, a foreign carrier is entitled to operate a non-scheduled service."[14]

The shape that is taken by an "express governmental yes" for scheduled services forms the subject-matter under discussion in the next section. The manner in which an (express) "governmental no" operates to limit non-scheduled services, will be discussed thereafter.

2.2 ARTICLE 6: SCHEDULED AIR SERVICES

2.2.1 Introduction

2.2.1.1 Chicago Convention: Arts. 1 and 6

For international air commerce to take place, Art. 1 of the Chicago Convention has made it necessary for States to conclude multilateral or bilateral agreements.[15] The Chicago Conference could not agree to a multilateral regula-

tory regime for scheduled air transportation. Article 6 of the Convention thus lays down the compromise that was reached at the Conference regarding the regulation of scheduled air services.[16] There is general consensus that this provision requires States to conclude bilateral agreements in order to exchange commercial air rights and let international civil aviation be realised.[17]

2.2.1.2 The Standard Form[18]

A non-binding, model bilateral air transport agreement was recommended by the Chicago Conference in its Final Act.[19] The aim, in recommending so, was to ensure that bilateral air transport agreements entered into by States, and patterned on the model agreement, would be uniform to some extent.[20] There was hope that a multilateral air commercial agreement could still be reached. Uniform bilateral State practice would have facilitated reaching an agreement at a multilateral level.[21] This was one reason why uniformity was sought.

The Standard Form does not determine routes or indicate which commercial rights are exchanged. It also does not contain provisions relating to capacity or tariffs. These three important inter-related factors - the freedoms of the air (i.e., the commercial rights), capacity and tariffs - regulate, in general, international air com-

merce.[22] The absence of these terms did not deter States from entering into agreements based on the Standard Form. On the contrary, the model found favour with the United States, in particular. Pricing or capacity issues being unrestricted, U.S. pro-competitive ("open skies") policy was satisfied; the U.S. immediately entered into several "Chicago Standard" bilateral agreements.[23] These agreements were, however, later superceded by the 'Bermuda I' type agreements (see, infra, 2.2.2.4).

The Standard Form's administrative and technical clauses have proven to be longer lasting - they are extensively used in bilateral agreements even today. A brief enumeration of these (and other typical clauses found in a bilateral agreement), will be made later in this section (under 2.2.2.3).

2.2.1.3 Bilaterals: A Pre-War Review

The concept of bilateral air agreements was not new in 1944: France and Germany, for example, had entered into one, relating to aerial navigation, in 1913![24] In general, the agreements that existed before the Second World War exchanged traffic rights over specified routes, into and through the territories of the contracting Parties.[25] Bilateral agreements were negotiated not only between

States, but also between airlines, on one side, and States, on the other.[26]

Aircraft demonstrated their destructive power during the First World War. States, becoming security conscious, desired to assert their sovereign rights over their airspace. This seems to be one of the main reasons why States entered into bilateral air agreements.[27] Later on, economic reasons became prominent. States sought to establish and strengthen their own airlines and exercise commercial rights in each other's territories. However, it had become obvious that the aviation industry needed government subsidies to survive. Thus, the "survival of the fittest", and "unfettered commercial rights" theories then being promoted became unacceptable to States, except to the economically strongest.[28] These, and other (economic) factors played a major role at the Chicago Conference of 1944 in confirming that (scheduled) international air commerce could function only through bilateral air transport agreements.

2.2.2 Bilaterals: An Overview

2.2.2.1 Definition

Bilateral air transport agreements may be defined as "international trade agreements in which governmental

authorities of two sovereign States attempt to regulate the performance of air services between their respective territories and beyond, in some cases."[29]

2.2.2.2 Mechanism

A bilateral agreement confers the right to conduct air services directly upon the States involved.[30] Each State "designates" (i.e. nominates) one or more of its airline(s) to conduct the air services described in the agreement. Once an air line has been designated by its State, the other State is obliged to issue it, with minimum delay, an "operating permit".[31] Having been thus designated and authorized, the airline then can begin to operate the services as agreed to in the bilateral agreement.

2.2.2.3 Structure

The operations of the airline will be governed by the provisions of the treaty. A bilateral air transport agreement normally, but not necessarily, consists of several distinct parts. It generally has a Preamble in which the aims and objectives of the contracting Parties are broadly laid out. The Body of the agreement makes mention of the rights granted,[32] sets out the other main economic principles under which the agreed air services are to be operated (eg., capacity[33] and tariffs[34]), and describes

administrative and technical matters, many which were first laid down in the above-mentioned "Standard Form".[35] The routes which the airlines are permitted to serve are usually contained in one (or more) Annex(es) to the agreement. Finally, amendments to the agreement, which may later be made, are contained in "Memoranda of Understanding", "Exchange of Letters", "Protocols", etc. These all, of course, form part of the agreement.[36]

2.2.2.4 Different Types

(1) Introduction

As seen above, the Chicago Conference did not succeed in setting up a post-war system to govern international air commerce. Therefore, in 1945, thirty-one scheduled air lines got together in Havana and organized the International Air Transport Association (IATA) to deal with the problems of tariffs. Further, in 1946, the United States and the United Kingdom entered into a bilateral air transport agreement and worked out a solution to resolve the problems of capacity and routes.[37] This agreement, later to be called the "Bermuda I" agreement, was to become a model for most of the world's bilateral air agreements for about thirty years.[38] In this manner, a post-War system to regulate international civil aviation emerged, "based

partly on some general principles affirmed at Chicago, partly on airline co-operation within IATA, and partly in a series of bilateral intergovernmental agreements" modelled on the Bermuda I agreement.[39]

Bilateral air transport agreements that have since been entered into generally have had administrative and technical clauses similar to the Bermuda I model. This agreement, in turn, "repeats and somewhat elaborates upon the ancillary Standard 'Chicago' Agreement provisions."[40] There have been additions: for example, aviation security clauses have become common, after being first introduced in the "Bermuda II" agreement.[41] On the whole, provisions in bilateral agreements that have differed over the years have been those dealing with economic matters. A brief review of the different "types" of bilateral agreements that have resulted due to these changes, follows.[42]

(2) The Bermuda I Agreement

"The result of a compromise" is what the Bermuda I Agreement has been called: the Americans and the British both agreeing to concepts contrary to the views they held at the Chicago Conference.[43] The Americans, on their part, accepted government tariff control; the British agreed to the airlines themselves fixing capacity. Thus, the pricing provisions of the Bermuda I Agreement provide for dual

Governmental approval of air tariffs, coupled with a recommended delegation of tariff-setting power to IATA.[44] Capacity is determined by the airlines concerned, with their governments having an 'ex post facto' power of review of the capacities actually offered.[45] Even though the capacity provisions of Bermuda I have been called "excessively vague", they have also been declared a "workable and flexible compromise"[46] between two mutually extreme forms of capacity determination (the "predetermination" and "free determination" methods - to be discussed below). Bermuda I's tariff and capacity provisions have been widely followed by other States in their bilateral agreements.[47]

(3) Post-Bermuda I Agreements

Capacity provisions in post-Bermuda I agreements have varied from the "Bermuda model", thus creating, in effect, a second "type" of bilateral agreement. In the years following the Second World War, many new States were created. Most had largely under-developed aviation industries. As a result, they sought to protect their airlines from competition and insisted on equal sharing of traffic rights.[48] This they did by placing, in their bilateral agreements, a system of predetermination of capacity, instead of the Bermuda I capacity provisions: before air services can commence, prior governmental determination or

approval of capacity is required.[49] This method is the most restrictive form of capacity determination possible and leaves very little freedom for designated airlines to compete for a larger share of the market.[50]

In many cases, flexibility for air carriers has also been reduced by the introduction of precise (point-to-point) route schedules.[51] Pricing provisions, however, have not varied a great deal from the Bermuda I model.[52]

In 1976, Britain denounced the Bermuda Agreement. In 1977, "Bermuda II", a new agreement with the United States was concluded, with capacity, frequency and tariff provisions basically the same as Bermuda I, though with a few "elaborations and restrictions".[53]

Bermuda II did not become a "model" for modern-day bilateral air transport agreements, like Bermuda I was for post-war agreements. One major reason for this was that the United States became committed to its "deregulation" policy, under which "[g]overnments 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 market place."[54] Deregulation concepts being much more liberal than even the "liberal" Bermuda I Agreement, the United States thus considered it necessary to enter into a new "type" of agreement - the "Liberal Bilateral Air Transport Agreement".

(4) Liberal Agreements

"It has been a cardinal point in American policy throughout that the ultimate judge should be the passenger and the shipper", remarked Roosevelt, in a letter sent to Churchill while the Chicago Conference of 1944 was still in progress.[55] This policy of relying on the forces of the market place was not implemented at the Chicago Conference. The Bermuda I Agreement, however, included 'market place' concepts in its provisions and has therefore been called a 'liberal' agreement: "A liberal air agreement is an agreement which includes a market-oriented exchange of routes on which all (six) freedom privileges can be exercised without undue restrictions."[56]

Then, the United States Government went further and promoted, for its bilateral agreements, "free competition and the exchange of opportunities, instead of protectionism and the exchange of restrictions."[57] Thus, from 1978, the United States began to enter into "liberal" bilateral air transport agreements, which relied on market forces to determine capacity, frequency, tariffs, etc.[58] In general, these agreements have the following characteristics: free determination of capacity, minimal governmental interference in tariff matters and the encouragement of low tariffs, a liberal route structure, unlimited multiple designation of airlines, inclusion of provisions on charter flights, etc.[59]

The United States began to regulate non-scheduled air services in its scheduled bilateral agreements under this new policy. However, the concept of the regulation of charter air services under bilateral air transport agreements is much older. To complete this chapter, a brief discussion of post-war charter growth and its regulation, follows. The next chapter will begin the review of the history of charter regulation under bilateral agreements.

2.3 ARTICLE 5: NON-SCHEDULED AIR SERVICES

2.3.1 Introduction

2.3.1.1 A Question of Terminology

"Non-scheduled" is a public law term.[60] "Charter" is a private law term.[61] However, in everyday language these two terms have come to be used interchangeably,[62] at least in the field of public air law. This trend has also been established in State practice, notably in bilateral air agreements.[63] Accordingly, this thesis will follow suit and use one word for the other.

2.3.1.2 Post-War Charter Development

Towards the end of, and immediately after, the Second World War, the importance of non-scheduled air

services was still limited.[64] The usual charter services were single flights, flights for humanitarian and emergency purposes, etc. Against this background, the framers of the Chicago Convention planned post-War non-scheduled civil aviation.[65]

World War II left land and sea transportation severely disorganized; scheduled services could not cope with the great demand that arose for air transport; large numbers of ex-military pilots and aircraft became available:[66] these, and other factors encouraged men and women "eager for uncertainty" to go anywhere and to do anything.[67] Thereby arose the "fierce, fervent, freemasonry of the sky tramps".[68] Thus, ad hoc, irregular, special, and even perilous, flights became the speciality of the charter carriers.[69]

2.3.2 Charters: Growth and the First Restrictions

2.3.2.1 Introduction

Although the sky tramps were eager for uncertainty and ready to go anywhere, charter flying, nevertheless, was a "wild, blind lottery".[70] The promise of a steady income gradually led non-scheduled companies to give their services a more or less "regular" character.[71] The "scheduled" companies naturally did not welcome this development!

Initially, under Article 5 of the Chicago Convention,[72] non-scheduled companies had the advantage of "freedom of flight" so long as these flights were unscheduled;[73] the scheduled companies have had no such freedom, being restricted by the provisions of Article 6.[74] Taking advantage of the Article 5 "freedom", charter companies sought to "regularise" their income by engaging in "regular" flights. However, "regular" flights were the province of the scheduled companies,so they urged their Governments to put an end to the competition that had begun to crop up.

2.3.2.2 The Search for a Solution

Both the International Air Transport Association (IATA) and the International Civil Aviation Organization (ICAO), responded to the scheduled airlines' call to resolve the charter "problem".

(1) The IATA Resolution 045

IATA, the scheduled carriers' association, viewed charters merely as price-cutters; it advised its members not to deal with charter operators.[75] In the event the carriers did deal with charters, IATA devised a method to restrict charter operations: it issued, in 1949, its "Traffic Conference Resolution 045" on passenger

charters.[76] Resolution 045 permits IATA carriers to perform certain types of charters, the most important being the "Affinity Group Charter".[77]

The affinity charter concept was developed to protect scheduled services.[78] Unfortunately, it added to Article 5 of the Chicago Convention a restriction that was "both arbitrary and difficult to meet".[79] The negative effect Resolution 045 would have on the growth and development of (international) non-scheduled air services became evident when the United States, in 1951, modelled its first charter regulations after the Resolution; this example was then followed by other nations.[80] Governments have also approved or promoted affinity charter rules in an attempt to distinguish charter, from scheduled, services.[81]

(2) The ICAO Definition

The ICAO response to the scheduled airlines' protest (regarding the charter competition) was to look for a way to distinguish scheduled and non-scheduled air services: which of the flights taking place could be considered regular (scheduled), and hence governed by Article 6?; which were non-scheduled, and hence to be regulated by Article 5? The Chicago Convention itself was silent.[82]

ICAO studied the problem and, in 1952, its Council gave a decision.[83] It only defined "scheduled international air service",[84] thereby implying that "non-scheduled" (international) air services were those services that fell outside the scope of the definition. ICAO's study still continues; however, its basic 1952 definition has not changed.[85]

2.3.2.3 Art. 5: Inoperative

The 1952 ICAO report did not stop at the definition. The Council also made reference to the "regulations, conditions or limitations" of paragraph 2, Article 5. States were advised "not to interpret the restrictions...in such a way as to render the operation of this important form of air transport (non-scheduled) impossible or non-effective."[86] This counsel was given in response to State practice, which had by then developed, concerning the application of the second paragraph of Article 5.[87]

Article 5 was meant "to create the right for operators of non-scheduled flights to operate them without prior permission."[88] However, even after being cautioned by ICAO not to do so, most States continued to widely interpret the restrictions stated in Article 5, and required permission for the performance of virtually all international charter flights.[89] They have largely continued

to do so. Thus, the provisions of Article 5, paragraph 2 have almost been rendered inoperative.[90]

2.3.3 Charters: Restrictions

2.3.3.1 Introduction

State practice in the late 1940s - early 1950s had already made Article 5 "altogether illusory": States interpreted the right granted, to impose the "regulations, conditions or limitations", as one given them to admit or not to admit non-scheduled air transport into their territories.[91] In addition, the lack of a positive definition for "non-scheduled" services left them free to determine the scope of Article 5, paragraph 2.[92] As a result, States "generated a mass of governmental regulations" to regulate the entry of foreign non-scheduled air carriers.[93]

A "wide variety" of national laws and regulations sprang up.[94] The principal aims of these were, inter alia, to protect scheduled services from charter competition[95] and to maintain the distinction between scheduled and non-scheduled air services.[96]

2.3.3.2 National Laws: Regulations and Restrictions

In general, international charters are subject to the national laws of either the country of origin of the

traffic or the country of destination of the traffic, or both.[97] In most cases, the rules of the country with the more restrictive regime apply.[98]

If at all controlled, charter air services can be regulated by any, or all, of the many ways States have at their disposal. Some of the most common control restrictions that have been applied are:

(i) the requirement of prior permission to operate non-scheduled services;[99]

(ii) "marketing" controls that restrict access to the market. The most common and principal (marketing) restriction has been the prohibition against the sale of seats to individuals or to the public directly.[100] Marketing controls, generally speaking, either forbid certain types of charters and/or specifically define types which may be operated;[101]

(iii) "geographical" and "route" restrictions that either limit charters to specific areas or keep them out of certain areas altogether;[102]

(iv) "capacity" controls which can take the form of traffic quotas,[103] be linked to scheduled traffic, be applied as "uplift ratios",[104] or even be imposed by determining the types of charter services which may be performed;[105]

(v) "price" controls. Pricing in international charter transportation is usually left to individual airlines and to the forces of the market place.[106] If price controls are applied, prices may be fixed on the basis of estimated costs, or by using IATA prices as a standard;[107]

(vi) the right of "first refusal"; a refusal to allow competition with flag carriers; having rules that discriminate against charters; discouraging responses to charter applications; the requirements of long notice applications;[108] etc.

2.3.3.3 Unilateralism Predominates

The Governments gathered at Chicago in 1944 had high hopes for the future of international civil aviation: they desired "to promote...cooperation between nations"; they hoped international civil aviation would develop in an "orderly manner"; they expected international air transport services to be "operated soundly and economically".[109] However, "much of the positive thrust of the Preamble is lost in Article 5's treatment of 'non-scheduled flight'".[110] States followed an "unsound" policy,[111] and developed a mass of regulations that made Article 5 (almost) inoperative.

However, it is only in relation to the multilateral regulation of non-scheduled traffic that Article 5 is almost ineffective. "Almost" is the key word: the Paris Agreement of 1956, for example, was entered into by the European Civil Aviation Conference (ECAC) States to give effect to the provisions of Article 5. However, in general, international charters are governed unilaterally through the application of national laws and regulations. Bilateral regulation has become common in recent years (see chapters 3, 4 and 5, below).

2.3.4 Charters: Multilateralism

2.3.4.1 Article 5, para. 1[112]

Article 5, paragraph 1, provides for the multilateral exchange of the first two freedoms of the air, the 'transit' and 'technical stop' rights.[113] Those provisions, along with the Transit Agreement, represent "universal freedom of transit and non-traffic stop for international air services."[114] Total freedom of flight under this Article does not exist. The restrictions contained in the paragraph have been applied by several States so as to have made necessary prior permission for overflight.[115]

2.3.4.2 The Paris Agreement, 1956[116]

The ECAC States signed the Paris Agreement with the aim of harmonising their non-scheduled policies.[117] Their intention was to mutually waive the restrictions of Article 5, paragraph 2 of the Chicago Convention; this they did for the air services listed in Article 2 of the Agreement.[118] Medical, taxi, and, to some extent, non-scheduled cargo flights, have benefitted from the Agreement.[119] However, large-scale charter passenger transportation is limited to flights "between regions which have no reasonably direct connection by scheduled air services"; states can freely define such regions and subsequently amend the definition; thus, the Agreement has been "largely irrelevant" to commercial charter transport.[120]

On the other hand, air transport between the above-mentioned "regions" have greatly benefitted from a liberal air charter policy for third and fourth freedom flights that was adopted (in the late 1950s and early 1960s) by ECAC and other European nations.[121] This liberal policy was a result of pressures from the tourist industry, an expectation of minimal diversion from scheduled services, etc.[122] The policy soon saw the development, on a very large scale, of the intra-European "Inclusive Tour Charter" (ITC) type of air charter service. This charter type, along

with others, will be discussed in the following section.

2.3.4.3 The Manila Agreement, 1971[123]

The Manila Agreement is "rather similar" to the Paris Agreement of 1956, and it liberalises performance of international charter air services in South East Asia.[124] However, "the clause favouring passenger transport between regions lacking reasonable access to scheduled services (in fact, favouring ITC's) is not contained in the agreement."[125]

2.3.5. Charters: Types Created

2.3.5.1 Introduction

The first charter "type" that has been, is the "single entity" charter: the 1919 business flight referred to above (sec. 1.2.2.1) is one such example.[126] Then came the "group charter": the affinity group charter, for instance, requires passengers travelling together to share a common interest, be they football supporters, students, pilgrims or sight-seers.

2.3.5.2 The Inclusive Tour Charter and the "Split" Charter

The next principal charter type to be created was the Inclusive Tour Charter (ITC). The "Inclusive Tour" concept first appeared in Europe in the 1930s: groups travelled about by coach, sightseeing; accommodation and meals were included in the price, and most often, the services of a tour guide, too.[127] The ITC appeared after the Second World War, also in Europe. In the late 1950s and early 60s, ECAC and European liberal non-scheduled policies encouraged ITCs; in 1961, ECAC made a series of recommendations concerning ITCs:[128] all this led to the rapid expansion of Inclusive Tour Charters in Europe.

The ITC made its appearance in the United States only in 1966, two years after the Civil Aeronautics Board (CAB) had sanctioned "Split Charters", whereby several (affinity) groups were each allowed to charter part of an aircraft.[129]

2.3.5.3 The Ottawa Declaration: ABCs & TGCs

During the 1950s and 1960s, the affinity charter had become the primary air charter operation, especially in Europe and North America.[130] However, "'bona fide' affinity groups became the exception rather than the rule".[131] The affinity charter rules became difficult to enforce; in addition, they showed a discriminatory nature.[132]

Therefore, in 1972, the United States disapproved IATA's Resolution 045: the time had come "to recognise new concepts of charter air transportation."[133] In the same year, United States, Canadian, and European (ECAC) authorities agreed to certain "Principles for North Atlantic Charter Flights"[134] (The "Ottawa Declaration"). The declaration recognised the operation of non-affinity "ABCs" and "TGCs".[135] The aims of the Ottawa Declaration were, inter alia, to regularise the operations of charters in a manner similar to scheduled air transportation, to facilitate the use of charters by a wider segment of the travelling public, and to establish substantially similar rules for North Atlantic States for the regulation of charter services.[136]

2.3.5.4 OTCs, Public and Part Charters

In 1975, the CAB introduced the One-Stop Inclusive Tour Charter (OTC), a "hybrid" between the ITC and the TGC.[137] The OTC did away with the (US) three-stop ITC and replaced it with the European-type point-to-point ITC.[138]

Barely three years later, the CAB further liberalised charter transport by replacing the ABCs, TGCs, OTCs, etc. with the "most liberal" Public Charter.[139]

In Europe, in the meantime, charter travel (especially holiday travel) had begun to significantly threaten the continuation of scheduled services on these holiday routes; thus, in 1971, the United Kingdom permitted scheduled airlines "to integrate scheduled and charter services in the same aircraft."[140] These "Part Charters" made possible the more economic use of capacity, let airlines operate more efficiently and thus at lower cost, and, in essence, gave scheduled carriers the same competitive flexibility that charter carriers enjoyed.[141] "Part Charters" were late in arriving in the United States: her authorities gave permission for Part Charters to operate to/from her shores only in 1982; and even now, this charter form is not so common.[142]

2.3.6 The Scheduled/Non-Scheduled Distinction Revisited

2.3.6.1 Introduction

The distinction which was drawn up at the Chicago Conference (and later clarified by ICAO in 1952) reflected the pre-War and post-War situations.[143] Almost immediately after the Conference closed, charter traffic began to expand and affect scheduled services. Thus, to regulate charters and to protect scheduled traffic, IATA came out with its Resolution 045; ICAO, to distinguish

scheduled from non-scheduled services, formulated its 1952 definition of "scheduled" services.[144]

2.3.6.2 The ICAO Definition Made Redundant

Charter traffic grew. Tourism; low fares; growth in disposable income; the advantage charters had of being outside the IATA system (and thus not restricted in setting fares); few entry barriers in the international market: these are but few of the reasons given for the growth of charters.[145]

Along with this growth came various rules and regulations. These restricted charters, primarily to protect scheduled services; they defined the scope of charters and hence, by doing so, created several charter "types";[146] they also served to protect charter services against scheduled competition![147]

Thus, scheduled and non-scheduled services have come to be differentiated by at least two means: the first is the "Chicago" distinction; the second is the distinction that has been created by the regulatory structure surrounding charters.[148] However, there seems to be consensus amongst jurists that the Chicago distinction has long ceased to be of any practical value,[149] at least for North American, North Atlantic and (West) European charter traffic.[150] In most cases, all that seems to be left of

the distinction is the requirement for a "middleman" to purchase capacity from the airline and sell it to the passenger.[151]

2.3.6.3 The Need for Charter Services

The ICAO distinction between scheduled and non-scheduled services may no longer be of any practical importance. This does not mean, however, that non-scheduled services are no longer important or no longer needed. Both scheduled and charter services are indispensable: the former are essential because of their (generally) regular, dependable and flexible services and their worldwide routes; the charter importance lies mainly in its low fares.[152]

Non-scheduled traffic, moreover, has caused travel and tourism industries to open up; it has made air travel a means of mass transportation; it has made international travel possible, at reasonable prices, to the public; it has expanded passenger and cargo markets.[153]

2.3.6.4 Bilaterals and Charters

As seen above, charter traffic was accompanied in its expansion by regulations which curbed, defined, and protected it. However, it was still acknowledged that there was an "uncertainty and lack of consistency regarding the legal status and regulation of international charter

services."[154] By this time, American aviation policy had begun to consider using bilateral air transport agreements to "regularise" foreign landing rights for charter services.[155]

As will be seen in the following chapter, the Americans were not the first to use bilateral agreements to regulate non-scheduled services. However, it is the United States which, at present, substantially regulates charters in its bilaterals: this will be the topic discussed in chapter four.

ENDNOTES - Chapter 2

1. See Chapter 1, Section 1.3.

2. NCC, Ch. 1, note 49 at 135; see Ch. 1 note 63 and Section 1.3.2.2 for statements of Articles 5 and 6, respectively. Art. 7 deals with "cabotage".

3. International Air Services Transit Agreement, 7/12/1944, ICAO Doc. 2187 [hereinafter, TRANSIT AGREEMENT]. The Transit Agreement exchanges, on a multilateral basis, the first two freedoms of the air for scheduled services.

   International Air Transport Agreement, 7/12/1944, ICAO Doc. 2187 [hereinafter, TRANSPORT AGREEMENT]. The Transport Agreement exchanges, on a multilateral basis, the first five freedoms of the air for scheduled services. Due to its extremely low ratifications, the Transport Agreement is a dead letter.

   Both these Agreements were, like the Chicago Convention, drafted and opened for signature at the Chicago Conference. Neither Agreement contains provisions relating to rates or capacity, the other important economic aspects of international civil aviation.

4. NCC, ch. 1, note 49 at 135.

5. See section 1.2, above. See also, SUNDBERG, Ch. 1, note 18 at 11; CHENG, Ch. 1, note 24 at 9; MOURSY, Ch. 1, note 32 at 305.

6. NCC, Ch. 1, note 49 at 136.

7. Ibid.

8. D. GOEDHUIS, "Questions of Public International Air Law" (1952) 81 Recueil des Cours 203 at 255 [hereinafter, GOEDHUIS].

9. Ibid.

10. Ibid.; see also 1.2.1.1 above.

11. GOEDHUIS, supra, note 8 at 256; see also, 1.2. above.

12. SUNDBERG, Ch. 1, note 18 at 12; CHENG, Ch. 1, note 24 at 9; NCC, Ch. 1, note 49 at 136.

13. NCC, Ch. 1, note 49 at 136.

14. W. GULDIMANN, "The Distinction Between Scheduled and Non-Scheduled Air Services: Another Exercise in International Frustration" (1979) 4 Annals of Air and Space L. 135 at 147 [hereinafter, GULDIMANN].

15. See Section 1.3.1.3.2.

16. See section 1.3.2.2 for a statement of Art. 6.

17. For example, see section 1.3.2.2.; MATTE, Ch. 1, note3 3 at 141; HAANAPPEL, Ch. 1, note 37 at 16.

18. Form of Standard Agreement for Provisional Air Routes, 7/12/1944. ICAO Doc. 2187, at 19 et seq. [hereinafter, STANDARD]. The Standard Form, part of the Final Act of the Chicago Conference, has been reproduced in CHENG, Ch. 1., note 24 at 504 et seq.

19. P.P.C. HAANAPPEL, "Bilateral Air Transport Agreements: 1913-1980" (1979) 5 Int'l Trade L.J. 241 at 245 [hereinafter, HAANAPPEL II].

20. CHENG, Ch. 1, note 24 at 234.

21. Ibid., at 26.

22. Ibid., at 18.

23. HAANAPPEL, Ch. 1, note 37 at 17.

24. Ibid., at 25.

25. CRIBBETT, Ch. 1, note 45 at 672.

26. Ibid.

27. Ibid.

28. Ibid.

29. HAANAPPEL II, supra, note 19 at 241.

30. C. GREENWOOD, "The U.S.-French Air Services Arbitration" (1979) 38 Cambridge L.J. 233 at 235.

31. The "authorisations" & "permissions" - i.e. the permit to operate - are usually granted subject to several conditions. Some of the most common conditions are: (i) that the airline designated be "substantially owned" and "effectively controlled" by the designating State and/or its nationals; (ii) that the designated airline be "qualified to meet the conditions prescribed under the laws and regulations" of the State granting the operating permit; and, (iii) that the Party designating the airline maintain and administer safety standards set forth in the agreement.

- U.S.-Barbados, 8/4/1982, TIAS 10370 at Art. 3.

32. See Ch. 1, section 1.3.1.3.3 for a description of the various transit and traffic rights. Usually, the body of the agreement specifically lists the two transit rights and denies cabotage traffic rights. The other rights could be referred to either in the Body or in the Annex.

33. "Capacity" may be defined either with reference to aircraft, the agreed service, or both. E.g.: i) "capacity" in relation to an aircraft means the payload of that aircraft available on a route or section of a route; and "capacity" in relation to "agreed service" means the capacity of the aircraft used on such service, multiplied by the frequency operated by such aircraft over a given period and route or section of a route.

- Austria-Jordan, 16/6/1976, CATC(80) 49 at Art. 1(g), (h).
- Austria-Syria, 28/7/1976, CATC(82) 50 at Art. 1(g),(h).
- China-Oman, 3/5/1983, CATC(85) 5 at Art. 1(g).

34. "The ... term 'tariffs' means the prices to be paid for the air transportation of passengers, baggage and cargo, and the conditions under which these prices apply, often including prices and conditions for agency and other auxiliary services."

- HAANAPPEL, Ch. 1, note 37 at 1.

35. The administrative and technical provisions of a bilateral air transport agreement include those dealing with, for example: recognition of certificates of airworthiness; application of laws of the State being flown over to the other State's aircraft; safety and security standards maintained by the contracting Parties; aviation security; termination of the agreement, etc.

36. Vienna Convention on the Law of Treaties, 23/5/1969 (1969) 8 Int'l Legal Mat. 679 at Art. 2(1)(a). Art. 2(1)(a) states: "'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

37. US-UK, 11/12/1946, UKTS no. 3 (1946).

38. HAANAPPEL II, supra, note 19 at 243.

39. LOWENFELD, Ch. 1, note 34 at 37.

40. HAANAPPEL, Ch. 1, note 37 at 27.

41. US-UK, 23/7/1977, UKTS no. 76 (1977) at Art. 7.

42. The scheme followed is based on that used by Prof. P.P.C. Haanappel, Ch. 1, note 37 at 24 et seq.

43. Ibid., at 27.

44. Ibid., at 178. Annex II of the Agreement contains the tariff provisions. See HAANAPPEL, Ch. 1, note 37 at 28-32 for an analysis of the Bermuda I tariff provisions.

45. Ibid., at 179. The Final Act of the Agreement contains the capacity provisions.

46. Ibid.

47. Ibid., at 178, 179.

48. CHENG, Ch. 1, note 24 at 241.

49. HAANAPPEL, Ch. 1, note 37 at 35.

50. Ibid., at 179.

51. Ibid., at 34. Broadly stated, a point-to-point route schedule, for example, in an agreement between Singapore and Canada, could be: Toronto-Montreal-London-Kuwait-Bombay-Bangkok-Singapore. A "flexible" route schedule, taking the same example, could be: "points in Canada" - "intermediate points" - Singapore. Fifth freedom traffic rights would, of course, involve additional agreements by the two States with the countries in question.

52. HAANAPPEL, Ch. 1, note 37, at 37.

53. Ibid., at 40. US-UK, 23/7/1977, TIAS 8641; UKTS no. 76 (1977); [hereinafter, BERMUDA II].

54. HAANAPPEL, Ch. 1, note 37 at 41.

55. Quoted in SAMPSON, Ch. 1, note 1 at 85.

56. H.A. WASSENBERGH, "Towards a New Model Bilateral Air Transport Services Agreement?" (1978) 3 Air Law 197 at 198 [hereinafter, WASSENBERGH].

57. Ibid.

58. P. HARBISON, Liberal Bilateral Agreements of the United States: A Dramatic New Pricing Policy (LL.M. Thesis, IASL, McGill University, 1982) (unpublished) at 1 [hereinafter, HARBISON].

59. HAANAPPEL, Ch. 1, note 37 at 42.

60. In aviation, it applies to all commercial air transport services which are not "scheduled": These (non-scheduled) services include air taxi, emergency and private flights and charter services: see, MOURSY, Ch. 1, note 32 at 313.

61. "Charter" applies to the contract between an air carrier and a charterer, the latter paying the carrier for use of an aircraft or part of it. See MOURSY, Ch. 1, note 32 at 313.

62. Ibid.

63. For example:
    1) Denmark-U.S.S.R., 31/3/1956, CATC(56) 174, Annex II, para. 7: "unscheduled flights".
    2) Morocco-Luxembourg, 19/5/1961, CATC(64) 30, Part III: "non-scheduled commercial air transport".
    3) U.S.S.R.-Cuba, 17/7/1962, CATC(69) 315, Art. 11: "non-scheduled flights".
    4) Cyprus-Bulgaria, 8/5/1965, CATC(65) 171, Art. 4: "non-scheduled flights".
    5) Morocco-Bulgaria, 14/10/1966, CATC(74) 16, Art. 17: "charters".
    6) Austria-Tunisia, 17/10/1966, CATC(68) 56, Art. 4: "non-scheduled flights (charter programmes".
    7) Austria-Korea, 8/5/1979, CATC(80) 205, Preamble: "non-scheduled air services".
    8) Cuba-Vietnam, 8/6/1979, CATC(83) 238, Art. 15: "charter flights".
    9) Belguim-Jamaica, 27/5/1980, CATC(80) 288, Art. 17: "charter air services".
    10) Chile-Singapore, 9/12/1980, CATC(82) 277, Annex II: "non-scheduled flights".
    11) China-Oman, 3/5/1983, CATC(85) 5, Art. 2(4): "charter flights".
    12) Canada-Jamaica, 18/10/1985, CATC(86) 45, Art. XVIII: "charter flights".
    13) U.S.-Ecuador, 26/9/1986, CATC(87) 112, Annex II, "charter traffic".
    14) U.S.-Czechoslovakia, 29/6/1987, CATC(88) 91, Annex, para. 8: "charter air services".

64. MOURSY, Ch. 1, note 32 at 305; see also, supra, section 2.1.2.3.

65. See above, section 2.1.2.

66. MOURSY, ch. 1, note 32 and 305; Y.A. SAFAR, The Development of Non-Scheduled International Air Services and their Impact on the Scheduled International Air Services in Relation to the Applicability of Articles 5 and 6 of the Chicago Convention (LL.M. Thesis, IASL, McGill University, 1981) (unpublished) at 70 [hereinafter, SAFAR]; GOEDHUIS, supra, note 8 at 256.

67. JACKSON, Ch. 1, note 27 at 29.

68. Ibid., at 16, 29.

69. The sky tramps flew holiday charter flights; they took an active role in the two Berlin air lifts; they met a the needs of customers wanting to fly, at times convenient to themselves, directly to their individual destinations. Scheduled air carriers generally specialized in "group" flying: athletes to Olympic Games, opera and ballet companies to their shows, military bands, football teams, etc. JACKSON, Ch. 1, note 27 at 16, 70, 98, 102, 150, 164.

70. Ibid., at 130.

71. GOEDHUIS, supra, note 8 at 257.

72. CHICAGO CONVENTION, Ch. 1, note 8. Article 5 is reproduced in Ch. 1, note 63.

73. It will be seen later (in section 2.3.2.3) that although this right of "freedom of flight" still exists, it exists only in theory. State practice has severely curtailed this right.

74. GOEDHUIS, supra, note 8 at 256-7. Article 6 is reproduced in Ch. 1, section 1.3.2.2.

75. J.M. GOLDKLANG, "Transatlantic Charter Policy - A Study in Airline Regulation", (1961/62) 28 J.A.L.C. 99 at 105.

76. HAANAPPEL, Ch. 1, note 37 at 129: "In essence the Resolution provides that IATA airlines may perform international charter air services, but if the price of such services, when reduced to a unit basis, is lower than the applicable IATA fare or rate, they must follow the rules of 045."

77. Ibid., at 129.

78. Ibid., at 128.

79. E.J. DRISCOLL, "The Role of Charter Transport in International Aviation" (1976) I Air Law 74 at 77 [hereinafter, DRISCOLL].

80. Ibid., at 77.

81. IATA, "An Analysis of International Charters Undertaken at the Request of the European Civil Aviation Conference" in I.A. VLASIC & M.A. BRADLEY, The Public International Law of Air Transport: Materials and Documents, Vol. II (Montreal, IASL, McGill University, 1974) 768 [hereinafter, VLASIC/BRADLEY II].

82. Article 96 defines "Air Service" as any "scheduled air service performed by aircraft...", without defining "scheduled air service".

83. Report by the Council to Contracting States on the Definition of a Scheduled International Air Service and the Analysis of the Rights Conferred by Article 5 of the Convention. ICAO Doc. 7278-C/841, 10/4/1952 [hereinafter, ICAO Doc. 7278].

84. The Council defined a scheduled international air service as "a series of flights that possesses all the following characteristics: (a) it passes through the airspace over the territory of more than one State; (b) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public; (c) it is operated, so as to serve traffic between the same two or more points, either (i) according to a published timetable or (ii) with flights so regular or frequent that they constitute a recognisable systematic series."

85. A tremendous growth in charter air traffic in the 1960s and 1970s obliged ICAO to conduct, in 1977, another investigation into the matter. Of the "air transport conferences" held by ICAO in recent years, the first "Special Air Transport Conference" of 1977 discussed the issue at length. The conclusion reached, by the Panel of Experts set up to debate the matter, was that the 1952 definition need not be redefined. Modifications were made, however, to the "Notes" pertaining to the Definition. See, Special Air Transport Conference, Montreal, 13-26 April 1977, Report, ICAO Doc. 9199. See also, Second Air Transport Conference, February 1980, Report, ICAO Doc.9297; HAANAPPEL, Ch. 1, note 37 at 16, 168; GULDIMANN, supra, note 14 at 142 et seq.

86. ICAO Doc. 7278, supra, note 83 at 12.

87. ICAO Doc. 6850-C/797, 21/7/1949. See GOEDHUIS, supra, note 8 at 269 et seq.

88. GOEDHUIS, supra, note 8 at 269.

89. HAANAPPEL, Ch. 1, note 37 at 15.

90. Ibid.

91. GOEDHUIS, supra, note 8 at 277.

92. MOURSY, Ch. 1, note 332 at 315; DRISCOLL, supra, note 79 at 176.

93. SUNDBERG, Ch. 1, note 18 at 75.

94. HAANAPPEL, Ch. 1, note 37 at 127.

95. B. van den ASSUM, International Air Charter Transportation: Its Legal Regulations and Implications (LL.M. Thesis, IASL, McGill University, 1975) (unpublished) at 1 [hereinafter, ASSUM]; NCC, Ch. 1, note 49 at 137; J. KAMP, Air Charter Regulation: A Legal, Economic, and Consumer Study (New York: Praeger Publishers, 1976) at 1 [hereinafter, KAMP].

96. M. LEBLANC, A Guide for Drafting Bilateral Air Transport Agreements in Canada (LL.M. Thesis, IASL, McGill University, 1987) at 164 [hereinafter, LEBLANC].

97. HAANAPPEL, Ch. 1, note 37 at 44; MOURSY, Ch. 1, note 32 at 335.

98. J. SUNDBERG, "Air Chartering: The Scandinavian Contribution" (1979) 4 Annals of Air and Space L. 323 at 326.

99. GOEDHUIS, supra, note 8 at 272 et seq.; MOURSY, Ch. 1, note 32 at 366.

100. NCC, Ch. 1, note 49 at 139.

101. SAFAR, supra, note 66 at 74; MOURSY, Ch. 1, note 32 at 366. The various charter "types" will be looked at below, in section 2.3.5. The "affinity group charter" has already been mentioned above, at section 2.3.2.2.1.

102. HAANAPPEL, Ch. 1, note 37 at 127; MATTE, Ch. 1, note 3 at 155.

103. Limitations on the number of charter flights and/or limitations on the number of passengers carried. S.B. ROSENFIELD, "U.S. Liberal Bilaterals and Charter Traffic to Latin America" (1982) 7 Air L. 156 at 164 [hereinafter, ROSENFIELD].

104. The carrier is entitled to fulfill a given number of fourth-freedom charters only when it has performed a certain number of third-freedom charters, the usual ratio being 4:3. B. CHENG, "Beyond Bermuda" in N.M. MATTE (ed.), International Air Transport: Law, Organization and Policies for the Future (Toronto: The Carswell Company Ltd., 1976) 81 at 89,99 [hereinafter, CHENG II].

105. HAANAPPEL, Ch. 1, note 37 at 126; MATTE, Ch. 1, note 3 at 155.

106. HAANAPPEL, Ch. 1, note 37 at 118; J.G. THOMKA-GAZDIK, "The Distinction between Scheduled and Charter Transportation" (1976) 1 Air L. 66 at 68 [hereinafter, THOMKA-GAZDIK].

107. SAFAR, supra, note 66 at 75; MOURSY, Ch. 1, note 32 at 367.

108. "Right of first refusal. A rule...allowing a foreign carrier a charter flight originating in the host country only after the flag carrier has declared to handle such charter." "Refusal to allow competition with flag carrier. Refusal to accept a charter which originates from a foreign point to which the flag carrier flies a scheduled service." "Discriminatory rules. Discriminatory against charter flights vis-à-vis scheduled flights. This may be additional landing fees or fuel taxes, or it may be based on landing rights or airport access." See ROSENFIELD, supra, note 103 at 162-163.

109. CHICAGO CONVENTION, Ch. 1, note 8 at the Preamble.

110. DRISCOLL, supra, note 79 at 75.

111. GOEDHUIS, supra, note 8 at 277.

112. See Ch. 1, note 63 for a statement of Article 5.

113. See Ch. 1, note 54 for a statement of the two technical rights.

114. LISSITZYN, Ch. 1, note 48 at 91; TRANSIT AGREEMENT, supra, note 3.

115. CHENG, Ch. 1, note 24 at 195.

116. Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, Paris, 30/4/1956. ICAO Doc. 7695 [hereinafter, PARIS AGREEMENT]. The Paris Agreement is reproduced in, MATTE, Ch. 1, note 3 at 683 et seq.

117. MOURSY, Ch. 1, note 32 at 317.

118. Art. 2, in part, states:
"(1) The Contracting States agree to admit...aircraft ...freely to their respective territories for the purpose of taking on or discharging traffic without the imposition of the 'regulations, conditions or limitations' provided for in the second paragraph of Article 5 of the [Chicago] Convention, where such aircraft are engaged in: (a) flights for the purpose of meeting humanitarian or emergency needs; (b) taxi-class passenger flights of occasional character on request, provided that the aircraft does not have a seating capacity of more than six passengers and provided that the destination is chosen by the hirer or hirers and no part of the capacity of the aircraft is resold to the public; (c) flights on which the entire space is hired by a single person (individual, firm, corporation or institution) for the carriage of his or its staff or merchandise, provided that no part of such space is resold; (d) single flights .... [rest omitted].

(2) The same treatment shall be accorded to aircraft engaged in either of the following activities: (a) the transport of freight exclusively; (b) the transport of passengers between regions which have no reasonably direct connection by scheduled air services; [rest omitted].

119. NCC, Ch. 1, note 49 at 137.

120. Ibid.

121. T. AUST, "Air Services Agreements: Current United Kingdom Procedures and Policies" (1985) 10 Air L. 189 at 200 [hereinafter, AUST]; also see, GULDIMANN, supra, note 14 at 140.

122. NCC, Ch. 1, note 49 at 9; KAMP, supra, note 95 at 47.

123. Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services Among the Association of South East Asian Nations, Manila, 13/3/1971, CATC(72) 132. Indonesia, Malaysia, The Philippines, Singapore and Thailand were the signatories to this Agreement.

124. HAANAPPEL, Ch. 1, note 37 at 19-20.

125. MATTE, Ch. 1, note 3 at 158 note 129.

126. The principle of the "single-entity" charter is that "so long as one person charters the aircraft, he is free to use it for any purpose he likes, provided he does not resell the unused seats or capacity to individuals for a separate fare." J.G. THOMKA-GAZDIK, "Are Inclusive Tour Charters Scheduled or Non-Scheduled Services?" in, E. McWHINNEY & M.A. BRADLEY (eds.), The Freedom of the Air (Leyden: A.W.Sijthoff, 1968) 106 at 113 [hereinafter, THOMKA-GAZDIK II].

127. KAMP, supra, note 95 at 48.

128. F. MARX, "Non-Scheduled Air Services: A Survey of Regulations on the North Atlantic Routes" (1981) 6 Air L. 130 at 142 [hereinafter, MARX].

129. LOWENFELD, Ch. 1, note 34 at 41.

130. "U.S. Accepts Agreed Principals for North Atlantic Charter Flights" (1973) 69 DOSB 20 at 21 [hereinafter, DEPT. BULL.].

131. HAANAPPEL, Ch. 1, note 37 at 130.

132. DEPT. BULL. supra, note 130 at 21.

133. L.S. Keyes, "The Trans-Atlantic Charter Policy of the United States" (1973) 39 JALC 215 at 237, 238 [hereinafter, KEYES].

134. DEPT. BULL., supra, note 130 at 20.

135. The main features of Advanced Booking Charter (ABCs) are: "The whole capacity of the aircraft is chartered by one or more charter organizers who put(s) together (a) group(s) of charter participants. The charter participants must book and pay their (round trip) flights in advance of departure. The advance booking and payment periods generally vary between one and three months and have over the years showed a tendency to be shortened. Usually there is a system of non-refundable deposits made by charter participants."

The Travel Group Charter (TGC) was the American version of the ABC. The main (regulatory) difference between the two was that in case seats were not taken up on any flight, the passengers were required to pay for these unoccupied seats under TGC rules; under ABC rules, the charterer bore the risk. Thus, these rules "caused considerable price uncertainty for the TGC passenger, and made the marketing of TGCs in the U.S.A. extremely difficult." Hence, in 1976 the European-style ABC was introduced in the United States.

- HAANAPPEL, Ch. 1, note 37 at 128, 131.

136. DEPT. BULL., supra, note 130 at 21, 23.

137. J. KAMP, "The Near Future of Air Charter Regulation: The Base for More Experimentation in Public Policy" (1975) 41 JALC 389 at 402 [hereinafter, KAMP II].

138. HAANAPPEL, Ch. 1, note 37 at 129.

139. Ibid., at 131. W. GULDIMANN, "Public Charters - Chicago Article 5 or Article 6?" in A. KEAN (ed.), Essays in Air Law (The Hague: Martinus Nijhoff Publishers, 1982) 81 at 81 [hereinafter, GULDIMANN II].

"Charter" means a Public Charter; "Public Charter" means a one-way or round-trip charter to be performed by one or more direct air carriers, which is arranged and sponsored by a charter operator....

- 14 CFR part 380. The provisions of 14 CFR Part 380 have remained unchanged, as at December, 1989. [See, "list of CFR Sections Affected" (LSA)].

140. J.J. FRIEDMAN, A New Air Transport Policy for the North Atlantic: Saving an Endangered System (New York: Athenum, 1976) at 69 [hereinafter, FRIEDMAN].

141. Ibid., at 70, 79, 72.

142. HAANAPPEL, Ch. 1, note 37 at 128.

143. Supra, Section 2.1.

144. Supra, section 2.3.2.

145. MOURSY, Ch. 1, note 34 at 312; SAFAR, supra, note 66 at 42; SAMPSON, Ch. 1, note 1 at 140; C. THAINE, "The Way Ahead from Memo 2: The Need for More Competition A Better Deal for Europe" (1985) 10 Air L. 90 at 91 [hereinafter, THAINE].

146. Supra, section 2.3.5.

147. In 1977, Laker offered a no-reservation no-frills service on his low-fare "Skytrian". Other scheduled airlines, to compete with him, put forth their "stand-by" and other bargain fares. The CAB began to be concerned that US charter carries might not be able to compete. So it relaxed certain charter regulations to make the industry more viable.

- A.F. LOWENFELD & A.I. MENDELSOHN, "Economics, Politics and Law: Recent Developments in the World of International Air Charters" (1978) 44 JALC 479 at 483 [hereinafter, LOWENFELD II].

148. B. WOOD, "Bilateral Agreements - A Current View" (1978) 3 Air L. 23 at 28 [hereinafter, WOOD].

149. For example, the "Part Charter" has very nearly made redundant the difference between scheduled and non-scheduled transportation in the United States; the "Public Charter" has eliminated any meaningful distinction between the two; relaxing of OTC, ABC, TGC, etc., rules had eroded elements of the ICAO scheduled services definition.

See, for example, MOURSY, Ch. 1, note 32 at 328; GULDIMANN, supra, note 14 at 147; HAANAPPEL, Ch. 1, note 37 at 128, 137; WOOD, supra, note 148 at 28; SAFAR, supra, note 66 at 59; CHENG II, supra, note 104 at 83.

150. MOURSY, Ch. 1, note 32 at 334.

151. THOMKA-GAZDIK, supra, note 106 at 67; See, HAANAPPEL, Ch. 1, note 37 at 128 regarding the relaxation of even the "middleman" rule in case of Public Charters.

152. MOURSY, Ch. 1, note 32 at 392.

153. Ibid., at 307; R.J. WALDMANN, "International Aviation: The Fuel Crisis and other Problems" (1974) 70 DOSB 192 and 195 [hereinafter, WALDMANN].

"Statement of International Air Transport Policy" (submitted to President Nixon) (1970) 63 DOSB 86 at 87 [hereinafter, NIXON].

154. First World Congress on Air Transportation and Tourism, 17-20 April 1972, Madrid, Spain: Conclusion and Recommendations of the Congress, Panel I, at the Preamble, reproduced in W. DIERSCH, "International Non-Scheduled Air Transportation (LL.M. Thesis, IASL, McGill University, 1976) at Appendix II-A-3 [hereinafter, MADRID CONGRESS].

155. NIXON, supra, note 153 at 88.

ARRANGEMENT OF TOPICS

CHAPTER 3

THE "NON-US" AGREEMENTS

3.1 INTRODUCTION

This chapter, and the next, give the results of the analyses made of those bilateral air transport agreements found regulating non-scheduled air services. For the sake of convenience, the agreements to which the United States are/were a party, will be discussed in the next chapter. The "non-US" agreements form the subject-matter under discussion in this chapter.

Nearly 1,325 bilateral air transport agreements, entered into by 125 States, were examined. One hundred and fifty-three "non-US" agreements, containing elements relating to non-scheduled air transport, were discovered:[1]

a) Five of these agreements deal exclusively with non-scheduled transport;[2]

b) The rest, though regulating scheduled air services, contain elements governing non-scheduled air transport. The extent of these rules vary, from one-sentence provisions to extremely detailed regulations, often running into paragraphs.

The rest of this chapter presents the results obtained from the analyses made of these bilateral air transport agreements. The discussion has been divided into two parts: the immediately following section deals with most of the "scheduled" agreements; then, the remaining scheduled, and the five "non-scheduled", agreements will be taken up.[3]

It must be pointed out that not all the agreements to be discussed in this, and the next, chapter, are in force. To determine the status of these agreements, reference was made to ICAO and United States' publications.[4] If an agreement is no longer in force, then the reader's attention is drawn to this fact. Otherwise, the agreement in question is still in force; it is not in force and has not been specifically reported so; or, it has not been registered with ICAO and thus its status is not reflected in ICAO documents.

3.2 THE "NON-US AGREEMENTS: PART I

3.2.1 Introduction

Of the 148 "non-US" scheduled bilateral air transport agreements, 130 of them have been set aside for discussion in this section. They have been so distinguished because most of them do not regulate the economic aspects of

air transport (i.e., matters primarily concerning commercial traffic rights, capacity and tariffs).[5]

A few of them do provide for economic regulation. Nevertheless, they, too, are considered in this section. They regulate economic matters in too general terms for them to be considered with the agreements in section 3.3.

The method used to present the findings of the examination made of the bilateral agreements is broadly based on Prof. Bin Cheng's method (see endnote 3, this chapter):

1. Inauguration of Non-Scheduled Services/Flights
   a) Airline(s) eligible to operate non-scheduled transport.
   b) The application to operate charter services.
2. Economic Regulatory Measures
   a) General Measures.
   b) Capacity.
   c) Tariffs.
   d) Traffic rights and route structure.
   e) Competition with scheduled services.
3. Ancillary Provisions

3.2.2 Inauguration of Non-Scheduled Services/Flights

3.2.2.1 Airline(s) Eligible to Operate Non-Scheduled Transport

As stated in section 2.2.2.2 above, a bilateral agreement confers the right to conduct air services directly upon the States involved. Each State then nominates one or more of its airlines to conduct the air services described in the agreement and "to take advantage of the rights obtained".[6] The "designation clause" of an agreement generally indicates the number of airlines that each State may nominate.

Coming to the bilateral agreements under consideration, most of them define the number of airlines, of each Contracting Party, eligible to conduct the permitted non-scheduled services. The relevant provision thus names either "the designated airline" or "an/any airline", as the air enterprise eligible to conduct the non-scheduled services.

1. The Designated Airline: "Designated airline", in this sense, means the airline designated by each Contracting Party to carry out the scheduled air services provided for, elsewhere in the agreement. Therefore, only the airline designated to carry out scheduled services may

operate non-scheduled flights, if it so wishes. Other airlines of both Parties are excluded from doing so.

Thus, for example:

"Non-scheduled flights carried out by the designated airlines shall be subject to special authorization"; "...flights of aircraft of the designated airline of each Contracting Party which are not scheduled flights may be operated..."; "The designated airlines may operate charter ...flights..."; "In case an airline designated by one Contracting Party wishes to operate (charter flights)...the designated airline shall have to inform the other Aeronautical Authorities"; and, "The...airline of each country (Aeroflot & Qantas) shall be permitted to operate... non-scheduled... air services"[7] (emphasis supplied).

The reason for submitting that "designated airlines" refer to the "scheduled" designated airlines, lies in the history of scheduled and non-scheduled transport. In the first two chapters, we noted the importance of regular ("scheduled") services in the early years of flight. We saw that regular airlines often made "special" flights outside their normal schedules.[8] "Non-scheduled services (aimed) to meet a more temporary and occasional demand", and thus came "to be regarded as complementing the regular services".[9] Thus, in post-War bilaterals, it was not unusual to find references to "special flights",[10] "additional

flights",[11] "flights outside the normal schedule",[12] "supplementary flights",[13] etc. In most modern bilaterals, the terms "charter flights" or "non-scheduled flights" are more common.

Thus Governments, in order to obtain legal stability for their scheduled carriers conducting non-scheduled flights, sought to regulate these flights in their "scheduled" bilateral agreements.

2. An/Any Airline: Other agreements are more "liberal" in their definition of the number of air enterprises that are allowed to conduct the permitted charter services. They indicate that "an airline", "any airline", etc. can carry out the services in question.

For example:

"Any airline of either Contracting Party may submit a request ... to operate charter flights...";[14] "Non-scheduled flights ... may be carried out by one or more airlines of either Contracting Party";[16] etc.

3. A handful of agreements do not specify at all which airline is eligible to perform the permitted non-scheduled services. For example:

"...non-scheduled flights may be operated subject to applications for such flights to be submitted at least 7 days before the day of departure to the aeronautical authorities of another (sic) Contracting Party".[17]

3.2.2.2 The Application to Operate Charter Services

1. Introduction: An application[18] to operate the non-scheduled flights/services provided for in the agreement has to be made. Most agreements provide that the application has to be made by the interested airline directly to the Aeronautical Authorities of the other Party.[19] Others indicate that communication regarding the application has to be between the Aeronautical Authorities of both Parties.[20] Two agreements agree that the "diplomatic channel" will be used.[21] Most Canadian agreements, and a few other agreements, are silent on this point.[22]

2. The Prescribed Period: Many agreements, including all the Canadian agreements, do not prescribe a time-limit for making an application, to conduct non-scheduled transport.[23] All the other agreements specify a minimum period of time, before the charter flight departs, by which an application has to be made. A wide range of time-limits is exhibited in the agreements. The prescribed period is specified either in hours[24] or in days.[25] Thus, for example, an agreement may state that the application must reach the aeronautical authority at least 48 hours before the flight departs.

3. Laws and Regulations: As seen in section 2.3.3, international charters are subject to the national laws of the country of origin of the traffic, the country of des-

tination of the traffic, or both. Several States incorporate this detail, in different ways, in some of their agreements.

For example, some agreements state that: "Operations of non-scheduled air services ... shall be carried out in accordance with the laws and regulations of the two Contracting Parties and as far as possible, on a basis of reciprocity".[26]

Yet other agreements state, for example, that: "Non-scheduled flights shall be subject to special permission being granted in accordance with the relevant requirements of the Contracting Parties."[27]

Most of the Canadian agreements specifically point out that ancillary rights granted to charter flights "shall not affect national laws and regulations governing the right of air carriers to operate charter flights or the conduct of air carriers or other parties involved in the organisation of such operations."[28] (These ancillary rights will be discussed below).

With respect to requests for charter flights that a carrier may wish to conduct, a few agreements prefer that these requests be made "in accordance with the aviation regulations" of the Parties.[29]

The UK-China agreement urges the authorities of both Parties to consider such a request "promptly", in the

"light of their charterworthiness rules, applying the principle of reciprocity."[30]

Uniquely, the Chinese agreement with Australia requires the designated airline, desiring to operate charter flights, to obtain "the agreement of the other designated airline" prior to obtaining approval from the aeronautical authorities of the other Party![31]

Finally, the Canadian agreement with India clearly states that the provisions of the agreement, that grant ancillary rights to charter flights by carriers of the Parties, "shall not be construed to imply any obligation on either aeronautical authority to approve charter flights by any airline of the other Contracting Party."[32]

3.2.3 Economic Regulatory Measures

3.2.3.1 General Measures

A handful of the "scheduled" bilateral agreements provide for the economic regulation of non-scheduled air transport. Three of the agreements discuss commercial regulation in a very general manner:

For example, the Hungary-Netherlands agreement says that:

> "All questions relating to the commercial operations and all services to be mutually rendered in connection with the operation of scheduled and special flights, e.g.:

> time tables, fares, rates, pool and co-operation agreements, methods for financial settlement between the designated airlines as well as ground handling services rendered at the airports will be dealt with between the designated airlines."[33]

In the Iraq-Austria agreement, at Article II, para. (2), each Party grants the other Party the "right to perform series of non-scheduled Inclusive-Tour flights between the territories of both Contracting Parties." At Article VII, para. (4),

> "The capacity, the frequency of services on the specified air-routes and the time tables concerned as well as the traffic volume of non-scheduled Inclusive-Tour flights...shall be agreed upon between the designated airlines...and duly submitted for approval to the Aeronautical Authorities."[34]

Here, we see predetermination of capacity (i.e., capacity is agreed prior to operation - in this case, by the airlines - and is then submitted to the aeronautical authorities for approval). The airlines are also given responsibility to fix tariffs; however, these would go into force only after both Parties have approved of them ("dual" or "double" approval of tariffs).[35]

Finally, the USSR-Australia agreement merely states that: "The international airlines of the two countries shall remain free to discuss directly all...commercial matters...".[36]

3.2.3.2 Capacity

Capacity is predetermined in both agreements which regulate capacity. However, the provisions are rather general in nature:

The Yugoslavia-France agreement says that "(t)he non-scheduled flights shall...be divided equally between the airlines...and shall be agreed between the airlines..."; the Romania-Tunisia agreement provides for the "fair and equal sharing of charter traffic between the designated airlines" and that the "arrangement shall be submitted for approval by the aeronautical authorities".[37]

3.2.3.3 Tariffs

The tariff clauses present in the agreements are also general in nature:

Two agreements provide that tariffs are to be agreed to, between the airlines.[38] Another two agreements merely state that the tariffs charged shall be subject to approval by the aeronautical authorities.[39] The Bulgaria-France agreement says that the "performance of (the) non-scheduled flights shall...be subject to the prior conclusion of a general agreement between the airlines...in accordance with international standards concerning tariffs and prices."[40]

3.2.3.4 Traffic Rights and Route Structure

The agreements that stipulate route(s) for non-scheduled aircraft, are uniform to the extent that they allow these flights onto the routes granted to scheduled flights.[41] The USSR-Australia agreement not only grants the airlines of both countries the third and fourth freedoms, it also grants non-traffic landing rights and expressly forbids fifth freedom traffic.[42]

3.2.3.5 Competition with Scheduled Services

It was seen above, in section 2.3.2, how IATA sought to resolve the charter "problem" that arose after World War II. It put forward its "Resolution 045", so as to limit charter competition with scheduled services. States modelled their charter regulations after this Resolution.

Several States which have regulated non-scheduled air transport in their bilateral agreements, have used these agreements to curtail charter competition with their scheduled services. For example:

The Belgium-Rwanda agreement provides for periodic consultations regarding "the position to be adopted with relation to unscheduled air services which might have an adverse effect on their reciprocal traffic on the agreed services. The...Parties agree henceforth to follow the resolutions in force or those which are adopted for such

services by (IATA), unless otherwise agreed by them." The Belgium-Congo agreement has a somewhat similar provision, except that it does not mention IATA resolutions.[43]

Several other agreements merely warn that non-scheduled flights "may not harm",[44] "must not prejudice",[45] or "will not adversely affect"[46] scheduled services.

The UK-Canada agreement, no doubt reflecting modern realities, protects, in addition, non-scheduled air transport from excessive scheduled competition![47]

Finally, the 1989 USSR-Australia agreement presupposes that initial air commerce between the two countries will mainly consist of non-scheduled air services! There is a possibility of scheduled services being established if the traffic between the two countries reaches "levels sufficient to sustain viable scheduled services...".[48]

3.2.4 Ancillary Provisions

Mention was made, in Chapter 2, of the administrative and technical provisions of the "Chicago Standard Form" agreement. These are rights, ancillary to international air navigation, that are to be found in the Chicago Convention, 1944.[49] States have, in one form or the other, long included these provisions in their bilateral air transport

agreements. This serves to build up a uniform body of international law in respect of these matters. It also provides for the "application of the (Chicago) Convention as between parties", especially when either one or both the Parties to the bilateral agreement, are not Parties to the Convention.[50]

All the Canadian agreements apply ancillary provisions to the non-scheduled air services allowed under an agreement. Provisions which are applied to these services, in nearly all the Canadian agreements, are:

a) Entry and Clearance of Aircraft and Traffic: This provision is similar to Articles 11 and 13 of the Chicago Convention. However, the bilateral agreements also provide for "baggage and cargo in direct transit across the territory" of either Party to be exempt from customs duties and other similar taxes. This provision has not been included in the agreement with Jamaica.[51]

b) Recognition of Certificates and Licences: (Similar to Arts. 32(b) and 33, Chicago Convention).[52]

c) User Charges: The agreement with Jamaica does not include this provision, which is based on Article 15 of the Chicago Convention.[53]

d) Customs Duties: This clause obliges both parties to exempt, in certain circumstances, each others' airlines from customs and other duties on aircraft, fuel,

spare parts, aircraft stores, etc. This concession is based on Article 24 of the Chicago Convention. Once more, this clause is found in all the Canadian agreements except the one with Jamaica.

e) Aviation Security: A clause on "aviation security" is one of the latest ancillary provisions to be introduced into bilateral air transport agreements. By the late 1960s, violence against civil aviation had become a very serious threat to the worldwide safety of aviation. In 1970, Canada initiated the idea of directly linking bilateral air transport agreements to the ICAO Conventions, relating to unlawful interference with civil aviation.[54] Directly linking bilateral air services agreements to these ICAO Conventions can provide a system of effective sanctions in the event a State does not discharge its obligations under the treaties.[55]

Unfortunately, nothing came out of this proposal. However, the Bermuda II bilateral air transport agreement between the United States and the United Kingdom saw the inclusion, for the first time, of a clause on aviation security.[56] Since then, other States concluding new bilateral agreements, or amending their old ones, have generally tended to include a clause on aviation security. An ICAO Council resolution of June 1986, urging all States to include, in their bilateral agreements, a clause on

aviation security, has helped to further this trend.[57] All the Canadian agreements, except the ones with China, Cuba and Poland, contain such a clause.

f) Other Important Ancillary Provisions: Another ancillary clause that is found in generally all the Canadian agreements requires the Contracting Parties to file periodic statistics so as to enable the Parties to review capacity. Yet another clause grants the designated airline(s) of each Party the right to sell air transportation, in the territory of the other Party, directly to the public, and the right to transfer earnings to its own country. Some agreements provide for exemption from double taxation. Finally, most agreements have a "consultations clause" which permits either Party to request consultations on the implementation, interpretation, application or amendment of the agreement.

A few other agreements apply such ancillary clauses to the non-scheduled air services they regulate. The UK - China agreement is one; Hungary-Turkey, Hungary-Sudan and Sudan-Bulgaria are others.[58]

3.3 THE "NON-US" AGREEMENTS: PART II

3.3.1 Introduction

Of the 23 "non-US" bilateral agreements that remain to be reviewed, eighteen are "scheduled" bilaterals and five

exclusively "non-scheduled". For convenience of discussion, the treaties have been "classified" into six "groups".[59] This has been done mainly because agreements in any one group (except the last), more or less similarly regulate charter air transport. For the sake of consistency, the agreements will all be discussed in the present tense, notwithstanding the fact that not all of them are in force.

3.3.2 Group A: The "French" Group

3.3.2.1 Introduction

Three of the four agreements in this group (France's agreements with Spain and Italy and Italy's agreement with Spain), are practically identical. Hence, for the purposes of this discussion, the France-Spain agreement will serve as an example for all three. France's agreement with West Germany has provisions in common with the first three, but is more detailed. The differences will be pointed out, as they occur.

3.3.2.2 Conditions Under Which Flights May Be Made

The French and Spanish Governments, in their agreement, begin by expressing a desire to facilitate "...air

communications other than (the agreed services) and, in particular, transport of goods by air between the two countries. They further agree to

> "...adapt their general regulations...in order to limit, reciprocally, the number of cases which necessitate a prior authorisation."[60]

The provision that follows requires prior notice be given for every flight. Except in certain circumstances, this prior notice is considered equivalent to an authorisation (Art. XXVIII).

However, prior authorisation is required: in case the airlines want to carry fifth freedom traffic; in case of charter flights competing with the regular services, whenever it is a question of the transport of more than four passengers; in the case of "obtaining any derogation" to the provisions prohibiting cabotage; etc.[61]

The treaty between France and West Germany requires that airlines be designated to conduct charter flights.[62] The designated airline has to prove that the "substantial ownership and effective control" of the airline are "vested in nationals or companies" of the designating State, or in the State itself. (The France-Italy agreement has a "substantial ownership" clause, as well).[63]

Further, each Party agrees to grant a designated airline authorisation to carry out non-scheduled commercial flights, if it makes a simple notification at least 48 hours

before the flight is to depart. Nevertheless, each Party reserves the right to refuse an authorisation if it thinks that the

> "flights specified in the notification are of such a kind as to be prejudicial to the air traffic interests of its country, and in particular to those of its scheduled services." (Art. 21, para. 3).

If a notification has not been refused on the part of the authorities concerned before the expiry of the 48-hour time limit, and for certain types of flights,[64] the notification is to be considered equivalent to an authorisation.

3.3.2.3 Other Provisions

All the four agreements specifically grant the airlines the two technical rights.[65] All of them grant a few ancillary rights, e.g., entry and clearance of aircraft and traffic, recognition of certificates and licences, user charges, customs duties, etc.

3.3.3 Group B: The UK Agreements

3.3.3.1 Introduction

Both these agreements, one with France and the other with Switzerland, deal exclusively with non-scheduled

air transport. The Governments agree that certain privileges will be granted to aircraft, registered in their States, to perform non-scheduled air services. Charter transport is hence not restricted to "designated" airlines, as is the case in their agreements regulating scheduled air services. Further, the privileges granted

> "shall be additional to the rights, enjoyed by the aircraft of each country, of making transit flights and stops for non-traffic purposes, in the territories of the other country without the necessity of obtaining prior permission, as provided for in Article 5 of the (Chicago) Convention...".[66]

3.3.3.2 Conditions Under Which Flights May Be Made

Both agreements lay down a set of conditions under which commercial charter flights may be made: (a) without prior permission and, (b) with prior permission.

(a) Flights Without Prior Permission:

i. (UK-France): own use charter flights, taxi flights and single flights;[67] and,

ii. (UK-Switzerland): aircraft not flying certain routes allotted to, and effectively operated by, designated airlines, as agreed under the scheduled bilateral agreement between the two Parties; taxi flights; and, single flights.[68]

(b) Flights Requiring Prior Permission:

i. (UK-France): on "own use" charters, if available space is sold to third parties; if, on on certain routes effectively operated by scheduled airlines, the charter operator is to carry more than four passengers and he has made, within the preceding thirty days, at least one other flight carrying more than four passengers over the route in question; and, for carriage of fifth freedom traffic, unless otherwise agreed to (Para. 2).

ii. (UK-Switzerland): if, on certain routes effectively operated by scheduled airlines, the charter operator is to carry more than four passengers and he has made, within the preceding ten days, at least one other flight carrying more than four passengers over the route in question. However, for affinity type charters, if the operator of the aircraft provides

> "information as to the purposes for which the (affinity group) is constituted and (gives) an undertaking that only the persons who are members of the (group) will be carried on the flights, permission in respect of such ... flights shall not ... be refused without good reason." (Para. 1).

3.3.3.3 Other Provisions

Both agreements prohibit cabotage and both have a "substantial ownership" clause.[69] They also grant

ancillary rights like the exemption, from custom duties, of aircraft fuel, oils, etc.

3.3.4 Group C: The Morroccan Agreements

Of the five agreements, four are exactly the same (the treaties of Morocco with France, Portugal, Luxembourg, and Yugoslavia). They are all very similar to Article 2 of the Paris Agreement of 1956,[70] except for an additional clause in the treaties requiring prior authorisation to be applied for, for all other cases of non-scheduled transport.[71]

The Morocco - Switzerland non-scheduled bilateral air transport agreement is also based on the Paris Agreement of 1956, except that it is more detailed. The agreement applies to any civil aircraft registered in either State and operated by a national of either State (Art. 1).

Art. 2 of the Paris agreement has been reproduced, with minor changes, as the second Article of the agreement. Articles 3 and 4 then regulate other non-scheduled flights, for which prior permission "may" be required. A request must be submitted directly to the aeronautical authorities of the other party. The time limits are the same as in the French agreement. Information concerning the operating company, aircraft, etc. is required to be filed.[72]

Finally, the agreement provides for arbitration in case of any dispute (Art. 5).

3.3.5 Group D: The Austrian Agreements

3.3.5.1 The Austria - Italy Non-Scheduled Agreement

Austria and Italy signed a non-scheduled bilateral air transport agreement in 1965.[73] The agreement exempts "civil aircraft registered in one (sic) of the two countries" from the requirement to apply for authorisation to fly over the territory of the other Country in cases of non-traffic overflights and stops of an occasional nature or stops made in the case of disasters.[74] The overflights and stops may be made with a simple notice, "in accordance with the provisions for flight safety ...".

3.3.5.2 The Other Agreements

1. Introduction

Between 1976 and 1979, Austria signed an agreement each with Jordan, Syria and the Democratic People's Republic of Korea. In all three cases, the Governments declare their desire "to conclude an agreement ... for the purpose of establishing scheduled and non-scheduled air services ..." (at the Preamble) (emphasis provided). Since the three

agreements are similar, the one with Jordan will be discussed, with important differences in the others pointed out, as they occur.

2. Inauguration of Non-Scheduled Services

Each Party has the right to designate one or more airlines (one, in the cases of Syria and Korea) to perform the agreed services.[75] On receipt of such designation, the other party is obliged to grant the designated airline the appropriate operating authorisations. This is to be done "without delay", but is subject to certain conditions being fulfilled by the airline.[76]

3. Capacity Regulation

In the agreements with Jordan and Syria, non-scheduled capacity, regulated separately from scheduled capacity, is predetermined: it is to be agreed between the airlines and then submitted for approval by the aeronautical authorities of both Parties.[77] The agreements make provision, whereby the airlines may transfer any unused capacity to the other airlines of either Party. This provision normally applies when an airline is unable or unwilling to exercise its rights under the agreement and it "assigns to another airline the whole or part of its capacity entitlement. It is usually a temporary arrangement

conditional on the restitution, at the initiative of the transferring (airline), of its original rights."[78]

In the treaty with Korea, the capacity clause begins with a statement of general principles governing both charter and scheduled capacity: Art. 9, para. 1 states that "(t)here shall be fair and equal opportunity for the designated airlines of both ... Parties to operate the agreed air services ..."; in para. 2, the Parties agree that each airline is to take into consideration the interests of the other airlines.[79] Then, as in the first two agreements, the clause provides for predetermination of capacity.

4. Tariffs

In all three agreements, the tariff clause applies to both forms of transport.[80] In general, two main processes are involved in the setting of tariffs: a) the tariff establishment process and, b) the tariff control process.[81]

In these agreements, the tariff establishment process begins with a statement that lists the "relevant factors" that govern the tariff to be fixed, e.g., cost of operation, reasonable profit, characteristics of service, the tariff of other airlines, etc..[82] The designated airlines are given initial responsibility for negotiating the tariffs (Art. 10, para. 2). The Korean agreement also

requires the designated airlines to first consult "the other airlines operating over the whole or part of the route" (Art. 11, para. 2). The agreements with Jordan and Syria advise that tariff agreements should, "where possible, be reached through the rate-fixing machinery" of IATA. Finally, only these two agreements provide for a secondary tariff-establishment mechanism (viz., the aeronautical authorities of the Parties), if initial airline efforts, to fix a tariff, fail.[83]

The tariff control process that is followed in these agreements is straightforward:

i. First, the tariff agreed to by the airlines must be submitted for approval to the aeronautical authorities of both the Parties.

ii. It is provided that "no tariff shall come into force if the aeronautical authorities of either Contracting Party have not approved it." This is normally called the "dual approval" method of tariff control. Thus, this tariff control method, together with predetermination of capacity, go to make the "most stringent combination" of rules a bilateral agreement could have, reserving "a very large role for government control and a much smaller role for inter-airline competition."[84]

iii. A time-limit is specified within which either Party must indicate its dissatisfaction with any tariff (15

days in the Jordanian and Syrian, and 30, in the Korean, agreements).

iv. Finally, the agreements provide that the tariffs so agreed will remain in force till a new tariff is agreed upon.

5. Traffic Rights and Route Structures

All three agreements have a "flexible" route structure (viz., "points" in the country of origin - intermediate "points" - "points" in the country of destination - beyond "points").[85] All three grant the two technical rights and third and fourth freedom rights. Cabotage is uniformly prohibited.[86]

6. Ancillary Provisions

All three agreements grant the usual ancillary rights, e.g., recognition of certificates and licenses, application of laws and regulations, customs duties, user charges, etc..[87]

3.3.6 Group E: The Singapore Agreements

3.3.6.1 Introduction

As will been seen in chapter 4, the United States, in the late 1970s/early 1980s, began to negotiate "liberal" bilateral air transport agreements. "Free determination" of capacity, encouragement of low tariffs, minimal Governmental interference in tariff matters, etc.[88] are some of the main features of a liberal agreement. Singapore's agreements with Chile, the Maldives and Brunei Darussalam have all the trade-marks of the liberal bilateral. They will be discussed individually.

3.3.6.2 Singapore - Chile

The agreement declares that all the provisions of the agreement, except those relating to designation, apply to non-scheduled air transport.[89] The "technical" rights are granted in Art. 2, and third, and fourth and fifth freedom traffic rights at Annex I.

Capacity is decided by the free determination method. Art. 8(2) declares that capacity

> "... shall be determined by each one of ... (the airlines) ... on the basis of market requirements. The type of aircraft and frequency of services on the specified routes will not be restricted by either of the Contracting Parties."

A regime of "controlled competition"[90] is also present, as the agreement insists upon the airlines having a

"fair and equal opportunity" to operate the agreed services. This provision is meant to counteract any unequality in commercial strength that may exist between the airlines of the two Parties.[91]

The tariff clause is very nearly the same, word for word, as that of Article 12 of the U.S. "Model" liberal bilateral agreement, the prototype of U.S. liberal agreements.[92] Discussion of this "liberal" tariff clause is deferred till the following chapter, when U.S. liberal agreements will be discussed at length.

3.3.6.3 Singapore - Maldives

Annex II of the agreement, which regulates charter air services, deals primarily with three matters: traffic rights, charterworthiness rules and change of gauge. The charter provisions of this agreement, like the one with Chile, are almost exactly the same as those found in the U.S. Model liberal agreement.

Traffic rights are dealt with in Section 1 of the Annex. The clause is similar to Section 1, Annex II of the Model bilateral.[93] Only third and fourth freedom charters are allowed, fifth freedom being excluded; sixth freedom charters are permitted only if sixth freedom traffic stops in the home country of the airline for at least two consecutive nights.[94] However, this agreement goes beyond

the Model agreement: the more "liberal" sixth freedom rules, as applied by both Parties, hold good.[95] Finally, provision is made for a flexible route structure.[96]

Charterworthiness rules are to be found in the first paragraph of Section 2 of the Annex to the agreement.[97] A charterworthiness rule is the rule that determines which charter type(s) may be performed. In the Maldives treaty, the "country of origin" rule is established. Under this rule, eligibility for charter air transportation is determined exclusively by the regulations of the country where the charter originates.[98] Thus, charter passengers originating in the country with more liberal rules, will be governed by those rules, and not by the rules of the other Party, whose rules may be very restrictive. Finally, the country of origin rule is "strengthened by the minimum procedural requirement rule" of Section 3, third para., of the Annex.[99]

Change of gauge means a "change to aircraft of different capacity."[100] Section 3 of the Model agreement, which provides a "very flexible" mechanism for change of gauge, is reproduced in the Maldives agreement.[101] Although a change in the "type or number of aircraft operated" is not limited, both outbound and inbound service is restricted by the "one service" provision which requires that the service, after a change of gauge, be a continuation

of the pre-change service.[102] Finally, the agreement warns that the permission granted for change of gauge should not be construed as a permit "to establish operations in the territory of the other Contracting Party".

3.3.6.4 Singapore - Brunei Darussalam

The Parties to this agreement begin by recognising the

> "growing demand from a section of the travelling public which is price-sensitive for air services at the lowest possible level of fares."

They hence, seeing the need for charter services, agree to apply the provisions set out in the treaty, to such services between their territories.[103]

Charterworthiness and most traffic rights provisions, found in the Maldives agreement, are then reproduced.[104] The agreement thereafter informs us that a Party may require a designated airline of the other Party to

> "provide such advance information with regard to flights as is essential for customs, airport and air traffic control purposes". (Para. 5)

Paragraph 6 asks airlines

> "to comply with established procedures in regard to airport slotting and (to) provide prior notification of flights or series of flights to the relevant authorities if so required."

Finally, para. 7 states that

> "Neither Contracting Party shall require prior approval of flights or notification of information relating thereto by desig-

nated airlines of the other Contracting Party, except as provided in paragraphs 4, 5, and 6..."

3.3.7 Group F: The Miscellaneous Agreements

3.3.7.1 The Tunisian Agreements

The first two of the remaining five agreements - Tunisia's agreements with Austria and Yugoslavia - have identical capacity clauses. No provision for tariff regulation has been made, in either. The only difference that lies between them, where charter regulation is concerned, is that the first agreement applies only to designated airlines and the second, to any airline, of the Contracting Parties.

In so far as capacity regulation is concerned, capacity is predetermined. It has to be divided equally between the airlines. The airlines themselves are given initial responsibility to divide capacity; if they fail to agree, the aeronautical authorities of the Parties are to "endeavour to reach agreement". If no settlement is reached, recourse to arbitration is provided for. Finally, each airline has a right "to delegate part of the whole of the volume of traffic ... to another airline registered in the territory" of either Party.[105]

3.3.7.2 Mali - Niger

In 1972, Mail and Niger entered into a non-scheduled bilateral agreement, so as to harmoniously develop possible non-scheduled air transport between them and "other parts of the world" (at the Preamble).

The route authorised under the agreement is from Bamako (the capital of Mali) - Niamey (Niger's capital) - Jidda, and vice versa. The airlines designated are entitled to carry out air transport operations "on request". Finally, the agreement is not to apply

> "...during a period beginning 30 days prior to the departure of the first outward flight for the annual pilgrimage and ending 30 days after the arrival of the last return flight from the said pilgrimage" (Art. 4).

3.3.7.3 USSR - Portugal

The agreement requires designated airlines, wanting to make charter flights, to submit a request to the authorities of the other Party, "at the latest 48 hours before the departure of the aircraft" (Annex 1, Section V).

The capacity of the aircraft making these flights is taken into account in accordance with the provisions of Article 13 of the agreement. This Article first makes a statement of general principles governing capacity (i.e., fair and equal opportunity to operate, each airline to take into consideration the interests of the other airline and

that airline capacity is to be related to traffic requirements).[106] Capacity is predetermined: it is to be divided equally and agreed to between the airlines and is subject to approval by the aeronautical authorities of both Parties.

3.3.7.4 Belgium - Jamaica

This agreement grants third, fourth, fifth and sixth (with conditions) freedom rights.[107] Art. 17(3) then permits the designated airlines to exercise their charter rights "in accordance with the charterworthiness rules of both Parties."[108] This could mean that Belgian charter airlines could perform charters originating in Jamaica according to either Belgian charterworthiness rules or Jamaican charterworthiness rules. Such a clause has been termed a "double country of origin" rule by Prof. Haanappel.[109] Finally, the agreement cautions charter air traffic from substantially impairing scheduled air services; nevertheless, each Party undertakes to grant "most liberal treatment" to the designated airlines of the other Party for charter flights.[110]

3.4 CONCLUSIONS

The idea behind Article 5 of the Chicago Convention was to have a multilateral exchange of commercial rights for

non-scheduled air services: charter companies were to have "freedom of flight", a right denied to "scheduled" companies.[111] However, Article 5 has been rendered inoperative. States have made laws and regulations that hinder the functioning of charter transport.[112]

One of the main aims of these laws and regulations has been the protection of scheduled services from charter competition.[113] We have just seen how States have also used their bilateral agreements to limit charter expansion.[114]

However, bilateral agreements can also serve to facilitate charter transport. For example, airlines wishing to conduct international charter flights are usually obliged to obtain the "prior permission" of the State into which they wish to fly. Applications for such permission "often have to be made some considerable time before the flight takes place... This...is at variance with the character of non-scheduled flights, which frequently have to be carried out at very short notice."[115] Bilateral agreements can by-pass national regulations which prescribe long time-periods and require, instead, much shorter notices. These agreements also serve to make such (and other) regulations uniform.

Coming back to national laws, it is not unusual that, even after prior permission is sought, charter

carriers may be "plagued by cliff-hanging uncertainties" as to whether their flights would be approved by Governments.[116] A bilateral agreement can resolve this problem by making it obligatory for a State to give the necessary approval on receipt of an application for charter permission.[117] Secondly, many agreements guarantee landing rights for charter carriers.[118]

Further, bilateral agreements can contribute to the ease of charter transport by even providing for "ancillary rights" (see, once again, the Canadian agreements). A final point: very few "non-US" agreements have, to any substantial degree, regulated both charter capacity and charter tariffs. Those agreements that do so (e.g., the agreements by Singapore, have generally been based on the US "liberal" bilaterals. These "liberal", with other US agreements, form part of the subject-matter under discussion in the next chapter.

ENDNOTES - Chapter 3

1. In chronological order, these are:
   1. Yugoslavia - Czechoslovakia, 14/3/1948, ICAO 683; CATC (52) 102, at the Final Protocol, Para. 2.
   2. France - Spain, 30/8/1948, ICAO 684; CATC (49) 144, at Chapter III.
   3. France - Italy, 3/2/1949, ICAO 763; CATC (49) 73, at Chapter III.
   4. Italy - Spain, 31/5/1949, ICAO 1078; 231 UNTS 251, at Part III.
   5. UK - France, 6/10/1950, ICAO 850; 96 UNTS 63; CATC (46) 34A, at the Exchange of Notes.
   6. UK - Switzerland, 13/5/1952, ICAO 957; 164 UNTS 91; CATC (52) 146, at the Exchange of Notes.
   7. Yugoslavia - Turkey, 16/4/1953, ICAO 1244; CATC (53) 125, at the Protocol, Para. 3.
   8. France - Federal Republic of Germany, 4/10/1955, ICAO 1437; CATC (56) 47, at Art. 12 and Section III.
   9. USSR - Denmark, 31/3/1956, ICAO 1275; CATC (56) 174, at Annex 2, Para. 7.
   10. Poland - Sweden, 8/6/1956, ICAO 1334; CATC (58) 94, Annex 2, Para. D.
   11. Poland - Belgium, 31/7/1956, ICAO 1486; CATC (56) 184, at Annexes I & II.
   12. Romania - Sweden, 15/4/1957, ICAO 1336; CATC (58) 142, at Annex 2, Para. C.
   13. Bulgaria - Sweden, 17/4/1957, ICAO 1639; CATC (60) 33, at Annex 2, Section B.
   14. Hungary - The Netherlands, 28/5/1957, ICAO 1346; CATC (58) 50, at Arts. 3 & 4.
   15. Hungary - Belgium, 1/6/1957, ICAO 1371; CATC (57) 160, at Art. 1(4).
   16. Hungary - Sweden, 2/8/1957, ICAO 1355; CATC (58) 137, at Annex 2, Section I.
   17. Morocco - France, 25/10/1957, ICAO 1564; CATC (59) 51, at Arts. 18 & 19.
   18. Bulgaria - The Netherlands, 7/2/1958, ICAO 1376; CATC (58) 109, at Art. IX.
   19. Hungary - UAR, 20/3/1958, CATC (68) 108, at Art. 4.
   20. Morocco - Portugal, 3/4/1958, ICAO 1465; CATC (59) 63, at Arts. 19 & 20.
   21. USSR - Belgium, 5/6/1958, ICAO 1459; CATC (58) 206, at Annex 2, Para. 17.
   22. Romania - Norway, 16/6/1958, CATC (58) 136, at Annex II (C).

23. USSR - The Netherlands, 17/6/1958, ICAO 1406; CATC (58) 190, at Art. 13.
24. Romania - UAR, 14/8/1958, CATC (59) 44, at the Annex, Part C.
25. Hungary - Iraq, 2/3/1960, ICAO 2388; CATC (61) 65, at the Annex, Section III.
26. Hungary - France, 2/5/1960, ICAO 1511; CATC (61) 43, at Art. V.
27. Hungary - UK, 25/10/1960, ICAO 1550, at Art. 4.
28. Morocco - Luxembourg, 19/5/1961, ICAO 3423; CATC (64) 30, at Arts. 21 & 22.
29. France - Mali, 5/8/1961, ICAO 1626; CATC (64) 128, at Art. 21.
30. Hungary - Ghana, 23/10/1961, CATC (64) 187, at Art. 4.
31. Hungary - Finland, 13/2/1962, ICAO 1835; CATC (66) 32, at Art. 4.
32. USSR - Morocco, 27/3/1962, ICAO 3140; CATC (84) 157, at Art. 17.
33. USSR - Ghana, 6/4/1962, ICAO 1731; CATC (64) 231, at Art. II.
34. Romania - France, 18/5/1962, ICAO 1646; CATC (63) 110, at Annex I, Section 2.
35. Morocco - Switzerland, 5/7/1962, ICAO 1747; CATC (64) 161.
36. USSR - Cuba, 17/7/1962, ICAO 2024; CATC (69) 315, at Art. II.
37. Hungary - Syria, 18/10/1962, CATC (64) 250, at Note 1.
38. USSR - Sudan, 20/10/1962, ICAO 2511, at Art. XII.
39. Hungary - Greece, 27/4/1963, CATC (65) 239, at the Annex, Art. 6.
40. Poland - Greece, 21/12/1963, CATC (64) 153, at the Annex, Art. VIII.
41. Morocco - Yugoslavia, 3/2/1964, ICAO 1899; CATC (65) 49, at Annex II.
42. USSR - Ceylon, 22/2/1964, ICAO 2513; CATC (65) 83, at the "Agreed Services", Para. 4.
43. Hungary - Cyprus, 2/6/1964, ICAO 1862; CATC (65) 169, at Art. 6.
44. Bulgaria - Greece, 9/7/1964, CATC (67) 292, at the Annex, Art. 5.
45. USSR - Iran, 17/8/1964, ICAO 2403; CATC (66) 24, at Annex I, Para. 4.
46. Yugoslavia - Algeria, 16/10/1964, ICAO 2184; CATC (74) 34, at the Annex.
47. Hungary - Luxembourg, 3/11/1964, CATC (70) 287, at Art. II (4).
48. Syria - Bulgaria, 13/12/1964, CATC (65) 241, at the Annex, Part III.

49. Bulgaria - Cyprus, 8/5/1965, ICAO 1851; CATC (65) 171, at the Annex, Art. 9.
50. Bulgaria - Luxembourg, 8/5/1965, CATC (70) 276, at the Annex, Art. 5.
51. Bulgaria - Cuba, 31/5/1965, ICAO 2048; CATC (69) 243, at the Annex, Art. 5.
52. Austria - Italy, 2/8/1965, ICAC 2202; CATC (57) 28, at the Exchange of Notes.
53. Bulgaria - France, 4/8/1965, ICAO 1826; CATC (66) 20, at Annex 1, Section 2.
54. Belgium - Congo, 10/9/1965, CATC (87) 10, at the Exchange of Letters, Paras. 1 & 3.
55. Hungary - Lebanon, 15/1/1966, ICAO 2783; CATC (73) 256, at Art. 1(f) & Annex 2.
56. USSR - Japan, 21/1/1966, ICAO 2437; CATC (68) 30, at Art. 7(2).
57. Belgium - Rwanda, 2/2/1966, CATC (88) 26, at the Letter, Para. 2.
58. USSR - Lebanon, 8/2/1966, ICAO 2213; CATC (72) 30, at Annex 1, Notes, Para. 3.
59. France - Syria, 7/4/1966, ICAO 1998; CATC (67) 318, at Art. 18.
60. France - Ceylon, 18/4/1966, CATC (67) 49, at the Annex, Para. 6.
61. Bulgaria - Turkey, 18/4/1966, CATC (67) 314, at Annex III, Art. 2(1).
62. France - Jordan, 30/4/1966, ICAO 1865, at Art. 17.
63. Romania - Turkey, 2/5/1966, CATC (67) 279, at Annex 1, Art. 2.
64. France - Iraq, 19/5/1966, ICAO 2496; CATC (68) 37, at Annex II.
65. Hungary - Turkey, 28/6/1966, CATC (68) 85, at Annex 3, Art. 2.
66. Bulgaria - Morocco, 14/10/1966, ICAO 3414; CATC (74) 16, at Art. 17.
67. Tunisia - Austria, 17/10/1966, ICAO 2007; CATC (68) 56, at Art. 4 & Annex 1.
68. Romania - Greece, 2/11/1966, CATC (64) 313A, at Art. II.
69. Bulgaria - Iraq, 15/11/1966, ICAO 2469, CATC (68) 362, at the Annex, Para. 7.
70. Tunisia - Yugoslavia, 18/11/1966, ICAO 1926; CATC (68) 50, at Annex II.
71. USSR - Nigeria, 26/1/1967, ICAO 2522; CATC (71) 102, at the Memorandum of Understanding, Para. 3.
72. Yugoslavia - France, 23/3/1967, ICAO 2002; CATC (69) 15, at Annex I, Section 2.
73. USSR - Turkey, 29/8/1967, ICAO 2516, at Annex III, Art. 2.

74. USSR - Poland, 24/4/1968, ICAO 2614; CATC (72) 121, at the Annex, Para. VII.
75. USSR - Austria, 2/7/1968, ICAO 2103; CATC (69) 37, at Art. 2(4) & Annex II, Para. 8.
76. Bulgaria - Sudan, 2/1/1969, CATC (71) 159, at the Protocol of Signature, Para. 4.
77. USSR - Malaysia, 27/11/1969, ICAO 2433; CATC (70) 58, at Art. 16.
78. USSR - Switzerland, 3/2/1970, CATC (69) 50A, at the Annex, Part B, Para. 6.
79. Hungary - Sudan, 23/8/1970, CATC (72) 40, at the Annex, Section III.
80. Austria - Iraq, 21/11/1970, ICAO 2312; 819 UNTS 255, at Arts. II(2) & VII(4).
81. USSR - Federal Republic of Germany, 11/11/1971, ICAO 2543; 972 UNTS 99, at Art. 2(5).
82. Mali - Niger, 31/5/1972, ICAO 2349; 835 UNTS 197.
83. China - Italy, 8/1/1973, CATC (86) 30, at Art. 2(5).
84. USSR - Greece, 22/1/1973, ICAO 3132, at Annex 1, Para. 7.
85. Canada - China, 11/6/1973, ICAO 2400; Can.T.S. 21/1973, at Arts. 2(5) & 20.
86. USSR - Bangladesh, 23/8/1973, ICAO 2491; 972 UNTS 151, at Annex I, Para. 4.
87. China - Switzerland, 12/11/1973, ICAO 2561; 987 UNTS 3, at Annex I, Paras. 4 & 5.
88. USSR - Rwanda, 30/11/1973, CATC (88) 63, at Annex I, Notes, Para. (b).
89. Mali - Chad, 12/2/1974, ICAO 2474; 944 UNTS 327, at Annex III.
90. USSR - Libya, 26/10/1974, ICAO 2590, at the Annex, Note 1.
91. USSR - Portugal, 11/12/1974, ICAO 2883; CATC (82) 171, at Annex I, Section V.
92. China - Belgium, 20/4/1975, ICAO 2763, at the Annex, Part III.
93. USSR - Luxembourg, 6/6/1975, ICAO 3133; CATC (84) 258, at Annex I, Notes, Para. (b).
94. Belgium - German Democratic Republic, 11/6/1975, CATC (88) 33, at Art. 5.
95. Canada - Cuba, 26/9/1975, ICAO 2629; Can.T.S. 26/1976, at Art. XVIII.
96. Yugoslavia - Iraq, 2/10/1975, ICAO 3080; CATC (82) 198, at Annex 2.
97. China - Syria, 10/11/1975, ICAO 2775, at the Annex, Part III.
98. Poland - Angola, 24/4/1976, CATC (77) 159, at the Annex, Section VI.

99. USSR - Spain, 12/5/1976, ICAO 2718; CATC (78) 91, at Annex I, Para. 5.
100. Canada - Poland, 14/5/1976, ICAO 2756; Can.T.S. 31/1977, at Art. XVII.
101. Yugoslavia - Portugal, 3/6/1976, ICAO 2805; CATC (79) 117, at the Memorandum of Understanding.
102. France - Angola, 7/6/1976, CATC (77) 108, at the Annex, Section V.
103. Austria - Jordan, 16/6/1976, ICAO 2870; CATC (80) 49.
104. Austria - Syria, 28/7/1976, ICAO 2892; CATC (82) 50.
105. USSR - Romania, 22/12/1976, ICAO 2850; CATC (82) 309, at the Annex, Para. VI.
106. Poland - Romania, 29/1/1977, ICAO 2849; CATC (82) 308, at the Annex, Para. IV.
107. USSR - Madagascar, 18/3/1977, ICAO 3135; CATC (84) 195, at Annex I, Notes, Para. 4.
108. Yugoslavia - Switzerland, 26/10/1977, ICAO 2864; CATC (79) 5, at Art. 12(2).
109. Indonesia - Switzerland, 14/6/1978, ICAO 3004; CATC (80) 198, at Art. 9(2).
110. USSR - Jamaica, 20/12/1978, ICAO 3138; CATC (79) 31, at the Notes, Para. C.
111. Mauritania - Switzerland, 13/3/1979, ICAO 2972; CATC (84) 259, at Art. 12(2).
112. Austria - Korea, 8/5/1979, CATC (80) 205.
113. Cuba - Vietnam, 8/6/1979, CATC (83) 238, at Art. 15.
114. Romania - Vietnam, 26/6/1979, ICAO 3103; CATC (83) 270, at the Annex, Part IV.
115. USSR - Kampuchea, 16/7/1979, ICAO 3139; CATC (84) 312, at Annex I, Notes, Para. (b).
116. Kenya - Korea, 5/10/1979, CATC (80) 86, at Art. 8(2).
117. UK - China, 1/11/1979, ICAO 2922; UKTS 14 (1980), at the Annex, Section II.
118. Mauritius - Switzerland, 14/11/1979, ICAO 2977; CATC (81) 82, at Art. 12(2).
119. USSR - Nicaragua, 19/3/1980, ICAO 3127; CATC (84) 156, at Annex I, Notes, Para. c.
120. Belgium - Jamaica, 27/5/1980, ICAO 2959; CATC (80) 288, at Art. 17.
121. Romania - Tunisia, 3/7/1980, ICAO 3099; CATC (85) 59, at the Annex, Part C.
122. USSR - Seychelles, 21/11/1980, ICAO 3128; CATC (82) 69, at the Annex, Note (b).
123. Singapore - Chile, 9/2/1980, ICAO 3087; CATC (82) 277, at Annex II.

124. Kenya - Spain, 3/3/1981, ICAO3024; CATC (82) 152, at Art. 8(4).
125. USSR - Malta, 8/10/1981, ICAO 3141, at the Annex, Note, Para. C.
126. Kenya - Malawi, 22/4/1982, CATC (88) 81, at Art. 7(2).
127. Canada - India, 20/7/1982, Can.T.S. 13/1982, at Art. XVIII.
128. Kenya - Burundi, 20/1/1983, CATC (83) 218, at Art. 8(2).
129. China - Oman, 3/5/1983, ICAO 3166; CATC (85) 5, at Art. 2(4).
130. Singapore - Maldives, 12/8/1983, CATC (88) 168, at Annex II.
131. Canada - St. Lucia, 6/1/1984, ICAO 3210; CATC (86) 59, at Art. XVIII.
132. Singapore - Mauritius, 24/2/1984, CATC (88) 157, at Art. 10(3).
133. Comoros - Malawi, 7/8/1984, CATC (88) [illegible], at Art. 10(2).
134. Canada - Greece, 20/8/1984, CATC (85) 133; Can.T.S. 11/1987, at Art. XIV.
135. China - Australia, 7/9/1984, CATC (85) 261, at Art. 2(3).
136. Malawi - Mozambique, 23/10/1984, CATC (88) 84, at Art. 7(2).
137. Canada - Yugoslavia, 16/11/1984, Can.T.S. 3/1985, at Art. 16.
138. Kenya - Uganda, 10/6/1985, ICAO 3224; CATC (86) 60, at Art. 7(2).
139. Canada - New Zealand, 4/9/1985, ICAO 3208; CATC (85) 302; Can.T.S. 30/1985, at Art. XVII.
140. Canada - Barbados, 18/10/1985, ICAO 3393; CATC (85) 382; Can.T.S. 33/1985, at Art. XIX.
141. Canada - Jamaica, 18/10/1985, ICAO 3396; CATC (86) 45; Can.T.S. 38/1985, at Art. XVIII.
142. Canada - St. Christopher and Nevis, 18/10/1985, CATC (85) 383, Can.T.S. 39/1985, at Art. XVIII.
143. Canada - Israel, 13/4/1986, CATC (86) 206; Can.T.S. 17/1987, at Art. XVIII.
144. Canada - Belgium, 13/5/1986, CATC (86) 207; Can.T.S. 5/1986, at Art. 18.
145. Canada - Brazil, 15/5/1986, ICAO 3394; CATC (86) 208, at Art. XVII.
146. Brunei - Nepal, 10/7/1986, CATC (86) 265, at Art. 14(2).
147. Brunei - Thailand, 13/1/1987, CATC (87) 114, at Art. 12(2).
148. Canada - Portugal, 10/4/1987, CATC (88) 162, at Art. XVII.

149. Canada - Ivory Coast, 3/9/1987, ICAO 3395; CATC (88) 155, at Art. XVIII.
150. Canada - UK, 22/6/1988, ICAO 3404, at Annex III.
151. Canada - Spain, 15/9/1988, ICAO 3397, at Art. XVII.
152. Singapore - Brunei Darussalam, 12/10/1988, ICAO 3449, at Annex II.
153. USSR - Australia, 18/10/1989, ICAO 3501, at the Exchange of Letters.

Please note: Henceforth, reference to an agreement will be made as follows:
(1) Yugoslavia - Czechoslovakia (1948);
(7) Yugoslavia - Turkey (1953); etc.

2. Ibid.:
(5) UK - France (1950): not in force (Doc. 9460, infra, note 4 at x);
(6) UK - Switzerland (1952): not in force (Doc. 9460, infra, note 4 at x);
(35) Morocco - Switzerland (1962);
(52) Italy - Austria (1965); and,
(82) Mali - Niger (1972);

3. The method followed in presenting these results is broadly based on that used by Prof. Cheng. See, CHENG, Ch. 1, note 24 at 289 et seq.

4. A. ICAO References:
i) Doc. 9204 - LGB/324: First Biennial Supplement (for the years 1975 - 1976) to "Tables of Agreements and Arrangements Registered with the Organization (Doc. 9181 - LGB/319)".
ii) Doc. 9235 - LGB/332: Second Supplement (for the year 1977) to "Tables of Agreements and Arrangements Registered with the Organization (Doc. 9181 - LGB/319)".
iii) Doc. 9267 - LGB/338: Third Supplement (for the year 1978) to "Tables of Agreements and Arrangements Registered with the Organization (Doc. 9181 - LGB/319)".
iv) Doc. 9307 - LGB/347: Tables of Agreements and Arrangements Registered with the Organization, January 1, 1946 - December 31, 1979 [hereinafter, Doc. 9307].
v) Doc. 9331 - LGB/352: First Annual Supplement (for 1980) to Doc. 9307, ibid.
vi) Doc. 9355 - LGB/358: Second Annual Supplement (for 1981) to Doc. 9307, above, at (iv).

vii) Doc. 9390 - LGB/365: Third Annual Supplement (for 1982) to Doc. 9307, above, at (iv).
viii) Doc. 9424 - LGB/372: Fourth Annual Supplement (for 1983) to Doc. 9307, above, at (iv).
ix) Doc. 9447 - LGB/377: Fifth Annual Supplement (for 1984) to Doc. 9307, above, at (iv).
x) Doc. 9460 - LGB/382: Tables of Agreements and Arrangements Registered with the Organization, January 1, 1946 - December 31, 1985 [hereinafter, Doc. 9460].
xi) Ibid., First Annual Supplement (1986).
xii) Ibid., Second Annual Supplement (1987).
xiii) Ibid., Third Annual Supplement (1988).
xiv) Ibid., Fourth Annual Supplement (1989).
xv) Doc. 9511: Digest of Bilateral Air Transport Agreements [hereinafter, Doc. 9511].

B. The United States:
I.I. KAVASS & A. SPRUDZS, A Guide to the United States Treaties in Force, 1989 ed., Part I (Buffalo, New York: William S. Hein Co., 1990) [hereinafter, KAVASS].

5. See, supra, sections 2.2.1.2 and 2.2.2.3.

6. CHENG, Ch. 1, note 24 at 359.

7. (68) Romania - Greece (1966); (71) USSR - Nigeria (1967); (88) USSR - Rwanda (1973); (113) Cuba - Vietnam (1979); and, (153) USSR - Australia (1989).
See, supra, note 1.

8. See, supra, sections 1.2 and 2.1.2.

9. H.A. WASSENBERGH, Post-War International Civil Aviation Policy and the Law of the Air, 2d. rev'd ed. (The Hague: Martinus Nijhoff, 1962) at 31 [hereinafter, WASSENBERGH II].

10. For example:
(14) Hungary - Netherlands (1957); (15) Hungary - Belgium (1957); (33) USSR - Ghana (1962); (36) USSR - Cuba (1962); (46) Yugoslavia - Algeria (1964); (48) Syria - Bulgaria (1964); (78) USSR - Switzerland (1970); (102) France - Angola (1976); (107) USSR - Madagascar.
See, supra, note 1.

11. For example:
(42) USSR - Ceylon (now, Sri Lanka) (1964); (45) USSR - Iran (1964); (66) Bulgaria - Morocco (1966); (71) USSR - Nigeria (1967); (135) China - Australia (1984).
See, supra, note 1.

12. For example:
(31) Hungary - Finland (1962); (94) Belgium - German Democratic Republic (1975).
See, supra, note 1.

13. For example:
(32) USSR - Morocco (1962); (110) USSR - Jamaica (1978); (115) USSR - Kampuchea (1979); (119) USSR - Nicaragua (1980); (122) USSR - Seychelles (1980).
See, supra, note 1.

14. (117) UK - China (1979).
See, supra, note 1.

15. For example:
(59) France - Syria (1966); and, all the Canadian agreements.
See, supra, note 1.

16. (64) France - Iraq (1966).
See, supra, note 1.

17. (122) USSR - Seychelles (1980). Examples of other such agreements are:
(1) Yugoslavia - Czechoslovakia (1948); (7) Yugoslavia - Turkey (1953); and, (106) Poland - Romania (1977).
See, supra, note 1.

18. The terminology used in the agreements varies: "an application" or "a request" has to be made; "a notice" has to be given; a "special permit" or a "special authorization" has to be applied for. However, for the purposes of this discussion, the term "application" will be used throughout.

19. In, for example:
(10) Poland - Sweden (1956); (14) Hungary - The Netherlands (1957); (34) Romania - France (1962); (40) Poland - Greece (1963); (61) Bulgaria - Turkey (1966); (99) USSR - Spain (1976); etc.
See, supra, note 1.

20. In, for example:
(43) Hungary - Cyprus (1964); (49) Bulgaria - Cyprus (1965); (87) China - Switzerland (1973); (129) China - Oman (1983); etc.
See, supra, note 1.

21. (1) Yugoslavia - Czechoslovakia (1948) and (85) Canada - China (1973).
See, supra, note 1.

22. For example:
(25) Hungary - Iraq (1960); (29) France - Mali (1961); (68) Romania - Greece (1966); etc.
See, supra, note 1.

23. For example:
(7) Yugoslavia - Turkey (1953); (27) Hungary - UK (1960); (43) Hungary - Cyprus (1964); (47) Hungary - Luxembourg (1964); (55) Hungary - Lebanon (1966); (56) USSR - Japan (1966); etc.
See, supra, note 1.

24. a) 24 HOURS: For example: (9) USSR - Denmark (1956); (32) USSR - Morocco (1962); (46) Yugoslavia - Algeria (1964); (51) Bulgaria - Cuba (1965), with a proviso that, "In special and urgent cases of transportation of VIPs or the conveyance of spare parts or equipment for the repair of aircraft of the airlines referred to, which have suffered damage abroad, such flights may be requested at any time..."; (86) USSR - Bangladesh (1973), which states that "the application should be submitted preferably five days, but not less than twenty-four hours, prior to take-off of aircraft; etc.

b) 36 HOURS: (45) USSR - Iran (1964).

c) 48 HOURS: (22) Romania - Norway (1958); (38) USSR - Sudan (1962), which also requires that full particulars of the flight be given; (53) Bulgaria - France (1965): in "exceptional cases", this period may be reduced on request; this exception is also provided for in (72) Yugoslavia - France (1967); etc.

d) 72 HOURS: (69) Bulgaria - Iraq (1966), with a similar proviso as in (51) Bulgaria - Cuba, above at (a), with a reduction in time to 24 hours; (96) Yugoslavia - Iraq (1975); (129) China-Oman (1983); etc.
See, supra, note 1.

25. a) 2 WORKING DAYS:
(29) France - Mali (1961), for a single flight or a series of four flights at the most. A longer period may be specified in the case of a more extensive series of flights; (39) Hungary - Greece (1963); (40) Poland - Greece (1963); (89) Mali - Chad (1974), for one to ten flights. A longer period may be specified for a more extensive series of flights; etc.

b) 3 WORKING DAYS:
(44) Bulgaria - Greece (1964); (49) Bulgaria - Cyprus (1965); etc.

c) 5 DAYS:
(84) USSR - Greece (1973); (110) USSR - Jamaica (1978); etc.

d) 7 DAYS:
(71) USSR - Nigeria (1967); (113) Cuba - Vietnam (1979); etc.

e) 15 DAYS:
(59) France - Syria (1966), with the proviso that in "exceptional cases", an application may be made for exemption from this requirement; (60) France - Ceylon (now Sri Lanka) (1966); (62) France - Jordan (1966); etc.

f) 18 DAYS:
(64) France - Iraq (1966), with the proviso that the time limit may be waived, on application, in "exceptional circumstances".

See, supra, note 1.

26. For example:
(55) Hungary - Lebanon (1966); (58) USSR - Lebanon (1966); etc. Some agreements speak of "national respective regulations", for example: (96) Yugoslavia - Iraq (1975); (101) Yugoslavia - Portugal (1976); etc. (105) USSR - Romania (1976) mentions "rules in force in the territory of each ... Party".
See, supra, note 1.

27. For example:
(27) Hungary - UK (1960); "pertinent national regulations": (43) Hungary - Cyprus (1964) and "internal legislation": (74) USSR - Poland (1968) are used instead of "the relevant requirements", found in the Hungary - UK agreement, to give a similar provision.

28. See, supra, note 1 at (139) to (145) and (148) to (151).

29. For example:
(63) Romania - Turkey (1966); (65) Hungary - Turkey (1966); (79) Hungary - Sudan (1970); etc.
See, supra, note 1.

30. (117) UK - China (1979).
See, supra, note 1.
"Charterworthiness Rule" is the rule that determines which charter types may be performed, e.g. ABC, public charter, ITC, affinity group charter, etc.
See, HAANAPPEL, Ch. 1, note 37 at 156. Also, see section 2.3.5.

31. (135) China - Australia (1984).
See, supra, note 1.

32. (127) Canada - India (1982).
See, supra, note 1.

33. (14) Hungary - The Netherlands (1957).
See, supra, note 1.

34. (80) Austria - Iraq (1970).
See, supra, note 1.

35. See, supra, section 2.2.2.

36. (153) USSR - Australia (1989).
See, supra, note 1.

37. (72) Yugoslavia - France (1967) and (121) Romania - Tunisia (1980).
See, supra, note 1.

38. (62) France - Jordan (1966) and (72) Yugoslavia - France (1967).
See, supra, note 1.

39. (59) France - Syria (1966) and (64) France - Iraq (1966).
See, supra, note 1.

40. (53) Bulgaria - France (1965).
See, supra, note 1.

41. For example:
(10) Poland - Sweden (1956); (22) Romania - Norway (1958); (56) USSR - Japan (1966); (99) USSR - Spain (1976); (129) China - Oman (1983); etc.
See, supra, note 1.

42. (153) USSR - Australia (1989). See, supra, note 1. See section 1.3.1.3. for an explanation of the "Freedoms of the Air".

43. (57) Belgium - Rwanda (1966).
(54) Belgium - Congo (1965) states: "The Contracting Parties' aeronautical authorities shall jointly agree the position to be taken on unscheduled services which are likely to be prejudicial to each authority's present and future traffic."
See, supra, note 1.

44. For example, (32) USSR - Morocco (1962).
See, supra, note 1.

45. For example:
(51) Bulgaria - Cuba (1965); (66) Bulgaria - Morocco (1966); etc.
See, supra, note 1.

46. (33) USSR - Ghana (1962).
See, supra, note 1.

47. (150) UK - Canada (1988):
"Recognizing the need to preserve the opportunities for competition between scheduled and non-scheduled air services, a Contracting Party may request consultations if:
(i) a tariff filing is approved which it considers might adversely affect the ability of non-scheduled air services to compete with scheduled air services; or
(ii) adjustments to existing charterworthiness rules or requirements, or new rules or requirements, are imposed which it considers might adversely affect the ability of scheduled air services to compete with non-scheduled air services.

Such consultations shall be held within 30 days of receipt of the request, with a view to considering any necessary adjustments to charter rules or requirements or to scheduled tariffs."

See, supra, note 1.

48. (153) USSR - Australia (1989), at para. (5):

"The aeronautical authorities of the two countries shall monitor closely traffic flows between the two countries, taking into account the results of any charter operations conducted under this exchange. Should USSR Australia origin/destination traffic reach levels sufficient to sustain viable scheduled services by the international airlines of both countries, either country may request consultations to consider the possibility of establishing scheduled international air services."

This is not to say that scheduled air services are not at all allowed initially. Paragraph (1) of the agreement reads:

"The international airline of each country...shall be permitted to operate scheduled and non-scheduled international air services on international routes over the territory of the other."

However, paras. (3) and (5), read together, seem to indicate that charter air services are initially expected to be the principal form of air transport between the two countries. Para. (5) has been reproduced above. Para. (3) says:

"Aeroflot and Qantas shall be allowed to operate charter flights between points in Australia and points in the USSR where such international operations are permitted, in accordance with the guidelines and regulations on international charter flights of the other country. Neither airline shall be permitted to operate flights for commercial purposes between third countries and the country of the other airline."

49. CHICAGO CONVENTION, Ch. 1, note 8 at Part I.

50. CHENG, Ch. 1, note 24 at 327.

51. (141) Canada - Jamaica (1985).
See, supra, note 1.

52. This provision is not in (85) Canada - China (1973).
See, supra, note 1.

53. For example, (150) Canada - UK (1988) provides, at Art. 18:

> "(1) The term "user charge" means a charge made to airlines for the provision for aircraft, their crews and passengers of airport or air navigation property or facilities, including related services and facilities.
> (2) The user charges which either of the Contracting Parties may impose, or permit to be imposed, on the designated airlines of the other Contracting Party shall not be higher than would be paid by its own designated airlines operating similar international air services..." (Para. (3) omitted in this discussion).

See, supra, note 1.

54. I.e., the so-called "Tokyo Convention" of 1963 and the proposed "Hague Convention", concerning hijacking. Today, there are four international instruments dealing with the problem of unlawful interference with civil aviation:

a) Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo 1963, TIAS 6758.
b) Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague 1970, TIAS 7192.
c) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal 1971, TIAS 7570.
d) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Done at Montreal on 23 September 1971, Montreal 1988, ICAO Doc. 9518.

55. A17 - WP/49.

56. US - UK, 23/7/1977, UKTS 76/1977, at Art. 7.

57. Resolution of 25 June 1986. ICAO has developed a "model clause" on aviation security to guide States intending to insert such a clause in their agreements. Both the Resolution and the Model Clause are to be found in:
Doc. 8849-C/990/4. Aviation Security. Digest of Current ICAO Policies and Actions on the Subject of the Unlawful Interference with International Civil Aviation and its Facilities.

58. (117) UK - China (1979) does not so extensively provide for ancillary clauses to be applied to charter services, as do the Canadian agreements. The provisions this agreement makes are: entry and clearance of aircraft and traffic; aviation security; user charges; customs duties; sales and revenues and transfer of funds; etc.
The Hungarian agreements state that the "technical and juridical" facilities offered to the scheduled services would likewise be offered to the non-scheduled services. The Bulgarian agreement offers just the "technical" facilities.

59. These agreements can be classified into groups, according to the similarities their provisions exhibit:

A. The "French" Group of Agreements:
(2) France - Spain (1948);
(3) France - Italy (1949);
(4) Italy - Spain (1949); and,
(8) France - Federal Republic of Germany (1955).
The French agreements are no longer in force: See, HAANAPPEL, Ch. 1, note 37 at 38.

B. The UK Agreements:
(5) UK - France (1950); and,
(6) UK - Switzerland (1952).
Both are exclusively non-scheduled air transport agreements. They are no longer in force. See, Doc. 9460, supra, note 4 at x.

C. The Moroccan Agreements:
(17) Morocco - France (1957);
(20) Morocco - Portugal (1958);
(28) Morocco - Luxembourg (1961);
(35) Morocco - Switzerland (1962) (non-scheduled only); and,
(41) Morocco - Yugoslavia (1964).

D. The Austrian Agreements:
(52) Austria - Italy (1965) (non-scheduled only);
(103) Austria - Jordan (1976);
(104) Austria - Syria (1976); and,
(112) Austria - Korea (1979).

E. The Singapore Agreements:
(123) Singapore - Chile (1980);
(130) Singapore - Maldives (1983); and,
(152) Singapore - Brunei Darussalam.

F. Miscellaneous:
(67) Tunisia - Austria (1966);
(70) Tunisia - Yugoslavia (1966);
(82) Mali - Niger (1972) (non-scheduled only);
(91) USSR - Portugal (1974); and,
(120) Belgium - Jamaica (1980).

See, supra, note 1.

60. (2) France - Spain (1948), at Art. XXVII.
See, supra, note 1.
The "air communications" referred to mean non-scheduled air transport. See GOEDHUIS, Ch. 2, note 8 at 271.

61. Art. XXX.
The provision regarding competition with the regular services reads: "(b) In case of flights between points of call (or between geographically neighbouring aerodromes of these) on one and the same route specified in the list of routes under Chapter II above, whenever it is a question of the transport of more than four passengers." Chapter II deals with the "agreed services" (defined in Art. XII).

Art. XXIX, concerning cabotage says: "It is agreed that in no case shall an aircraft of one of the Contracting Parties carry out more than one commercial landing on the territory of the other Contracting Party." The Spain - Italy agreement, at Art. 33(c) is similarly worded: Prior authorisation shall be obtained "(f)or any flight involving more than one traffic stop in the territory of a Contracting Party (Cabotage)."

62. Art. 21(1).
Further, each Party "shall have the right to require an airline designated by the other Contracting Party to give proof that the said airline is qualified to fulfil the conditions prescribed under the laws and regulations applied by the first...Party...". (Art. 14, para. 3).
If the designated airline fails to comply with the laws and regulations of the other Party, or with the conditions of the agreement, if the airline fails to perform the obligations derived from the agreement, or does not give proof as to the "substantial ownership" of the airline, then authorisation to conduct the services may be revoked. (Art. 15, para. 1).

63. Art. 14(4) and Art. XXVIII, respectively.

64. Art. 22 lists these types of flights, which are similar to the ones found in the Paris Agreement of 1956. See, section 2.3.4.2 for the Paris Agreement. Art. 22(2) forbids these flights from being in the nature of a systematic series of flights, "however great the number of airlines involved." Further, if these flights seem to be competing with scheduled services, as observed under Art. 21(3), the flights may be prohibited, or permission revoked.

65. E.g., France - Spain, at Art. II.
See, Ch. 1, note 54, and the accompanying text, for an explanation of these rights.

66. See, Ch. 1, note 64 for Art. 5.

67. a) Own use charters: e.g., the British note to France states that: "...French aircraft wholly chartered by or hired to one person or body corporate may without prior authorisation carry traffic between the United Kingdom and the French Union, provided that throughout the duration of the contract, the charterer or hirer does not sell space to be made available in the United Kingdom to third parties." (at Para. 1).
For selected national regulations regarding "own use" charters, see, W. DIERSCH, International Non-Scheduled Air Transportation (LL.M. Thesis, IASL, McGill University, 1976) at 75 [hereinafter, DIERSCH].

b) Taxi flights: i.e., when the aircraft carries four (or less) passengers.
At Para. 2(a), UK - France. Also see, CHENG, Ch. 1, note 24 at 201.

c) Single flights: i.e., flights performed by an operator not more frequently than once in every thirty days.
See, CHENG, Ch. 1, note 24 at 201.

68. At para. 1.
For "taxi flights", the same conditions as in the agreement with France, apply. For "single flights", the period is ten days, as opposed to thirty days, as in the French agreement.
See, ibid.

69. Arts. 3 and 7 (UK - France) and Arts. 2 and 5 (UK - Switzerland) deal with cabotage and "substantial ownership", respectively.

70. PARIS AGREEMENT, Ch. 2, notes 116 and 118, and accompanying text. Portions of each of the "provisos" of Art. 2(2) (emphasized below) have been omitted from these three treaties:

> Art. 2(2): "The same treatment shall be accorded to aircraft engaged in either of the following activities:
> (a) the transport of freight exclusively;
> (b) the transport of passengers between regions which have no reasonably direct connection by scheduled air services;
>
> provided that any Contracting State may require the abandonment of the activities specified in this paragraph if it deems that these are harmful to the interests of its scheduled air services operating in the territories to which this Agreement applies; any Contracting State may require full information as to the nature and extent of any such activities that have been or are being conducted; and,
>
> further provided that, in respect of the activity referred to in sub-paragraph (b) of this paragraph, any Contracting State may determine freely the extent of the regions (including the airport or airports comprised), may modify such determination at any time, and may determine whether such regions have reasonably direct connections by scheduled air services.

71. "(T)he period within which the application must be lodged shall not exceed two working days for a single transport flight or a series of four transport flights at the most; a longer period may be specified in the case of a more extensive series of flights.": Art. 19, Morocco - France.

72. Art. 4(2) reads:

> "The information to be furnished in the case of permission for a single flight or a series of not more than four flights shall not exceed:
> (a) name of operating company;
> (b) type of aircraft and registration marks;

(c) date and estimated time of arrival at and departure from the territory of the other Contracting Party;
(d) the itinerary of the aircraft;
(e) the purpose of the flight, the number of passengers and the nature and amount of freight to be taken on or put down."

73. (52) Austria - Italy (1965).
See, supra, note 1.

74. At para. 1, which states:
"Civil aircraft registered in one of the two Countries shall be exempted from the requirement to apply for authorisation to fly over the territory of the other Country and to make stops there on condition that they observe the provisions governing air traffic in the territories of the two Countries, in the following cases:
(a) non-traffic overflights and stops made by private aircraft;
(b) overflights and stops made in the case of disasters and urgent necessity;
(c) overflights and stops of an occasional nature on condition that the air taxi has a capacity of not more than six passenger seats."

75. At Art. 3.
Art. 2 describes "agreed services" as "the rights specified in the...Agreement for the purpose of establishing scheduled and/or non-scheduled international air services...".

76. At Art. 3(4) and 3(5). For the conditions (substantial ownership, etc.), see, supra, note 62. See, also Ch. 2, note 31.

77. At Art. 5, Part II, in both agreements.
See, DOC 9511, supra, note 4 (xv) at En-xxii, paras. 35 and 36, for a description of the various types of capacity clauses that can be found in bilateral air transport agreements and for an explanation of the elements that may make up a clause.

78. See, DOC 9511, supra, note 4 (xv) at En-xxiv, para. 36.11.

79. See, ibid., at En-xxiii, para. 36.1.

80. Art. 10 in the agreements with Jordan and Syria and Art. 11 in the one with Korea.

81. See, DOC 9511, supra, note 4 (xv) at En-xviii, paras. 30 to 33.

82. Art. 10(1) in the agreements with Jordan and Syria; Art. 11(1) in the one with Korea. The last-named factor appears only in the Korean agreement.

83. At, Art. 10(5) of both agreements:
"If the designated airlines cannot agree on any of these tariffs, or if for some other reason a tariff cannot be fixed...the aeronautical authorities of the Contracting Party shall endeavour to agree upon the tariffs."

84. HAANAPPEL, Ch. 1, note 37 at 180.

85. See, CHENG, Ch. 1, note 24 at 392 et seq. Also see, HAANAPPEL, Ch. 1, note 37 at 3 and R.K. GARDINER, "United Kingdom Air Services Agreements 1970 - 1980" (1982) 7 Air L. 2 at 5 et seq. [hereinafter, GARDINER].

86. Art. 2 and the Annexes to the agreements define the traffic rights and the route structures.
For the "Freedoms", see section 1.3.1.3.

87. For details regarding ancillary rights, see section 3.2.4.

88. See, HAANAPPEL, Ch. 1, note 37 at 42 et seq. for a detailed discussion of the liberal bilateral.

89. At Annex II:
"(1) Each Contracting Party shall grant the operation from and to its territory of non-scheduled passengers or cargo flights carried by operators of the other Contracting Party provided that substantial ownership and effective control of the operators are vested in the latter Contracting Party or in the national of the latter Contracting Party.
(2) All the provisions of the Agreement, with the exception of Article 3, will be applicable to non-scheduled flights. To this effect, the term, "designated airline or airlines" in the Agreement will be understood to have been substituted by the term "operator or operators" where applicable."

The usual ancillary rights apply: entry and clearance of aircraft and passengers, customs duties, user charges, etc. As these have been discussed at length in other parts of this chapter, they will not be touched upon here.

90. See, CHENG, Ch. 1, note 24 at 429 et seq.

91. See, HAANAPPEL, Ch. 1, note 37 at 180, where he says that although the free determination method "with little or no Governmental involvement or control seems particularly suitable for mature transport markets where air carriers of different nations have approximately equal commercial strength", other forms of capacity determination may be needed where such equality is lacking.

92. Ibid., at 146 et seq. for Art. 12 of the Model liberal agreement.
Also see, R.W. BOGOSIAN, "Aviation Negotiations and the U.S. Model Agreement" (1981) 46 JALC 1007 [hereinafter, BOGOSIAN]. Also, hereinafter, reference will be made to the "Model agreement".

93. For Section 1, Annex II of the Model Agreement, see, HAANAPPEL, Ch. 1, note 37 at 155.
Section 1, Annex II of the Maldives agreement reads:
"Any airline of one Contracting Party which has been designated to perform charter air services shall, in accordance with the terms of its designation, be entitled to international air service to, from and through any point or points in the territory of the other Contracting Party, either directly or with stopovers en route, for one-way or round-trip carriage of the following traffic:-
(a) any traffic to or from a point or points in the territory of the Contracting Party which has designated the airline;
(b) any traffic to or from a point or points beyond the territory of the Contracting Party which has designated the airline and carried between the territory of that Contracting Party and such beyond point or points (i) in air service other than under this Annex; or (ii) in air service under this Annex with the traffic making a stopover of at least two consecutive nights in the territory of that Contracting Party; unless applicable regulations promulgated by the aeronautical authorities of the other Contracting Party are more liberal." (Emphasis supplied).

94. HAANAPPEL, Ch. 1, note 37 at 155.

95. Supra, note 93, at the emphasis.

96. At the second para. of Section 2:
"Each designated flight may, on any or all flights and at its option, operate flights in either or both directions, serve points on the routes in any order, and omit stops at any point or points outside the territory of the Contracting Party which has designated that airline, without loss of any rights to carry traffic otherwise permissible under this Agreement."
See, HAANAPPEL, Ch. 1, note 37 at 153-54.

97. This, and the U.S. Model agreement clause, are very similar. See, ibid., at 156, for the Model charterworthiness clause. The clause found in the Maldives agreement is:
"With regard to traffic originating in the territory of either Contracting Party, each designated airline performing air service under this Annex shall comply with such laws, regulations and rules of the Contracting Party in whose territory the traffic originates, whether on a one-way or round-trip basis, as that Contracting Party now or hereafter specifies shall be applicable to such service. When such regulations or rules of one Contracting Party apply more restrictive terms, conditions or limitations to one or more of its airlines, the designated airline or airlines of the other Contracting Party shall be subject to the least restrictive of such terms, conditions or limitations. Moreover, if the aeronautical authorities of either Contracting Party promulgate regulations or rules which apply different conditions to different countries, such Contracting Party shall apply the least restrictive regulation or rule to the designated airline or airlines of the other Contracting Party."

98. HAANAPPEL, Ch. 1, note 37 at 40.

99. Ibid., at 156.
The third para. of Section 3 reads:
"Neither Contracting Party shall require a designated airline of the other Contracting Party, in respect of the carriage of traffic from the territory of that other Contracting Party on a one-way

or round-trip basis, to submit more than a declaration of conformity with the laws, regulations and rules of that other Contracting Party referred to under Section 2 of this Annex or of a waiver of these regulations or rules granted by the aeronautical authorities of that other Contracting Party."

100. CHENG, Ch. 1, note 24 at 434.

101. HAANAPPEL, Ch. 1, note 37 at 154, for section 3 of the Model agreement.
The first part of Section 3 of the Maldives agreement reads:

> "On any international segment or segments of the routes described in Section 1 above, a designated airline may perform international air service without any limitation as to change, at any point on the route, in type or number of aircraft operated, provided that in the outbound direction the service beyond such point is a continuation of the service from the territory of the Contracting Party which has designated the airline and, in the inbound direction, the service to the territory of the Contracting Party which has designated the airline is a continuation of the service beyond such point.
>
> Nothing in this Section shall be construed to permit the airline or airlines of either Contracting Party to establish operations in the territory of the other Contracting Party which do not originate or terminate in the homeland of the airline performing these operations."

The second paragraph of this provision is not found in the Model agreement.

102. See, CHENG, Ch. 1, note 24 at 436.

103. The clause in full, at para. 1, reads:

> "The Contracting Parties whilst recognising the need to further the maintenance and development of a viable network of scheduled air services, consistently and readily available, catering for those needing a wide and flexible range of air services, nonetheless also recognise the growing demand from a section of the travelling public which is price-sensitive for air services at the lowest possible level of fares. The Contracting Parties accordingly recognise the need for complementary charter

services and shall accordingly apply the provisions hereinafter set out governing charter air services between their territories."

104. At Annex II. Para. 2 deals with traffic rights. The clause is the same as the one in the Maldives agreement (Section 1), except provisions (i) and (ii) of sub-para. (b), have been omitted in the Brunei agreement.
See, supra, note 93 for the traffic rights clause.
Paras. 3 and 4 of the Brunei agreement (charterworthiness rules) correspond to Section 2, first paragraph and Section 3, third paragraph, of the Maldives agreement.
See, supra, notes 97 and 99, for the Maldives provisions.

105. At Annex I, Part B and Art. 4 (in the Austrian agreement) and Annex II in the agreement with Yugoslavia.

106. At Art. 13(1) and (2).
See, DOC 9511, supra, note 4(xv) at En-xxiii, para. 36.1 for an explanation of these "general principles".

107. At Article 17 of the agreement:
"(1) Each Party grants to the other Party the right for the designated airlines of the other Party to uplift and discharge international charter traffic in passengers...or in cargo at any point or points in the territory of the first Party for carriage between such points and any point or points in the territory of the other Party, either directly or with stopovers at points outside the territory of either Party or with carriage of stopover or transiting traffic to points beyond the territory of the first Party."

"(2) Charter passenger traffic carried by an airline of one Party and originating in or destined for a third country behind the territory of that Party without a stopover in the home territory of that airline of at least two consecutive nights shall not be covered by this Agreement."

108. See section 3.3.6.3 for details on charterworthiness rules.

109. See, HAANAPPEL, Ch. 1, note 37 at 157. He has applied this term to the following clause which appeared in the US - Belgium Protocol of 1978, at Art. 2(3):
"...airlines of one Party may also operate charters originating in the territory of the other Party in compliance with the charterworthiness rules of the first Party."
It is submitted that although the terminology of the two clauses differs, they could possibly have the same meaning.

110. At Art. 17(5):
"While charter air traffic should not be permitted to cause substantial impairment of the scheduled air services covered by this agreement, each Party undertakes to grant most liberal treatment to the designated airlines of the other Party for charter flights."

111. See sections 1.3.2.2 and 2.3.2.1.

112. See section 2.3.3.1.

113. Ibid.

114. At sections 3.2.3.5, 3.3.7.2 and 3.3.7.4.

115. WASSENBERG II, supra, note 9 at 34.

116. S.D. BROWNE, "The International Angle", Lecture given at an Air Law Group Symposium on "The Air Charter Market and the Restrictive Effects of Current Bilateral Agreements" (1973) 77 Aeronautical J. 29 at 29 [hereinafter, BROWNE].

117. To give but one example, (8) France - Federal Republic of Germany (1955) says that a Party "shall grant... authorization to carry out non-scheduled commercial flights bound for its territory." (Art. 21, para. 2) (emphasis provided).
See, supra, note 1.

118. See, section 3.2.3.4.

ARRANGEMENT OF TOPICS

CHAPTER 4

THE UNITED STATES AGREEMENTS

4.1 INTRODUCTION

4.1.1 United States Charter Policy: The Early Years

4.1.1.1 The Era of Mass Tourism

As seen in chapter 1, "scheduled" air services were the most common pre-World War II form of air transport; special "non-scheduled" flights, however, were undertaken on an infrequent basis.[1] In the United States, these special flights were regulated under the Civil Aeronautics Act of 1938[2] as the performance, by scheduled airlines, of "charter trips ... or any other special service."[3]

The end of the Second World War saw a surplus of military pilots and aircraft. Both in the U.S. and in Europe, the civilian demand for air traffic began to increase. As a result, transatlantic travel entered a new era, "the era of mass tourism. Low cost, newly available air charter services ... made it possible. Their far-reaching benefits, economic, cultural, and educational, (became) widely recognised and enjoyed on both sides of the Atlantic ... [T]here (was) no turning back...".[5]

4.1.1.2 Unilateral Regulation Inadequate

Trammels of legislation slowly gave way to the forces of the market place, and charter "types" began to proliferate.[6] U.S. charter policy "liberalisation" was initiated. The popularity of low cost charter operations; a reluctance, on the part of scheduled international airlines, to reduce fares "in consonance with the economies of jet operation"; and, the growing dominance of foreign carriers on the transatlantic charter market, which led U.S. authorities to take measures to strengthen U.S.-flag competition, were but some of the reasons for this liberalisation.[7]

Nevertheless, unilateral regulation of charter services still operated to thwart U.S. moves to a more liberal international non-scheduled environment. However, charter travel became "too important to consumers of air transportation services, to tourist interests and to governments to tolerate unilateral action by each nation often serving to frustrate the transportation policies of other nations; there was growing recognition on both sides of the Atlantic that unilateral regulation of charter services (was) inadequate (and that) some form of international understanding (was) needed."[8]

It was this sentiment that finally led the United States to make an effort to secure the regulation of non-scheduled services under bilateral air transport agreements.

4.1.2 The Nixon Statement

The origins of the regulation of non-scheduled air services, under U.S. bilateral air transport agreements, lie in the 1970 "Statement of International Air Transport Policy", issued by the Nixon administration ("Nixon Statement").[9] This was the first United States civil aviation policy statement that dealt with charters in depth.[10]

Where charters were concerned, the Nixon Statement emphasized the need to preserve and encourage these services.[11] It recognised the existence of a "bulk transportation market" in which both scheduled and non-scheduled services should compete.[12] Finally, it recommended that inter-governmental agreements governing charter services be established. It said:

> "The foreign landing rights for charter services should be regularized, as free as possible from substantial restriction. To accomplish this, intergovernmental agreements covering the operation of charter services should be vigorously sought, distinct, however, from agreements covering scheduled services. In general, there should be no trade-off as between scheduled service rights and charter service rights. In negotiating charter agreements, the continuation of and the nature of the charter rights of foreign carriers will be at issue."[13]

4.1.3 The Ottawa Declaration

The Nixon Statement did not state whether the "intergovernmental agreements" be bilateral or multilateral in character. The European view was that some kind of multilateral understanding be entered into.[14] This stand eventually led to the "Ottawa Declaration" of 1972,[15] which tried to lay the basis for commonality of charter rules on both sides of the North Atlantic.[16]

The aim of the Declaration was to provide "a generally agreed framework" which would permit all North Atlantic States to establish "substantially similar charter rules with respect to the new nonaffinity class of air charters" (i.e., ABCs and TGCs)[17] that were expected to facilitate and regularise their operation on North Atlantic air routes. The Americans "adhered" to the Declaration so as to "permit the operation to and from the United States of foreign-originating charters marketed under different national rules consistent with the Declaration but differing from (their) own pro-rata regulations."[18]

4.1.4 Bilateralism Preferred

However, it can be said that the United States considered the Ottawa Declaration a temporary arrangement,[19] and that it still preferred the bilateral approach. The American position was that a multilateral

approach was "impractical" and "simply not feasible", in the post-Chicago complex aviation environment.[20]

A multilateral agreement, it was argued, cannot be as general and as all-inclusive as a bilateral agreement; selection of carriers, choice of the number of carriers, and access to market points are potential national benefits that cannot be "lumped" into a multilateral understanding: these exchangeable benefits are matters for bilateral negotiation; certain national differences (e.g., the resolution of charter capacity with regard to a specific bi-national market, the promotion of tourism, etc.) are more readily solved bilaterally.[21] Further, a bilateral agreement allows each government to determine how its own citizens will be permitted to travel, and how the total air traffic originating in its own country will be allocated among its carriers.[22] It can provide consistency in the regulation of international charter services.[23] In addition, a bilateral agreement assures legal certainty,[24] provides stability,[25] and it creates a "specific legal environment",[26] all of which facilitate the orderly planning of non-scheduled operations.

These were but few of the many reasons that led the United States to begin to regulate its charter services under bilateral agreements. The process, which was initiated

with "Memoranda of Understanding", and continued in agreements that exclusively regulated non-scheduled services, has now been fine-tuned into treaties (new or existing treaties, amended by memoranda of understanding, Protocols of amendment, etc.) that deal with both scheduled and non-scheduled air services. The rest of this chapter describes this evolution.

4.2 THE MEMORANDA OF UNDERSTANDING

4.2.1 Introduction

In the period 1972 - 1973, the United States entered into charter Memoranda of Understanding (MOUs) with six countries.[27] The general aim of these MOUs was to facilitate "advance charters" (i.e., ABCs and TGCs), by setting down general policies with regard to charter services, and to stress important principles, like the country of origin rule and the minimisation of administrative procedures.[28] All the agreements are more or less similar, except the Belgian MOU, which will, thus, be discussed separately.

4.2.2 The MOU with Belgium[29]

4.2.2.1 Introduction

The memorandum of understanding with Belgium marked a breakthrough in achieving the goal of the Nixon Statement.[30] The process of regularising foreign landing rights for charter services, as free as possible from substantial restriction, began with this agreement. "The understanding stabilizes an environment which", said a State Department news release,[31] "(W)ill permit United States and Belgian airlines to conduct charter flights without arbitrary restraints...".

4.2.2.2 Common Elements

To begin with, the parties "recognize certain common elements important to both their governments."[32] That charters provide opportunities to the public, for promoting cultural exchange, tourism and air commerce; that certain principles, agreed to between the parties in their scheduled bilateral agreement of 1946, will be similarly applied to their charter services;[33] and, that consultations will be called for, in the event of difficulties arising from the regulation, operation or volume of charter services, are some of the "common elements" listed.[34]

4.2.2.3 No Quotas, Discrimination, or Prior Approval

The parties also recognise that while passenger charter air traffic,

> "should not be permitted to cause substantial impairment of scheduled air services, quota limits on the volume of passenger charter air traffic are not acceptable for this purpose. The parties shall deal with this question by establishing and enforcing reasonable passenger charter regulations."[35]

Discrimination against a carrier is prohibited; charter operations are permitted, subject only to reasonable notice requirements: carriers need not request prior approval for charter flights.[36]

4.2.2.4 The Annexes

The Annexes to the memorandum lay down the regulatory regimes to be applied by each country, with respect to the other. Annex 1 concerns United States regulatory policy. The Belgian "designated route carrier" (SABENA, the scheduled airline), is: a) allowed to continue its existing on-route charter services, for "all charter types as are or may be authorized to foreign scheduled airlines" (including TGCs); b) authorised to conduct ITCs; and, c) authorised to lease a Belgian registered aircraft with crew from another Belgian certified carrier, to conduct charter operations.[37] The United States also agrees, at para. (6),

to "(a)ccord liberal treatment ... to applications of other Belgian carriers for limited and infrequent charter flights...".

In Annex 2, Belgium agrees to permit "all United States carriers certificated to provide passenger charter service to and from Belgium ... to pick up and set down in Belgium" charter traffic between the two countries, including flights serving intermediate countries or points beyond Belgium.[38] This permission is for "all charter type traffic as is or may be authorized by the Civil Aeronautics Board (including travel group charters)."[39] American carriers are also allowed to carry fifth freedom charter traffic between Belgium and points in North America outside the United States, when permitted to do so by the third country.[40] Finally, at para. (3), Belgium agrees to "(g)rant liberal treatment to applications of other ... United States carriers for limited and infrequent charter flights to and/or from Belgium."

4.2.3 The Other MOUs[41]

The Memoranda of Understanding the United States signed with the UK, the Federal Republic of Germany, France, Ireland, and the Netherlands are all, more or less, similar. The MOU with the UK will be discussed, and differences in the others will be pointed out.

The UK agreement begins with a preamble, stating the reasons for the MOU.[42] The three sections that then follow, set forth the regulatory procedures agreed to between the parties.[43]

Section I ("Agreed Procedures for Mutual Implementation and Enforcement of Advanced Charter Regulations"), lays down the principles that apply to both Parties. Part A sets out the rules on charter traffic: each Party accepts the charterworthiness of the country of origin.[44] The purpose of Part B, "administration and enforcement" is to minimise administrative burdens. Although a carrier may be required to file charter programs with the authorities of the other Party,[45] routine filing of passenger lists and other documents will not be required (except in cases of "split charter" flights of TGC and ABC traffic). Each Party agrees to conduct spot checks of flights, take appropriate action where violations are observed, regulate the conduct of charter organisers in its territory, etc.

Part C, in order to further facilitate the development of the "international air transport systems", lays down "other considerations". The authorities of each Party are required to: a) be prepared to modify their advance charter rules should it become necessary to prevent "undue diversion of traffic from the scheduled services" of either Party; b) consult, on request by the other Party, on any matter

covered by their advance charter rules or concerning the "reasonableness of charter tariffs, rates or fares" for traffic moving under these rules; and, c) to work towards commonality of rules for advance charter flights.[46]

Sections II and III require the Parties to take necessary administrative measures under their own laws to authorise the operation of flights which originate in the territory of the other Party and which conform to its advance charter rules.

Except for the MOU with the UK, the agreements with the others all contain a tariffs clause. For example, the clause in the West German MOU reads:

> "TARIFFS, RATES AND FARES. To assure that prices are neither unreasonably high or low taking into account all relevant costs, each party shall require the filing of tariffs or price schedules (as applicable) and enforce conformity to tariff or price schedules on all flights operated."[47]

The tariffs clause in the MOU with the Netherlands, a bit more elaborate, provides that the regulatory authorities of each Party shall:

> "Consult ... about uneconomical, unreasonable, or unjustly discriminatory charter rates charged or proposed to be charged for services conducted pursuant to this understanding and, in the event of no resolution by consultation, may take appropriate action to prevent the inauguration or continuation of uneconomical, unreasonable, or unjustly discriminatory rates."[48]

In later years, amendments to the MOUs were made to include, within their purview, other charter types like "prior affinity charters", "special event charters" (SECs), "one-stop inclusive tour charters" (OTCs), and "split charters".[49]

4.2.4 The Interim Agreement with Austria

The United States also signed an interim agreement with Austria, "pending the conclusion of a MOU" on TGCs and ABCs.[50] In the agreement, the two Parties agreed to accept as charterworthy transatlantic traffic originated in the territory of the other Party and organised and operated pursuant to the "advance charter" rules of that Party. An amendment added OTCs and SECs to the agreement.

4.2.5 The Road to Bermuda II

4.2.5.1 The 1976 US-UK Memorandum

In 1976, the US and the UK signed a new passenger charter Memorandum of Understanding.[51] The understanding, not "an exchange of economic rights", was expected to provide stability in the US-UK charter market and to facilitate the operation of charter flights during 1976.[52]

The administration and enforcement procedures, agreed to by the Parties, by and large correspond to those

set out in their earlier MOU.[53] Once again, each government agrees to accept as charterworthy, transatlantic charter traffic originating in the territory of the other, and organised and operated in accordance with the other's charterworthiness criteria.[54] The MOU, which covers all charters, and not just ABCs, allows commingling of upto three types of charters on the same aircraft.[55]

The agreement also envisages "price surveillance": if either Party believes that a charter rate of a carrier of the other Party is "uneconomical, unreasonable, or unjustly discriminatory", it must notify the other Party within 30 days of receiving notification of the rate. The other Party may call for consultations; if the matter is not then resolved, the objecting Party "may take appropriate action to prevent the use of such charter rate."[56]

Finally, the agreement guarantees operating rights to the carriers of both Parties:

> "[N]either Party can deny or withhold its approval of charter traffic to be flown by carriers of the other Party when, on any flight leg of the total movement, points in the territories of both Parties are served, provided, however, that should either Party decide to deny ... such approval, it may do so only after consultations with the other Party...".[57]

4.2.5.2 The MOU Amended

In April 1977, the MOU was amended by way of exchange of notes.[58] A State Department Announcement said that the agreement "covers all types of charters currently approved in both countries and includes for the first time the U.S.-originating ABCs.... It brings closer together the charter types on both sides of the Atlantic. The two governments hope that this agreement will lead to an increase in charter traffic between the two countries without diverting traffic from the scheduled services."[59]

Barely three months later, the US and the UK signed 'Bermuda II", the first US air transport agreement which regulates jointly, both scheduled and non-scheduled air services. This agreement, which began the current phase in US international charter regulation, will be looked at, below (at section 4.4).

4.3 BILATERAL AGREEMENTS ON NON-SCHEDULED SERVICES

4.3.1 The Draft Charter Agreement

The implementation of the charter aviation policy, laid down in the Nixon Statement, began, on the one hand, with the Memoranda of Understanding which the US negotiated with several European countries. On the other hand, work on a draft charter bilateral agreement was begun, so as to

combine "the liberality called for in the policy statement", with legal certainty.[60]

When developed, the model agreement, which was given to many interested governments, suggested a formal arrangement with provisions for designation, licensing, consultation, bilateral rate and capacity (impairment) controls, acceptance of charter flight definitions by country of origin of each charter flight, etc.[61]

The draft agreement was more or less followed when the United States entered into non-scheduled agreements with Yugoslavia, Canada, and Jordan;[62] a charter agreement was also entered into with Switzerland, but is different from the first three.[63]

4.3.2 The Agreements with Yugoslavia, Canada, and Jordan

4.3.2.1 Introduction

These agreements are very similar in structure and in content. Differences are to be found in a few key clauses and in the Annexes to the agreements. These will be made note of, during the course of the discussion.

Most administrative and ancillary provisions (e.g., entry and clearance of aircraft, recognition of certificates and licences, etc.) are identical to those found in the "non-US" agreements, analysed in the previous chapter.[64]

All agreements have a Preamble, which states the purpose to be achieved by the Contracting Parties. The agreements with Yugoslavia and Jordan indicate the Parties' desire to regularise non-scheduled air service, so as to promote cultural exchange, tourism and commerce; the public interest in a "viable international air transportation system encompassing all types of air service", is recognised; and, finally, the Parties indicate a need for the orderly development of charter services and for maintaining a sound system of scheduled air services. The Preamble in the agreement with Canada is much more detailed. As in the other agreements, the Parties indicate a desire to promote and develop non-scheduled services. However, the two sides also wish to ensure: a) that a system of air transport is developed, "free from discriminatory practices, based on an equitable exchange of economic benefits to the two countries"; and, b) that the air carriers of the twc countries get an equitable opportunity to participate in the development of this system.

4.3.2.2 Definitions

Article 1 of all agreements is the "definitional" section. Inter alia, "non-scheduled air services" are defined as those air services, specifically authorised in the Annexes.[65] The agreements with Canada and Jordan

also define "rates". These are "all tariffs, tolls, fares, and charges for transportation, and the conditions of carriage, classifications, rules, regulations, practices and services related thereto" [at paras. (k) and (j), respectively].

"Enplane", "deplane", and "replane", terms not normally found in bilateral air transport agreements, are defined in this clause.[66]

4.3.2.3 Charterworthiness Rules

Charterworthiness rules are set out in Article 7 of each agreement. In all agreements, the "country of origin rule" prevails. However, the application of this rule varies, as will be seen below.

The agreements with Yugoslavia and Canada allow each Party to promulgate and enforce laws and regulations governing non-scheduled air services. Where both Parties have promulgated different rules governing the same specific service type, the rules of the Party in whose territory the enplanement occurs shall govern, unless agreed otherwise.[67]

The agreement with Jordan, however, merely states that, "(r)egulations prescribing the specific service types permitted under this Agreement are identified in Annex B." This Annex then lists the various charter types, "as set

forth in U.S. Civil Aeronautics Board Regulations", that may be performed for enplanements, by carriers of the two countries.[68] Annex B also permits ALL charter types "as set forth in the rules of the country of origin" (emphasis supplied) to be enplaned, if they originate in territories other than the United States or Jordan! Under the agreement, only the carriers of the US are permitted to deplane charter traffic in Jordan that has been enplaned in the territory of a third country.[69] Thus, in this case, rights granted to the United States are considerably broader than those granted to Jordan.

In the agreements with Yugoslavia and Canada, too, the country of origin rule applies only to the specific charter types mentioned in Annex B of both agreements. The difference here, as compared to the Jordanian agreement, is that the regulations of both the concerned countries apply, and not just those of the United States.[70] However, in the agreement with Yugoslavia, rights to conduct charters originating in the United States are "considerably broader than those ... available to the Yugoslav airline and reflect the fact that residents of the United States constitute the large bulk of the air travelers between the two countries."[71]

The agreements with Canada and Jordan provide that new charter types, proposed by one Party, may be included in

the Annex, if accepted by the other Party; if not accepted, consultations are called for.[72]

4.3.2.4 Predetermination of Traffic Streams

Article 8 regulates traffic streams.[73] The provision in all the agreements is very similar; the clause in the agreement with Canada reads:

> "The volume of nonscheduled air service traffic between the territories of the two Contracting Parties enplaned by the carriers of one Contracting Party in the territories of the other Contracting Party shall be reasonably related to the volume of such traffic enplaned by carriers of the first Contracting Party in its own territory and deplaned or re-enplaned in the territory of the other Contracting Party, taking into account the nature of the respective markets...".

The agreements thus provide for predetermination of the volume of non-scheduled air service traffic, between the countries concerned.[74] In each case, an "uplift ratio" determines the amount of volume of traffic that airlines of the Parties may carry. "Uplift ratio" means that a foreign carrier may only perform X number of domestically originating charters if it has performed Y number of charters originating in its own home country.[75]

The Annexes to the agreements detail the uplift ratios that are to apply in each case. In the agreement with Jordan, the uplift ratio is one to one, i.e., "a

Contracting Party may require of each carrier of the other Contracting Party that such carrier's enplanements in the territory of the first Contracting Party be matched by its enplanements outside the territory of the first Contracting Party at a one to one ratio of flights."[76]

In the agreement with Yugoslavia, the uplift ratio is four to three.[77] However, it is only with respect to the Yugoslav airlines that this ratio operates; the United States airlines are not restricted by an uplift ratio.[78]

Finally, the ratio in the agreement with Canada is also four to three: airlines of either Party will be required to operate three charters originating in their own country for every four which originate in the other country.[79] This uplift ratio, on its own, could have been to the disadvantage of the United States, since most "Canadian-U.S. charter traffic (originates) in Canada and (heads) for the U.S. sunbelt"; it has thus been modified by the provisions of Annex A, Section IV (C) and Annex (C).[80] These contain special volume of traffic provisions for certain vacation markets in the United States.

4.3.2.5 Tariffs

In all the three agreements, Article 11 governs rate fixing. However, the tariff provisions in the agreement with Jordan are different and will, hence, be discussed

separately.

In the Yugoslav and Canadian agreements, the tariff-fixing process is divided into two parts. In the process of tariff-establishment, the carriers themselves set the rates to be charged, after considering all "relevant factors bearing upon the economic characteristics" of non-scheduled air services.[81]

The tariff-control process that then follows requires that the carriers file the tariffs set, with the aeronautical authorities of the other Party; approval of the tariff, by the authorities of both Parties, is required.[82] If the authorities of one Party are dissatisfied with an existing or proposed rate, the Parties are to exercise their best efforts to resolve the matter through prior consultations.[83] The agreements provide for tariff enforcement: the aeronautical authorities are to insure that the rates charged and collected conform to the tariffs filed and in effect with each Party and that no carrier rebates any portion of the price.[84]

The agreement with Jordan, too, initially regulated tariffs in the same way as in the two treaties just discussed. However, the January 1979 amendment drastically altered matters: provision was made for liberal price-fixing.[85] Since "liberal" bilateral agreements are to be

discussed below, discussion of this clause is deferred till then.

4.3.2.6 Other Matters

Unless otherwise agreed, the Canadian and Jordanian agreements:

a) prohibit one Party from requiring that prior approval be obtained, for any individual flight or a series of flights, by a carrier of the other Party which has qualified before the aeronautical authorities of the first Party; and,

b) prohibit the Parties from imposing any restrictions with respect to capacity, frequency, or type of aircraft employed on charter services.[86]

Finally, all agreements warn that charter services, conducted by one Party, "shall not cause substantial impairment of the scheduled services of the scheduled airlines of the other Contracting Party or of the nonscheduled air services of the carriers of the other Contracting Party" (emphasis provided). Consultations may be requested by one Party if it appears to it that the operations of the other Party are, indeed, causing such impairment.[87]

4.3.3 The Agreement with Switzerland

The United States signed an agreement, on air charter services, with Switzerland, in July 1977.[88] The

Parties agree to accept as charterworthy "air charter traffic which originates in the territory of the other and which is organized and operated pursuant to the rules of the other air transport authority...".[89]

Modifications or additions to the charterworthiness rules of the air transport authorities of one country "which are of a technical or administrative nature and which do not alter the basic character of an existing charter rule nor establish a new charter type, will be accepted by the air transport authorities of the other country"; other modifications may be rejected (Section A, para. 4).

The airlines of both countries may be requested to submit price information on charter contracts between the airline and the charterer (Section B). For Swiss originating traffic, the charter types authorised are listed in the Annex to the agreement.[90] For US-originating traffic, all that the agreement says is that "the rules governing charter traffic are set forth in the Economic and Special Regulations of the (CAB)."[91]

4.4 BERMUDA II

4.4.1 Introduction

The Bermuda I agreement that the United States and the United Kingdom signed in 1946,[92] served very well to

regulate air traffic between them for about a quarter of a century. Then, around the early 70s, difficulties began to arise in their aviation relations. The British view was that American airlines had excess capacity,[93] to the disadvantage of British airlines. The Americans had relatively more freedom and flexibility under Bermuda I: for example, they had significant fifth freedom rights; they could fly to many destinations with UK origin traffic.[94] These, and other reasons, caused the United Kingdom to serve notice, to terminate the agreement. Thus, the two sides sat down, once again, to negotiate an air transport agreement.

4.4.2 The Ford Statement

During the course of these negotiations, on 8 September 1976, a new United States International Air Transportation Policy Statement was published ("Ford Statement").[95] With regard to charter flights, the main lines of the Nixon Statement continued to apply: the Statement recognised the basic necessity of the charter formula for those persons, travelling on holiday or for pleasure, "who are ... less pressed for time and for whom the transport price should always be as low as possible."[96] Thus, administrative regulation of charter flights had to be simplified even more. This could be achieved, for example, by authorising part charters in scheduled flights and split

charters on the same flight; and so could it be achieved by developing the OTC and ABC programmes, by mixing charter passengers and freight on board the same aircraft, and so on.[97]

The United States, the Statement added, sought an "international economic environment and air transportation structure conducive to healthy competition among all air carriers"; so also it sought to rely upon "competitive market forces", for it is a "basic tenet" of US economic philosophy that marketplace competition provides improved services.[98]

4.4.3 Charters in Bermuda II

4.4.3.1 The Negotiations

During the negotiations towards the new air services agreement, the British proposed that charters be included in the agreement.[99] At first, the Americans were very cautious about this proposal. However, they soon changed their minds. They expressed a view that the capacity control mechanism, negotiated into the new treaty, imposed limits on competition in scheduled services; and, hence, a "competitive spur" in the charter sector, inserted in the treaty, would counter-balance the effect of this capacity mechanism.[100]

A charter clause was thus included in the treaty, in spite of British objections that acceptance of the US charter proposals would undermine the scheduled air transport system.[101] The British may have had in mind the Ford Statement (whose principles the Americans were no doubt eager to implement), which gave a regulatory advantage to charter operations by calling for "greater freedom and a greater market for charter operations and a greater tariff flexibility."[102]

Bermuda II was signed on 23 July 1977. For the United States, this was the first bilateral air transport agreement that regulated, jointly, both scheduled and non-scheduled air services. United States policy to conclude separate charter bilaterals, as distinct from ordinary bilaterals, ceased with Bermuda II.[103]

4.4.3.2 The Original Charter Provisions

The Bermuda II agreement,[104] emphasises the value of both forms of air transport when, in the Preamble, it says that, "both scheduled and charter air transportation are important to the consumer interest and are essential elements of a healthy international air transport system". The treaty elaborated these sentiments in (the unamended) Article 14, which laid down the guidelines under which charter air services were to operate. The Parties recognised

the need to maintain and develop a viable network of scheduled air service (at para. 1). They also recognised "the substantial and growing demand from that section of the travelling public which is price- rather than time-sensitive, for air services at the lowest possible level of fares"; the Parties thereby agreed to further the maintenance and development of efficient and economic charter air services so as to meet that demand (para. 2).

Annex 4 of the agreement set out the principles, regulating non-scheduled services between the two countries. It incorporated, in its first paragraph, the 1977 Memorandum of Understanding (see section 4.2.5). Paragraph (2) of the Annex made certain ancillary and administrative provisions of Bermuda II applicable to charter airlines.[105] Under para. (3), the Parties expressed a desire to work towards a multilateral arrangement for charter air services in the North Atlantic market; however, they then acknowledged the fact that a bilateral arrangement would be more appropriate, and listed the items that should be included in such a bilateral. The absence of any capacity provisions, and the fact that the question of a new charter bilateral was raised in Annex 4, left little doubt that these charter provisions were an "untidy compromise" and an "overall approach", rather than detailed regulations.[106]

4.4.3.3 The Amendments

This "untidy compromise", for example, was not to the satisfaction of the two States; thus, back they went to the negotiating table. In 1978, a detailed agreement, amending the charter provisions in the original Bermuda II, was signed.[107] The "guiding principles" set out in paragraph (1) of the new Article 14 are a repeat of the original, except that the second version exhorts the Parties to continue their efforts to achieve a multilateral charter arrangement for the North Atlantic.

Paragraph (3)(a) details the rights the Parties grant each other. Airlines designated and authorised under paragraph (4)[108] (called "charter designated airlines") are granted, third and fourth freedom passenger and cargo traffic rights. Such traffic may be carried "either directly or via intermediate or beyond points in other countries with or without stopovers."

"Free-determination" of capacity is called for, in paragraph (5) of Article 14.[109] Also, each Party assures the airlines of the other, a "fair" and "equal" opportunity to compete with its own airlines; each Party also agrees to take into consideration the interests of the airlines of the other Party, so as not to affect unduly their opportunity to offer the services covered by the agreement [at para. (5)(a), (b), and (c), respectively]. Finally, para. (5)(f)

requires that the charterworthiness rules of each Party preserve opportunities for charter air services to compete with scheduled air services. Likewise, sub-para. (g) instructs each Party to preserve opportunities for scheduled air services to compete with charter air services. If the scheduled tariffs adversely affect the ability of charter services to compete with scheduled air services, or vice-versa, then either Contracting Party may request consultations to resolve the matter.

Article 14(6), unless otherwise provided for in Annex 4, regulates charterworthiness by requiring each Party to accept as charterworthy, traffic originating in the country of the other Party and complying with the charterworthiness rules of that Party.

Paragraph (8) originally regulated both passenger and cargo rates. However, cargo charter rates across the North Atlantic are now governed by the provisions of a 1980 amendment.[110] As regards passenger rates, each Party may require the filing of prices to be charged by the airlines of the other Party; if it is dissatisfied with the rates so filed, it must notify the other Contracting Party, who may request consultations; if the matter cannot be resolved by consultations, the objecting Party can take action to prevent the use or charging of such rate, but only insofar as the price applies to traffic originating in its country.

Each Party is prohibited from regulating the prices or rates charged by charterers to the public, for traffic originating in the country of the other Party.

Finally, Article 14(7) instructs each side to minimise administrative and procedural burdens with respect to charter flights and the information that is to be furnished by charter airlines. Also, charter airlines do not need to obtain prior approval for charter flights. Paragraph (9) deals with enforcement of charterworthiness rules: the country in which the traffic originates has primary responsibility for the enforcement of charter-worthiness requirements (contained in Annex 4), and they are required to cooperate with each other, on enforcement matters.

Annex 4 of the agreement, which laid out the passenger and cargo charterworthiness requirements, is no longer in force: it expired in 1980. As just seen, a new regime was agreed to, for cargo charters. However, the Contracting Parties were unable to reach agreement on the passenger-charter regime, to replace the arrangements embodied in Annex 4. This was mainly due to a growing reluctance, on the part of the British, to accept American liberal charter rules.[111] It was thus decided that Annex 4 would not be replaced when it expired; however, each Party would "thereafter continue to regulate charter traffic in

a responsible manner and on a basis of comity and reciprocity."[112]

4.5 POST-BERMUDA II AVIATION POLICY

4.5.1 Deregulation

As discussed in Chapter 2, the Bermuda II agreement did not become a "model" bilateral agreement like its predecessor, Bermuda I. Bermuda II was not in harmony with the "market-place" international aviation policy that the United States had become committed to. The agreement included terms that were contrary to the fundamental competitive principles of the United States.[113] "Deregulation", under which economic decisions and policies are left to the determination of individual airlines and to the free forces of the market place, had begun to rule the day.[114]

Starting in academic circles in the early sixties, the deregulation movement in the United States entered the political arena in the mid-seventies.[115] It was under the Carter administration that it became law: domestically, deregulation is embodied in the Air Cargo Reform Act of 1977,[116] and the Airline Deregulation Act of 1978.[117] Deregulation was brought onto the international field in 1978, when the United States signed its first liberal bilateral air transport agreement with the Netherlands[118]

(liberal bilaterals have been overviewed in section 2.2.2.4. The agreement with the Netherlands will be discussed, along with other such agreements, below).

4.5.2 The Carter Statement

On 21 August 1978, a Policy Statement on liberal bilateral air transport agreements was issued by the White House (Carter Statement).[119] Inter alia, the Statement said:

> "Routes, prices, capacity, scheduled and charter rules and competition in the marketplace are interrelated, not isolated problems to be resolved independently. Thus, the following (objective) will be presented in negotiations as an integrated U.S. position:
>
> > liberalization of charter rules and elimination of restrictions on charter operations" (at para. 2).

The Carter Statement explained this point as follows:[120]

> "Restrictions which have been imposed on the volume, frequency, and regularity of charter services as well as requirements for approval of individual charter flights have restrained the growth of charter traffic and tourism and do not serve the interests of either party to an aviation agreement. Strong efforts will be made to obtain liberal charter provisions in bilateral agreements."

The International Air Transportation Competition Act of 1979,[121] which embodied "international" deregulation in US legislation, complemented and extended this policy:[122]

> "In formulating United States international air transportation policy, the Congress intends that ... a negotiating policy (be developed) which emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system. This includes, among other things:
>
> (1) & (2) ... [omitted];
>
> (3) the fewest possible restrictions on charter air transportation";[123] [rest omitted].

4.6 POST-BERMUDA II BILATERAL AGREEMENTS

4.6.1 The "Model" and Other Bilaterals

In anticipation of taking deregulation into US international aviation relations, a "Model" US liberal bilateral agreement was drafted ("Model"). This Model, "the international analogue to domestic deregulation",[124] summarises the basic terms of the US government's international aviation policy.[125] Using this Model as a guide, the United States began to enter into liberal bilateral agreements.

In the meanwhile, during the period immediately following Bermuda II, till it signed its first liberal bilateral with the Netherlands, the United States began its move towards "liberalisation" of its air transport agreements. It amended three existing agreements by way of Memoranda of Understanding, introducing elements of "liberal" provisions that were soon to be seen in other

agreements. These agreements, with Mexico, Paraguay, and Liberia,[126] will be discussed, along with the liberal agreements, below.

The United States entered into its first liberal agreement in 1978. The rest of this chapter will be devoted to a study of the provisions of US agreements since then - liberal or otherwise, amended or new - that contain provisions relating to charter air services.[127]

4.6.2 The Preamble

From the indirect ("covering all forms of air transportation"),[128] to the direct ("increased opportunities for charter services"),[129] the agreements, in their Preambular statements, move to more substantial citations of charters. For example, the agreements with West Germany, Jamaica and Finland, begin by following the lead of Bermuda II, in emphasizing the importance of charters and scheduled services to the consumer; but they then go further, recognise the relationship between these two modes of air transport, and declare an intention of providing increased opportunities for charter air services.[130]

However, these Preambles seem to have been a stop-gap arrangement. The agreement with Thailand saw a new Preambular format, one which places more emphasis on the "market-place" policy of the United States, and less

emphasis on the modes of air transportation. In addition, it reflects the growing - and continuing - concern of the US, with crimes against aviation. Currently, the United States, more often than not, introduces its agreements with this new structure.[131]

The Mexican agreement (no longer in force), in its Preamble, was more "charter-inclined": the Parties recognised the "importance with which charter flights contribute to air transport and tourism..., the desirability of permitting charter flight operations with the fewest possible restrictions..., (and the) desirability of ensuring certainty in the conditions under which charter flights operate...". As just seen, changing policy considerations resulted in later Preambles being drafted differently.

4.6.3. Capacity Determination

Capacity determination is dealt with in Article 11 of the Model Agreement. Its provisions are (now) known as the "free-determination" of capacity method.[132] The Article gives "maximum freedom to airline management to determine capacity, frequency of flights and aircraft to be used, and all that in a fair competitive climate amongst airlines designated...and without Government interference."[133]

The capacity provisions of the Model Agreement have been reproduced almost word-for-word in several agreements, e.g., Belgium (Art. 11), Barbados (Art. 11), Costa Rica (Art. 11), Aruba (Art. 11), etc. In the Netherlands-Antilles agreement, each Party promises, in addition, that it will consider the "interests of the other Party in its designated airlines so as not to affect unduly the opportunity for the airlines of each Party to perform the air transportation covered by the Agreement" (para. 2).

Other agreements' capacity clauses are less detailed and/or show variations in their provisions.[134] The agreement with New Zealand is unique: the Parties agree that consultations may be called for if either Party finds that its airlines are being subjected to "unreasonable, predatory or discriminatory competition".[135] Finally, the agreements with Papua New Guinea and Fiji (both in Art. 10), merely state that "(t)here shall be a fair and equal opportunity for the airlines of each Contracting Party to operate international air services in accordance with the provisions of this Agreement."

4.6.4 Tariffs

4.6.4.1 Dual Disapproval

By and large, the general trend with respect to charter (and scheduled) tariffs, in current, post-Bermuda bilateral agreements, has been to reproduce the provisions of Article 12 of the Model agreement [entitled "Pricing (Mutual Disapproval)"].

Paragraph (1) of the Model Agreement lays down the "leading rule" (common to all agreements, whether dual disapproval or country of origin, the latter to be discussed below): prices are to be established by airlines, on the basis of commercial considerations in the marketplace, i.e., on the basis of airline management decisions.[136] Intervention by the Parties is limited to the prevention of predatory or discriminatory prices, the protection of consumers from unduly high prices, or the protection of airlines from "artificially low" prices.[137] The tariff clauses of the agreements, now being discussed, also begin thus.[138]

Paragraph (2) of the Model provides that filing of charter retail prices, as opposed to wholesale prices, may not be required.[139] This provision, too, has found its way in most of the other agreements, and is common to all, whatever the tariff control process.[140]

Under paragraph (3) of the Model, "prices proposed to be charged or charged by airlines come into force or remain in force automatically, unless, after notification of dissatisfaction and intergovernmental consultations, they are disapproved by the aeronautical authorities of both Contracting Parties (mutual, dual or double disapproval)."[141] A majority of the agreements have similarly worded double disapproval tariff clauses.[142]

This mutual disapproval rule may be overridden by the "matching" and "price leadership" provisions of paragraph (4).[143] Several agreements have provisions very similar to the Model clause.[144] A few agreements have limited matching to the airlines of the Contracting Parties only,[145] or matching rights have been granted to the airlines of third parties only if reciprocity is granted to the airlines of the Contracting Parties.[146] The agreement with Israel specifically allows matching in respect of the carriage of cargo.[147]

4.6.4.2 Country of Origin

Some post-Bermuda II agreements that the United States has concluded, contain the "country of origin" disapproval rule (e.g., the Federal Republic of Germany, Papua New Guinea, Fiji, Paraguay, China, Brazil, etc.).

The agreement with Paraguay merely states that "the acceptability of prices will be determined by the rules of the country of traffic origin" (at Attachment 6, para. b). The agreement with Brazil allows each airline to agree on the charter price directly with the charterer, "observing the regulations in force in the territory of the Party where the traffic originates" (at Art. VIII, para. 5).

Most of the other agreements follow the Model clause format, with paragraph (3) being replaced by the country of origin provisions. In the agreement with West Germany, for example (nearly all other clauses are similar to this one), if a Party is dissatisfied with the tariffs, the airlines of the other Party are required to file, it must notify the other Party. Consultations, called for, may not be successful; nevertheless,

> "...neither contracting party shall prevent the institution or continuation of any fare or rate of any wholesale or retail price which is proposed or offered by a designated airline of the other contracting party, except where the first point in the itinerary ... is in the territory of the first contracting party..." (at Art. 6, para. d).

This allows unilateral Government disapproval. The country of origin disapproval method seems "more realistic than the mutual (i.e., dual) disapproval rule", for those who want to maintain some kind of Governmental tariff disapproval.[148]

4.6.5 Charter Air Service

4.6.5.1 Introduction

Annex II of the Model agreement regulates charter air services. The agreements with Singapore, Thailand, the Netherlands-Antilles, Jordan, Belgium, El Salvador, Barbados, Costa Rica, Aruba, Taiwan, etc., all have charter service provisions similar to the Model agreement's Annex II.[149] Thus, reference to these agreements will now only be made when differences of importance, with the Model, occur.

Annex II of the Model is divided into three Sections. The first regulates the Grant of Rights, the second deals with the Charterworthiness Rule, and the last, Procedural Requirements. Each Section will now be dealt with, in turn.

4.6.5.2 Section 1: The Grant of Traffic Rights[150]

Third and Fourth Freedom Charters

One-way or roundtrip third and fourth freedom charters, either directly or with stopovers *en route*, are allowed. Any point or points in the territories of the Parties may be served; thus, there is no need to include a charter route schedule.[151] A few agreements, although

worded differently, allow the same third and fourth freedom rights as the Model, and also implicitly exclude the need for a route schedule.[152] Most agreements allow passenger charters, cargo charters, or combination (i.e., mixed, both passenger and cargo) charters.[153]

Many agreements, in general, allow designated airlines of one Contracting Party to carry charter traffic originating in their home country through the territory of the other Contracting Party, with stopover rights there, to the territory of third countries and vice versa.[154]

Fifth and Sixth Freedom Charters

Fifth and sixth freedom charters are not allowed under the Model, and other, agreements.[155] Sixth freedom charters are allowed only when the traffic stops over in the home country of the carrier for at least two consecutive nights.[156] However, in some liberal agreements, there is a slightly less restrictive policy towards fifth and sixth freedom charters.[157]

4.6.5.3 Section 2: The Charterworthiness Rule[158]

Country of Origin Rule

Section 2 first establishes a country of origin rule. Each charter airline, whether a national of one Con-

tracting Party or the other, shall follow the charterworthiness rules of the country where the charter transportation, on a one-way or roundtrip basis, commences.[159] This rule regulates charter services in all the agreements.[160]

Under this rule, eligibility for charter air services is determined exclusively by the laws and regulations of the country where the charter transport originates. This principle is being used by the United States as a principal means of accomplishing its policy of liberalising international non-scheduled air transport.[161] Country of origin charter rules allow the operation of charter air services under the liberal charter regulations of the United States. Thus, US-originating charter passengers, for example, are governed by liberal US, and not restrictive foreign, rules.

Current United States policy is to push for an additional charterworthiness rule: the "double country of origin" or the "country of destination" rule.[162] This rule is even more liberalised than the ordinary country of origin rule. Under this rule, the designated airlines of one Party have "the right to use either Party's charter rules for traffic originating in the other Party's territory".[163] Thus, US carriers may apply US charter rules to traffic which they uplift in the territory of the State with which the US has an agreement.

Most Favoured Airline Clause[164]

Section 2 of the Model provides for the least restrictive terms, conditions or limitations to apply to the designated airlines of one Party when the other Party subjects its airlines to more restrictive terms. This provision, along with the following one (MFN), is found in most of the agreements.

Most Favoured Nation Clause

The last sentence of Section 2 provides for the application of the "Most Favoured Nation Clause" (MFN Clause).[165] If the aeronautical authorities of either Party promulgate regulations or rules which apply different conditions to different countries, each Party shall apply the least restrictive regulation or rule to the designated airlines of the other Party.

4.6.5.4 Section 3: The Procedural Requirements[166]

The minimum procedural requirements, set out in this Section, go to strengthen the country of origin charterworthiness rule of Section 2.[167] This clause, too, forms part of the charter regulations of most bilateral agreements.

4.7 CONCLUSIONS

The international aviation system was considered, in the immediate post-World War II era, an "infant industry", needing Government support and protection, so that it could grow. This support and protection came by way of generous subsidies and by way of countless rules and regulations. However, all this backing did not prevent, in the late 1960s - early 70s, aircraft from flying at reduced loads. There were "too many empty seats" and "unduly high rates"; the high rates kept the seats empty; this produced losses, which led to even higher fares, which in turn, led to even more empty seats.[168] Tariffs were kept high by the above-mentioned rules and regulations. Competition, which could have lowered prices, existed more in theory, than in practice.

Thus, the United States, which had, even before the Chicago Conference, advocated the rule of the market place,[169] began, in the 1960s, to look at charter services with a new eye. Till then, like everyone else, her Government had ignored the importance of this mode of air travel. Charters received attention only when they became a (competitive) nuisance, and had to be subdued, by the application of more laws and regulations.

The much ill-treated charters, with their low fares, had begun to succeed where the much cossetted "schedules" failed: in filling seats. In addition, the US, tired of being "confronted with ever more dirigistic policies of other Governments in respect of scheduled air services, ... concentrated on promoting charter service to enable US carriers to carry the US passenger and the cargo of the US shipper all over the world without undue restrictions."[170]

In order to promote charter transport, the United States had to first alter the status quo: it had to find ways and means of bypassing the diverse regulations which States unilaterally imposed on charters. The Nixon Statement began the wheels rolling. It indicated that the United States was looking forward to regularising foreign landing rights for charters. The Ottawa Declaration, which followed, worked at establishing uniform rules, at a multilateral level, for advance booking charters.

However, multilateralism did not find favour with the United States. Bilateralism was preferred. Thus, come 1972, the US began to conclude Memoranda of Understanding with various North Atlantic nations. These MOUs went a great deal towards attaining the United States goal, of having civil aviation being regulated by the forces of the marketplace.

These Memoranda facilitated advance charter rules; they stressed the "country of origin" charterworthiness principle; they did away with the "prior approval" requirement and with charter "quota" limits; they reduced administrative burdens with respect to charter flights; they began a tentative charter tariff regulation programme. However, they also kept watch on charter competition to see that it did not affect scheduled services. The 1976 US-UK Memorandum went further. It permitted the operation of all charter-types, allowed charter commingling, and guaranteed operating rights to charters. The implementation of the Nixon Statement continued still further, when the United States also concluded full-fledged non-scheduled bilateral air transport agreements.[171]

The next development towards US liberalisation of (charter) air transportation came in 1976, when the Ford Statement was released. Among its many pronouncements, of note is the emphasis it placed on the regulation of air services by competitive market forces. The United States was, by this time, racing towards the "deregulation" of its domestic aviation market. The Bermuda II agreement of 1977 was a minor detour that was made by the US: as noted above (at section 4.5.1), this agreement was not in harmony with the deregulation policy that the US had, by then, become

committed to. Nevertheless, in respect of non-scheduled services, the agreement broke new ground. For the first time in United States aviation history, charters and scheduled services became subject to joint regulation.

The Carter Statement and the 1979 International Air Transportation Competition Act internationalised deregulation. This was achieved partly through the "liberal" bilateral agreements that the United States entered into, from the late 1970s onwards.

These liberal agreements have liberalised charter air services a great deal. There is free determination of capacity; tariffs are set according to the dual disapproval or country of origin rules; the country of origin charterworthiness rules now dominate charter regulation; charter landing rights, charter rules, etc., have all been "regularised" and standardised.

The United States liberal bilateral strategy was successful because the US was willing to open up new "gateways" to foreign carriers, in exchange for their countries accepting liberal charter, pricing, etc. principles.[172] It must be noted that the Reagan Administrative, in May 1982, announced a shift in aviation negotiating policy to "partial", instead of full-scale, liberal bilaterals, taking care of immediate problems.[173] The general trend of liberalism remains intact, however.

On the current agenda, the priorities, with regard to US aviation policy, are: the growth and expansion of markets, which should be "as open as possible"; the opening up of markets by specific bilateral negotiation: Europe and Asia being priority areas; and, minimising restrictions and maximising opportunities, so that the aviation industry can expand.[174]

ENDNOTES - Chapter 4

1. See sections 1.2.1 and 1.2.2.

2. 52 Stat. 973 (1938) [hereinafter, CAA 1938].

3. Ibid., 401(f). See, R.M. LICHTMAN, "Regularization of the Legal Status of International Air Charter Services" (1972) 38 JALC 441 at 444 [hereinafter, LICHTMAN].

4. LICHTMAN, ibid., at 447.

5. BROWNE, Ch. 3, note 116 at 29.

6. See section 2.3.5.

7. KEYES, Ch. 2, note 133 at 220-223.

8. LICHTMAN, supra, note 3 at 455.

9. NIXON, Ch. 2, note 153.

10. LICHTMAN, supra, note 3 at 455.

11. "Charter services by scheduled and supplemental carriers have been useful in holding down fare and rate levels and expanding passenger and cargo markets. They offer opportunities to exploit the inherent efficiency of planeload movement and the elasticity of demand for international air transport. They can provide low-cost transportation of a sort fitted to the needs of a significant portion of the traveling public. Charter services are a most valuable component of the international air transportation system, and they should be encouraged. If it appears that there is likely to be a substantial impairment of charter services, it would be appropriate, where necessary to avoid prejudice to the public interest, to take steps to prevent such impairment."

    NIXON, Ch. 2, note 153 at 87.

12. Ibid.: "Both scheduled carriers and supplemental carriers should be permitted a fair opportunity to compete in the bulk transportation market. We consider passengers traveling at group rates on scheduled

services to be part of that market. Regulatory and promotional policies should give greater recognition to the dimensions, characteristics and needs of the bulk transportation market, as such, and less emphasis to the type of carrier that is serving that market. However, the (g)overnment should not allow enjoyment of the right to perform both scheduled service and charter service to result in decisive competitive advantage for scheduled carriers."

13. Ibid., at 88.

14. LICHTMAN, supra, note 3 at 459.

15. DEPT. BULL., Ch. 2, note 130. See section 2.3.5.3.

16. H.A. WASSENBERGH, "Reality and Value in Air and Space Law" (1978) 3 Annals of Air and Space L. 323 at 339 [hereinafter, WASSENBERGH III].

17. "Advance Booking Charters" and "Travel Group Charters". See Ch. 2, note 135 for a brief description of these charter types.

18. DEPT. BULL., Ch. 2, note 130 at 23.

19. This can be borne out by the fact that the U.S. Department of State announcement of the Ottawa Declaration, specifically made note that the Declaration was "not a treaty or an executive agreement" (See, ibid. at 20). The announcement went on to explain (at page 22) that, "within the framework of the declaration the United States (intended) to seek bilateral discussions with other interested aviation authorities ... to arrive at a mutually agreeable regime for particular bilateral traffic flows and to insure fully reciprocal treatment for U.S.-originating Travel Group Charter flights."

20. For a detailed discussion of the American opposition to the multilateral approach, see, BROWNE, Ch. 3, note 116 at 31 - 32.

21. Ibid., at 31.

22. LICHTMAN, supra, note 3 at 464.

23. First World Congress on Air Transportation and Tourism, 17-20 April 1972, Madrid, Spain: Conclusions and Recommendations, reproduced in DIERSCH, Ch. 3, note 67 at Appendix II-A-3, Panel 1.

24. B.W. REIN, "Current Policy Problems in International Aviation" (an address made before the International Aviation Club at Washington, D.C., 17 November 1970) (1971) 64 DOSB 15 at 16 [hereinafter, REIN].

25. THOMKA-GAZDIK, Ch. 2, note 106 at 68.

26. H.A. WASSENBERGH, "U.S. Jurisdiction and Bilateral Air Agreements" (1984) 9 Air L. 170 at 173 [hereinafter, WASSENBERGH IV].

27. In chronological order, these MOUs are:
[NOTE: am.=amended; ex.=extended; ren.=renewed; rep.=reported in]

1. US-Belgium, 17/10/1972, TIAS 7479; ICAO 2473; 938 UNTS 3; rep. (1972) 67 DOSB 573.
[ex.: 29/12/75 & 16/1/76, ICAO 2728; rep. (1976) 74 DOSB 284; ren. & am.: 23 & 27/6/77, TIAS 8618; ICAO 2735; rep. (1977) 77 DOSB 140].

2. US-UK, 30/3/1973, TIAS 7594; ICAO 2445; rep. (1973) 68 DOSB 669.
[am.: 29/3/74, TIAS 7832; ICAO 2490; rep. (1974) 70 DOSB 508; ex.: 2 & 3/4/75, TIAS 8047; ICAO 2586, rep. (1975) 72 DOSB 592; ex.: 4/6/75, ICAO 2595; rep. (1975) 73 DOSB 196].

3. US-Federal Republic of Germany, 13/4/1973, TIAS 7605; ICAO 2443; 916 UNTS 113; rep. (1973) 68 DOSB 715.
[am.: 12/3/74, TIAS 7804; ICAO 2479; rep. (1974) 70 DOSB 476; ex.: 30/12/75, ICAO 2624; rep. (1976) 74 DOSB 144].

4. US-France, 7/5/1973, TIAS 7617; ICAO 2457; 927 UNTS 35; rep. (1973) 68 DOSB 864.
[am.: 26 & 29/3/74, TIAS 7815; ICAO 2487; rep. (1974) 70 DOSB 596; ex.: 29 & 31/12/75, TIAS 8236; ICAO 2648; rep. (1976) 74 DOSB 312].

5. US-Ireland, 29/6/1973, TIAS 7662; ICAO 2450; 916 UNTS 261; rep. (1973) 69 DOSB 176 & 206.
[ex.: 23/12/75 & 9/1/76, ICAO 2649; rep. (1976) 74 DOSB 356; am.: 28/5/76, TIAS 8306; ICAO 2741; rep. (1976) 75 DOSB 39 & 102].
NOTE: Before the 29 June 1973 MOU was signed, the two countries entered into an agreement, "relating to recognition of charterworthiness of charter traffic" during the month of June 1973; signed 7 & 8/6/73, ICAO 2449; rep. (1973) 69 DOSB 44.

6. US-The Netherlands, 11/7/1973, TIAS 7771; ICAO 2472; rep. (1973) 69 DOSB 234 and (1974) 70 DOSB 156.
[ex.: 11 & 30/12/75, ICAO 2625; CATC (57) 88D; rep. (1976) 74 DOSB 144].

None of the above are in force. See DOC 9460, Ch. 3, note 4(x) and 4(B).

28. MARX, Ch. 2, note 128 at 147.

29. Supra, note 27.

30. LICHTMAN, supra, note 3 at 467.

31. State Department News Release No. 264, 17 October 1972, reported in (1972) 67 DOSB 573.

32. Termed as "mutually recognized principles".

33. "The bilateral provisions referred to deal with inauguration of air services, airport and related charges, adherence to air navigation laws and regulations and the requirement of substantial ownership and effective control of air carriers by nationals of the contracting states." LICHTMAN, supra, note 3 at 465.

34. Paras. (1), (2) and (4) of the Principles. See, supra, note 32.

35. Ibid., at para. (3).

36. Ibid., at para. (5).

37. Annex 1 at paras. (1), (3) and (4).

38. Annex 2 at para. (1), which, by way of a footnote, warns that "(w)here authority to uplift a particular Belgium-originating charter flight composed of third-country residents has been denied by another European authority, the Belgian authorities reserve the right to require prior approval."

39. Ibid.

40. Ibid., at para. (2).

41. Supra, note 27 at nos. 2 to 6.

42. The preamble of the UK memorandum reads:

> "Representatives of the (US and UK) have discussed the conditions governing ... (TGC) flights and ... (ABC) flights between the United States and the United Kingdom, and have concluded that their respective rules are substantially similar, are experimental in character, and are "advance charter" rules in the transatlantic connotation of the term. Nevertheless, at the present time, each set of rules contains dissimilar elements related to the distinctive marketing conditions, internal legal situations, and enforcement structures of each country. They recognized that these dissimilar elements are an obstacle to the carriage of advance charter traffic between their two countries.
>
> "They recognized that uniformity of rules would have been preferable but has not been achieved; therefore the solution which will best serve the public interest in present circumstances is that traffic conforming with the advance charter rules of the country of origin of the traffic should be accepted as charterworthy by the other country...".

43. The MOUs with Ireland and the Netherlands are structured differently, in that the regulatory principles are not categorised into "sections", but are listed serially.

44. "A. CHARTERWORTHINESS. Each Party will accept as charterworthy transatlantic traffic originated in the territory of the other Party and organized and operated pursuant to the advance charter (TGC or ABC) rules of that Party. For the purpose of this Memorandum of Understanding, (a) the country of the origin of the traffic is to be determined by refer-

ence to the point in the territory of either Party from which the group of advance charter passengers departs on the outward portion of a roundtrip (including circle and open-jaw) journey under the TGC or ABC rules...".

US-UK, supra, note 27 at Section A.

45. Ibid., at section B, footnote 2:
"In this regard, and in order to identify the origin of the traffic and to monitor charter prices, each Party may require for each flight, information relating to the proposed date, time and routing of the flight, the identity of the travel organizer and the number of seats contracted for as well as the prices proposed to be charged to and ultimately paid by the travel organizer and the passenger."

46. Ibid., at C. The MOUs with West Germany, France, etc., have slightly different, and more elaborate provisions.

47. US - Federal Republic of Germany, supra, note 27 at Section I (C). The clause in the French MOU is similar.

48. US - The Netherlands, supra, note 27 at para. (7). The agreement with Ireland has a similar clause.

49. Supra, note 27:
(a) prior affinity: e.g., in the amendments to the MOUs with West Germany and France.
(b) special event charter: e.g., in the amendments to the MOUs with UK and France.
(c) OTC: e.g., in the amendment to the MOU with Ireland.
(d) split charter: e.g., in the amendment to the MOU with West Germany.

50. US-Austria, 6/11/1973, TIAS 7751; ICAO 2463; reported in (1973) 69 DOSB 699.
[Amended, 10 and 22/12/75, TIAS 8250; ICAO 2651; reported in (1976) 74 DOSB 356].
Both in force, as at 1/1/1989: see Ch. 3, note 4 (B).

51. US-UK, 28/4/1976, TIAS 8303; ICAO 2727; reported in (1976) 74 DOSB 37 and 768.
[Amended: 11/4/77, ICAO 2737].

52. Department of State Announcement, (1976) 75 DOSB 37.

53. Supra, note 51 at Section C: Administration and Enforcement. The procedures described in this memorandum are more detailed than the earlier MOU (see section 4.1.3 for the MOU of March 1973).

54. Ibid., at Section A: Charterworthiness, paras. 1 to 5.

55. Para. (6) of Section A reads as follows:
"Each Party reserves the right (a) not to accept traffic originating in the territory of the other Party where more than three categories of charters, as elected by the carrier, are commingled on the same aircraft; (b) to authorize only the commingling of advance booking charters, travel group charters, inclusive tour charters, one-stop inclusive tour charters, special event charters, and affinity group charters; and (c) to prohibit commingling of other than inclusive tour charters, one-stop inclusive tour charters, advance booking charters, and travel group charters when an aircraft's route includes a traffic stop or stops outside the territory of either Party."

56. Ibid., at Section B: Price Surveillance.

57. Ibid., at Section D: Operating Rights. The meaning of "total movement" is provided by way of a footnote: "2. Total movement is understood to include movements of the same traffic to or from third countries, provided the traffic originates in either the United States or the United Kingdom and provided further that, if it originates in the territory of the Party of which the carrier is not a national, it stops over in the homeland of that carrier for at least two nights."

58. Amended: 11/4/77, ICAO 2737. Neither the MOU, nor the amendment, are in force (DOC 9460, Ch. 3, note 4).

59. (1976) 77 DOSB 426 and 504.

60. REIN, supra, note 24 at 17.

61. BROWNE, Ch. 3, note 116 at 32.

62. HAANAPPEL, Ch. 1, note 37 at 39.

63. The four agreements, in chronological order, are:
1. US - Yugoslavia, 27/9/1973, TIAS 7819; ICAO 2486; 25 UST 659; 951 UNTS 205; CATC (80) 201; reported in (1973) 69 DOSB 524 and 551.
[Amended: TIAS 8305 and 8972].
[Amended: 15/12/77, TIAS 9364; reported in (1978) 78 DOSB 62].
[Extended: 15/4/81, TIAS 10450; amended and extended: 15/1 and 6/7/1987, reported in (1988) 88 DOSB 86].

2. US - Canada, 8/5/1974, TIAS 7826; ICAO 2484; 953 UNTS 211; 25 UST 787; CATC (74) 157; reported in (1974) 70 DOSB 596.
[Amended: 1973/75, ICAO 2588; 992 UNTS 389].

3. US - Jordan, 21/9/1974, TIAS 7954; ICAO 2548; reported in (1974) 71 DOSB 564 and 580.
[Amended: 14 & 16/3777, TIAS 8553; ICAO 2721; reported in (1977) 76 DOSB 388; amended: 10/1/79, ICAO 2984].
[Amended: 10/1/79, TIAS 9375].

4. US - Switzerland, 12/6 & 25/7/1974, ICAO 2545; reported in (1974) 71 DOSB 492 (no longer in force: DOC 9460, Ch. 3, note 4).
20 & 24/11/1975, ICAO 2672; reported in (1975) 73 DOSB 912; replaced by: 14 & 27/7/1977, TIAS 8695; ICAO 2749; 1088 UNTS 103; reported in (1977) 77 DOSB 328.

The agreements with Yugoslavia and Jordan are no longer in force (DOC 9460, Ch. 3, note 4). The agreements with Canada and Switzerland are still in force: See, Ch. 3, note 4 (B).

64. For example, in all the agreements:
Art. 3 deals with designation (see section 3.3.2.2 for a note on designation); Art. 4 lays down the conditions and limitations on which permission to operate depend (see chapter 2, note 31); and, Arts. 5, 6, 12 and 13 deal with admission and departure of aircraft and passengers, certificates and licenses, customs and duties, and airport charges, respectively (see section 3.2.4 for a note on these provisions).

65. Supra, note 63 at Art. 1, para. (f). Annex B of the agreements then limits non-scheduled air services to charter services; these, in turn, are defined as "commercial air transportation of traffic on a time, mileage, or trip basis by a carrier or carriers, where the entire planeload capacity of one or more aircraft has been engaged, [or, under (under certain conditions specified in Annex B, section III), where less than the entire planeload capacity of one or more aircraft has been engaged for operations under the particular subsections of Annex A ...]."; at Annex B, Section I (A) and (D). The bracketed portions indicate additional provisions in the agreement with Yugoslavia.

66. For example, the agreements with Canada and Jordan define these terms as follows:
"Enplane" means "the first taking on board of nonscheduled air service traffic on an aircraft of a carrier."
"Deplane" means "any deboarding of nonscheduled air service traffic from an aircraft of a carrier but shall not include deboarding for nontraffic purposes."
"Re-enplane" means "any taking on board an aircraft of a carrier of nonscheduled air service traffic which has enplaned and deplaned."
Art. 1, paras. (g), (h) and (i), respectively, in both agreements. The agreement with Yugoslavia has very similar definitions.

67. Ibid., at Art. 7 of the agreement with Yugoslavia. Art. VII, paras. 1 to 3, of the agreement with Canada is more detailed, but makes a similar provision.

68. The charter types specified are: single entity passenger, pro rata affinity, mixed (entity/pro rata), inclusive tour (U.S. originating only), study group (Jordanian originating only), travel group, overseas military personnel (originating in territories other than the US or Jordan) and split charters of the same type or any combination of types specified above.

69. Supra, note 63 at Annex A, Section I, para. (B) and Section II, para. (B).

70. Supra, note 63 at Annex B of both agreements. In the agreement with Yugoslavia, charter types set forth in US regulations are: single entity, pro rata affinity, mixed (entity/pro rata), ITC (US-originating

only), study group (Yugoslav-originating only), overseas military personnel, TGCs and split charters of the same type or any combination of the above. Charter types set forth in Yugoslav regulations are: common purpose charters (USA-originating only), ABCs, and ITCs (Yugoslav-originating only).
In the agreement with Canada, charter types set forth in US regulations are as follows: single entity passenger and property, pro rata affinity, mixed (entity/pro rata) (US-originating only), ITC, study group, overseas military personnel and TGC. As for Canadian charters: single entity passenger and property, ABC, ITC and pro rata common purpose (Canadian-originating only).

71. (1973) 69 DOSB 551 at 552.

72. Supra, note 63 at Art. VII (4) and (5) in the Canadian agreement and Art. 7 (B) in the Jordanian agreement. To give just one example, the agreement with Jordan was amended in March 1977 (TIAS 8553, at Para. I), when OTCs, SECs, and Advance Booking Charters were added to Annex B, Sec. II, part 1, of the agreement. Once again, in January 1979, the agreement was amended to add Public Charters to the list of prescribed service types.

73. Traffic can be: total-route traffic, inter-partes traffic, national traffic, grantor's traffic, and third-country traffic. For a detailed description of traffic streams, see CHENG, Ch. 1, note 24 at 403 et seq.

74. Legal, Economic and Socio-Political Implications of Canadian Air Transport (Montreal: CRASL, McGill University, 1980) at 638 [hereinafter, CRASL].

75. HAANAPPEL, Ch. 1, note 37 at 128.

76. Supra, note 63 at Annex A, Section III (A).

77. Supra, note 63 at Annex A, Section II (A) (3) (b). Also see, CHENG II, Ch. 2, note 104 at footnote 24.

78. Supra, note 63 at Annex A, Section I and Section II.

79. Supra, note 63 at Annex A, Section IV (A). Also, CRASL, supra, note 74 at 638.

80. P.P.C. HAANAPPEL, "Bilateral Air Transport Agreements Between Canada and the U.S.A." (1980) 5 Annals of Air and Space L. 133 at 151 [hereinafter, HAANAPPEL III].

81. Supra, note 63 at Art. 11 (A) in the Yugoslav agreement and Art. 11 (1) in the agreement with Canada.

82. Ibid., at Art. 11 (A) and (B) in the Yugoslav agreement. The Canadian agreement is silent on these points.

83. Ibid., at Art. 11 (C), (D), and (E) [Yugoslavia]; and, Art. XI (2) [Canada].

84. Ibid., at Art. 11 (B) [Yugoslavia]; and, Art. XI (3) [Canada].

85. Supra, note 63 at TIAS 9375, para. (3). Art. 11 was replaced by the following:

> "(A) Each Party shall allow prices for services to be established by each airline based upon commercial considerations in the market-place, and intervention by the Parties shall be limited to (a) prevention of predatory or discriminatory prices or practices; (b) protection of consumers from prices that are unduly high or restrictive because of the abuse of a dominant position and (c) protection of airlines from prices that are artificially low because of direct or indirect governmental subsidy or support."

Para. (B) states that each Party may require the filing, with its aeronautical authorities, rates to be charged by airlines of the other Party; if it is dissatisfied with the rates, it must notify the other Party who may request consultations. If the matter cannot be resolved, the objecting Party "may take appropriate action to prevent the use ... of such price ... but only insofar as (it) applies to traffic originating in its territory."

> "(C) A Party shall not regulate the prices or rates charged by charterers to the public for charter traffic originating in the territory of the other Party."

86. Ibid., at Art. 9 (B) [Jordan] and Art. IX (2) [Canada]. The agreement with Yugoslavia, at Art. 9 (B), states that neither Party shall "unilaterally limit the volume of traffic to be transported by the carriers of the other Party...".

87. Ibid., at Arts. 9 (A) and 10 [Yugoslavia and Jordan]; and, Arts. IX (1) and X [Canada].

88. Supra, note 63.

89. Ibid., at Section A, para. 1.

90. The Swiss charter categories permitted, as listed in the Annex, are: advance booking charters, affinity charters, special event charters, inclusive tour charters, student charters, own use charters, and split charters (for the same or different - except "own use" - charters). The features that make up each charter type is listed, under the charter category. To give one example, to qualify as an "inclusive tour charter", each flight has to fulfill the following conditions:

> "1. At least local transportation at the flight destination (airport-hotel-airport) as well as accommodation in recognized hotels or similar facilities are provided by the charterer for the duration of the tour.
> "2. The passenger travels together with the same group both on the outward and return portion of the journey in the framework of an inclusive tour and has a firm booking for the return flight before starting the tour."

91. Supra, note 63 at Section (C).

92. See section 2.2.2.4.

93. J.L. KATZ, "U.S., U.K. Aviation Agreement" (1978) 78 DOSB 59 at 59 [hereinafter, KATZ].

94. BOGOSIAN, Ch. 3, note 92 at 1011.

95. The Ford Statement has been reproduced in I.A. VLASIC & M.A. BRADLEY (eds.), The Public International Law of Air Transport: Materials and Documents, Supplement 1 (Montreal: IASL, McGill University, 1976) at 202 et seq. [hereinafter, VLASIC/BRADLEY III].

96. C. PAYEN, "The New United States International Aviation Policy Statement" (1976, October) No. 34 ITA Bull. 751 at 752-3 [hereinafter, PAYEN].
For the Nixon Statement, see section 4.1.2.

97. Ibid., at 753.

98. Department of State Press Release: "President Issues Policy Statement on International Air Transportation" (1976) 75 DOSB 488.

99. C.E. POWELL, "Bermuda 2 - A Discussion of its Implications: The Views of British Caledonian Airways" (1978) 82 Aeronautical J. 57 at 59 [hereinafter, POWELL].

100. T.E. BRIDGES, "Bermuda II and After" (1978) 3 Air L. 11 at 13 [hereinafter, BRIDGES].

101. E. SCHOTT, "Bermuda 2 - A Discussion of its Implications: The United States Attitude; A View from Pan Am" (1978) 82 Aeronautical J. 61 at 62 [hereinafter, SCHOTT].

102. WASSENBERGH, supra, note 16 at 333.

103. HAANAPPEL, Ch. 1, note 37 at 39.

104. US - UK, 23/7/1977, TIAS 8641; UKTS No. 76 (1977). [Amended: 25/4/78, TIAS 8695; UKTS No. 85 (1978)]. [Amended: 4/12/1980, UKTS No. 21 (1981)].

105. E.g., customs duties, user charges, consultations, settlement of disputes, etc.

106. A.J. KHAN, UK/US Air Transport Agreement of 1977 (LL.M. Thesis, IASL, McGill University, 1983) (unpublished) at 99 [hereinafter, KHAN]; MATTE, Ch. 1, note 3 at 248.

107. Supra, note 103.

108. The usual "designation" clause has been employed here. See, Ch. 2, note 31 and, for example, Ch. 3, note 63.

109. At para. (5) (e). Under "free-determination", the Parties agree that neither shall limit the volume of traffic, frequency, or regularity of service, except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the Chicago Convention. See, for more details on "free-determination", DOC 9511, Ch. 3, note 4 (xv) at En-xxiii.

110. Supra, note 103 at Annex 5.
From 1 January 1980 to 31 December 1982 (the "transitional period"), charter cargo traffic was limited to sole use (single entity) flights, specialist cargo flights (the carriage of livestock, bloodstock, or outsize cargo), or "other cargo flights", wherein the carrying capacity of the aircraft on each flight was to be purchased exclusively for cargo carriage by one or more persons, with each individual consignment being required to exceed 1000 kilograms in weight. The total annual charter tonnage of the last category was limited to 1,500 tonnes in each direction in 1980, 2,000 tonnes in 1981 and 3,000 tonnes in 1982 (at Part II, Section 2: Transitional Period). From 1 January 1983, the limitations of Section 2 ceased to apply. Art. 14 of the agreement, as modified by Annex 5, governs cargo charters.
Part IV, Section (8) deals with tariffs. Each Party may require filing of tariffs; however, neither Party can take unilateral action to prevent the initiation, continuation, or termination of a tariff charged by an airline of the other Party. If either Party considers that a tariff is "predatory as regards other airlines, discriminatory as between shippers in similar circumstances, or unduly high or restrictive in such a way as to constitute abuse of a dominant market position", it may request consultations.

111. MOURSY, Ch. 1, note 32 at 340.

112. Supra, note 103 at the Exchange of Letters (No. 1), dated 4 December 1980. The now-expired Annex 4 listed several "categories" of charter types that were allowed (ABCs, ITCs, military personnel charters, etc.) (at para. 1). Charter carriers were to conform to the requirements of these categories. Either Party could modify the charterworthiness rules (para. 3). Consultations were to be called if these modifications were rejected by the other Party. Finally, the application of uplift ratios were prohibited (see Section 4.3.2.4 for a discussion on uplift ratios).

113. BOGOSIAN, Ch. 3, note 92 at 1012, quoting then Chairman of the CAB, Cohen.

114. HAANAPPEL, Ch. 1, note 37 at 41.
Also see, H.A. WASSENBERGH, "Regulatory Reform - A Challenge to Inter-governmental Civil Aviation Conferences" (1986) 11 Air L. 31 at 35 [hereinafter, WASSENBERGH V].

115. HAANAPPEL, Ch. 1, note 37 at 50.

116. P.L. 95-163, Nov. 9, 1977, 91 Stat. 1284.

117. P.L. 95-504, Oct. 24, 1978, 92 Stat. 1705.

118. HAANAPPEL, Ch. 1, note 37 at 51.

119. "International Air Transportation Negotiations: Statement of U.S. Policy for the Conduct of the Negotiations", 21 August 1978 in, Public Papers of the Presidents of the United States - Jimmy Carter: 1978, Book II (Washington: United States Government Printing Office, 1979) 1462 at 1463.

120. Ibid., at 1464.

121. P.L. 96-192, Feb. 15, 1980, 94 Stat. 35.

122. BOGOSIAN, Ch. 3, note 92 at 1013.

123. See, Section 17, 94 Stat 42. This Section amends Sec. 1102 of the Federal Aviation Act of 1958 (49 U.S.C. 1502).

124. BOGOSIAN, Ch. 3, note 92 at 1016.

125. Ibid., at 1013. The Model is reproduced at page 1021 et seq. of the Bogosian article.

126. In chronological order, these are:

1. US - Mexico, 20/1/1978, TIAS 10115. [extended: 27/12/82 & 13/1/83, TIAS 10638].

2. US - Paraguay, 3 & 9/3/1978, TIAS 8966; ICAO 2844 at para. 4 and Attachment 6.

3. US - Liberia, 30/3/1978, TIAS 8997 at para. (d).

The agreement with Mexico is no longer in force: see, KAVASS, Ch. 3, note 4 (B).

An agreement was also signed with Ivory Coast [30/3/1973, TIAS 9766; ICAO 3011]. It does not follow the line taken in the others. Art. 12 of the agreement makes provisions for charters as follows:

"The Contracting Parties recognize the importance of charters to the development of air transport

between their territories and agree to promote and encourage their growth. They will facilitate charter services to the maximum extent consistent with their national laws."

127. In chronological order, these are:

1. US - The Netherlands, 31/3/1978 [Protocol of Amendment], TIAS 8998; CATC (57) 88B. [amended: 13/10 & 22/12/1987, CATC (57) 88D at paras. 5 & 6].

2. US - Romania, 26/4/1978 [MOU], TIAS 9431; CATC (74) 17A.

3. US - Nigeria, 27/4/1978 [MOU], TIAS 8999; ICAO 2855.

4. US - Israel, 16/8/1978 [Protocol of Amendment], TIAS 9002; ICAO 2857.

5. US - Federal Republic of Germany, 1/11/1978 [Protocol of Amendment], TIAS 9591; ICAO 2987.

6. US - Rep. of Korea, 22/3/1979 [MOU], TIAS 9427; ICAO 2982.

7. US - Papua New Guinea, 30/3/1979, TIAS 9520.

8. US - Jamaica, 4/4/1979 [Protocol of Amendment], TIAS 9613; CATC (79) 74; ICAO 2887.

9. US - Singapore, 14/9/1979 [MOU], CATC (78) 78C; ICAO 2966.

10. US - Fiji, 1/10/1979, TIAS 9917; ICAO 2907; CATC (81) 175.

11. US - Thailand, 7/12/1979, TIAS 9704; ICAO 3009; CATC (80) 252.

12. US - Senegal, 1979, Provisions in U.S. International Air Transport Agreements: A Compilation of Texts of Scheduled and Charter Provisions Contained in U.S. Bilateral Air Transport Agreements, Vol. III (Washington, D.C.: Air Transport Association of America, 1985) 81 at 109 [hereinafter, ATA].

13. US - Netherlands - Antilles, 25/1/1980, CATC (80) 227.

14. US - Jordan, 21/2/1980, TIAS 9868; ICAO 3077; CATC (80) 175.

15. US - Finland, July 1980 [Protocol of Amendment], TIAS 9845; CATC (49) 107A.

16. US - Belgium, 23/10/1980, TIAS 9903; ICAO 3074.

17. US - New Zealand, 25/11/1980 [Memorandum of Consultations], TIAS 9956; ICAO 3074.

18. US - Taiwan, 1980, ATA, this note, no. 12 at 112.

19. US - El Salvador, 2/4/1982, TIAS 10488; CATC (83) 9.

20. US - Barbados, 8/4/1982, TIAS 10370; ICAO 3221.

21. US - China, 17/9/1982, TIAS 10326; reproduced in (1980) 80 DOSB 2 et seq.

22. US - Japan, 7/9/1982 [MOU], TIAS 10434; CATC (53) 201.

23. US - Brazil, 20/4 & 2/5/1983 [Interim Agreement], TIAS 10896.

24. US - Costa Rica, 20/10 & 23/11/1983, TIAS 10894.

25. US - Argentina, 22/10/1985, CATC (85) 384.

26. US - Ecuador, 26/9/1986, CATC (87) 112.

27. US - Aruba, 7/11/1986, CATC (87) 9.

28. US - Czechoslovakia, 29/6/1987, CATC (88) 91; ICAO 3359.

29. US - Poland, 1/2/1988, CATC (88) 126.

Note: The agreements with the following States are no longer in force: Mexico, Papua New Guinea and Brazil.

128. In the Model Agreement.

129. For example, in the agreements with The Netherlands and Korea.

130. In the Preamble with West Germany, for example, the two Parties:

- Recognise that "both scheduled and charter air transportation are important to the consumer interest and are essential elements of a healthy international air transport system";

- Recognise "the relationship between scheduled and charter air services and the need for continued development of a total air service system which caters to all segments of demand and provides a wide and flexible range of air services";

- Desire "to promote an international aviation system based on competition among airlines in the market place with minimum governmental regulation"; and,

- Intend "to make it possible for airlines to offer the travelling and shipping public low-fare competitive services and increased opportunities for charter air services over the North Atlantic";...

131. The Preamble with the agreement with Thailand, which has more or less been followed in the agreements with The Netherlands-Antilles, Jordan, Belgium (with the additional clause that "cargo operations ... should be conducted in a deregulated environment"), El Salvador, Barbados, etc., reads:

> The two Governments,
>
> "Desiring to promote an international air transport system based on fair and constructive competition among airlines in the marketplace with as little governmental interference and regulation as possible, consistent with the provisions of this Agreement,
>
> "Desiring to facilitate the expansion of international air transport opportunities,
>
> "Desiring to make it possible for airlines to offer the traveling and shipping public a variety of service options at the lowest prices that are not predatory or discriminatory and do not represent

abuse of a dominant position and wishing to encourage designated airlines to develop and implement innovative and competitive prices,

"Desiring to ensure the highest degree of safety and security in international air transport...

"Desiring to conclude (an) ... agreement covering scheduled and charter air transportation...", etc.

132. Article 11, entitled "Fair Competition", reads:
"(1) Each Party shall allow a fair and equal opportunity for the designated airlines of both Parties to compete in the international air transportation covered in this Agreement.
"(2) Each Party shall take all appropriate action within its jurisdiction to eliminate all forms of discrimination or unfair competition practices adversely affecting the competitive position of the airlines of the other Party.
"(3) Neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated airlines of the other Party, except as may be required for customs, technical, operational or environmental reasons under uniform conditions consistent with Article 15 of the (Chicago) Convention.
"(4) Neither Party shall impose on the other Party's designated airlines a first refusal requirement, uplift ratio, no-objection fee, or any other requirement with respect to the capacity, frequency or traffic which would be inconsistent with the purposes of this Agreement.
"(5) Neither Party shall require the filing of schedules, programs for charter flights, or operational plans by airlines of the other Party for approval, except as may be required on a non-discriminatory basis to enforce uniform conditions as foreseen by paragraph (3) of this Article or as may be specifically authorized in an Annex to this Agreement. If a Party requires filings for information purposes, it shall minimize the administrative burdens of filing requirements and procedures on air transportation intermediaries and on designated airlines of the other Party."

133. HAANAPPEL, Ch. 1, note 37 at 144.

134. For example, some agreements allow just a "fair", as opposed to a "fair and equal", opportunity to compete (e.g., The Netherlands, Israel, West Germany, Finland, etc. - all at their Art. 5, first para.). Then, the first three agreements just mentioned, do not provide for the "unilateral" limitation of volume of traffic, frequency, etc., as do the other agreements.
Further, the first four paras. of Art. 8 of the agreement with Argentina are similar to those of the Model capacity clause. However, its fifth para. reads:

> "(5) Each Party agrees that it will not implement or enforce any cargo preference laws or regulations on any of the services except insofar as such laws or regulations apply to cargo transported for the account of the national government itself or pursuant to the terms of any contract, agreement, or other special arrangement under which the national government makes payment for those transportation services. The national government in exercising the cargo preference laws or regulations mentioned in this article and in order to avoid a prejudicial effect on the transportation of non-preferential cargo will contract directly with the airline or airlines for air transportation."

135. Art. 7(b) of the agreement reads:

> "Each Contracting Party shall take into consideration the interests of the other Party in both its designated airline and in the ability of its national or localized infrastructure to absorb high levels of tourism traffic during particular seasonal periods. Should either Contracting Party find that its designated airlines are being subjected to unreasonable, predatory or discriminatory competition, or; should either Party find that its national or localized infrastructure is going to experience a critical over-saturation level, it may then request consultations ...

136. HAANAPPEL, Ch. 1, note 37 at 147.

137. This provision reads:

> "(1) ... Intervention by the Parties shall be limited to:
> "(a) prevention of predatory or discriminatory prices or practices;
> "(b) protection of consumers from prices that are unduly high or restrictive because of the abuse of a dominant position; and

"(c) protection of airlines from prices that are artificially low because of direct or indirect governmental subsidy or support."

138. For example: Papua New Guinea (Art. 11 A); Fiji (Art. 11 A); Thailand, Netherlands-Antilles, Jordan, Belgium, El Salvador, etc. (all Art. 12, para. 1);

However, in several agreements, the Parties also desire "to facilitate the expansion of international air transportation opportunities ... in charter transportation. This objective can best be achieved by making it possible for airlines to offer the traveling and shipping public a variety of service options at the lowest fares, rates and prices that are not predatory or discriminatory and do not tend to create a monopoly. In order to give weight to this objective, each Contracting Party shall encourage individual airlines to develop and implement competitive fares, rates and prices." This, for example, is found in the agreements with: The Netherlands [unamended Art. 6 (a)], Israel [Art. 9(a)], West Germany [Art. 6(a)], etc.

139. HAANAPPEL, Ch. 1, note 37 at 147.

This provision usually reads:
"Neither Party shall require the notification or filing by airlines of the other Party or by airlines of third countries of prices charged by charterers to the public for traffic originating in the territory of the other Party."

140. For example, in: Thailand, Netherlands-Antilles, Jordan, Belgium, El Salvador, Aruba (all Art. 12, para. 2); West Germany (Art. 6 c); Fiji (Art. 11 B); etc.

141. HAANAPPEL, Ch. 1, note 37 at 148. The paragraph reads:
"(3) Neither Party shall take unilateral action to prevent the inauguration or continuation of a price proposed to be charged by (a) an airline of either Party or by an airline of a third country for international air transportation between the territories of the Parties .... If either Party believes that any such price is inconsistent with the considerations set forth in paragraph (a) of this Article, it shall request consultations and

notify the other Party of the reasons for its dissatisfaction.... If the Parties reach agreement with respect to a price for which a notice of dissatisfaction has been given, each Party shall use its best efforts to put that agreement into effect. Without mutual agreement, that price shall go into or continue in effect."

A variation with a few agreements, e.g., Israel, is that charters are specifically mentioned. Thus, in place of "international air transportation" (as above), one reads, for example, "airlines ... for scheduled or charter air transportation ..." (Art. 6, para. D, Israel).

142. For example: The Netherlands (as amended) [Art. 11 (c)]; Korea (Art. 1 E); Jamaica (Art. 6, para. 4); Netherlands-Antilles, Jordan, Belgium, El Salvador, Costa Rica, Aruba [all Art. 12 (3)]; etc.

143. Para. (4) of the Model tariff clause reads:

"Notwithstanding paragraph (3) of this Article, each Party shall allow (a) any airline of either Party or any airline of a third country to meet a lower or more competitive price proposed or charged by any other airline or charterer for international air transportation between the territories of the Parties, and (b) any airline of one Party to meet a lower or more competitive price proposed or charged by any other airline or charterer for international air transportation between the territory of the other Party and a third country. As used herein, the term "meet" means the right to establish on a timely basis, using such expedited procedures as may be necessary, an identical or similar price on a direct, interline or intra-line basis, notwithstanding differences in conditions relating to routing, roundtrip requirements, connections, type of service or aircraft type, or such price through a combination of prices."

The two concepts involved in this provision, "matching" and "price leadership", have been very clearly explained by Prof. Haanappel in his book (see Ch. 1, note 37 at 150).

144. These are, for example, the agreements with: Jamaica [Art. 11(5)]; Netherlands-Antilles, Jordan, Belgium, El Salvador, Costa Rica, Aruba [all at their Art. 12 (4)], etc.

145. E.g., Art. 11 (d) of the agreement with The Netherlands.

146. E.g., Art. 6(4)(b) of the Finnish agreement.

147. At Art. 9E (3).

148. HAANAPPEL, Ch. 1, note 37 at 151.

149. Supra, note 127 at Annex II, for all agreements.

150. Section 1 of Annex II reads:

> "Airlines of one Party whose designation identifies this Annex shall, in accordance with the terms of their designation, be entitled to perform international air transportation to, from and through any point or points in the territory of the other Party, either directly or with stopovers en route, for one-way or roundtrip carriage of the following traffic:
>
> "(a) any traffic to or from a point or points in the territory of the Party which has designated the airline;
>
> "(b) any traffic to or from a point or points beyond the territory of the Party which has designated the airline and carried between the territory of that Party and such beyond point or points (i) in transportation other than under this Annex; or (ii) in transportation under this Annex with the traffic making a stopover of at least two consecutive nights in the territory of the Party."

151. HAANAPPEL, Ch. 1, note 37 at 155.

152. For example, the agreements with Israel [at Art. 4 (1)], West Germany [at Art. 4(a)], Korea [at Section 2 (A)], Papua New Guinea [at Art. 13 (B)], Jamaica [at Art. 4 (1)], etc., stipulate:

> "Each Party grants to the other Party the right for the designated airlines of that other Party to uplift and discharge international charter traffic in passengers (and their accompanying baggage) and cargo at any point or points in the territory of the first Party for carriage between such points and any points or points in the territory of the

other Party, either directly or with stopovers at points outside the territory of either Party or with carriage of stopover or transiting traffic to points beyond the territory of the first Party."

Also see, MOURSY, Ch. 1, note 32 at 347, 348.

153. This is specifically stated in most agreements listed in note 152, above. In a majority of the other cases, "air transportation", whose definition is normally found in the "Definitions" section of each agreement, means "any operation performed by aircraft for the public carriage of traffic in passengers, baggage, cargo, ... separately or in combination, for remuneration or hire" (at Art. 1, para. c, of the agreement with Belgium, to give just one example).

154. HAANAPPEL, Ch. 1, note 37 at 155 and MOURSY, Ch. 1, note 32 at 347.

For example, see the agreements with Israel [at Art. 4(1)], West Germany [at Art. 4(a)], Korea [at Section 2(A)], Papua New Guinea [at Art. 13(B)], Jamaica [at Art. 4(2)], etc.

155. HAANAPPEL, Ch. 1, note 37 at 155.

See, for example, the agreements with The Netherlands [at Art. 4(a)], Israel [at Art. 4(2)], West Germany [at Art. 4(b)], Korea [at Section 2(A)], Papua New Guinea [at Art. 13(B)], Jamaica [at Art. 4(2)], Fiji [at Art. 13(B)], Finland [at Art. 4(2)], New Zealand [at Art. 12(3)], etc.

156. Ibid.

157. For example, in the Netherlands agreement [at Art. 4(a)], the Parties agree that each side shall consider applications by designated airlines of the other Party to carry such traffic "on the basis of comity and reciprocity." [Also in West Germany: Art. 4(b); Ecuador: Annex II, para. 3; Korea: Section 2(A); Papua New Guinea: Art. 13(B); Fiji: Art. 13(B); Finland: Art. 4(2); etc.].

The agreement with Singapore forbids fifth freedom and sixth freedom (without the two consecutive-night stopover) traffic, "unless applicable regulations promulgated by the Aeronautical Aurhorities of the other Party are more liberal." [at Annex II, Section 1(b)].

158. Section 2 of Annex II reads:

> "With regard to traffic originating in the territory of either Party, each airline performing air transportation under this Annex shall comply with such laws, regulations and rules of the Party in whose territory the traffic originates, whether on a one-way or roundtrip basis, as that Party now or hereafter specifies shall be applicable to such transportation. When such regulations or rules of one Party apply more restrictive terms, conditions or limitations to one or more of its airlines, the designated airlines of the other Party shall be subject to the least restrictive of such terms, conditions or limitations. Moreover, if the aeronautical authorities of either Party promulgate regulations or rules which apply different conditions to different countries, each Party shall apply the least restrictive regulation or rule to the designated airlines of the other Party."

159. HAANAPPEL, Ch. 1, note 37 at 156.

160. For example, the agreements with Paraguay [at Attachment 6, para. (a)], Liberia [at para. (d)], Nigeria [at para. 4(a)], Singapore [at Annex II, Section 2], Ecuador [at Annex II, para. (4)], Czechoslovakia [at Art. 8(c)], Poland [at the Annex, para. E], Senegal [at Art. 12], etc.

161. MOURSY, Ch. 1, note 32 at 350.

162. HAANAPPEL, Ch. 1, note 37 at 157.

See, for example, the agreements with The Netherlands [at Art. 4(b)]; the Netherlands-Antilles, Belgium, El Salvador, Barbados, Brazil, and Aruba [all at Annex II, Section 2]; New Zealand [at Art. 12(4)], etc.

163. MOURSY, Ch. 1, note 32 at 350.

164. See, supra, note 158, second sentence.

165. "Most Favoured Nation" treatment is a tool for trade liberalisation through the reduction of trade barriers. In the case at hand, MFN means that any benefits, privileges or concessions granted, by one Party to the bilateral agreement, to any third State(s), must be automatically and unconditionally extended to the other Party to the agreement.

166. Section 3 reads:
"Neither Party shall require a designated airline of the other Party, in respect of the carriage of traffic from the territory of that other Party on a one-way or roundtrip basis, to submit more than a declaration of conformity with the laws, regulations and rules of that Party referred to under Section 2 of this Annex or of a waiver of these regulations or rules granted by the aeronautical authorities of that other Party."

167. HAANAPPEL, Ch. 1, note 37 at 156.

168. R.N. COOPER, "International Aviation Policy" (1978) 78 DOSB 24 at 24 [hereinafter, COOPER].

169. See Ch. 2, note 55 and text.

170. WASSENBERGH, supra, note 16 at 333.

171. See section 4.3.

172. HAANAPPEL, Ch. 1, note 37 at 140-141.

173. Ibid. at 51-52.

174. E.J. McALLISTER, "Aviation's Role in Shaping Today's World", address before the International Aviation Club, 20 June 1989; (1989, Oct.) DOSB 33 at 34.

CONCLUSION

> "International civil aviation is ... an economic activity of considerable magnitude, representing today, together with tourism, the largest single world trade item after petroleum."[1]

This one statement tells us how far international aviation has come, since 1944, when representatives of States met at Chicago, to debate how aviation could help re-build a world, from the ashes of World War II.

Tourism and civil aviation have grown together, showing the dependence that one has on the other. In the beginning, flying was the privilege of the businessman: only he could afford the high rates set by the yet-developing aviation industry. But this state of affairs did not last long, and soon the tourist was beginning to be as common a sight as the businessman, in the airports of the world. Tourism was set to boom.

If not all, then at least part of the credit for this boom goes to the non-scheduled airlines of the world. Charters (i.e., non-scheduled carriers, as otherwise called) have, from the word "go", borne the brunt of Government ire, in the form of rules and regulations meant to restrict charter growth. Governments feared that too much charter

competition could badly damage their carefully nurtured "scheduled" air industries.

Nevertheless, non-scheduled carriers persisted, and gradually grew. That charter services are important and no longer an insignificant part of the international aviation scene, is no longer in doubt.[2] In spite of this, a vast majority of Governments persist in restricting charter services, by the unilateral application of disparate "regulations, conditions and limitations", ostensibly under licence from Article 5 of the Chicago Convention.[3]

The United States, on the other hand, realised, in course of time, the economic advantages a liberalised charter market could have for its many carriers. She thus began, in the late 1960s, working towards freeing charters from the shackles in which they had, till then, been bound. One of the many ways the US set about achieving this objective was by gradually having charters regulated in her bilateral air agreements.

Other States, too, have long regulated charters in their bilateral agreements. A quick glance at note 1 of chapter 3 will confirm this fact. Unfortunately, for what these States make up in the number of agreements, they lack in substance: just three of the agreements listed come up to US "liberalising" standards. These are the agreements that Singapore recently concluded.[4] The agreement with

Chile, for example, determines (charter) capacity using the "free determination" method; the tariff clause is almost word-for-word the same as the tariff clause in the US "Model" agreement.[5] Charter traffic rights in the agreements with the Maldives and Brunei Darussalam are as in the US Model; the "country of origin" charterworthiness rule regulates charters.[6]

Most of the other "non-US" agreements do not deal with the economic aspects of charter air commerce. Those that do have had capacity predetermined[7] and tariffs regulated under the double approval regime.[8] In general, agreements have done away with the "prior permission" requirement, have had landing rights for charters guaranteed (section 3.4) and have provided ancillary rights for charters services (section 3.2.4): all of which have contributed to securing some legal rights for charters, at least.

A broad comparison between "US" and "non-US" agreements reveals the vast difference that exists in the charter aviation policies (at least), of the United States, on the one hand, and the rest of the world, on the other. Singapore is one country that seems to have begun to take up US liberal charter policies and apply them in her relations with other States. From the material that was available to this author, no other such trend has been noticed, with

respect to other States (other than the United States, of course!).

It is possible that the rapidly changing international aviation environment (especially in the European Economic Community) has kept policy-makers occupied with scheduled air transport. It is also possible that, once the dust has settled down in post-1992 Europe, a closer look would be paid to non-scheduled air policy, to examine how charters could fit in the new EEC (aviation) world. That charters play a large part in the intra-European "international" market is not in doubt: more than "half of the total international intra-European passenger kilometres are performed in nonscheduled service offering discount fares."[9] Charters have also been in the thick of the "liberalisation" movement in the EEC.[10] An EEC Charter Policy for the post-1992 era, is inevitable.

Now that multilateralism is in vogue, how long is it before the multilateral charter question is raised again? More importantly, now that the European aviation industry has caught up with the American industry, can it be long before someone proposes that, for the North Atlantic, at least, a multilateral commercial air transport regime be negotiated? Time will tell.

ENDNOTES - Concluding Remarks

1. C. JONSSON, International Aviation and the Politics of Regime Change (New York: St. Martin's Press, 1987) at 4.

2. See, in general, chapter 2.

3. See section 1.3.2.2 and note 63, chapter 1.

4. These are: (123) Singapore - Chile (1980); (130) Singapore-Maldives (1983); and, (152) Singapore-Brunei Darussalam (1988). See, Ch. 3, note 1.

5. For the Chile agreement, see section 3.3.6.2 and for the Model clause, see section 4.6.4.

6. For details regarding these agreements, see section 3.3.6.3. For the US Model clauses, see section 4.6.5.

7. For example, (72) Yugoslavia - France (1967); (121) Romania - Tunisia (1980) [see section 3.2.3.2]; (103) Austria - Jordan (1976); (104) Austria - Syria (1976) [see section 3.3.5.2]; etc.
See, Ch. 3, note 1.

8. For example, (80) Iraq - Austria (1970) [see section 3.2.3.1]; (59) France - Syria (1966) and (64) France - Iraq (1966) [see section 3.2.3.3]; etc.
See, Ch. 3, note 1.

9. N.K. TANEJA, The International Airline Industry: Trends, Issues and Challenges (Toronto: D.C. Heath & Co., 1988) at 56.

10. Ibid., at 69.

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j) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, ICAO Doc. 8966; TIAS 7570; 1973 Can. T.S. 6; 24 UST 564.

k) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Done at Montreal on 23 September 1971, signed at Montreal on 24 February 1988, ICAO Doc. 9518 [not yet in force].

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A. Agreements of States Other Than the United States

Argentina - Portugal, 7/3/1947, CATC (49) 67.

Chile - Brazil, 4/7/1947, CATC (51) 119.

Brazil - The Netherlands, 6/11/1947, CATC (48) 6.

Brazil - Denmark, 14/11/1947, CATC (49) 63.

Brazil - Norway, 14/11/1947, CATC (49) 64.

France - Argentina, 30/1/1948, CATC (48) 166.

Yugoslavia - Czechoslovakia, 14/3/1948, ICAO 683; CATC (52) 102.

Brazil - Argentina, 2/6/1948, CATC (49) 77.

Brazil - Switzerland, 10/8/1948, CATC (49) 200.

France - Spain, 30/8/1948, ICAO 684; CATC (49) 144.

Chile - Argentina, 14/12/1948, CATC (50) 256.

France - Italy, 3/2/1949, ICAO 763; CATC (49) 73.

Italy - Spain, 31/5/1949, ICAO 1078; 231 UNTS 251.

Brazil - Spain, 28/11/1949, CATC (52) 60.

Austria - Switzerland, 19/12/1949, CATC (49) 244.

UK - France, 6/10/1950, ICAO 850; 96 UNTS 63; CATC (46) 34A.

Switzerland - Sweden, 8/10/1950, CATC (51) 5.

UK - Switzerland, 13/5/1952, ICAO 957; 164 UNTS 91; CATC (52) 146.

Yugoslavia - Turkey, 16/4/1953, ICAO 1244; CATC (53) 125.

Jordan - Iraq, 4/11/1953, CATC (54) 42.

France - Federal Republic of Germany, 4/10/1955, ICAO 1437; CATC (56) 47.

USSR - Denmark, 31/3/1956, ICAO 1275; CATC (56) 174.

Poland - Sweden, 8/6/1956, ICAO 1334; CATC (58) 94.

Poland - Belgium, 31/7/1956, ICAO 1486; CATC (56) 184.

Paraguay - Uruguay, 19/3/1957, CATC (59) 97.

Romania - Sweden, 15/4/1957, ICAO 1336; CATC (58) 142.

Bulgaria - Sweden, 17/4/1957, ICAO 1639; CATC (60) 33.

Hungary - The Netherlands, 28/5/1957, ICAO 1346; CATC (58) 50.

Paraguay - Chile, 1/6/1957, CATC (57) 103.

Hungary - Belgium, 1/6/1957, ICAO 1371; CATC (57) 160.

Hungary - Sweden, 2/8/1957, ICAO 1355; CATC (58) 137.

Brazil - The Federal Republic of Germany, 29/8/1957, CATC (57) 197.

Morocco - France, 25/10/1957, ICAO 1564; CATC (59) 51.

Bulgaria - The Netherlands, 7/2/1958, ICAO 1376; CATC (58) 109.

Hungary - UAR, 20/3/1958, CATC (68) 108.

Morocco - Portugal, 3/4/1958, ICAO 1465; CATC (59) 63.

USSR - Belgium, 5/6/1958, ICAO 1459; CATC (58) 206.

Romania - Norway, 16/6/1958, CATC (58) 136.

USSR - The Netherlands, 17/6/1958, ICAO 1406; CATC (58) 190.

Romania - UAR, 14/8/1958, CATC (59) 44.

Bulgaria - U.A.R., 9/7/1959, CATC (60) 151.

Hungary - Iraq, 2/3/1960, ICAO 2388; CATC (61) 65.

Hungary - France, 2/5/1960, ICAO 1511; CATC (61) 43.

Hungary - UK, 25/10/1960, ICAO 1550.

Morocco - Luxembourg, 19/5/1961, ICAO 3423; CATC (64) 30.

France - Mali, 5/8/1961, ICAO 1626; CATC (64) 128.

The Netherlands - Mexico, 24/8/1961, CATC (62) 56.

Hungary - Ghana, 23/10/1961, CATC (64) 187.

Mali - Guinea, 17/11/1961, CATC (63) 105.

Hungary - Finland, 13/2/1962, ICAO 1835; CATC (66) 32.

USSR - Morocco, 27/3/1962, ICAO 3140; CATC (84) 157.

USSR - Ghana, 6/4/1962, ICAO 1731; CATC (64) 231.

Romania - France, 18/5/1962, ICAO 1646; CATC (63) 110.

Morocco - Switzerland, 5/7/1962, ICAO 1747; CATC (64) 161.

USSR - Cuba, 17/7/1962, ICAO 2024; CATC (69) 315.

Hungary - Syria, 18/10/1962, CATC (64) 250.

USSR - Sudan, 20/10/1962, ICAO 2511.

Hungary - Greece, 27/4/1963, CATC (65) 239.

Poland - Greece, 21/12/1963, CATC (64) 153.

Morocco - Yugoslavia, 3/2/1964, ICAO 1899; CATC (65) 49.

USSR - Ceylon, 22/2/1964, ICAO 2513; CATC (65) 83.

Hungary - Cyprus, 2/6/1964, ICAO 1862; CATC (65) 169.

Bulgaria - Greece, 9/7/1964, CATC (67) 292.

USSR - Iran, 17/8/1964, ICAO 2403; CATC (66) 24.

Yugoslavia - Algeria, 16/10/1964, ICAO 2184; CATC (74) 34.

Hungary - Luxembourg, 3/11/1964, CATC (70) 287.

Syria - Bulgaria, 13/12/1964, CATC (65) 241.

Bulgaria - Cyprus, 8/5/1965, ICAO 1851; CATC (65) 171.

Bulgaria - Luxembourg, 8/5/1965, CATC (70) 276.

Bulgaria - Cuba, 31/5/1965, ICAO 2048; CATC (69) 243.

Austria - Italy, 2/8/1965, ICAO 2202; CATC (57) 2B.

Bulgaria - France, 4/8/1965, ICAO 1826; CATC (66) 20.

Belgium - Congo, 10/9/1965, CATC (87) 10.

Hungary - Lebanon, 15/1/1966, ICAO 2783; CATC (73) 256.

USSR - Japan, 21/1/1966, ICAO 2437; CATC (68) 30.

Belgium - Rwanda, 2/2/1966, CATC (88) 26.

USSR - Lebanon, 8/2/1966, ICAO 2213; CATC (72) 30.

France - Syria, 7/4/1966, ICAO 1998; CATC (67) 318.

France - Ceylon, 18/4/1966, CATC (67) 49.

Bulgaria - Turkey, 18/4/1966, CATC (67) 314.

France - Jordan, 30/4/1966, ICAO 1865.

Romania - Turkey, 2/5/1966, CATC (67) 279.

France - Iraq, 19/5/1966, ICAO 2496; CATC (68) 37.

Hungary - Turkey, 28/6/1966, CATC (68) 85.

Bulgaria - Morocco, 14/10/1966, ICAO 3414; CATC (74) 16.

Tunisia - Austria, 17/10/1966, ICAO 2007; CATC (68) 56.

Romania - Greece, 2/11/1966, CATC (64) 313A.

Bulgaria - Iraq, 15/11/1966, ICAO 2469, CATC (68) 362.

Tunisia - Yugoslavia, 18/11/1966, ICAO 1926; CATC (68) 50.

USSR - Nigeria, 26/1/1967, ICAO 2522; CATC (71) 102.

Yugoslavia - France, 23/3/1967, ICAO 2002; CATC (69) 15.

USSR - Turkey, 29/8/1967, ICAO 2516.

USSR - Poland, 24/4/1968, ICAO 2614; CATC (72) 121.

USSR - Austria, 2/7/1968, ICAO 2103; CATC (69) 37.

Bulgaria - Sudan, 2/1/1969, CATC (71) 159.

Denmark - Brazil, 18/3/1969, CATC (69) 256.

USSR - Malaysia, 27/11/1969, ICAO 2433; CATC (70) 58.

USSR - Switzerland, 3/2/1970, CATC (69) 50A.

Hungary - Sudan, 23/8/1970, CATC (72) 40.

Austria - Iraq, 21/11/1970, ICAO 2312; 819 UNTS 255.

USSR - Federal Republic of Germany, 11/11/1971, ICAO 2543; 972 UNTS 99.

Belgium - Cameroon, 25/11/1971, CATC (88) 34.

Mali - Niger, 31/5/1972, ICAO 2349; 835 UNTS 197.

China - Italy, 8/1/1973, CATC (86) 30.

USSR - Greece, 22/1/1973, ICAO 3132.

Canada - China, 11/6/1973, ICAO 2400; Can.T.S. 21/1973.

USSR - Bangladesh, 23/8/1973, ICAO 2491; 972 UNTS 151.

China - Switzerland, 12/11/1973, ICAO 2561; 987 UNTS 3.

USSR - Rwanda, 30/11/1973, CATC (88) 63.

Mali - Chad, 12/2/1974, ICAO 2474; 944 UNTS 327.

USSR - Libya, 26/10/1974, ICAO 2590.

USSR - Portugal, 11/12/1974, ICAO 2883; CATC (82) 171.

China - Belgium, 20/4/1975, ICAO 2763.

USSR - Luxembourg, 6/6/1975, ICAO 3133; CATC (84) 258.

Belgium - German Democratic Republic, 11/6/1975, CATC (88) 33.

Austria - Romania, 14/7/1975, CATC (83) 231.

Canada - Cuba, 26/9/1975, ICAO 2629; Can.T.S. 26/1976.

Yugoslavia - Iraq, 2/10/1975, ICAO 3080; CATC (82) 198.

China - Syria, 10/11/1975, ICAO 2775.

Poland - Angola, 24/4/1976, CATC (77) 159.

USSR - Spain, 12/5/1976, ICAO 2718; CATC (78) 91.

Canada - Poland, 14/5/1976, ICAO 2756; Can.T.S. 31/1977.

Yugoslavia - Portugal, 3/6/1976, ICAO 2805; CATC (79) 117.

France - Angola, 7/6/1976, CATC (77) 108.

Austria - Jordan, 16/6/1976, ICAO 2870; CATC (80) 49.

Austria - Syria, 28/7/1976, ICAO 2892; CATC (82) 50.

USSR - Romania, 22/12/1976, ICAO 2850; CATC (82) 309.

Poland - Romania, 29/1/1977, ICAO 2849; CATC (82) 308.

USSR - Madagascar, 18/3/1977, ICAO 3135; CATC (84) 195.

Yugoslavia - Switzerland, 26/10/1977, ICAO 2864; CATC (79) 5.

Guatemala - The Netherlands, 15/12/1977, CATC (80) 309.

Indonesia - Switzerland, 14/6/1978, ICAO 3004; CATC (80) 198.

USSR - Jamaica, 20/12/1978, ICAO 3138; CATC (79) 31.

Mauritania - Switzerland, 13/3/1979, ICAO 2972; CATC (84) 259.

Austria - Korea, 8/5/1979, CATC (80) 205.

Cuba - Vietnam, 8/6/1979, CATC (83) 238.

Romania - Vietnam, 26/6/1979, ICAO 3103; CATC (83) 270.

USSR - Kampuchea, 16/7/1979, ICAO 3139; CATC (84) 312.

Kenya - Korea, 5/10/1979, CATC (80) 86.

UK - China, 1/11/1979, ICAO 2922; UKTS 14 (1980).

Mauritius - Switzerland, 14/11/1979, ICAO 2977; CATC (81) 82.

USSR - Nicaragua, 19/3/1980, ICAO 3127; CATC (84) 156.

Belgium - Jamaica, 27/5/1980, ICAO 2959; CATC (80) 288.

Romania - Tunisia, 3/7/1980, ICAO 3099; CATC (85) 59.

USSR - Seychelles, 21/11/1980, ICAO 3128; CATC (82) 69.

Singapore - Chile, 9/2/1980, ICAO 3087; CATC (82) 277.

Kenya - Spain, 3/3/1981, ICAO3024; CATC (82) 152.

USSR - Malta, 8/10/1981, ICAO 3141.

Kenya - Malawi, 22/4/1982, CATC (88) 81.

Canada - India, 20/7/1982, Can.T.S. 13/1982.

Kenya - Burundi, 20/1/1983, CATC (83) 218.

China - Oman, 3/5/1983, ICAO 3166; CATC (85) 5.

Singapore - Maldives, 12/8/1983, CATC (88) 168.

Canada - St. Lucia, 6/1/1984, ICAO 3210; CATC (86) 59.

Singapore - Mauritius, 24/2/1984, CATC (88) 157.

Comoros - Malawi, 7/8/1984, CATC (88) 86.

Canada - Greece, 20/8/1984, CATC (85) 133; Can.T.S. 11/1987.

China - Australia, 7/9/1984, CATC (85) 261.

Malawi - Mozambique, 23/10/1984, CATC (88) 84.

Canada - Yugoslavia, 16/11/1984, Can.T.S. 3/1985.

Kenya - Uganda, 10/6/1985, ICAO 3224; CATC (86) 60.

Canada - New Zealand, 4/9/1985, ICAO 3208; CATC (85) 302; Can.T.S. 30/1985.

Canada - Barbados, 18/10/1985, ICAO 3393; CATC (85) 382; Can.T.S. 33/1985.

Canada - Jamaica, 18/10/1985, ICAO 3396; CATC (86) 45; Can.T.S. 38/1985.

Canada - St. Christopher and Nevis, 18/10/1985, CATC (85) 383, Can.T.S. 39/1985.

Canada - Israel, 13/4/1986, CATC (86) 206; Can.T.S. 17/1987.

Canada - Belgium, 13/5/1986, CATC (86) 207; Can.T.S. 5/1986.

Canada - Brazil, 15/5/1986, ICAO 3394; CATC (86) 208.

Brunei - Nepal, 10/7/1986, CATC (86) 265.

Brunei - Thailand, 13/1/1987, CATC (87) 114.

Barbados - Trinidad & Tobago, 5/4/1987, CATC (88) 46.

Canada - Portugal, 10/4/1987, CATC (88) 162.

Canada - Ivory Coast, 3/9/1987, ICAO 3395; CATC (88) 155.

Canada - UK, 22/6/1988, ICAO 3404.

Canada - Spain, 15/9/1988, ICAO 3397.

Singapore - Brunei Darussalam, 12/10/1988, ICAO 3449.

USSR - Australia, 18/10/1989, ICAO 3501.

B. Agreements of the United States

I. Pre-Bermuda II

US - UK, 11/2/1946, UKTS No. 3 (1946).

US-Belgium, 17/10/1972, TIAS 7479; ICAO 2473; 938 UNTS 3; rep. (1972) 67 DOSB 573.
[ex.: 29/12/75 & 16/1/76, ICAO 2728; rep. (1976) 74 DOSB 284; ren. & am.: 23 & 27/6/77, TIAS 8618; ICAO 2735; rep. (1977) 77 DOSB 140].

US-UK, 30/3/1973, TIAS 7594; ICAO 2445; rep. (1973) 68 DOSB 669.
[am.: 29/3/74, TIAS 7832; ICAO 2490; rep. (1974) 70 DOSB 508; ex.: 2 & 3/4/75, TIAS 8047; ICAO 2586; rep. (1975) 72 DOSB 592; ex.: 4/6/75, ICAO 2595; rep. (1975) 73 DOSB 196].

US-Federal Republic of Germany, 13/4/1973, TIAS 7605; ICAO 2443; 916 UNTS 113; rep. (1973) 68 DOSB 715.
[am.: 12/3/74, TIAS 7804; ICAO 2479; rep. (1974) 70 DOSB 476; ex.: 30/12/75, ICAO 2624; rep. (1976) 74 DOSB 144].

US-France, 7/5/1973, TIAS 7617; ICAO 2457; 927 UNTS 35; rep. (1973) 68 DOSB 864.
[am.: 26 & 29/3/74, TIAS 7815; ICAO 2487; rep. (1974) 70 DOSB 596; ex.: 29 & 31/12/75, TIAS 8236; ICAO 2648; rep. (1976) 74 DOSB 319].

US-Ireland, 29/6/1973, TIAS 7662; ICAO 2450; 916 UNTS 261; rep. (1973) 69 DOSB 176 & 206.
[ex.: 23/12/75 & 9/1/76, ICAO 2649; rep. (1976) 74 DOSB 356; am.: 28/5/76, TIAS 8306; ICAO 2741; rep. (1976) 75 DOSB 39 & 102].
NOTE: Before the 29 June 1973 MOU was signed, the two countries entered into an agreement, "relating to recognition of charterworthiness of charter traffic" during the month of June 1973; signed 7 & 8/6/73, ICAO 2449; rep. (1973) 69 DOSB 44.

US-The Netherlands, 11/7/1973, TIAS 7771; ICAO 2472; rep. (1973) 69 DOSB 234 and (1974) 70 DOSB 156.
[ex.: 11 & 30/12/75, ICAO 2625; CATC (57) 88D; rep. (1976) 74 DOSB 144].

US-Austria, 6/11/1973, TIAS 7751; ICAO 2463.
[am.: 10 & 22/12/1975, TIAS 8250; ICAO 2651].

US-UK, 28/4/1976, TIAS 8303; ICAO 2727.
[am.: 11/4/1977, ICAO 2737].

US - Yugoslavia, 27/9/1973, TIAS 7819; ICAO 2486; 25 UST 659; 951 UNTS 205; CATC (80) 201; reported in (1973) 69 DOSB 524 and 551.
[Amended: TIAS 8305 and 8972].
[Amended: 15/12/77, TIAS 9364; reported in (1978) 78 DOSB 62].
[Extended: 15/4/81, TIAS 10450; amended and extended: 15/1 and 6/7/1987, reported in (1988) 88 DOSB 86].

US - Canada, 8/5/1974, TIAS 7826; ICAO 2484; 953 UNTS 211; 25 UST 787; CATC (74) 157; reported in (1974) 70 DOSB 596.
[Amended: 19/3/75, ICAO 2588; 992 UNTS 389].

US - Jordan, 21/9/1974, TIAS 7954; ICAO 2548; reported in (1974) 71 DOSB 564 and 580.
[Amended: 14 & 16/3/77, TIAS 8553; ICAO 2721; reported in (1977) 76 DOSB 388; amended: 10/1/79, ICAO 2984].
[Amended: 10/1/79, TIAS 9375].

US - Switzerland, 12/6 & 25/7/1974, ICAO 2545; reported in (1974) 71 DOSB 492 (no longer in force: DOC 9460, Ch. 3, note 4).
20 & 24/11/1975, ICAO 2672; reported in (1975) 73 DOSB 912; replaced by: 14 & 27/7/1977, TIAS 8695; ICAO 2749; 1088 UNTS 103; reported in (1977) 77 DOSB 328.

US - UK, 23/7/1977, TIAS 8641; UKTS No. 76 (1977).
[Amended: 25/4/78, TIAS 8695; UKTS No. 85 (1978)].
[Amended: 4/12/1980, UKTS No. 21 (1981)].

II. Post-Bermuda II

US - The Netherlands, 31/3/1978 [Protocol of Amendment], TIAS 8998; CATC (57) 88B.
[amended: 13/10 & 22/12/1987, CATC (57) 88D at paras. 5 & 6].

US - Romania, 26/4/1978 [MOU], TIAS 9431; CATC (74) 17A.

US - Nigeria, 27/4/1978 [MOU], TIAS 8999; ICAO 2855.

US - Israel, 16/8/1978 [Protocol of Amendment], TIAS 9002; ICAO 2857.

US - Federal Republic of Germany, 1/11/1978 [Protocol of Amendment], TIAS 9591; ICAO 2987.

US - Rep. of Korea, 22/3/1979 [MOU], TIAS 9427; ICAO 2982.

US - Papua New Guinea, 30/3/1979, TIAS 9520.

US - Jamaica, 4/4/1979 [Protocol of Amendment], TIAS 9613; CATC (79) 74; ICAO 2887.

US - Singapore, 14/9/1979 [MOU], CATC (78) 78C; ICAO 2966.

US - Fiji, 1/10/1979, TIAS 9917; ICAO 2907; CATC (81) 175.

US - Thailand, 7/12/1979, TIAS 9704; ICAO 3009; CATC (80) 252.

US - Senegal, 1979, Provisions in U.S. International Air Transport Agreements: A Compilation of Texts of Scheduled and Charter Provisions Contained in U.S. Bilateral Air Transport Agreements, Vol. III (Washington, D.C.: Air Transport Association of America, 1985) 81 at 109 [hereinafter, ATA].

US - Netherlands - Antilles, 25/1/1980, CATC (80) 227.

US - Jordan, 21/2/1980, TIAS 9868; ICAO 3077; CATC (80) 175.

US - Finland, July 1980 [Protocol of Amendment], TIAS 9845; CATC (49) 107A.

US - Belgium, 23/10/1980, TIAS 9903; ICAO 3074.

US - New Zealand, 25/11/1980 [Memorandum of Consultations], TIAS 9956; ICAO 3074.

US - El Salvador, 2/4/1982, TIAS 10488; CATC (83) 9.

US - Barbados, 8/4/1982, TIAS 10370; ICAO 3221.

US - China, 17/9/1982, TIAS 10326; reproduced in (1980) 80 DOSB 2 et seq.

US - Japan, 7/9/1982 [MOU], TIAS 10434; CATC (53) 201.

US - Brazil, 20/4 & 2/5/1983 [Interim Agreement], TIAS 10896.

US - Costa Rica, 20/10 & 23/11/1983, TIAS 10894.

US - Argentina, 22/10/1985, CATC (85) 384.

US - Ecuador, 26/9/1986, CATC (87) 112.

US - Aruba, 7/11/1986, CATC (87) 9.

US - Czechoslovakia, 29/6/1987, CATC (88) 91; ICAO 3359.

US - Poland, 1/2/1988, CATC (88) 126.

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A. Documents

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7. UNITED STATES OFFICIAL PUBLICATIONS

"Statement of International Air Transport Policy" (1970) 63 DOSB 86.

"U.S. Accepts Agreed Principles for North Atlantic Charter Flights" (1973) 69 DOSB 20.

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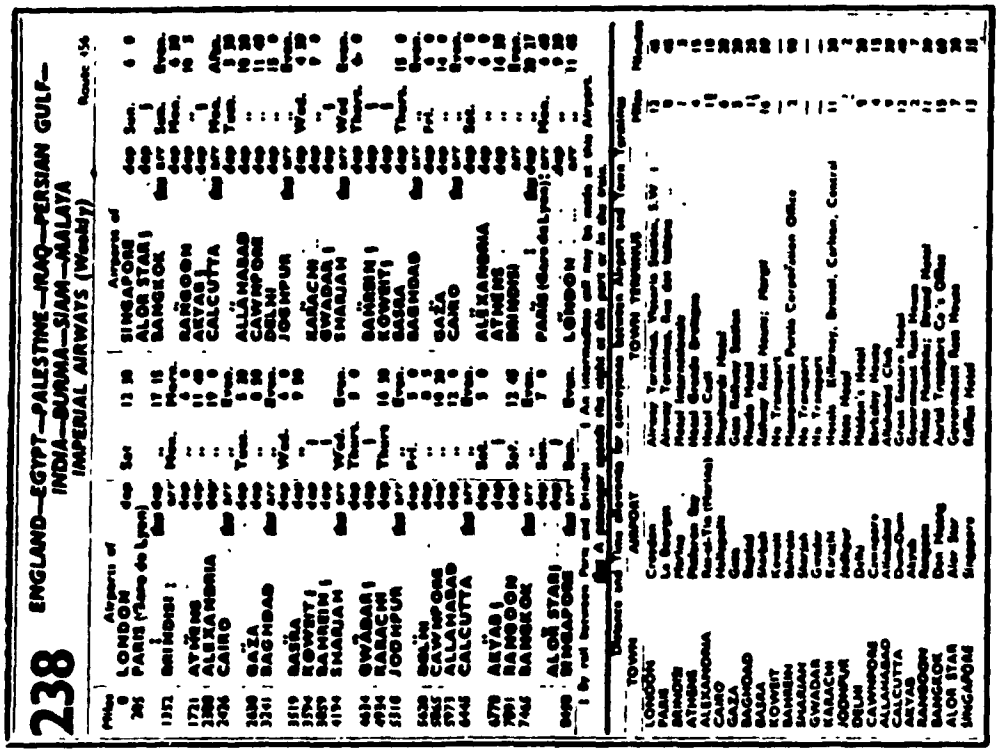
APPENDIX



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