THE "FAIR AND EQUAL OPPORTUNITY" CLAUSE IN BILATERAL AIR TRANSPORT AGREEMENTS OF THE PEOPLE'S REPUBLIC OF MOZAMBIQUE

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TABLE OF CONTENTS

ABSTRACT

The object of this thesis is to establish whether a particular aviation regulation of the People's Republic of Mozambique is incompatible with the "Fair and Equal Opportunity" clause appearing in the predetermination-type air transport agreements concluded by Mozambique. The regulation gives priority to the national airline (L.A.M) over foreign airlines to carry certain categories of traffic.

An investigation is made to ascertain not only whether the "Fair and Equal Opportunity" clause has a common meaning among States, but also the relevance of the interpretation given to Bermuda I Air Transport Agreement between the United Kingdom and the United States with regard to other bilateral air transport agreements modelled on it, concluded by other States.

Brief reference is made to the civil aviation structure in Mozambique and to the international legal framework of civil air transport.

RÉSUMÉ

Cette thèse a pour object de faire des investigations si une determinée réglementation legale de la République populaire du Mozambique au sujet de l'aviation civile est incompatible ou non avec la clausule de la "juste et égale opportunité" existenté dans les accords bilateraux du transport aérien, de l'orientation pré-deterministe, conclus par le Mozambique. Le diplôme legal indiqué ci-dessus donne la priorité à la compagnie aérienne nationale (L.A.M.) sur les congénères étrangeres en relation au transport de certainnes categories du trafic.

On recherche, pas seulement si la clausule de la "juste et égale opportunité" est donnée par les États un même et unique sens, mais aussi l'importance de l'interpretation donnée à l'accord des Bermude I, entre le Royaume Uni et les États Unis d'Amérique, en relation à d'autres accords du transport aérien y modelés, conclus par d'autres États.

On fait, finalement, briève referènce à la structure de l'aviation civile au Mozambique et aux normes internationales qui réglent le transport aérien civil.

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The views expressed in this thesis are my own views. The Government of the People's Republic of Mozambique, ICAO or L.A.M. (my employer) do not necessarily share my viewpoints.

ABBREVIATIONS

BATA	Bilateral Air Transport Agreement.
CAB	(U.S.A.) Civil Aeronautics Board.
CRAC	Conferencias Regiolanes de Aviación Civil.
D.E.T.A.	Direcção de Exploração dos Transportes Aéreos.
ECAC	European Civil Aviation Conference.
IATA	International Air Transport Asssociation.
ICAO	International Civil Aviation Organization.
ITA	Institut du Transport Aérien.
KLM	Royal Dutch Airlines.
L.A.M.	Linhas Aéreas de Moçambique, E.E.
TAP	TAP-Air Portugal.
TIAS	Treaties and Other International Acts Series (U.S.A.).
TTA	Empresa Nacional de Transporte e Trabalho Aéreo, E. E.

" The application of Bermudian principles to Mozambique would be tantamount to allow you to go with your hand into my pocket, take my money out and use it according to your wish."

(Eugénio Baptista de Figueiredo Picolo, former National Director for Civil Aviation, Mozambique).

CHAPTER I

THE INTERNATIONAL CIVIL AIR TRANSPORT STRUCTURE OF MOZAMBIQUE

A - THE PRESENT POLITICAL AND CONSTITUTIONAL STRUCTURE

Mozambique, was until June 25, 1975, one of Portugal's colonies in Africa. On that date, FRELIMO, proclaimed the independence of the country. This constituted a culmination of 10 years of armed struggle against the Portuguese Colonialism carried out by FRELIMO.

The Political Constitution of the country, drawn up by the Central Committee of FRELIMO - Partido de Vanguarda, the ruling Party, spells out that, from the independence, the country is known as "República Popular de Moçambique", People's Republic of Mozambique (1).

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(1) Article 1 of the Constitution which, according to the official translation, reads as follows:

> "The People's Republic of Mozambique, the fruit of the Mozambican People's centuries-old resistance and their heroic and victorious struggle, under the leadership of FRELIMO, against Portuguese colonial domination and imperialism, is a sovereign, independent and democratic State."

The FRELIMO Party, according to the Constitution, is the "leading force of the State and Society"(2). As such, through its Congress (3), the Party draws up in broad terms the policy to be followed and the goals to be achieved through its "directivas", guidelines.

The President of the Party is, according to the Constitution (4), the President of the People's Republic of Mozambique. The President of the Republic is the Head of State (5).

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(2) Ib., Article 3 which states:
"The People's Republic of Mozambique is guided by the political line laid down by FRELIMO, which is the leading force of the State and society. FRELIMO lays down the basic political orientation of the State and directs and supervises the work of State organs, in order to ensure that the State policy is in conformity with the people's interests".

(3) The Congress is the supreme organ of the Party which, as a rule, meets every five years (Article 16 (2) of the "Estatutos e Programa do Partido", Statutes and Programme of the Party).

(4) Article 53 reading:
"The President of the People's Republic of Mozambique is the President of FRELIMO. The President of the People's Republic of Mozambique is the Head of State. He is the Symbol of national unity and represents the Nation at home and internationally."

(5) Ib.

He is the Chairman of the Cabinet-Council (6) which constitutes the Government of the People's Republic of Mozambique (7).

The supreme organ of the State is the "Assembleia Popular", the People's Assembly (8), the legislature. It meets twice a year, as a rule (9).

The Chairman of the People's Assembly is the President of the Republic. The main task of the People's Assembly is to enact "leis", statutes.

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(6) Article 59 which reads:
"The Council of Ministers is presided over by the President of the Republic. The composition of the Council of Ministers is fixed by law."

(7) Article 58 which provides:
"The Council of Ministers is the Governing body of the People's Republic of Mozambique. In its work the Council of Ministers must comply with the laws of the People's Assembly and of its Permanent Commission and with decisions of the President of the Republic."

(8) Article 43 which sets forth that:
"The People's Assembly is the supreme organ of State power in the People's Republic of Mozambique(...)"

(9) Article 47 of the Constitution:
"The People's Assembly is convened and presided over by the Head of State. The People's Assembly meets in ordinary sessions twice a year, and in extraordinary sessions when convened by the President of the Republic or when convocation is requested by the Central Committee of FRELIMO, by the Permanent Commission of the People's Assembly, or by at least one-third of the members of the People's Assembly."

This constitutes an exclusive power which is only shared with the "Comissão Permanente da Assembleia Popular", the Permanent Commission of the People's Assembly, a permanent organ made up of deputies selected among the members of the People's Assembly.

The task of this organ is to take the place of the People's Assembly in the period when it is adjourned (10). The enactments of the Permanent Commission, although come in force in the meantime, must be ratified at the next session of the People's Assembly (11). All the statutes enacted either by the People's Assembly or by its Permanent Commission are promulgated by the President of the Republic (12).

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(10) The relevant part of Article 51 of the Constitution reads as follows:

> It is the duty of the Permanent Commission of the People's Assembly in periods between the meetings of that organ (...)

(11) Article 44 of the Constitution States:

> "The functions of the People's Assembly are as follows:
>
> a) ...
>
> g) To ratify legislative acts of the Permanent Commission of the People's Assembly"

(12) Ib. , Article 54 states that:

> "It is the function of the President of the Republic:
>
> a)...
>
> c) To promulgate the laws, legislative decrees and resolutions".

One of the duties of the People's Assembly, inter alia, is the ratification of treaties (13).

The Government, whose Chairman is the President of the Republic, is the executive body entrusted with the execution of the guidelines issued by the Party's Congresses and of the laws and resolutions of the legislature. The policies of the government must comply with those drawn up by the Party and by the legislature. The Government reports to the People's Assembly (14).

The Constitution (and any other document) does not clearly stipulate the procedural aspects of implementation by the Government. However, practise has shown that only the Cabinet-Council, as a whole, may enact "decretos", decrees. The President issues not "decretos" but "decretos presidencias", that is to say, presidential decrees. A minister or a group of ministers issue "diploma ministerial", and the least formal kind of regulation issued as a rule by each minister is the "despacho", ministerial dispatch. Thus, the hierarchy of enactments in

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(13) Ib., Article 44 (e).

(14) Ib., Article 61 which reads:
"The Council of Ministers is answerable to the People's Assembly for the implementation of the internal and external policy of the People's Republic of Mozambique, and is accountable to it for its activities. The members of the Council of Ministers are personally responsible for the decisions and work of the Council of Ministers and for their implementation."

the People's Republic of Mozambique can be said to be:

. Constitution

. Statute

. Decree

. Presidential decree/ "Diploma Ministerial"

. Ministerial dispatch

All the above regulations are clearly binding and enforceable either in civil or criminal courts or in "tribunais administrativos", administrative tribunals, depending on the kind of matter in dispute.

B - AVIATION POLICY MAKERS AND BILATERAL AIR AGREEMENTS NEGOTIATORS.

Based on our discussion, we observe that the national bodies that are directly connected with enacting a civil aviation policy in Mozambique are the following:

- The FRELIMO Party through its broad guidelines issued in its Congresses;

- The legislature which embodies the air policy in statutes;

- The government whose main task, in keeping with its executive role, is concerned with finding the best way to implement an operative air policy by enacting suitable regulation and negotiating bilateral air transport agreements.

Although the negotiation of bilateral air transport agreements is a task of the government, a body (not even a ministry) has been entrusted with that task. For example, from independence in 1975 until 1980, the area of civil aviation was integrated in the Ministry of Transport and Communications (15) (16). This ministry was deemed to be the "aeronautical authority" according to the definition embodied in the bilateral air transport agreements concluded at that time. For example, the bilateral air transport agreement with Romania states:

> "Aeronautical Authority" means, as regards the Socialist Republic of Romania, Department of Civil Aviation, and as regards the People's Republic of Mozambique, the Ministry of Transport and Communications or in both cases any person or body authorized to perform the functions presently exercised by these aeronautical authorities (Emphasis added)" (17).

However, it was a separate body, the National Directorate for Civil Aviation, headed by a National Director for Civil Aviation, which dealt with the negotiation, implementation and monitoring of that particular

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(15) "Portaria" no. 83/76 set up the "Direcção Nacional da Aviação Civil" whose task was to supervise the airlines, ensure compliance of safety standards, licensing of personnel and similar technical aspects.

(16) The national airlines presently existing in Mozambique are: "Linhas Aéreas de Moçambique, E.E." (L.A.M.) for domestic, regional and intercontinental, scheduled and non-scheduled, air services; "Empresa Nacional de Transporte e Trabalho Aéreo (TTA) which is mainly a feeder airline. Details on the airlines, their fleet, the routes etc. will be dealt with later, in this Chapter, under paragraph D.

(17) Article 1, paragraph c) of the Bilateral Air Transport Agreement Mozambique - Romania, of 21st April, 1979.

bilateral air transport agreement and others.

In 1980, the Ministry of Transport and Communications was split. A new ministry, the Ministry of Posts, Telecommunications and Civil Aviation, was created. This ministry lasted until 1983. The area of civil aviation was entrusted to the Department of Civil Aviation which continued to perform the same duties and responsabilities of the superseded National Directorate for Civil Aviation. Under both the Ministry of Transport and Communications and the Ministry of Posts, Telecommunications and Civil Aviation, the Director for Civil Aviation reported to the respective minister.

In 1983, another re-organization of ministries was carried out. The Secretariat of State for Civil Aviation was created. It was regarded as a quasi-miniatry, the Secretary of State for Civil Aviation not being subordinated to any minister but, reporting directly to the Cabinet-Council (18). In keeping with this, the bilateral air transport agreement with Malawi concluded in 1984 lays down that for the purpose of the bilateral agreement, the aeronautical authority is the "Secretariat of State for Civil Aviation"(19).

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(18) Presidential Decree no.18/83, of May 28, 1983.

(19) Article 1 of the Bilateral Air Transport Agreement concluded on October 23, 1984.

However, according to a legislation enacted recently in 1985, the Secretary of State for Civil Aviation is supposed to report to the Minister of Ports, Railways and Mercantile Marine (20). Whatever the legal status of the Secretariat of State for Civil Aviation is (whether it is an autonomous body or is integrated in a ministry), it is beyond any question that the task of formulating and proposing to the government a sound aviation policy and a sound strategy for the negotiation of bilateral air transport agreements is, ultimately, entrusted to the head of civil aviation.

Turning to the question of the process of negotiating a bilateral air transport agreement, one must recall that a bilateral air transport agreement is nothing more than a trade agreement between two governments (21). Being so, at least three authorities may have an interest in it:

. the Civil Aviation Authority.

. the Ministry of External Trade.

. the Ministry of Foreign Affairs.

In Mozambique, the preparation and negotiation of bilateral air transport agreements is entrusted to those primarily concerned with civil aviation: the Secretariat of State for Civil Aviation.

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(20) Presidential decree no. 5/85, of May 22, 1985.

(21) Haanappel, P.P.C., "Bilateral Air Transport Agreements - 1913 - 1980", Vol.5, Int'l Trade L.J. (1979), p.241.

The first step towards the negotiation of a bilateral air transport agreement may come from either of the prospective contracting parties.

The government of Mozambique might feel that a service to a particular foreign country would be in the interest of the country. It may happen that the approach comes from another government. The Aeronautical Authority within its overall plan to develop air transport may take the initiative.

In negotiating a bilateral air transport agreement there is a number of considerations that must be taken into account, for instance:

- Whether a given air service is economically viable or will be in the future. This is the rule applied in most cases.
- Linked with the abovementioned economic criterion, there is the issue of the route pattern itself (indeed, the revenues of the airlines will derive from the exploitation of given routes which may or may not serve a worthwhile market).
- Political considerations may also play a major role. That is to say, the air services to a particular country may sometimes not be particularly attractive in terms of revenues. But the government may feel that air links with that country may promote better understanding and closer collaboration.

Other political considerations that may be taken into account are the desire to develop tourist trade or that of promoting cultural exchanges.

In negotiating bilateral air transport agreements, the Contracting Parties are interested in an exchange. They want different things. Therefore the negotiators must carefully establish, in advance, the price to pay in return, as well as the repercussions which may occur.

The team of negotiators is made up of only aviation people, including members of the national airline who have the status of delegates and not merely that of observers (22). To the knowledge of the author of this paper, the Ministry of External Trade has never been involved in a negotiation of an aviation agreement. In the bureaucratic process preceding the negotiations (i.e. exchange of standard forms of bilaterals, analysis of routes and the market value of the other country, the decision on which traffic rights should be exchanged with a given State) the Ministry of Foreign Affairs is consulted just for advice on matters of foreign policy (23). But as of today, no representative has been included in the negotiating team.

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(22) Source: own information and own experience as a delegate in the negotiations of several agreements.

(23) Idem.

The Political Constitution of the People's Republic of Mozambique empowers the President of the Republic **"to conclude international treaties"**, according to Article 54 (f). However, in regard to bilateral air transport agreements, practise has shown that, as a rule, the President of the Republic has delegated his constitutional powers of concluding treaties to both the Ministry in which the area of Civil Aviation is integrated and the head of delegation (almost invariably the person in charge of civil aviation) who, so far, have signed the agreements.

The coming into force of a bilateral air transport agreement varies from agreement to agreement. Sometimes it comes into force immediately upon its signature. This is, for example, the case of the agreement with the Soviet Union that says:

> "The present Agreement shall come into force from the day of its signing (24).

In other cases the coming into force of an aviation agreement is subject to ratification as, for example, the agreement with Romania:

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(24) Article 21 of the Agreement (February 12, 1976)

"The present Agreement shall come into force when the Contracting Parties have reciprocally notified the compliance with the formalities required by their legislation relating to the coming into force of International Agreements"(25).

C - National Air Transport Regulations.

Aviation, in Mozambique, is in its infancy. This is reflected in its legislation which, not being exhaustive, only has dealt with certain aviation related matters as, for example, Air Navigation, Personnel Licensing and User Charges. Whatever little legislation it has can be dated to the pre-independence period. Moreover, its legal status is doubtful, notwithstanding that the Constitution states that the legislation existing at the time of its coming into force not contrary to its provisions remains in force (26). Whatever the case, the fact is that it deals with technical matters, except for provisions on User Charges which, in the meantime, have been replaced by new provisions, and not with air transport, a subject intimately related with the subject-matter of this paper.

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(25) Article 16 (1) of the Agreement (April 21, 1979).

(26) Article 79 of the Constitution. However, technical legislation only very hardly can be regarded as contrary to the Constitution.

According to what has been said above, we are going to concentrate our attention to the legislation enacted after independence. The one dealing with air transport deserves more attention. Significant air regulations for international air transport are the "Diploma Ministerial" no.97/80 and the "Diploma Ministerial" no. 99/80, both of 22 October, 1980.

The first deals with the rules regarding the issuance of air traffic documents for international travel originating in Mozambique and the latter deals with charges for providing Airport and Air Navigation facilities. In this paper, we shall discuss only the "Diploma Ministerial" no. 97/80 which has the most real connection to the subject-matter of this paper, and also the legal status of bilateral air transport agreements vis-à-vis the domestic law of Mozambique as it is a related matter.

1. The "Diploma Ministerial" no. 97/80.

Economic reasons led the Government of the People's Republic of Mozambique to enact this regulation. This is reflected in its Preamble which states that international air transport originating in the People's Republic of Mozambique is reflected in payments in convertible currency which are a significant burden in the foreign exchange funds of the country. The abovementioned situation called for corrective measures by means of enacting regulation dealing with the issuance of air transportation documents. It would be an operative tool for Civil

Aviation to achieve a sound management of the foreign exchange entrusted to its area (27).

The legal norms were believed to put an end to this situation, or at least, to help it. The most important provisions of "Diploma Ministerial" no. 97/80 are incorporated in Articles 4, 5 and 6. Article 4 deals with the selling of passenger tickets; article 5 deals with the issuance of PTA's (28); article 6 deals with air cargo and baggage transport.

It is well known that for the portion of the journey to be flown in a foreign air carrier, the air fare must be paid to that carrier in convertible currency which is then transferred to its homeland. It was then thought that if the traveller paid in convertible currency, that would diminish remittances abroad. In fact, in this case what will be transferred will not be the local currency but exactly the same currency paid by the passenger. On the other hand, it is the sole responsibility of the traveller to obtain foreign currency and he cannot expect any help from any institution of the State. The above has been incorporated into government regulation by article 4 of the "Diploma Ministerial" which says:

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(27) Preamble of "Diploma Ministerial" no. 97/80. This regulation appears as Appendix A of this paper.

(28) PTA stands for "Prepaid Ticket Advice".

"Tickets for international air travel with origin in Mozambique are to be sold in convertible currency" (29).

This general principle is applicable to all individuals , citizens or not, to all corporations, State-owned or not, inter-governmental organizations or diplomatic missions.

However, the general principle discussed above is subject to a few exceptions which are important in nature. Certain individuals and legal persons may be authorised to make their travel payments in the local currency if they meet certain conditions. Such an exception would be applicable to

- Government officials and civil servants travelling on official duty.
- Employees of State-owned enterprises travelling on official duty.
- Those individuals belonging to private enterprises when travelling on duty, if such travel is authorised by the Minister supervising their business field.
- Those travelling under government contracts.
- Citizens on private travel within the network of the national airline, once in a year.
- Expatriates, who have been residing in Mozambique for more than 3 years, not entitled under their labour contracts to transfer abroad any part of their salaries , for one trip in a year, in the network of the national airline (30).

The same article adds that "the handling" of the exceptions are to be

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(29) Article 4 (1) of the Regulation.

(30) Ib. , Article 4 (2)

"mandatorily processed through L.A.M." (31), the national airline (32). Despite its briefness, it is one of the key-provisions of Article 4. The seemingly harmless language in which it is written may mislead those not paying enough attention to it. In fact, in actual practice, it has been construed as giving a first entitlement to the national airline to carry this exceptional traffic which, indeed, may be termed "national traffic" in the sense that it pays in local currency. Construing the provision otherwise would make no sense, since the bureaucratic process designed to evidence that one qualifies for the exception is entirely carried out outside the airline. The Aeronautical Authority is the one that authorizes or decides on the application, without any need of the airline's opinion. Another evidence of this assertion is that, as said above, the exception is given for travelling "in the network of the national airline".

Article 6 deals with the carriage of cargo. The rule for payment of such carriage in convertible currency is laid down in paragraph 3 (33) (34). It is noteworthy that rather than being mandatory, the use of the

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(31) Ib., Article 4 (3)

(32) For details on L.A.M. , the national airline, see Paragraph D, 1, of this Chapter.

(33) Article 6, paragraph 3 reads as follows:
"The carriage of all goods to be carried abroad the country shall be paid in convertible currency".

(34) Temporary exports are exempted from the general principle quoted above. This has been laid down in paragraph 4 of that same Article.

national carrier for the carriage of cargo is merely an exhortation:

> "The carriage of cargo from or to the country shall be done preferentially in the network of the national carrier" (35).

As to the import and export involving air transport, a different approach was taken: there shall be mandatory coordination between shippers and the national airline (36). The aim, of course, is to afford a chance to the national airline to carry this traffic with priority over others.

Article 5 regulates the issuance of PTA'S. These are issued exclusively by the national airline. Qualify for the receipt of a PTA:

- Cases covered by government contracts.
- Parents of Mozambican citizens who cannot afford the payment of the air transport carriage "on flights of the national airline".
- Under-age children studying abroad (37).

To close this discussion we would refer the reader to Chapter III. It discusses what has not been stated in the Preamble of the regulation and which most contribute for the detrimental effect on the foreign currency of the country: the existence of an unbalanced situation in the number of passengers who start and terminate their air travels in Mozambique. The foreign air carriers, more experienced

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(35) Article 6 (1).

(36) Ib. , paragraph (2).

(37) Article 5 (2) (a) and (b).

and better equipped than the national airline, when picking up traffic in Mozambique were doing nothing but reaping where they had not sown.

2. Bilateral Air Transport Agreements v. Domestic Laws

We have been discussing the air transport regulations of Mozambique. But, before we proceed any further, it is essential, first, to examine the legal status of a bilateral air transport agreement. And once such an agreement is in force, can it qualify as part of the law of Mozambique. This question is a crucial one because according to the long-recognized principle of customary international law of **pacta sunt servanda**, once a State has adhered to a treaty, that State is obliged to respect it and conduct itself in full accordance with the treaty (38).

This can give rise to an embarrasing situation. For example, if for any Constitutional reasons, a treaty in a given country is not considered part of the law of the land, it might happen that national bodies because of that reason are unable to give effect to that treaty. The situation is this: on the one hand the government is obliged to fulfil

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(38) The principle of **pacta sunt servanda** has been incorporated in Article 26 of the Vienna Convention on the Law of Treaties, of May 22, 1969, which reads:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

its duties under the treaty but on the other hand national bodies are legally unable to give effect to the treaty (39).

In Mozambique, practice has shown that bilateral air transport agreements are considered as being inter-governmental agreements and therefore are not ratified by the People's Assembly as it is the case with all "international treaties": this has already been dealt with in paragraph A of this Chapter. In addition, the Constitution does not state whether or not inter-governmental agreements should be ratified and, further, which body should do it.

Prior to independence, bilateral air transport agreements were ratified by the government by decree. They had the legal standing of the Act by which they had been ratified, that is to say, of a decree (40) (41).

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(39) That was the situation, for ex., in an English Court of Appeal decision regarding the bilateral air transport agreement between the UK and the USA, of 1946, The Bermuda I agreement, where it was said that that agreement was a useful illustration as to what governments had agreed between themselves but it formed no part of British municipal law. - Pan-American World Airways v. Department of Trade (1976), 1 Lloyd's L.R. 257.

(40) The "decree" is drawn up by the government and does not have the same standing of a "law" which is enacted by the legislative body and has a superior legal standing.
In the post-independence period the government very seldom has enacted a "decree-law" possibly because of the existence of the Permanent Commission of the People's Assembly whose task is precisely the enactment of "laws" in the adjourning period of the People's Assembly.

However, the post-independence legal environment around bilateral air transport agreements is rather vague and, indeed, uncertain. Only the bilateral air transport agreement with the German Democratic Republic has been published in "Boletim da República", the official journal (42).

As will be seen in Chapter II, the People's Republic of Mozambique has concluded a number of bilateral air agreements. For illustrative purposes only, the national airline was until 1983 providing scheduled air services to Sofia (Bulgaria) under the respective bilateral air transport agreement. According to article 16 of this agreement, it would come into force after ratification. The "Boletim da República" never published the text of the agreement nor notified its ratification.

Despite that, de facto, it was and is still in force.

Further examples of inter-governmental agreements (ratified by "resolution" of the Cabinet-Council) are the agreements on Economic, Scientific, Technical and Commercial Cooperation concluded with the

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(41) In Portugal the Bilateral Air Agreement with Mozambique was ratified by the government through the decree no. 73/77.

(42) It should be noted, however, that the "Boletim da República" has not notified the ratification of that agreement; it just published its text.

Socialist Republic of Vietnam, with Switzerland and with Zimbabwe. The ratification and the text of these agreements have been published in the "Boletim da República", no.46, I Série, of November 19, 1980.

It should be noted that in the hierarchy of enactments discussed above, "resolutions" were not included in the list as binding and enforceable enactments in the courts of Mozambique.

In addition, everywhere, including inter-governmental organizations, resolutions are generally regarded as not binding and have no legal standing (43).

Under these circumstances what is the legal standing of a bilateral air agreement in Mozambique vis-à-vis the domestic legislation? Will the courts, for example, one day, if they are faced with it, give effect to a bilateral air transport agreement ratified by "resolution" and not specifically made part of domestic law?

In the absence of a judicial pronouncement on this matter, it is difficult to state with certainty how the courts would decide.

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(43) For example, on the United Nations General Assembly Resolutions, it has been said that

> "States often don't meanigfully support what a resolution says, and they almost always do not mean that the resolution is law." (Emphasis added)

See "United Nations General Assembly Declarations", in the "Digest of United States Practice in International Law 1978", at p. 1.

D - AIRLINES AND THEIR ROLE

1. Direcção de Exploração dos Transportes Aéreos (D.E.T.A.).

D.E.T.A. was the first airline in Mozambique. It was created in 1936 by the "Diploma Legislativo" no. 521, of August 26, 1936 as a Department of "Serviços dos Portos, Caminhos de Ferro e Transportes", the Railways Service, an institution run by the State. This airline existed until 1980, initially providing domestic and regional international, scheduled and non-scheduled, air services. But in the period after Mozambique gained independence, along with the previously referred services, it extended its operations to long-haul services to Europe (serving points such as Lisbon and Rome).

However, in 1980, the Government of Mozambique realized that D.E.T.A. had inherent weaknesses, such as poor organization and poor services for the travelling public; these, it was incapable of overcoming. Thus it had failed to adapt itself to the new requirements of independence. Therefore, the government, through decree no. 8/80 of November 19, 1980, decided to extinguish the airline and create a new one through the same decree. In addition, another airline with a more narrow scope was created in the same year by decree no. 9/80. In this paper I will discuss in the first place the major airline and, in the second, the other one.

2. Linhas Aéreas de Moçambique, E.E. (L.A.M.)

The new airline created by decree no. 8/80, with retroactive effect as from May 14, 1980, is the currently existing major national airline, "Linhas Aéreas de Moçambique, E.E." (L.A.M.).

L.A.M., as a State enterprise of a national scope, was created by decree, according to the law governing the State-owned enterprises (44). Despite being wholly State-owned, the airline is autonomous in its functioning. This is stated in the decree:

> "L.A.M. is a State enterprise endowed with administrative, financial and patrimonial autonomy"(45).

The decree does not state whether the airline has its own legal personality and legal capacity. But it is beyond doubt that it does. Under the law no. 2/81, which governs all State enterprises, all are endowed with their own legal personality and capacity (46). This means that they can sue and be sued and conclude any agreement or contract in their own names.

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(44) Article 6 (2) of law no. 2/81. See Appendix B.

(45) Decree no. 8/80, Article 1 (2).

(46) Law no.2/81, Article 5.

Article 2 of Decree no. 8/80 declares that L.A.M. is attached to the Ministry of Posts, Telecomunications and Civil Aviation (47) and its scope is nationwide (48). It further states that its headquarters are to be located in Maputo, the capital of the country. However, branches and offices may be established anywhere in Mozambique or abroad with the authorization of the minister.

The objective of L.A.M. is laid down in article 3. The relevant part reads as follows:

> " L.A.M. has, as its main objective the public service of carrying passengers, cargo and mail on intercontinental and regional international air services as well as domestic air services, of a scheduled and non-scheduled nature" (49).

L.A.M. may enter into an association or collaboration of any kind with other companies, corporations or organizations which carry out similar activities or which help in the achievement of its objectives, provided that the necessary authorization has been given by the minister (50).

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(47) It is to be recalled that, with the creation of the Secretariat of State for Civil Aviation in 1983 (see above p. 8) the enterprises dealing with civil aviation were attached to this new body.

(48) In contrast with enterprises of national level, there are those whose scope is confined to a certain area of the country, such as, a province. This is laid down in Article 6 (2) of law no. 2/81.

(49) Decree no. 8/80, Article 3 (1).

(50) Ib. , Article 3 (2) and (3).

According to Article 5, the capital of the airline is 1.2 million "contos". This amount includes any property transferred from D.E.T.A. (51) and ANAVIA (52) to L.A.M. (53).

The decree is silent on the question of the managing body of the airline. This is so because the law governing state enterprises deals with this subject. The person charged with the management of the airline is the Director General (54) who may be assisted by Directors. The Director General is the legal representative of the airline and may enter into any agreement or contract on behalf of the airline; he is appointed by the government (55). The Directors are also appointed by the government, but they must be proposed by the Director General (56).

L.A.M.'s fleet is made up of:

. 3 Boeing 737
. 1 Ilyushin IL-62
. 1 DC 10-30

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(51) D.E.T.A. was extinguished by Article 4 (1) of the discussed decree.

(52) ANAVIA was a State owned Travel Agency. It was extinguished also by this decree (Article 4 (2)).

(53) Decree 8/80, Article 5 (2).

(54) Law no. 2/81, Article 15 (1).

(55) Ib. , Article 17 (1).

(56) Ib., Article 17 (2).

With this fleet, the airline serves the following routes:

Domestically, the airline links Maputo, the capital of the country, with 7 (57) of the 10 (58) provincial capitals.

Regionally it flies, in weekly services, to Harare (Zimbabwe), Dar-Es-Salaam (Tanzania), Luanda (Angola) and Johannesburg (Republic of South Africa) (59).

These services are performed by Boeing 737 equipment.

Long-haul services are operated, weekly, to Lisbon (Portugal), Paris (France), Copenhagen (Denmark) and East-Berlin (German Democratic Republic) (60).

These services are performed by the DC-10 and the IL-62.

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(57) Beira, Quelimane, Nampula, Pemba, Lichinga, Tete (and Maputo).

(58) In addition to the above referred capitals, others are: Xai-Xai, Inhambane and Chimoio.

(59) L.A.M. flies to those places using the following routes:
- Maputo - Harare - Maputo
- Maputo - Luanda - Maputo
- Maputo -Johannesburg - Maputo

(60) Long-haul services use the following routes:
- Maputo - Lisbon - Maputo
- Maputo - Paris - Copenhagen - Berlin and back

As for the foreign airlines flying to Mozambique, these will be dealt with in Chapter III, paragraph A.

According to the statistic data available, L.A.M. carried, in 1985, in domestic services 150,463 passengers; 23,660 passengers in regional international services and 33,535 passengers in long-haul services (61).

Although L.A.M. flies to many places, it has stations only in Berlin, Copenhagen, Johannesburg, Lisbon and Paris.

As an important feature of the State-owned enterprises in Mozambique it should be said that although they have their own budget, the Director General of the enterprise is answerable on accounting matters not only to the Ministry to which his enterprise is attached but also to the Ministry of Finance. He must submit annual statements to the abovementioned ministries (62). Accordingly, state enterprises are subject to inspections by the Audit Department of the Ministry of Finance (63). According to the law (64), the Ministry of Finance, under proposal of the Ministry to which the state enterprise is attached, is

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(61) Information from L.A.M.

(62) Law no. 2/81, Article 28 (2) and (3)

(63) Ib. , Article 28 (7)

(64) Ib., Article 26 (2)

entitled to decide, case by case, the proportion of the enterprise's profits that is to be transferred to the State Budget.

Finally one must say that L.A.M. is an active member of IATA.

3. Empresa Nacional de Transporte e Trabalho Aéreo (TTA)

The "Empresa Nacional de Transporte e Trabalho Aéreo, E.E.", most commonly known as TTA, is the second airline of the People's Republic of Mozambique. In contrast with L.A.M., it operates small aircraft. It directs its efforts to different activities in the air and is more concerned with commuter air services. The decree creating this small airline follows that one of L.A.M., word by word, except in a few articles including the main objectives of the airline.

TTA was created by decree no. 9/80, of November 19, with retroactive effect as from 1 November of that year (65). The objectives of this small airline are laid down in article 3 which, however, must be read altogether with the Preamble of the decree. According to the Preamble, the airline

> "shall organize itself to provide all the aerial work related to, aerial spraying, cartography, geological prospecting, road and railroad construction and electric energy lines."

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(65) Decree no. 9/80, Article 8. It appears as Appendix D.

This aim has been embodied in article 3, which states that the airline, among others, has as its main activities:

> "to carry out the aerial work in support of social and economic activities, and that relating to search and rescue operations."

As said above, one of the main features of TTA is that of being a **"Feeder Airline"**. In doing so, it may provide scheduled or non-scheduled air services. However, while in inter-district air services, the airline may simultaneously provide both scheduled and non-scheduled services, but the inter-provincial operations should be provided at non-scheduled services. In keeping with this, the decree further states that other main objectives of TTA are:

> . to provide **"scheduled or non scheduled"** public services of carrying passengers, cargo and mail **"in an inter-district scope"**.
>
> . to provide public service of carrying passengers, cargo and mail in an **"inter-provincial"** scope on a **"non-scheduled"** basis, or **"scheduled"** basis **"when so determined"**(66).

As a conclusion of this Chapter, one must say that the creation of a separate State institution dealing solely with civil aviation as the Secretariat of State for Civil Aviation as well as the setting up of the airlines brought a significant improvement in the aviation industry in Mozambique. By extinguishing D.E.T.A. and creating L.A.M., the latter was given a sound basis for starting from the beginning.

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(66) Ib., Article 3

In fact, the objectives and autonomy of D.E.T.A. were not clear, and its methodology in the exploitation of air services was done bureaucratically as is generally the case with the institutions without autonomy from the State.

The new aviation regulations have enabled the airlines to grow by halting a deeper penetration into the Mozambique market by the foreign airlines, usually better equipped and more experienced. It is undoubtful that the Diploma Ministerial" no. 97/80 imposes significant constraints on the freedom of the travelling public. However, I am of the opinion that with regard to that particular point one has to balance the priorities and then decide:

> . whether the welfare of the Mozambican society as a whole should prevail through the growth of the economy of the country which imposes a certain amount of constraints;
>
> or
>
> . whether those constraints should be lessened and in doing so allow the draining of the limited convertible currency available with the obvious consequence that the country will become poorer.

CHAPTER II

THE INTERNATIONAL LEGAL FRAMEWORK OF CIVIL AIR TRANSPORT

The carriage of passengers, cargo and mail can only be performed with an elaborate legal framework supporting it.

At present, the legal framework of international air transport may be said as being constituted of:

. The Convention on International Civil Aviation, signed at Chicago, in December 1944 (The Chicago Convention)(67).

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(67) ICAO DOC. 7300/6. It may accurately be said that multilateral conventions on a regional basis have a major importance in the regulation of international regional air transport. See, for ex. the "Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe "(ICAO Doc. 7695), of 1956; the "Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services Among the Association of South East Asian Nations " of March 13, 1971; the "International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services", which however established under ECAC, has a geographical scope not limited to Europe, according to its article 8, (ICAO Doc. 8681), of July 10, 1967.

. Bilateral Air Transport Agreements (sometimes called also Bilateral Air Services Agreements) entered into by pairs of States, under the umbrella of the Chicago Convention (68).

. Domestic regulation whose importance derives from the fact that they are instruments complementing and giving effect to the bilateral air transport agreements (69).

In this Chapter an examination of the Chicago Convention and the role of BATAs will be made. This Chapter will also refer, to some extent, to the now defunct bilateral air transport agreement concluded between the United States of America and the United Kingdom, at Bermuda, in February, 1946 (The Bermuda I Agreement). As a bilateral agreement between the U.S.A. and the U.K., the Bermuda Agreement would seemingly be important only as between them. However, it will be dealt with because of the impact it had (and, indeed, still has) for other countries that have taken it as a model for their BATAs. Even for countries, like Mozambique, that do not use it as a model, the Bermuda Agreement is important, for example, because some phraseology, peculiar to the Bermuda Agreement, has been used in their BATAs.

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(68) Bilateral air transport agreements will hereinafter be referred to, sometimes, as BATAs.

(69). Example of the importance of domestic legislation vis-à-vis the international air transport is that foreign airlines are allowed to operate only if they abide by the local laws, e.g. licensing, customs and other regulations.

A - THE CHICAGO CONVENTION (70)

The Second World War had enabled aviation in the U.S.A. to become so refined and to develop to such an extent that this country no longer feared competition. This development required the building-up of a system of legal norms that would facilitate movement through the air in order to do business.

Therefore, in September 1944, the U.S.A. decided to send invitations to 53 countries for an international Conference, at Chicago, with an aim to build an **economically sound** (71) aviation system for the post-war period. The Conference lasted from the 1st November, 1944 until the 7th December. The Conference may be considered as a success, despite the fact that it was not possible for the countries to agree upon all the key-matters due to the divergent opinions propounded mainly by the U.S.A. and the U.K. which were the major aviation powers at the time. At the end of the Conference, the following documents had been worked out:

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(70) It is not the intention of the author of this paper to deal thoroughly with the Chicago Convention, but solely to enlighten the economic issues linked to the Chicago Convention. One of them is capacity. The "fair and equal opportunity" clause, the subject-matter of this paper, is usually one of the capacity principles.

(71) The aim that air transport services should be "**operated soundly and economically**" has been embodied in the Preamble of the Chicago Convention. The same principle was incorporated in Article 44 of said Convention, paragraph (d).

. The Convention on International Civil Aviation, which came into force on April, 4, 1947. This was the main achievement of the Conference. Part II of it sets up the International Civil Aviation Organization (ICAO).

. The Interim Agreement on International Civil Aviation, which set up the Provisional International Civil Aviation Organization whose task would be to act until the coming into force of the Convention and, consequently, the functioning of ICAO.

. The International Air Services Transit Agreement. This agreement is most commonly known as the "Two-Freedoms Agreement".

. The International Air Transport Agreement, also called the "Five-Freedoms Agreement".

. The Standard Form of Agreement for Provisional Air Routes, sometimes called the "Standard "Chicago" Agreement". This was intended to be a "non-binding" model for bilateral air transport agreements between sovereign States (72)

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(72) Haanappel in his article "Bilateral Air Transport Agreements - 1913 - 1980", at p. 245, writes:
"The main feature of Standard "Chicago" Agreement

. A number of resolutions and 12 annexes dealing with subjects of a legal, economic and technical nature (73).

The delegates attending the Conference hoped to reach an agreement on two sets of problems:

(i) establishing procedures for setting and enforcing technical standards of safety, uniform means of communication, sharing technological improvements and the like, and

(ii) establishing principles and procedures for the economic regulation of international civil aviation, authorizing air routes, exchanging of traffic rights, setting of fares, and regulating frequency and capacity of aircraft flown over these routes (74).

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(72) Continued

is the bilateral exchange of air traffic rights between two nations on specific routes, laid down in an annex to the agreement. The agreement and its annex, however, are silent on the questions of capacity, frequencies and tariffs leaving these matters to free competition between the airlines duly designated under the agreement by the contracting parties to perform the agreed services", supra, ft. 21, at p. 245.

(73) D. H. N. Johnson, "Rights in Air Space" The Public International Law of Air Transport", by Vlasic & Bradley (McGill University, 1974), vol. I, at p. 65.

(74) Daniel S. Cheever, "Organization for Peace, International Organization in World Affairs", 1954, Harvard University, at p. 250-253.

As to the first aspect, the Conference was a complete success since technical aspects have been laid down in the body of the Convention itself (75) and above all in the Annexes. With regard to economic regulation, it did not come up to the expectations because commercial rights were multilaterally exchanged on a very limited basis. To illustrate the meaning of economic rights, Prof. Cooper has stated the following:

> "The economic regulation of international air transport ...involves one or more of the following:
> **Routes** to be operated by the nations concerned (sometimes generally expressed and sometimes in detail);
> **Privileges** accorded to an air carrier of one nation in the airspace of a second (usually called the "Five - Freedoms");
> **Rates** to be charged to the public;
> **Frequency** of aircraft operation on each route by each nation;
> **Capacity** of aircraft (for example, number of passenger seats) offered to the public in some unit of time such as the number per week;
> **Powers of economic control** (if any) accorded to an international authority such as PICAO (...)"(76).

As to the proposals put forward to regulate international air transport, 4 of them are generally considered as being the most representative: the joint proposal of Australia and New Zealand, that of Canada, that of the U.K. and finally, that of the U.S.A.

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(75) Although there is no rigid dividing line, it may be said that, Part I of the Convention, dealing with "Air Navigation", refers to technical and operational aspects of civil aviation. See, **supra**, Johnson, at p. 59.

(76) J. C. Cooper, "The Right to Fly", at p. 163.

Australia and New Zealand proposed international ownership and operation of the most important international air services. In order to do this, an International authority, owning and operating the aircraft, would have to be set up by an International Agreement. This International Authority would be the most suitable to serve the common interests of mankind because it would put together "all the best technical, research and other aviation resources of all countries" (77).

This proposal aimed at avoiding national competition which, they said, would achieve individual ends at the expense of world interests. Australia and New Zealand also said that any other system would have to be run by large commercial organizations whose aim would be to make profit. This would inevitably lead to national rivalries, ill-will and ultimately work against the interests of all nations (78).

Domestic air services would be carried out by each nation and those to neighbouring countries would be regulated through bilateral agreements.

This proposal was rejected during the early discussions.

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(77) Proceedings of the International Civil Aviation Conference, Department of State Publication 2802, International Organization and Conferences, Series IV, 1948, vol. I, at p. 83. For details see Prof. Matte, "Treatise on Air-Aeronautical Law", p. 128-130.

(78) Ib., p. 79.

Canada envisaged an International Authority with regulatory powers which would encompass economic issues. It would be similar to the then existing Civil Aeronautics Board of the U.S.A.. An airline willing to operate international air services would have to obtain a certificate from the International Authority. The certificate would describe the route, specify the initial frequency and rates to be charged. With the granting of such certificate the airline would be allowed to exercise the Four Freedoms of the air but not the Fifth which was the subject of bilateral agreements between the governments concerned (79).

The United Kingdom was of the opinion that there should be "Order of the air" this being synonymous with protection of national airlines. The British position reflected the condition of its air transport industry which had been severely damaged by the war and could not afford unregulated competition. The basis of the United Kingdom position had been laid down in a "White Paper" that had been submitted to the British Parliament a few weeks before the opening of the Chicago Conference. The British had, as a result of an agreement with the U.S.A., specialized in building fighter planes. This industry could not be readily converted to constructing aircraft for civilian use (80). Therefore they could not favour a position that would harm their interests.

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(79) For the Canadian proposal see Proceedings, supra, p. 67-73.

(80) Thornton, "International Airlines and Politics; A Study in Adaptation to Change", p. 23-25.

The British proposal (81) supported the establishment of an International Air Authority with broad regulatory powers. Such an organization would have the power to determine frequencies on international air services.

Tariffs and rates would also be set up by this Authority as well as capacity, which on a given route would be shared (according to a formula to be agreed upon) between the airlines allowed to fly the route. At a certain time of the Conference, the British proposed the so-called "escalator clause" (82) which was designed to make the predetermination of capacity they were envisaging more flexible. This clause allowed airlines to increase or withdraw capacity in certain cases, depending on the load factor (83) they had been operating over a given period.

As to traffic rights, the first four freedoms of the air (84) could be multilaterally exchanged in the Convention. The fifth freedom would be granted on a bilateral basis (85).

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(81) The details can be found in Prof. Bin Cheng, "The Law of International Air Transport", p. 18-19.

(82) Proceedings, p. 523-524.

(83) An airline's load factor is that percentage of its total passenger seats and cargo space, which is actually used by passengers and shippers.- See Hannappel, "Background of the Dutch - American Aviation Conflict", 1 Annals Air & Space L. (1976), p. 79, ft. 2.

(84) For definition of the freedoms of the air see page 46-47.

(85) Proceedings, p. 568.

The United States advocated a policy of "freedom of the air" which actually meant (to use Prof. Matte's expression) that "no State must oppose freedom to do business by way of the skies" (86), that is to say, a policy of commercial freedom. According to the Americans, the International Air Authority should not have economic regulatory powers. Its role in this field would simply be advisory. The background of this American policy was a very strong aviation industry that virtually had not suffered the war effects. Under the agreement, already mentioned, with the U.K., the Americans had inter alia specialized in the construction of military transport aircraft which could easily be converted to civil aircraft.

According to the United States view, no limitations were to be put on capacity and frequency. They would be determined by the carriers themselves on a free competition basis. Not only would the first four freedoms of the air be multilaterally exchanged but also the fifth freedom. The latter would not have any kind of restriction. As an argument in favour of unlimited capacity on fifth freedom routes, they called upon the commercial survival of long haul services which, they said, without the extra capacity would be economically impossible. Turning to the Convention itself, Articles 1, 5 and 6 are the most significant when one considers the legal regime regarding the

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(86) Matte, supra, p. 128.

commercial aspects of international air transportation. Confirming the principle laid down in the Paris and Havana Conventions (87) and for long confirmed by the practice of States, Article 1 provides that

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

Prof. Cooper explained this article stating that:

> "Every State of the International Civil Aviation Organization has formally acknowledged that air space above national lands and waters is an integral part of the territory of the subjacent State whether the latter is or not a member of the International Civil Aviation Organization (Emphasis added) (88).

Dr. Matte finds this article as a declaration and affirmation of a generally recognized principle under customary international law. According to him, this principle "does not imply a right of innocent passage" (89).

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(87) Article 1 of the Paris Convention of 1919 provides:

> The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory.

The same principle is found in Article 1 of the Havana Convention of 1928.

(88) Cooper, "The Chicago Convention After Twenty Years", University of Miami Law Review, no.3, p. 334-5.

(89) Nicolas Mateesco Matte, "Treatise on Air-Aeronautical Law", p. 132.

Under the Convention "territory" includes the land areas and territorial waters adjacent under the sovereignty, suzerainty, protection or mandate of the State (90).

As a consequence of the above quoted article, States have the right to determine who can overfly their territory.

Article 5 deals with "non-scheduled" (91) air services in respect to which States decided, in the first paragraph of the Article, to grant the first two freedoms of the air

> "Without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing" (92) (93)

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(90) Article 2 of the Chicago Convention.

(91) The Chicago Convention does not define neither "scheduled service" nor "non-scheduled service". However the ICAO Council, in March 1952, defined "scheduled service" as being a series of flights that possess all the following characteristics:

> a)it passes through the air-space 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 time-table
>
> or
>
> ii)with flights so regular or frequent that they constitute a recognizably systematic series."

ICAO Doc. 9440, p. 9.

(92) Article 5 of the Convention.

(93) Article 5 lays down such further restrictions: "the right, for reasons of safety of flight, to require aircraft desiring to

However it can rightfully be said that most of the States do require "prior permission" for this type of air services (94).

With respect to non-scheduled services intending to exercise the 3rd, 4th and 5th freedoms of the air, the second paragraph of the same Article entitles a given State

> "To impose such regulations, conditions or limitations as it may consider desirable" (95)

Definitively, Article 5 has exchanged multilaterally the five freedoms, but in an imperfect manner since some limitations, outlined above, may be placed by States.

With regard to scheduled flights, no freedoms, at all, have been

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(93) Continued
proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights."

(94) H. A. Wassenbergh, "Aspects of Air Law and Civil Air Policy in the Seventieq", at p. 79.

(95) Article 5 of the Chicago Convention reads as follows:
(...) Such aicraft, 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"** (Emphasis added).

multilaterally exchanged. Article 6 clearly spells out that

> "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".

Thus this Article leaves to the descretion of each State to authorise or refuse permission to a scheduled international air service to be operated over its territory. The language of Article 6, specially the reference to a **"special permission or other authorization"** is regarded as the root of the present system of bilateral air transport agreements which governs scheduled air services worldwide.

The other two international agreements also produced during the Chicago Conference, the "Two Freedoms Agreement" and the "Five Freedoms Agreements", had, as their main objective, the exchange on a multilateral basis of the freedoms of the air. The former has been ratified by numerous States and, by doing so, they exchanged the first two freedoms of the air for scheduled international air services (96).

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(96) Article I, section 1 of the Agreement reads:

> Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:
>
> (1) The privilege to fly across its territory without landing;
>
> (2) The privilege to land for non-traffic purposes (Emphasis added).

In contrast to it, the International Air Transport Agreement has been ratified up to-date only by 12 States (97) and is consequently a dead letter due to lack of ratification. Even its promoter, The U.S.A., realizing the great reluctance of States to adhere to that agreement, decided to withdraw from it in 1946 (98). This agreement was designed to exchange among the Contracting Parties all the 5 freedoms with regard to **scheduled flights**.

The freedoms of the air are the following, according to Article 1, section 1, of the International Air Transport Agreement:-

(1) The privilege to fly across its territory without landing;

(2) The privilege to land for non-traffic purposes;

(3) The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;

(4) The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses;

(5) The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.

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(97) Matte, op. cit., p. 221.

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

In addition to the above five "classic" freedoms there is the so-called sixth freedom. Sixth freedom can be defined as

> (6) The privilege to take on passengers, mail and cargo destined for the territory of any other State via the State whose nationality the aircraft possessses, and the privilege to put down passengers, mail and cargo coming from any such territory via the State of the aircraft.

The legal nature of the sixth freedom is controversial. Some authors are of the opinion that it is simply a combination of third and fourth freedom traffic under two different bilateral air transport agreements, while others take the position that sixth freedom traffic is a kind of fifth freedom traffic subject to the same regulation of the latter (99) (100).

The Chicago Convention is also the Constitution of the International Civil Aviation Organization (ICAO). Part II of the said Convention contains the provisions dealing with the creation of ICAO and the organs it should have and their competence. The constituting provision is article 43 which solemnly declares that:

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(99) For details see Haanappel, op.cit., p. 252, and Wassenbergh, op. cit., p. 32 et seq.

(100) In addition to these freedoms, practice has shown that it is convenient to distinguish the following freedoms:

> (7) The privilege to carry traffic between the grantor State and the third States only, without stopping over in the State whose nationality the aircraft possesses.
>
> (8) The privilege to carry traffic between two service points within the territory of the grantor State (Cabotage).

See, Prof. Matte, supra, p. 143-4.

"An organization to be named the International Civil Aviation Organization is formed by the Convention. It is made up of an Assembly, a Council, and such other bodies as may be necessary".

ICAO belongs to the great family of the United Nations and is one of its Specialized Agencies, dealing precisely with the development of the principles and techniques of international navigation as well as with the fostering of the planning and development of international air transport. Article 44 of the Chicago Convention sets forth the aims and objectives of ICAO, which are to:

"a) Insure the safe and orderly growth of international civil aviation throughout the world;

b) Encourage the arts of aircraft design and operation for peaceful purposes;

c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;

d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;

e) Prevent economic waste caused by unreasonable competition;

f) Insure that the rights of contracting states are fully respected and that every contracting state has a fair opportunity to operate international airlines;

g) Avoid discrimination between contracting states;

h) Promote safety of flight in international air navigation;

i) Promote generally the development of all aspects of international civil aeronautics."

ICAO has a legal personality and a legal capacity in order to enable it to fully perform its duties in the territory of all Contracting States (101).

ICAO has as its supreme organ an Assembly, with broad powers, constituted of all member States of the organization. It meets, as a rule, every three years (102). However the ICAO Council, the Executive Organ of ICAO, by itself, or at the request of not less than one fifth of the total number of contracting states addressed to the Secretary General, may request extraordinary meetings (103). Each State has one vote (104) in the Assembly where the decisions are taken by a majority of the votes cast (105).

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(101) See Article 47 of the Convention.

(102) See Article 48, paragragh (a).

(103) Ib.

(104) Same article, paragragh (b).

(105) Ib.

The Assembly as the supreme organ of the organization may "deal with any matter within the sphere of action of the Organization not specifically assigned to the Council", according to article 49, paragraph (k). The powers and duties are laid down in article 49. They are very broad in order to enable the Assembly to fulfil its role. The Assembly may also delegate any matter to the Council and set up any commissions to deal with a specific subject (106).

The Council presided by a president (107), is the executive organ of the organization, made up of 33 members. Article 50, paragraph (a) of the Convention refers to it in the following way:

> "The Council shall be a permanent body responsible to the Assembly. It shall be composed of thirty-three contracting States elected by the Assembly. An election shall be held at the first meeting of the Assembly and thereafter every three years, and the members of the Council so elected shall hold office until the next following election".

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(106) Ib., paragragh (g).

(107) The President is elected by the Council for a term of three years. He has no vote in the Council. His duties are to:

a) Convene meetings of the Council, the Air Transport Committee, and the Air Navigation Commission;
b) Serve as representative of the Council; and
c) Carry out on behalf of the Council the functions which the Council assigns to him.

See Article 51 of the Convention.

The members constituting the Council are representing their States. The latter are elected due regard being taken in order to attain adequate representation to:

> (1) The States of chief importance in air transport.
>
> (2) The States not otherwise included which make the largest contribution to the provision of facilities for international civil air navigation; and
>
> (3) The States not otherwise included whose designation will insure that all the major geographic areas of the world are represented on the Council (108).

The Convention provides that the Council has two categories of functions: (i) mandatory and (ii) permissive. The former are cumpulsory and the latter are optional. The mandatory functions are those laid down in Article 54 such as, inter alia:

> . to carry out the directions of the Assembly and discharge the duties and obligations which are laid on it by the Convention.
>
> . appoint and define the duties of an Air Tranport Committee, which are chosen from among the representatives of the members of the Council and which shall be responsible to it.
>
> . to report to the Assembly any infraction of the Convention where a Contracting State has failed to take appropriate action within a reasonable time after notice of the infraction.
>
> . to adopt international standards and recommended practices (Annexes to the Convention).

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(108) See Article 50 (b).

The permissive functions are set forth in Article 55. Permissive functions, for example, are:

> . to create subordinate air transport commissions on a regional basis and define groups of States or airlines with which the Council may deal to facilitate the carrying out of the aims of the Convention.
>
> . to study any matters affecting ICAO and the operation of international air transport.
>
> . to investigate, at the request of any Contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear desirable.

As concluding remarks on ICAO it can be said that although ICAO was set up mainly as a technical body, in the recent years it has been engaging more and more in economic issues. After the failure of PICAO and ICAO in obtaining a multilateral agreement covering such matters as rates, routes and capacity (109), more recently ICAO set up a Panel of Experts on the Regulation of Air Transport Services and a Panel of Experts on the Machinery for the Establishment of International Fares and Rates.

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(109) For the Geneva Conference see McClurkin, R.J.G. " The Geneva Commission on a Multilateral Air Transport Agreement", 15 J. Air L. & Com. 39 (1948), p. 39-46.

ICAO has also convened Special Air Transport Conferences, the first in 1977 (110), the second in February 1980 (111) and the third in Montreal, 22 October - 7 November, 1985 (112).

The main topics of concern to ICAO member States have been the following: the relationship between scheduled and non-scheduled international air services; capacity regulation in international air transport; international ratemaking procedures, through IATA or otherwise; and tariff enforcement (113).

B - BILATERAL AIR TRANSPORT AGREEMENTS

We have seen that the Chicago Convention in its Article 6 only requires a "special permission or other authorization" given by the overflown State in case of scheduled air services. However, State practice shows that they have understood that language to be requiring, as a general rule, the conclusion of bilateral air transport agreements.

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(110) ICAO Doc. 9199, SATC (1977).

(111) ICAO, AT Conf. 2., Second Air Transport Conference (Montreal).

(112) ICAO, AT Conf./3 Documentation.

(113) Haanappel, supra, p. 264-5.

A bilateral agreement is a Treaty between governments whereby they regulate the performance of air services linking their countries (114) (115).

BATAs have for long solely dealt with scheduled services, non-scheduled air services being regulated unilaterally by national laws. However, nowadays, governments have concluded BATAs either dealing only with non-scheduled air services or covering both scheduled and non-scheduled services.

For convenience, BATAs may be divided into 3 categories according to the type of capacity regulation contained:

(i) Bermuda-type,

(ii) Predetermination-type, and

(iii) Free-determination type (liberal) agreements.

The first type will be discussed next. Predetermination-minded agreements will be touched upon, slightly, in the next Chapter in considering the BATAs of the People's Republic of Mozambique (116),

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(114) Haanappel, "Pricing and Capacity Determination in International Air Transport", on p. 24.

(115) However, it must be said that bilateral air transport agreements may take the form of treaty, inter-governmental agreement (this is the rule) or even the form of an exchange of diplomatic notes. All of them are binding upon States, no matter the name (Vienna Convention, Article 2 (1) (a).

(116) See Chapter III, p. 75.

while as to liberal agreements the same will be done in Chapter IV whilst discussing the meaning of "fair and equal opportunity" in those agreements (117).

Although BATAs vary, it can be said that they usually contain the following clauses (118):

Preamble - Name of the parties involved and their general objectives in desiring to conclude an agreement.

Principles and objectives for routes - To establish air services which will take care of the traffic demand with an overall equitable exchange of economic benefits for both carriers.

Basic Grant of Rights - Description of the traffic to be exchanged, i.e, 1st., 2nd., 3rd., 4th., and 5th. Freedoms. These are the agreed services which refer to the specified routes listed in the Route Schedule or Annex.

Designation of Airlines - Give to the parties the right to designate airline(s) to operate the agreed services.

Authorization of Services - Conditions imposed upon the airline(s).

Revocation and withholding of Authorization - Clause permitting

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(117) See Chapter IV, p. 133 et seq. In addition, one author suggests the following classification for BATAs:
(1) those without capacity clauses
(2) those with capacity clauses which are neither Bermuda nor predetermination type
Vide, Diamond, op. cit., note 178, on p. 428.

(118) Azzie, Ralph, "Lecture given to the Institute of Air and Space Law, McGill University, January 12, 1966", at p. 8; Gidwitz, Betsy, "The Politics of International Air Transport", p. 153-4.

contracting States to revoke or withhold the authorization to operate from an airline that does not comply with the laws and regulations of the State granting the privileges.

Applicable Laws and Regulations - States that airline(s) are subject to the laws and regulations of the country to which they are operating.

Certificates of Airworthiness, etc. - States that designated airline(s) shall operate aircraft that meet the safety and other technical standards required by the State where the services are to be operated.

Charges for Airports and other facilities (customs, fees, etc.). - States materials exempted or subject to custom duties or other fees.

Capacity Provisions - A certain number of clauses refer to the capacity offered by each contracting State.

Rates and Fares - States what should be taken into account in establishing tariffs, how and when they will be submitted. How will the differences of opinion or disputes concerning tariffs be dealt with, etc.

Consultations - Suggested to be regular and frequent in order to ensure close collaboration in all matters affecting the fulfilment of the agreement.

Arbitration - Sets the procedure to be followed in the establishment of an arbitral tribunal if any disputes arise which cannot be settled by negotiations between the Contracting Parties.

Termination - Procedure to be followed if one of the Parties wishes to terminate the agreed services.

Registration - Parties agree to register the Agreement or any Exchange of Notes regarding the agreement with ICAO.

Definitions - Definition of certain terms used in the Agreement; the definitions are usually those of the Chicago Convention.

Entry into Force - Gives the date when the Agreement will come into force.

Route Schedule or Route Annex - The route pattern is described here.

In addition to the above referred items some more have been added thus expanding the field of bilateral air transport agreements. For example, the following clauses have been added:

User Charges - Tryes to ensure that the charges relating to airport and navigation facilities will be just and reasonable, not higher than those imposed on the designated airlines of the State providing the facilities, operating similar international air services (119).

Commissions to be paid to travel agents - Attempts to halt unfair competition by assuring that airlines do not pay higher commissions than those approved by both Contracting Parties (120).

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(119) Article 10 of Bermuda II. For example, paragragh 2 of this Article reads that:

> "Neither Contracting Party shall impose or permit to be imposed on the designated airlines of the other Contracting Party user charges higher than those imposed on its own designated airlines operating similar international services."

(120) **Idem**. See Article 13 whose paragragh 1 states the following in the relevant part:

> "(...) The aeronautical authorities of each Contracting Party shall exercise their best efforts to ensure that the commissions and compensation paid by the airlines for each Contracting Party conform to the level or levels of commissions and compensation filed with the aeronautical authorities."

Charter Services - The relevant clause includes them in the bilateral agreement.

Aviation Security - This clause reaffirms the adherence of the Contracting Parties to the Conventions on unlawful interference with civil aviation (121).

Commercial Operations - Whose main feature is to entitle the airlines to have their own ground handling or, at their option, to select among competing agents (122).

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(121) See Article 7 of the BATA U.S.-Belgium (October 1980). Its paragragh 3 states, for example, that each Party "shall provide maximum aid to the other Party with a view to preventing unlawful seizure of aircraft, sabotage to aircraft, airports, and air navigation facilities, and threats to aviation security, give sympathetic consideration to any request from the other Party for special security measures for its aircraft or passengers to meet a particular threat; and, when incidents or threats of hijacking or sabotage against aircraft, airports or air navigation facilities occur, assist the other Party by facilitating communications intended to terminate such incidents rapidly and safely".
The conventions on unlawful interference with civil aviation are: (i) Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on September 14, 1963 (ICAO Doc. 8364); (ii) Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on December 16, 1970 (ICAO Doc. 8920); and (iii) the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971 (ICAO Doc. 8966).

(122) Article 8 of the Agreement U.S.-Belgium. If, for example, it is not possible for each airline to have its own ground handling, paragragh 3 asserts that "where such considerations preclude self-handling, ground services shall be available on an equal basis to all airlines; charges shall be based on the costs of services provided; and such services shall be comparable to the kind and quality of services if self-handling were possible."

Surface transportation - States that the airlines and charterers of both Parties shall be permitted to employ any surface transportation that is incidental to international air transportation (123).

The standing of a bilateral air transport agreement vis-à-vis the domestic laws and regulations of a given State depends much on the Constitutional laws of that country. In some cases BATAs have the same stand as a treaty which needs ratification by the legislative organ. In this case, in addition, they may need implementing legislation in order to be enforceable by the courts on the same footing as domestic laws. Otherwise they will form no part of the law of the land (124). In other cases, they are considered self executing agreements with no need of ratification by legislature under the normal powers of the government (125). In this latter case, a domestic aviation legislation consistent with the BATA giving wide powers to the aeronautical authority for its implementation, will be required.

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(123) **Idem**, Article 13, which reads: "Notwithstanding any other provision of the agreement, the airlines and charterers of both Parties shall be permitted to employ any surface transportation that is incidental to international air transportation, provided that passengers or shippers are not misled as to the facts concerning such transportation".

(124) For example, in the United Kingdom. See, **supra**, on p. 20, ft. 39

(125) As in the United States. Haanappel, **op. cit.**, at p. 264.

C - THE BERMUDA I AIR TRANSPORT AGREEMENT.

The Chicago Convention was successful in building up rules with regard to technical aspects of civil aviation either in the Convention itself or in the standards and recommended practices which are annexes to the Convention (126). But, with regard to the economic aspect, very little was achieved (127). As a result of this, the economic regulation of air transport had to be dealt with by way of bilateral air transport agreements whose roots may be found in article 6 of the Chicago Convention as noted before. The Chicago Conference had worked out a model of a bilateral agreement which, however was not satisfactory: it was silent on capacity, frequency and tariffs (128).

Thus in February 1946, after lengthy negotiations, the United Kingdom and the United States concluded a bilateral air transport agreement, commonly known as the Bermuda I, which for the coming decades would remain the model of most bilateral agreements worldwide until being replaced by the Bermuda II in 1977.

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(126) Article 54 (1) of the Chicago Convention.

(127) In this aspect articles 1, 5 and 6 are the most important. Article 1, though being a political declaration on sovereignty of the airspace, has far reaching consequences in the economic field of air transport. This is so because it enables every State to close its airspace to commercial air operations and open it according to its wish in exchange of a benefit (which most of the time is the granting of equivalent traffic rights) considered adequate by that State.

(128) Haanappel, op. cit., at p. 247.

Bermuda I was a success not only between the parties themselves but even all over the world, because the aspects in which the Chicago Convention and its Chicago Standard Form had failed, found an answer in Bermuda I, although at the expense of mutual concessions by the contracting States. In other words, The United States and the United Kingdom that in the Chicago Conference had defended so divergent views that the Conference was unable to find a multilateral agreement on the exchange of commercial rights, in Bermuda I Agreement they reached a compromise on these issues, by making mutual concessions.

This agreement reflected an accomodation of opposite interests; consequently it seemed also appropriate for other States. In fact, if the U.S.A. and the U.K. defending such divergent views as:

> "1- No limitation of frequencies v. predetermination
>
> 2- No division of capacity v. 50-50 division of capacity
>
> 3- No regulation of rates v. regulation of rates
>
> 4- A complete grant of the fifth freedom v. no grant of fifth freedom
>
> 5- An international body with advisory powers v. an international body with executive powers over international air services"(129)

they had achieved a satisfactory agreement, that evidenced that the agreement could work for every State.

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(129) Wassenbergh, "Post-War International Civil Aviation Policy and the Law of the Air", at p. 59.

In trying to explain the worldwide acceptance of the Bermuda agreement, Adriani writes:

> "It seems that these compromise-clauses were in accord with vague and lingering thoughts in many other countries all over the world, which countries had not been able to formulate them clearly"(130).

The same author goes on to explain that the acceptance of the Bermuda I

> "Should be attributed to the fact that these Bermuda clauses were drafted in general terms, just formulating some broad ideas and are therefore to a certain extent vague and flexible, creating possibilities for protection as well as for a necessary amount of freedom" (131).

The Bermuda Agreement is divided into three parts:

(i) The Final Act

(ii) The Agreement itself (forming appendix 1 of the Final Act) and

(iii) The Annex

The Agreement itself (132) deals with the exchange of commercial rights

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(130) P. Van Der Tuuk Adriani, "The Bermuda" Capacity Clauses", 22 J. Air L. & Com. (1955), at p. 406.

(131) Ibid.

(132) TIAS 1507, at p. 1 et seq.

and such ancillary rights as designation of airlines, inauguration of services, airport and similar charges, customs duties, non-discriminatory application of national air regulations, substantial national ownership, registration with ICAO, etc.

The Annex (133) contains detailed clauses on the procedures and the principles governing rate-making process as well as the routes to be served, amendments to routes and change of gauge (134). The parties left the ratemaking to the Conference machinery of IATA, subject to the approval by both parties.

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(133) Ibid., at p. 7 et seq.

(134) Change of gauge is dealt with in Part V of the Annex to Bermuda I. There, it is defined as "the onward carriage of traffic by an aircraft of different size from that employed on the earlier stage of the same route".
See paragragh (a) of said Part.

AbdulAziz, in his LL. M Thesis (McGill 1982), enumerates a number of conditions attached to change of gauge and also appearing in the above referred Part V:

> "1- The change of gauge must be justified by reasons of economy of operation.
> 2- The aircraft used on the section more distant from the territory of the contracting State designating the airline is to be smaller in capacity than the one used on the near section.
> 3- The aircraft of small capacity shall operate only in connection with the aircraft of larger capacity and shall be scheduled to do so.
> 4- There must be adequate volume of through traffic.
> 5- The provisions of the Bermuda Agreement relating to the regulation of capacity shall apply to all arrangements made with regard to the change of gauge".

Despite the interest of the above referred Parts of the Bermuda I Agreement, this paper will not expand on them. Actually the subject-matter of this paper requires that special attention be placed on capacity provisions which usually is the seat of the "fair and equal opportunity" clause.

1. CAPACITY CLAUSES OF BERMUDA I

Turning to capacity clauses in Bermuda I, it is noteworthy that capacity is not dealt with in the Agreement itself but in the Final Act. This means that the traffic rights exchanged in Article I of the Agreement (whose details are set out in the Annex) must be exercised in full accordance with the principles and limitations laid down in the Final Act ("the Bermuda principles"). The most important "Bermuda principles" are the following (135):

> "(3) That the air transport facilities available to the public must bear close relationship to the requirement of the public for such transport.
>
> (4) That there shall be a fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories (as defined in the Agreement) covered by the Agreement and its Annex.
>
> (5) That, in the operation by the air carriers of either Government of the trunk services described in the Annex to the Agreement, the interest of the air carriers of the other Government shall be taken

(135) Final Act (Bermuda Agreement), Resolutions 3, 4, 5 and 6.

into consideration so as not to affect undully the services which the latter provides in all or part of the same routes.

(6) That it is the understanding of both Governments that services provided by a designated air carrier under the Agreement and its Annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in the Annex to the Agreement shall be applied in accordance with the general principles of orderly development to which both Government subscribe and shall be subject to the general principle that capacity should be related:

a) to traffic requirements between the country of origin and the countries of destination;

b) to the requirements of through airline operation; and

c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services".

The Bermuda principle quoted in the first place is designed to ensure that the designated airlines will not put excessive capacity (136) without

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(136) Baker, "The Bermuda Plan as the Basis for a Multilateral Agreement", in Vlasic & Bradley, op. cit., Vol. I, at p. 254-5) states the following:

"The purpose of this paragragh was to prevent the continued operation of aircraft at unnecessarily low load factors since it was realized that such activity would be generally detrimental to all airlines servicing the route. Such cases might be those where a government might desire to support excessive operations of its own airline for competitive advantage or where one private airline with strong financial backing felt it could afford competitive over-servicing to its advantage over a competitor without such strong financial backing".

economic justification and in doing so operate at an unnecessarily low load factor (137) for a prolonged period of time. Capacity is not defined in the Bermuda Agreement. It is, however, accepted that capacity can refer to two different contexts. In dealing with a particular aircraft, capacity

> "means the pay load of that aircraft available on the route or the section of a route" (138).

When referring to a specified service, capacity

> "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" (139).

In capacity control or regulation of capacity by government, the latter meaning of capacity is envisaged (140).

According to experts in aviation industry, an optimum load factor (or "reasonable load factor") that would meet the meaning of principle 3 of the Bermuda principles would be around 65-70 percent, a reasonable margin being left in order to allow for unsold passenger seats or cargo space. Adriani explains this saying that

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(137) For definition of "load factor" see, supra, ft. 83.

(138) Bin Cheng, op. cit., at p. 411.

(139) Ibid.

(140) Ibid.

> "It is a well known fact that operating a transport service at an over-all load factor of more than 65 or 70 percent of its capacity is not a sound proposition; in these circumstances quite a number of individual services are fully booked and the operator would on many occasions have to disappoint prospective passengers.
> In the long run the passengers will be inclined to turn away from the carrier in question" (141).

In contrast with Baker's statement quoted in footnote 136 with regard to clause 3, Prof. Lowenfeld finds this clause completely meaningless. He wonders:

> "Does that mean anything at all?
> - I do not think it is a commitment to target load factors;
> - I do not think it has to do with the relationship of aviation to other forms of transport such as ships or Zeppelins;
> - I am quite sure it does not entail a commitment to the typical demand curve, which illustrates that as price goes down consumption goes up;
> - And other clauses in Bermuda I and its successors make clear that this is not the "motherhood clause" that all international agreements seem to contain".

And he concludes saying:

> " If I were an editor, I would strike this clause" 142).

The clauses dealing with "Fair and equal opportunity" and "due consideration to the other airline's service" have, as their aim, to prevent "unfair trade practices", "discrimination" and "predetermination of capacity and or frequency". These have been dealt

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(140) Ibid.

(141) Adriani, op. cit., at p. 409.

(142) Andreas F. Lowenfeld, "The Future determines the Past: Bermuda I in the light of Bermuda II", 3 Air Law (1978), at p. 5.

with in detail in Chapter IV (143).

The 6th "Bermuda principle" lays down guidelines on the primary objective of the air services to be provided under the agreement as well as the carriage of fifth freedom traffic. According to it

> "Services provided by a designated air carrier under the Agreement and its Annex shall retain as **their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic** (Emphasis added).

This clause states what should be the primary purpose of the services agreed upon in the agreement or in other words what the **"primary justification traffic"** for those services. Lissitzyn, in simple terms, explains the meaning of **"the principle of primary justification traffic"**, saying that it

> "means that an international airline must not offer services or capacity considerably in excess of those required to accomodate traffic between the airline's own country and each of the countries that the airline serves. In other words, the offering of services or capacity primarily for traffic between countries other than the airline's own country is regarded, in principle, as somehow illegitimate, although in practise some exceptions are allowed" (144).

Although the contrary has sometimes been stated, the fact is that according to the wording of the quoted clause, the provision of capacity, when starting the air services, has to take into account not

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(143) Chapter IV, no. 1, at p. 91 et seq.

(144) Oliver J. Lissitzyn, "Freedom of the Air: Scheduled and non-Scheduled Air Services", In "Freedom of The Air", by McWhinney & Bradley (1968), at p. 93.

the "inter-partes traffic criterion" (145) but the "national traffic criterion", i.e. the traffic embarked in or destined to the party which has designated the airline. Supporting this latter viewpoint Prof. Bin Cheng writes:

> "One of the main features of the Bermuda agreement with the United States is the introduction of national traffic as the primary capacity criterion: "Traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic" (146).

The same clause deals also with fifth freedom traffic. This is treated not as a primary, but as secondary justification traffic. Fifth freedom traffic is here described as being the

> "right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in the Annex to the Agreement (...)".

The capacity to accomodate this traffic shall comply with these further restrictions relating:

> a) to traffic requirements between the country of origin and the countries of destination;
>
> b) to the requirements of through airline operation (147), and
>
> c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.

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(145) According to the terminology adopted by Prof. Bin Cheng, "national traffic" is wider than "inter-partes traffic" since the former embraces traffic to or from the flag-State of the carrier and, includes, as one of its subdivisions, inter-partes traffic.

(146) Bin Cheng, op. cit., at p. 419.

(147) Through services is the same as transit or traversing services. Bin Cheng, op. cit., at p. 400.

The Bermuda Agreement did not attach any figure what proportion should be considered primary or secondary justification of traffic (148) but it is generally agreed that if in an airline service most of the capacity is used for secondary traffic (fifth freedom traffic) this is in clear contravention of the principle of primary justification traffic. As built up at Bermuda, the fifth freedom traffic rights will be justified when replacing the passengers that drop off the aircraft along the route, i.e. the so-called "fill-up traffic" (149). The basic idea behind fifth freedom traffic was that no country was allowed to use fifth freedom traffic as the basis of its operation, or to concentrate on attracting fifth freedom traffic because this traffic constitutes third and fourth freedom traffic for countries between which fifth freedom traffic rights are exercised.

To conclude these remarks, it should be noted that one of the Bermuda I features is precisely the existence of an **ex post facto review** mechanism. This is dealt with in resolution no. 9 of the Final Act, according to which

> "That is the intention of both Governments that there should be regular and frequent consultation between their respective aeronautical authorities

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(148) Lowenfeld, "CAB v. KLM; Bermuda at Bay", 1 Air Law (1975), at p. 5 and 6.

(149) Baker, op. cit., explains this saying that: " in regard to the much debated issue of Fifth Freedom traffic, the United States no longer held out for the complete Fifth Freedom rights propounded at Chicago but did hold out for the right to fill up empty seats on through schedules". At p. 251.

> (as defined in the Agreement) and that there should thereby be close collaboration in the observance of the principles and the implementation of the provisions outlined herein and in the Agreement and its Annex".

The **ex post facto review** is a consultative mechanism which was designed to give an opportunity to the aeronautical authorities to discuss and review the issues of capacity and frequency in case where either airline was blamed for providing excess capacity. That is to say, "ab initio", there should be freedom for each airline to determine the capacity. In case of abuses, this freedom would be corrected through governmental action. Yet, it must be noted that, according to Peter Masefield in an article written in April 1973, in "FLIGHT international", page 550, entitled "The Air Charter Challenge",

> "The ex-post facto review did not, incidentally, provide for a mandatory cutback of frequencies. The philosophy was that there should be flexibility for agreement of sensible solutions".

However, it is submitted that where governments under domestic laws have not enough power to interfere with managerial decisions of the airlines, this **ex-post facto review** is useless and the only way to correct abuses is by **denouncing** the agreement and negotiating another. This is what was done by the United Kingdom in 1976 (150). In fact,

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(150) It is noteworthy that the British when denounced Bermuda I were of the opinion that the ex-post facto review was written nowhere in the agreement. In fact, at p. 29 of the "Aviation Week & Space Technology, of July 26, 1976, in an article entitled "British Ready to Renegotiate on Bilateral", it is stated as one of the reasons to terminate Bermuda I, that "the British charge ex post facto review of capacity is not written into the Bermuda agreement". To this, "U.S. officials counter that, while the language is not in Bermuda, it is specified in a joint statement that was issued by the two governments in 1946".

Masefield, in the abovementioned article, at page 551, had already noted that first under the Civil Aeronautics Act of 1938 and, later, the Federal Aviation Act of 1958, the Government of the United States "had no legal powers to control the capacity of its own carriers".

To conclude this Chapter we would say that it is regrettable that, until today, no multilateral agreement exchanging commercial rights has been achieved. With such an agreement national competition and supremacy would not exist and better air services would be possible. Bilateral agreements are concluded thanks to bargaining power and concessions of states. If for some reason a given State has nothing to exchange, it will be difficult for it to find the best connecting points for its air services. This has a detrimental effect on the travelling public.

It is hoped, however, that now that ICAO is engaging more and more in economic issues, things may eventually change and a multilateral agreement will be reached in the future.

CHAPTER III

THE CAPACITY CLAUSES IN THE BILATERAL AIR TRANSPORT AGREEMENTS CONCLUDED AFTER THE INDEPENDENCE OF MOZAMBIQUE

A - BILATERAL AIR TRANSPORT AGREEMENTS CONCLUDED

L.A.M., the national airline of the People's Republic of Mozambique, has been providing air services either under formal bilateral air transport agreements or under simple authorizations by the aeronautical authorities (151).

Formal BATAs have been concluded with the following neighbouring countries (152):

- Lesotho, dated August 26, 1978.
- Malawi, dated October 23, 1984.

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(151) Simple authorizations are unilateral acts of aeronautical authorities for a temporary basis and may be revoked at any time.

(152) Informal arrangements exist with the following neighbouring countries: Angola, South Africa, Swaziland and Zambia. Only TAAG (from Angola), SAA (from South Africa), and Royal Swazi (from Swaziland) operate weekly services to Mozambique. Other neighbouring countries' carriers do not operate to Mozambique under informal arrangements.

. Tanzania, dated October 29, 1977.

. Zimbabwe, dated August 7, 1980.

Only L.A.M. (the national airline of Mozambique) and Air Lesotho, with regard to the abovementioned agreements, have been operating. L.A.M. provides weekly services to Tanzania and Zimbabwe; Air Lesotho flies to Maputo every week. Details of the routes flown by L.A.M. may be found, supra, on page 27.

With regard to other countries, Mozambique has entered into formal arrangements with (153):

. The German Democratic Republic, agreement of July 10, 1978.

. Cuba, agreement of October 21, 1982.

. Portugal, agreement of January 28, 1977.

. Bulgaria, agreement of May 17, 1978.

. The People's Democratic Republic of Korea, agreement of July 24, 1979.

. S. Tomé e Príncipe, agreement dated September 12, 1981.

. Romania, agreement dated March 21, 1979.

. USSR, agreement dated February 12, 1976.

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(153) Informal arrangements on intercontinental air services exist with Denmark, France and Brasil. However, carriers from these countries do not operate to Mozambique, except VARIG (from Brasil) which flies to Maputo fortnightly.

Despite the existence of BATAs, L.A.M. does not operate to Bulgaria, Cuba, the People's Democratic Republic of Korea, S. Tomé e Príncipe, Romania and USSR. On the other side, only the designated airlines of USSR (AEROFLOT) and Cuba (Cubana) are operating to Mozambique. The former operates, weekly, from Moscow to Maputo, and the latter, monthly, from Havana to Maputo.

The designated airlines, L.A.M., TAP and Interflug, fly under the respective air agreements (154). No designated airline is operating to Bulgaria, Korea, Romania and S. Tomé e Príncipe.

As to the type of BATAs now in force, all of them, without exception, are predetermination-minded agreements. Curiously, France proposed a Bermuda-type agreement, in 1981, when L.A.M. started services to Paris. Such an agreement, however, has not been discussed up-to-date.

It is the nature of a predetermination-minded agreement that capacity be agreed upon, before the commencement of the services, either by the governments themselves through the aeronautical authorities or by agreement drawn up by the designated airlines and subject to the governments' approval (155).

Since the BATAs with the German Democratic Republic, Portugal, Romania

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(154) TAP - Air Portugal operates weekly to Maputo. Interflug, the German Democratic Republic airline, is currently operating fortnightly air services to Maputo.

(155) Haanappel, **supra** at p. 254.

and USSR are the most representative, we have selected them as illustrations for the purpose of this paper.

With the sole exception of the BATA with the German Democratic Republic, the others have, among their capacity clauses, one using the "fair and equal opportunity" language. For example, the agreement with Romania, in paragragh 1 of Article 5 reads as follows:

> "Each designated airline shall enjoy equal and fair possibilities for the operation of the agreed upon services on the routes specified in the Annex of the present Agreement".

While the other agreements, following the normal wording of the principle of fair and equal opportunity of the BATAs of Mozambique, extended their application to the "agreed routes between the territories of the two Contracting Parties", the agreement with Portugal seems to contemplate the possibility that there may be joint routes between the territories of third parties. To embrace this possibility, paragragh 1 of Article 7 of the agreement speaks of

> "fair and equal opportunity in the exploration of the agreed services on the specified routes between its territory and that of the other Contracting Party and or Third Parties". (Emphasis added).

Clause no. 1 of Article 4 of the agreement with the German Democratic Republic sets forth that

> "The designated Airlines of both Contracting Parties shall have equal rights to operate in the agreed services".

This formula, however brief, is even vaguer than the usual "fair and equal" language and can, indeed, raise serious problems: what is the meaning of "equal rights"? To what extent are those "equal rights"? Does

it mean full reciprocity? Does it mean equal shares on the division of capacity? However, the subject of apportionment of capacity seems to have been cleared up pretty well in the next provision which reads:

> "The total capacity offered between the two parties on the agreed services shall be divided as much as possible in equal parts between the designated Airlines, unless otherwise agreed by the Aeronautical Authorities".

Despite the difference in wording, we believe that the intention of the parties may have very well been to meet the "fair and equal opportunity" language.

The principle whereby the designated airlines must have due regard to each other's interests is usually retained in the BATAs. Thus, paragragh 2 of Article 5 of the Agreement with Romania states that

> "Each designated airline shall take into consideration the interests of the airline designated by the other Contracting Party not to affect the air services the latter designated airline provides on the whole or part of the specified routes".(Emphasis added).

The requirement so peculiar to the predetermination system that no air service may be inaugurated unless a previous agreement on capacity has been reached has been embodied in all the BATAs concluded by Mozambique. Despite the fact that the language of the agreements speaks sometimes only in capacity and frequency to be approved, the fact is that, under the practice of Mozambique, predetermination does not limit itself to total capacity. It goes beyond. Schedules of flights and types of aircraft are always agreed upon. For example in the agreement with GDR, only frequency and capacity are to be agreed upon. It states that:

> "The capacity to be provided, the frequency of services to be operated and the nature of air service that is, transiting through or terminating in the territory of the other Contracting Party shall be agreed between designated airlines in accordance with the provisions of this Article. Such agreement shall be subject to the approval of the aeronautical authorities of the two Contracting Parties, at least 60 days before the intended date for the beginning of such service" (156). (Emphasis added).

The agreement with Portugal (157), Romania (158) and the USSR (159), departing from the one with GDR, require agreement not only on total capacity to be approved in advance but also on frequencies and timetables. The one with the USSR requires also agreement on the equipment to be used. For example this latter agreement provides that:

> "All the technical and commercial matters concerning the operation of aircraft and transportation of passengers, cargo and mail on the agreed services as well as the matters concerning commercial cooperation, particularly time-table, frequency of flights, types of aircraft, ground technical service of aircraft and procedure of

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(156) Paragragh 3, Article 4.

(157) Paragragh 3 of Article 7 repeats with much about the same words the quoted Article of the agreement with GDR. As to timetables, Article 8 states:

> "The timetables of the agreed services shall be submitted by the designated airline of each Contracting Party to the approval of the aeronautical authorities of the Other Contracting Party, at least thirty days before the commencement of the operation of this service. Any alteration of the timetables shall also be submitted to the approval of the aeronautical authorities".

(158) Article 5 (3) has exactly the same wording of the GDR agreement quoted in the text.

(159) See Article 10 (3) quoted in the text, infra.

> financial accounts shall be settled by agreement between the designated airlines of Contracting Parties and if necessary shall be submitted for the approval of the aeronautical authorities of the Contracting Parties (160). (Emphasis added).

Predetermination of capacity may be done either by the aeronautical authorities themselves or by an agreement between the designated airlines, subject to the approval by the aeronautical authorities (161).

Mozambique's BATAs follow the latter method rather than the first. The predetermined matters are agreed between designated airlines in accordance with the provisions of the agreement (162).

Some agreements, for example those with GDR, Portugal and Romania, but not that with the Soviet Union, establish that the agreement drawn up by the airlines be presented to the aeronautical authorities in a given period before the intended date of coming in force: 60 days in the agreement with GDR (163) and Romania (164), and 30 days in that with

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(160) Article 10 (3) of the Agreement.

(161) Bin Cheng, **supra**, on p. 424.

(162) For ex., Article 4 (3) of the Agreement with GDR.

(163) **Ibidem**. It reads:

> "Such agreement shall be subject to the approval of the aeronautical authorities of the two Contracting Parties, at least 60 days before the intended date for the beginning of such services".

(164) Article 5 (3) has the same wording of the previous note.

Portugal (165). As to the manner in which the designated airlines agree on capacity and related matters, under the Mozambique practice they agree on the timetables, frequency, type of aircraft and the number of seats or tons of cargo (or containers) they intend to make available in these aircraft to the public, over the agreed routes, according to estimates for a given period.

We have seen that the BATAs of Mozambique do not favour at all unrestricted capacity to be offered by the airlines. But how is the right provision of capacity to be attained? In other words, do the BATAs provide any criteria to be followed by the designated airlines in making provision of capacity?

The answer to this question depends much on the commercial traffic rights granted under the BATA. As a rule, Mozambique favours a policy of point-to-point air services and therefore very rarely fifth freedom traffic rights will be embodied right through in the agreement itself. The agreement will favour third and fourth freedom traffic rights. Therefore, most commonly a clause like the understated will be found in the Annex rather than in the Agreement itself:

> "The carriage of fifth freedom traffic on intermediate or beyond points will be agreed in the first instance between the designated airlines of both Contracting Parties. Such an Agreement shall be

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(165) For the wording, supra, note 157.

> submitted for approval by the Aeronautical Authorities of both Parties (166).

Therefore we can state that it is first for the designated airlines to agree upon fifth freedom rights which are then subject to approval by the concerned aeronautical authorities, not otherwise.

However, if the above statement represents the rule, there are a few exceptions. One of them is the agreement with the Soviet Union in which paragragh 4 of Article 3 itself lays down that

> "the designated airline of each Contracting Party may have the rights to take on or put down in the territory of the other Contracting Party international traffic of passengers, cargo and mail destined to or taken from intermediate points in third countries on the routes specified in Annex 1, which shall be subject to agreement between aeronautical authorities of the Contracting Parties".

Under this provision no inter-carriers agreement is required to exercise fifth freedom traffic rights, only an inter-aeronautical authorities agreement will be needed. It is our belief, however, that the views of the aeronautical authorities are influenced to a great extent by the advice given to them by the national airlines.

Coming back to the provision of capacity to be used, this will be much more enlightened by the traffic rights exchanged. In the above referred agreement with Romania, where third and fourth freedoms have primarily been exchanged, despite the fact that no guidelines are explicitly

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(166) Section B, para. 2 of the Annex to the Agreement with Romania.

given for the provision of capacity in normal circumstances, it is made clear that, in any increase of capacity or frequency, the primary objective of the air services should be to serve traffic moving between the territories of the two Contracting Parties. This capacity should meet, primarily, the requirements of third and fourth freedom traffic, that is to say "inter-partes" traffic (167) (168). This very same criterion has been adopted in the BATAs with GDR (169) and Portugal (170).

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(167) On the subject of "inter-partes traffic", Prof. Bin Cheng writes that

> "Traffic between the contracting States in a direct terminating service constitutes inter-partes traffic (A-B)"

And that

> "this is the most restrictive of the three primary capacity criteria in general use. Here, the principle is to mantain capacity "in equilibrium" with traffic offering between the two contracting parties. Third country traffic, whether national, extra-partes or fifth-freedom, is, therefore, to be left out of account when the amount of capacity to be offered on the agreed service is first computed".

Bin Cheng, op. cit., at p. 404 and 417.

(168) The primary objective of the air services is set forth in paragragh 4 of Article 5 which reads as follows:

> "Any increase in the capacity to be provided or frequencies of services to be operated by the designated airline of either Contracting Party shall be agreed, in the first instance, between the the designated airlines and shall be subject to the approval of the Aeronautical Authorities **on the basis of the estimated requirements of traffic between the territories of both States.** Pending such Agreement or settlement, the capacity and frequency entitlements already in force shall prevail". (Emphasis added).

(169) Paragragh 4 of Article 4 of the Agreement.

(170) Paragragh 4 of Article 7 of the Agreement.

As stated above, one of the main features of the bilateral agreement with the Soviet Union is the granting of fifth freedom traffic rights in the agreement itself. Departing once more from the general rule whereby the primary justification traffic is the "inter-partes" traffic, the "national traffic" criterion (171) (172) has been introduced as the primary capacity criterion. This finds expression in Article 10 (2) of the Agreement according to which

> "The agreed services provided by the designated airline of each Contracting Party shall be closely related to the requirements of the public for transportation on the specified routes, and each of them shall have as **its primary objective** the provisions of capacity adequate to meet the demands to carry passengers, cargo and mail **embarked or disembarked in the territory of the Contracting Party which has designated the airline.** (Emphasis added).

As a general rule, the bilateral agreements concluded by Mozambique, however predetermination-minded, do not fix any specific figure according to which capacity will be shared. They confine themselves to say that capacity, frequencies and related matters shall be agreed upon between the designated airlines.

Exception to this rule is, however, the agreement with GDR in which is said that

> "The total capacity offered between the two parties on the agreed services shall be divided as much as

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(171) According to B. Cheng (op. cit., at p. 404), national traffic comprises traffic to or from the flag-State of the carrier and hence includes, as one of its subdivisions inter-partes traffic.

(172) Attention is called upon the fact that "national traffic" is here employed in a different meaning from that appearing in the next Chapter.

> possible in equal parts between the designated Airlines, unless otherwise agreed by the Aeronautical Authorities". (Emphasis added).

The last sentence "unless otherwise agreed by the Aeronautical Authorities" is designed to allow the governments to establish different shares of traffic in the cases where they may find that this would be just.

As to other agreements in which nothing is said on how capacity should be divided, a resort to what was the intention of the parties, under the factual and legal circumstances in which they concluded the agreement, will be required. In other words, the Parties may have relied on the "fair and equal opportunity" principle existing in the bilaterals.

Fair is perhaps an equal share. Countries when negotiating a treaty are deemed to know each other's domestic laws and regulations. Under these circumstances, if a country has its own regulations dealing with division of traffic, as is the case with Mozambique, the Contracting States may have found that regulation adequate for fair air commercial operations for their airlines between their territories.

B - THE UNBALANCED SITUATION OF TRAFFIC ORIGINATING IN MOZAMBIQUE AND IN FOREIGN COUNTRIES AND THE "DIPLOMA MINISTERIAL" NO. 97/80

The main concern of capacity regulation in bilateral agreements is to determine how many passenger places, how much cargo space and how many services a week a foreign airline may offer. In order to do so, as seen before, many countries, including Mozambique, resort to the system of fixing, **a priori**, the capacity to be made available to the public by the designated airlines.

One of the consequences of international air transport is that if one travels a portion of his trip on a foreign airline, the country where the fare was paid has to transfer to that foreign airline's homeland the amount corresponding to the portion flown, most of the time in convertible currency. This has detrimental effect on the balance of payments of the country transferring those remittances. This causes no major problems when both Contracting Parties produce, by and large, equivalent traffic streams and their designated airlines, due to their approximate commercial strength, capture approximately the same share of traffic. However, under other circumstances, things appear differently.

Due to particular situations, either political, social or economic, that Mozambique has been experiencing since its independence in 1975,

the fact is that the country has been originating most of the international traffic under its BATAs. This holds true for all international routes in general, but most particularly for the two long -haul routes: the one to Lisbon, and that to Berlin, via Paris and Copenhagen. The traffic originating in Mozambique (which as a matter of fact has its destination in Mozambique too) is comprised not only of government officials, but also of State owned enterprises people, businessmen and a significant number of common passengers. The latter may be subdivided into:

. Those expatriates working in Mozambique, as experts in a given field, under governmental contracts, whose travel on vacation to their homelands is paid by the government of Mozambique. They constitute a significant number.

. Expatriates who live in Mozambique and whose labour contracts do not entitle them to transfer any remittances to their countries. These are considered unskilled people who, however remaining with the legal status of expatriates, decided to stay in Mozambique. They travel abroad with the sole purpose of visiting relatives.

. Last but not the least, citizens travelling outside the country constitute a significant percentage of the market travelling by aircraft. Like the expatriates, they travel to meet their relatives and friends.

In addition to these, one must be aware that, in a number of cases, despite the journey not actually starting in Mozambique, the fact is that it is paid in Mozambique by PTA (Prepaid Ticket Advice). This situation is tantamount to a journey originating in Mozambique.

Just as an example, according to a recent joint memorandum L.A.M/TAP - Air Portugal, in the route Maputo/Lisbon/Maputo (which has by far the

most traffic) the percentage of tickets sold in Mozambique is about 90% in contrast with only 2% sold in Portugal (173).

Contrary to what happens in Mozambique, most of the traffic originating and paid abroad is constituted of government officials, few entrepeneurs who hold interests in Mozambique, delegations of foreign non-profit organizations and a very few visitors.

This traffic is not significant.

It is well known that every trip abroad has a detrimental effect on the balance of payments of a country and if done on a foreign airline the case is even worse (174). As stated above, this situation could be reversed if the designated airlines had equivalent commercial strength. However this is not the situation, particularly in the long-haul routes which deserve more concern from the Government of Mozambique. L.A.M. is an infant airline, lacking equipment and commercial experience in contrast with some airlines operating into Mozambique.

This led to the adoption , in October of 1980, of the "Diploma Ministerial" no. 97/80 already explained in the preceding Chapter, which, along with establishing as a matter of general rule that

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(173) Information kindly supplied by L.A.M.

(174) Wassenbergh, " Aspects of Air Law and Civil Air Policy in the Seventies", on p. 8.

international travels should be paid in convertible currency, sets forth also some exceptions to the said rule and in connection with this, establishes that the national airline has, in principle, priority to carry this exceptional traffic. The payment of air transport in convertible currency has the effect of lightening the burden on the foreign exchange reserves of the country.

The importance of this regulation in regard to BATAs is that the capacity clauses laid down therein must be read together with this regulation.

CHAPTER IV

THE "DIPLOMA MINISTERIAL" NO. 97/80 AND THE CAPACITY PROVISIONS IN THE BILATERAL AIR TRANSPORT AGREEMENTS

As seen in Chapters I and II, the "raison d'être" of the "Diploma Ministerial" no. 97/80 is clearly linked , on the one hand , to the restraint on the drain by air transportation on the foreign exchange reserves of Mozambique and , on the other hand , to the fact that this country has been the one which generates, by far, the largest amount of passenger traffic over the two long-haul routes operated by L.A.M.: that via Paris to Copenhagen on to East Berlin, and that to Lisbon. By establishing various categories of traffic and different entitlements to their carriage, this regulation succeeded in correcting the existing unbalanced situation.

The question now is whether or not the regulation runs against the capacity clauses of the different BATAs by denying "fair and equal opportunity" to foreign airlines to exploit the Mozambique market. This issue is a delicate one under international law since international law has a superior status over domestic law. By adhering to an international treaty, a State commits itself to modifying inconsistent

domestic law in order to carry out its international obligations. This is specifically recognized by Article 27 of the Vienna Convention on the Law of Treaties which provides:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty (...)"

As a consequence of the above statements, two conclusions come out with direct impact on the subject-matter of this paper:

a) internal law barring implementation of international obligations is not acceptable as a justification for failure to respect the provisions of a treaty.

b) domestic law cannot supersede the relevant international agreement.

The discussion of the "fair and equal opportunity" which follows will lead the reader to the conclusion that, nowadays, there is no agreed meaning of the clause among States. On the contrary, different meanings are assigned to it by different States and, amazingly, sometimes by the same States on different occasions, according to their momentary interests.

Finally, it is hoped to show that the understanding given to it by Mozambique is reasonable, taking into account the factual circumstances which in the proper place will be described.

Next, a general discussion on the meaning of "fair and equal opportunity" will follow, and further, as a conclusion, a specific discussion within the context of the aviation industry in Mozambique will be carried out.

A - THE "FAIR AND EQUAL OPPORTUNITY" CLAUSE

1. IN BERMUDA I

As already mentioned, the capacity clauses of the Bermuda I Agreement were included in the Final Act of the Bermuda Conference, rather than in the Agreement itself. The clauses, despite their great acceptance and seeming clarity, have been subject to controversial and contradictory interpretations by States. Legally speaking, they are far from being satisfactory. It has been said that the Bermuda text

> "was accepted because it is incomprehensible and because, for this very reason, it provides its negotiators and those who are entrusted with its implementation (as long as there is no disagreement) with the possibilty of placing upon it the interpretation they prefer" (175).

For Prof. Lowenfeld, paragraghs 3 and 5 of the Bermuda capacity principles are meaningless. This finding enabled him to form the opinion that if he was an editor, he would strike out the clauses (176).

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(175) Thomka-Gazdik, "Co-Existence of Scheduled and Charter Services in Public Air Transport", 77 The Aeronautical Journal 745 (1973), p.34, ft. 9.

(176) Lowenfeld, " The Future Determines the Past: Bermuda I in the Light of Bermuda II", 3 Air Law (1978), p. 5 and 6.

For other authors,

> "the faults in the Bermuda principles do not appear to lie in what they say but rather in what they not say " (177).

But "one critic's vice is another critic's virtue" (178).

Talking about Adriani's (179) point of view, Diamond writes that

> "the broad framing of the Bermuda principles is an act of wisdom which has a sound basis of reasonableneas" (180).

In the same sense MacDevitt was able to write that

> "Bermuda I, in contrast to Bermuda II, contained vague and ambiguous phraseology which rendered it adaptable to virtually any set of political and economic realities existing between any two nations" (181).

With regard to interpretation, the same author notes that

> "the ambiguous phraseology of Bermuda I rendered it subject to varying interpretations. The fifth freedom limiting language was used by nations favoring restrictive policies to interpret the Bermuda principles as "protectionist". Nations favoring freedom of the the air, on the other hand, utilized the very same language to construe the principles as "liberal" (182).

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(177) Albert W. Stoffel, "American Bilateral Air Transport Agreements on the Threshold of the Jet Transport Age", 26 J. Air L. & Com. 2 (1959), p. 130.

(178) Barry Diamond, "The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements", 41 J. Air L. & Com. (1975), p. 449.

(179) P. Van der Tuuk Adriani, supra, p. 406 and 413.

(180) Diamond, supra, p. 449.

(181) Kathleen K. MacDevitt, "The Triangle Claims Another Victim: A Watery Grave for the Original Bermuda Agreement Principles", 7 Den. J. Int'l L. & Pol'y 2 (1978), p. 243.

(182) Ib., p. 253.

Notwithstanding the eulogies, it is doubtfull wHether the Bermuda capacity clauses fit, indeed, " virtually any set of political and economic realities existing between any two nations". This will be dealt with later.

However, whatever the ambiguities that may exist, it is beyond any doubt that the parties intended to adopt flexible principles rather than a restrictive system which would regulate capacity, and that in trying to accomplish that intention, they may have neglected the requirement for its precision.

In the process of finding out the real intention of the parties when drawing up the capacity principles, a recourse to the commentaries by the official participants in the Bermuda negotiations as well as to the legal writing of aviation scholars will have to be taken.

Amongst other capacity clauses, one dealing with a "fair and equal opportunity" for the designated airlines to operate the routes specified in the Agreement was agreed upon. Since then, with little variation, this clause has been repeated in most of the BATAs, either in those following the Bermuda model or not.

It is believed that this principle is the pratical interpretation, in bilateral relations, of:

(i) The principle embodied in the Preamble of the Chicago Convention that "international air transport services may be established on the basis of equality of opportunity".

(ii) article 44 of the same Convention according to which one of the ICAO objectives is to ensure that "every Contracting State has a fair opportunity to operate international airlines" (183).

Paragraph 4 of the Final Act of the Bermuda Conference reads as follows:

> "That there shall be a **fair and equal opportunity** for the carriers of the two nations to operate on any route between their respective territories (as defined in the Agreement) covered by the Agreement and its Annex. (Emphasis added).

This is one of the Bermuda principles whose actual text does not say all that the parties of Bermuda say it does (184)

The "fair and equal opportunity" clause must be read together with another principle laid down in paragraph 5, which reads:

> "That, in the operation by the air carriers of either government of the trunk services described in the Annex to the Agreement, **the interest of the air carriers of the other Government** shall be taken

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(183) H. A. Wassenbergh, "Post-War International Civil Aviation Policy and the Law of the Air", p. 110.

(184) Andreas F. Lowenfeld, "CAB V.KLM; Bermuda at Bay", 1 Air Law (1975), p. 2.

into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes". (Emphasis added).

According to the U S A and U K press releases on February 11, 1946 and September 19 1946 (185) the "fair and equal opportunity" clause does not imply the allocation of frequency by agreement; it affirms the right of each airline to offer the services it believes justified under the guiding principles laid down in the agreement. Such principles are inter alia those of the objective of traffic and of due consideration in regard to the air services provided by the other designated airline(s) Further the clause does not allow arbitrary division of air traffic between countries and their national airlines Accordingly, there is no room for the doctrines of passenger nationality and the country of origin travel which claim a primary entitlement for the carriage of traffic by a specific airline (186)

Individual statements by the participants in the Bermuda negotiations also support this interpretation

George P Baker Chairman of the American Delegation in a lecture delivered at McGill University on April 18, 1947 speaking about those two principles said that their purpose was "to protect against unfair trade practices" (187)

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(185) Press Releases 14 U S Dep t of State Bulletin 302 306 (1946); 15 U S Dep t of State Bulletin 577 578 (1946)

(186) Frank E Loy, "Bilateral Air Transport Agreements Some Problems of Finding a Fair Route Exchange" Freedom of the Air (1968), supra p 184

Both parties tried to ensure freedom of management for the designated airlines in relation to capacity, frequency and schedules in such a way that the freedom of each airline

> "to put on or take off schedules would be the same as the present of either of two competing bus lines between New York and Washington to experiment with their schedules without restriction" (188)

Further the clauses were designed to out law

> practices which were specifically for the purpose of driving a competitor out of business in any way" (189)

Any advantage of either airline would derive from attracting more passengers solely by means of offering better service

As to the division of traffic Baker fully rejected that that was the purpose in saying

> "There was certainly no intention that free opportunity to compete on a fair basis and the right to do half the business were as concepts even distantly related" (190)

Peter Masefield a British delegate to the Bermuda I negotiations fully supports Baker s statements. For him the "fair and equal

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(187) Baker "The Bermuda Plan as the Basis for a Multilateral Agreement" The Public International Law of Air Transport (vol 1 1974), by Vlasic & Bradley, p 254

(188) Ib

(189) Ib

(190) Ib

opportunity" clause was more flexible than the "escalator clause" (191) of the Chicago Conference since, according to the former capacity to be provided by the airlines is "to be related broadly to the traffic demand" (192) Another advantage found out by this author is that the principle implies

> no inhibiting insistence upon an equal split of capacity between the airlines or the countries concerned" (193)

George Cribbet a contemporary of the Bermuda I negotiations stresses that the "fair and equal opportunity" language constitutes a defense against inflation of capacity and operation unduly detrimental to the competing airlines (194)

One can say that according to early interpretations the Bermuda agreement while securing a system of managerial decision on capacity and frequencies without governmental intervention also introduced a system of controlled competition (195) fair and equal opportunity implied that the airlines were required to use only fair means of competition

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(191) Peter Masefield "The air Charter Challenge" in Flight International April 1973 p 550

(192) Ib p 549

(193) Ib p 550

(194) George Cribbett "Some International Aspects of Air Transport" Journal of the Royal Aeronautic Society (1950) p 680

(195) Bin Cheng "The Law of International Air Transport" (1962), p 462

The deployment of excess or uneconomic capacity/frequency on given routes the use of lower fares than those agreed upon or subsidization of one airline to enable it to offer services to the public at a lower rate would be regarded as violations of that principle

The capacity clauses of Bermuda I Agreement have been the subject of numerous writings since their enunciation Through them legal authors have propounded refined interpretations of the clauses and have expanded the field of their application

Next an overview of positions taken by some writers on the "fair and equal opportunity" clause as intended in Bermuda I will be provided

For Adriani (196), equal opportunity to operate is not the same as equal share in the operations Equality of shares can only be achieved in the special and rare cases of a complete balance of power between the designated airlines of both parties But as a rule there is an imbalance of power The words "fair" and "equal" would be conflicting should "opportunity" be the same as "share" Since not always "fair" would be identical to "equal" and "equality" in these circumstances would not be "fair"

In order that "equality" be "fair" it would be necessary that the stronger or more enterprising carrier would have to fall to the lower

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(196) Adriani op cit. p 409 10

level of the weaker carrier (197). This would not be fair for the development of the aviation industry and it would not be in the interests and the needs of the public. "Fair and equal opportunity" means, according to Adriani,

> "that the carrier of one party which happens to be the weaker still has the same - equal - fundamental right to operate as the stronger competitor and should just as well be enabled to have its place under the sun. And this cannot be but fair, even if, in practice, this place might only be a modest one" (198).

In other words it is assured an opportunity to attempt to gain a certain share of the traffic.

For Prof. Lowenfeld the "fair and equal" clause not only means an opportunity for the airlines "to start the race together (...) but not necessarily to finish together" (199) but it has a much more wider field of application (200).

It concerns not only the behaviour of the designated airlines (as said heretofore) but also a commitment by the governments neither to practise nor to permit practice of descriminatory measures of a wide range against the foreign airline(s). The following is a list of

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(197) In the same sense, Wassenbergh, "Public International Air Transport Law in a New Era", p. 41.

(198) Adriani, op. cit., p. 410.

(199) Lowenfeld, op. cit., p. 5.

(200) On treaty interpretation, Lowenfeld appears to share the view that content of treaties expands with changes in circumstances and the meaning of words.

the main forms of discriminatory pratices that can affect the "fair and equal opportunity" principle (201) (202):

- Preferential treatment for the national carrier generally;
- unequal airport and user charges;
- unequal or unfair business and other charges;
- preferential customs and immigration services for the national carrier;
- preferential ground services for the national carrier;
- discounting or special tickets on the national carrier to the detriment of foreign carriers;
- preferential treatment for the national carrier in respect of the carriage of mail;
- a tax on tickets only applicable to foreign carriers;
- restrictions on the carriage of outgoing cargo and mail by foreign carriers;
- restrictions upon advertising by foreign carriers and upon the location of their airport counters and their downtown sales offices;
- monopoly held by the national carrier upon check-in and boarding facilities;
- monopoly held by the national carrier upon ticket stocks;
- monopoly held by the national carrier on computer reservation systems.

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(201) List taken from Vlasic & Bradley, op. cit., (Supplement 1, 1976), p. 132 (International Air Transportation Competition Hearing Before the H. R. Com. On Interstate & Foreign Commerce, 93rd Cong. 2nd Sess. (1974)).

(202) On the same subject, Lowenfeld, op. cit., p. 5.

Briefly stated, the "fair and equal" clause, as intended by the parties to the Bermuda I Agreement or at least as largely spread out by the U.S.A. aviation authorities and legal writers, prohibits unfair competition and discriminatory practices and does not imply allocation of frequencies or a duty to remove inherent disabilities under which an airline may labour (203).

The Bermuda I Agreement reflects a belief in free enterprise and market forces. Each airline should be left itself to and whichever is better in management, marketing, equipment, experience etc. should win. Obviously, a State with a weak airline will resist to enter into Bermuda I type agreements. Its airline will not have the strength needed to compete successfully with the stronger airline (204).

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(203) On the same subject, Lowenfeld, **ibidem**.

(204) MacDevitt, supra, on page 258-9, refers to a number of "Capacity Restriction Agreements" on the North Atlantic routes, concluded, in the seventies, under Bermuda I. These Agreements have been approved by the CAB on the grounds of the constraints imposed by the international fuel crisis. Apart from the goodwill behind these agreements, it seems that they ultimately undermine the Bermuda capacity principles. As seen above, the "fair and equal opportunity" language is designed to assure the freedom of each airline to provide the capacity it believes justified (subject to the restrictions already outlined). Adriani, supra, is positive in saying that under the referred Bermuda principle neither carrier is supposed to slow down in case the other airline does not have the same commercial strength. Well, such agreements not only have as their result that the airlines have to slow down but also that the situation created is tantamount to a predetermination of capacity.

2. THE PREDETERMINATION SYSTEM

Although the United Kingdom was one of the parties to Bermuda I Agreement, it did not generally remain faithful to the capacity pattern established therein. On a number of occasions, the Bermuda capacity provisions have been replaced and, instead, the United Kingdom put forward the proposal of a predetermination of capacity (205). This attitude was in line with that taken by the United Kingdom at the Chicago Conference which, with regard to capacity, envisaged predetermination, equal division of capacity and limited fifth freedom rights.

Under the predetermination system, governments fix, prior to the commencement of the air services, by agreement, in accordance with the principles governing capacity in the BATA, the actual capacity to be made available. Sometimes, the agreement fixing capacity is concluded not by the aeronautical authorities but by the designated airlines and subject to government approval (206). The contents of such agreements usually deal with total capacity to be provided but frequency of flights, scheduling of flights and types of aircraft to be operated are sometimes agreed upon (207) (208).

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(205) Cheng, op. cit., p. 424.

(206) As an illustration of this latter modality, see the BATA with GDR, supra, p.78 and note 157.

(207) Haanappel, op. cit., p. 254.

(208) For illustration, see Chapter I, p.77 (Agreement with USSR).

As a rule BATAs using the system of predetermination of capacity, notwithstanding a "fair and equal" clause, couple predetermination with an equal division of capacity between the designated airlines of both contracting parties. ICAO has drafted a similar clause to be used by its member States negotiating BATAs. The relevant parts of it read as follows:

> "(1) The total capacity to be provided on the agreed services by the designated airlines of the Contracting Parties shall be agreed between, or approved by, the aeronautical authorities of the Contracting Parties before the commencement of the operations, and thereafter according to anticipated traffic requirements.
>
> (3) Each Contracting Party shall allow **fair and equal opportunity** for the designated airlines of both Contracting Parties to operate the agreed services between their respective territories so as to achieve equality and mutual benefit, **in principle by equal sharing of the total capacity** between the two Contracting Parties (209). (Emphasis added).

With regard to the above clause, it is noteworthy that by the use of the words "in principle", equal division of capacity is not made mandatory. It provides the Contracting States with enough room to agree or approve otherwise.

Many nations have, indeed, as early as 1946, turned away from the Bermuda pattern on capacity and adopted the predetermination method (210). How to understand this, if, according to what has been said,

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(209) ICAO Doc. 9440, "Policy and Guidance Material on International Air Transport Regulation and Tariff" (1984), p. 15.

(210) ICAO Doc. A16-WP/33 - EC/5, 8.7.68, "Exchange of Commercial Rights", p. 5.

Bermuda I contained vague and ambiguous phraseology which rendered it adaptable to virtually any set of political and economic realities existing between any two nations" (211)?

Contrary to the above opinion, reality has shown that Bermuda I does not fit all States due to its liberal approach to international air transport. According to this view, commercial competition should be the sole arbiter of market shares. Restrictions are not allowed as they are regarded as violations of the Bermudian principle of "fair and equal opportunity". This kind of philosophy built up in Bermuda I has been successful in those conditions where the commercial strengths of the designated airlines are more or less on par with each other. Competition which relies only on the market forces is high-costing. It requires extensive programs of advertising, re-equipment, service etc... which are not easy to match by weaker airlines.

States whose carriers had no ability to compete in a "fair and equal opportunity" basis as understood in Bermuda I came to view that principle as a licence for the better equipped and more efficient carriers to dominate the market at the expense of their own carriers.

Fully agreeing with the position taken by those States, King and

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(211) MacDevitt, op. cit., p. 243.

(212) John R. King & Susan C. Roosevelt, "Civil Aviation Agreeements of the People's Republic of China", 14 Harv. Int'l L. J. (1973), p. 334-35.

Roosevelt, commenting on Civil Aviation Agreements of the People's Republic of China, wrote the following (212):

> "Pure Bermuda agreements are well-suited to carriers of relatively equal economic strength, as they provide for a degree of competition within the limits of mutually approved rates and specifically designated routes. The Bermuda Model is ill-suited for a pair of States of disparate economic size. The 20 per cent (213) air traffic available for competitive capture under a normal Bermuda would go to the stronger airline".

These States managed to create a more restrictive view of that principle whereby it would mean

> "not simply the absence of legal impediments but equality of practical capability to compete" (214).

Further, these nations share the opinion that

> "if their national airline is not getting half the traffic on the route it operates, this proves that the conditions are not fair and equal" (215).

As a conclusion, one can say that according to the views of the countries seeking practical equality for their airlines, the "fair and equal opportunity" principle does imply allocation of capacity and

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(213) Stephen Wheatcroft, in "Air Transport Policy", p. 74 has observed that the lowest percentage of the traffic which a country operating under a Bermuda type agreement will be willing to accept on major routes where it generates fifty percent of the traffic is forty percent. Since the other contracting party to such a BATA will likewise be unwilling to accept less than a forty percent share in a market in which it generates fifty percent of the traffic, the two parties can be said to be effectively competing for just this middle twenty percent of the traffic.

(214) McCarroll, "The Bermuda Capacity Clauses in the Jet Age", Vlasic & Bradley, op. cit., vol. 1, p. 272.

(215) Wheatcroft, op. cit., p. 73.

frequency. As seen in the ICAO capacity clause quoted above, it not only divides traffic on a 50-50 basis but even allows unbalanced shares in some cases. This latter hypothesis may lead to the conclusion that, seemingly, a situation of descrimination was recognized as not running against the "fair and equal opportunity" language existing in that very same clause. Under these circumstances, one may ask what is left from the original meaning of "fair and equal opportunity". Very little indeed.

3. "THE QUID PRO QUO" DOCTRINE (EQUAL EXCHANGE OF ECONOMIC BENEFITS)

Sometimes, the principle of "fair and equal opportunity" finds expression in the routes exchanged and in the value of the markets served through such routes. Under these circumstances, the principle seems to have little relation with its Bermudian meaning. In this case, governments in the process of granting a route to their territory, look, first of all, at the amount of benefits that their airlines can obtain from operating air services to that country over specific routes(s). In other words they compare their markets in order to find out whether they are equivalent before granting traffic rights. If they are equivalent, then there shall be an "equal opportunity" for the airlines to compete. If not, no "equal opportunity" exists. The latter no longer means, as heretofore, just the impeded right to operate sought in Bermuda I. According to Wassenbergh this has been the U. S. approach to BATAs and was translated in the seventies, into the U.S. doctrine of "an equal exchange of economic benefits" (216). Such an approach, Wassenbergh says, clearly favors those countries having, like the U.S., a great traffic originating potential and is of

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(216) H. A. Wassenbergh, "Aspect of the Exchange of International Air Transportation Rights", Annals Air & Space L. (1981), p. 235-6. See also Eric Wessberge, "Reciprocity in Air Transport Bilaterals: Realities, Illusions and Remedies. Part One: Fair Exchange of Benefits", ITA Bulletin, no. 32, September 1981, p. 824.

no advantage to those not having that capability (217). The latter can even be denied access to the U.S. if it is found that there is a pronounced unbalanced situation notwithstanding the fact that no adverse effects on the operations of U.S. carriers are feared (218).

However, U.S. carriers, for example, are of the opinion that foreign carriers profit much more from their access to the U.S. market than the american carriers do from those foreign countries markets due to their less value (219). This is aggravated by the claim made by the U.S. carriers that foreign carriers disregard the principle of "primary justification traffic" and carry too much sixth freedom traffic (220). In doing so they divert traffic to their homelands which rightfully should otherwise be shared between the American carriers and carriers of third States.

In the opinion of U.S. aviation authorities, the situation of different market values only could be helped by the granting to U.S. carriers of greater number of routes to fly to those countries and fifth freedom

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(217) H. A. Wassenbergh, "Post-War International Civil Aviation Policy and the Law of the Air", p. 111, ft. 3.

(218) Wassenbergh, "Public International Air Transport Law in a New Era", p. 23.

(219) Wassenbergh, "Aspect of the Exchange...", supra, p. 235.

(220) For the notion of "primary justification traffic" see Chapter II, p. 68. For the definition of "sixth freedom traffic", see in the same Chapter, p. 47.

traffic rights. This being exchanged by the granting to the foreign carriers of a limited number of U.S. gateways in third and fourth freedoms (221). This is done so in the seeking of a balanced situation as explained by Wassenbergh:

> "In exchanging a gateway point in its own territory for a gateway point in the territory of the other party the revenues which may be obtained or are being obtained by the carriers of the contracting parties from the operation of the route concerned are sometimes taken as a basis for determining the balance of the rights to be exchanged, or which have been exchanged. The economic equivalence of the rights exchanged is measured in terms of the benefits derived from the use of the rights" (222).

Loy has analyzed the steps which should be followed to get an equitable exchange of economic benefits in effecting a fair route exchange. First, in the case of a revision of an existing agreement, the actual experience of the carriers in operating the routes is the best guide (223). Secondly, in the case of the negotiation of a new agreement, or the expansion of an existing one, four analytical steps should be followed:

> (1) Determining the kinds of traffic properly included in evaluating the market potential of the route.
>
> (2) Determining the proportion of the potential market that can properly be attributed to the carriers of the two countries.

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(221) Wassenbergh, op. cit., p. 235.

(222) Wassenbergh, "Aspects of Air Law...", supra, p. 47.

(223) Frank E. Loy, supra, p. 179.

(3) Calculating the projected numbers of passengers or tonnes of cargo that are attributable to each country, based on the foregoing steps.

(4) Converting the resulting volume of traffic into potential revenues (224).

The result should be favourable to the U.S.

The consequence of this doctrine with regard to the "fair and equal opportunity" as stated by Wassenbergh is that

> "The U.S. in this way translates the principle of equal opportunity for the carriers of both parties by putting the opportunities on a level with the benefits derived from them" (225). (Emphasis added).

A final remark is that this doctrine is also coupled with the assertion that because the U.S. is the largest international traffic generating country in the world, the American carriers should have a first entitlement to carry the traffic originating in the U.S (226). Such a view is in sharp contrast with that propounded in Bermuda I which, as explained earlier, rejects first entitlements and relies solely in the market forces and better service.

We believe that whilst negotiating a BATA, States are deemed to exchange different benefits which, however different, are equivalent. We also believe that it is fair to recognize that the State originating more traffic should carry a bigger percentage of traffic. This should be achieved by pre-determining the capacities. However, in

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(224) Ibid., p. 180.

(225) Wassenbergh, op. cit., p. 47.

(226) Wassenbergh, op. cit., supra 216, p. 235; ITA Bulletin, supra 216, p. 824.

the particular case of those BATAs of a pure Bermuda-type, this understanding of fairness does not fit therein because, despite with some restraints, the principle of "survival of the fittest" should rule.

4. VISUAL RECIPROCITY

Further to the views of different authorities expressed above, route exchange has been used as a basis to attain "fair opportunity" in the international carriage of traffic although in variance with the preceding view. It has been shown that States sharing the "quid pro quo" view manage to obtain the most profitable routes from the other State in a BATA in order to match their traffic generating potential. This endeavour will most probably lead - actually this is what they most desire - to the exchange of different routes with different traffic potentials to satisfy the claim of the traffic generating countries.

Under this new viewpoint the best conditions to have an "equal opportunity" to compete are those in which the same routes are exchanged - the so-called "visual reciprocity", "double tracking" or "mirror reciprocity" (227). This seemes to be a sound proposition. In

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(227) Wassenbergh, op. cit., p. 47. However, for Gidwitz, supra, on p. 151, "mirror image" or "equivalent exchange reciprocity", refers to an exchange that includes equivalent, but not identical, fifth-freedom rights.

(228) Frank E. Loy, op. cit., p. 177-8.

fact, if the airlines are using one and the same route, it seems to be a rightful assumption that they gain equal benefits. Under this system contracting States may also agree on an equal number of intermediate and beyond points or may draw up equal number of routes of similar looking (228).

However good this doctrine may sound, one must be aware that the benefits derived from a route do not depend only on the route itself, but, moreover, also on the airline's ability to transform the opportunity, represented by the route, into actual revenues (229).

In fact, the capture of traffic sometimes depends on the type of aircraft used. Jet aircraft and large aircraft are generally preferred. Reliability and punctuality as well as the on-board services rendered by the airline are crucial. If the airline fails to meet these details, it may very well happen that despite an excellent route and excellent market, the airline will suffer the consequences of a diversion of traffic.

5. THE FERREIRA DOCTRINE

The Latin American States have formed their own view of "fair and equal opportunity" under the so-called Ferreira Doctrine advanced by Prof. E. A. Ferreira, in 1946, to serve as a basis for bilateral agreements of

(229) This is also true for the "quid pro quo" doctrine.

Argentina. This theory came up in response of a proliferation of fifth freedom traffic rights existing in Latin America, exercised by airlines of non-Latin American countries. The aviation liberalism of the U.S.A., their neighbour and main partner, played a major role in the development of this theory. Most aspects of this doctrine have been incorporated in recommendations of CRAC, in 1959, 1960 and 1962 (230).

It is characterised as being highly protectionist, propounding a restrictive interpretation of the principles on which the Chicago Convention is based: sovereignty, reciprocity and good faith (231).

This doctrine has a number of implications. It is asserted that air traffic, in a given State, is the property of that State, being best compared with an intangible property. It does not matter where the traffic comes from nor the nationality of traffic. Therefore, as national product like grain, machinery, frozen meat etc., air traffic is subject to the system which governs other products, which implies:

. protection against competition.

. absolute priority for national operators.

. strict regulation.

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(230) CRAC stands for "Conferencias Regionales de Aviacón Civil" - Civil Aviation Regional Conferences (of the American States). See "South American Attitudes Towards the Regulation of International Air Transportation", by Eduardo Jiménez de Aréchaga, in "Freedom of the Air", by McWhinney & Bradley, p. 71-78.

(231) Michel G. Folliot, "South American Protectionism in Air Transport", ITA Bulletin, May 1982, p. 1 and 2.

. control of capacity, frequencies and the equipment used (232).

Traffic directly exchanged between the two negotiating States is given primacy. Fifth freedom is no longer considered as a component complementary to directly exchanged traffic, but only as a subsidiary traffic whose share remains very low compared with directly exchanged traffic (233). Fifth freedom traffic because is necessarily taken from the "mainstream traffic" of any one State (third and fourth freedom traffic) may give rise to a trade-off (234).

As to capacity, a system of predetermination by governments is applied, which according to Folliot is

> "On the basis of fair and equal opportunities for the designated enterprises, taking into account the possible requirements of scheduled Third and Fourth Freedom traffic between the territories of the contracting parties, or taking into account the possible requirements of scheduled Third and Fourth Freedom traffic at all points on the agreed routes, or a combination of these two systems (235). (Emphasis added).

How is the "fairness" to be attained?

The Ferreira doctrine has an answer to this: through the methodology

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(232) ITA Bulletin, no. 36, October 1978, p. 891-2.

(233) Ibid., p. 892.

(234) Folliot, op. cit., p. 5 and 6.

(235) Ibid., p. 4.

of apportionment of capacity and through reciprocity. As to the former, the apportionment will be fair if done, as a rule, on a strictly 50-50 basis (236). If this is the rule, the doctrine allows, however, for different attitudes. By agreement, nations can divide traffic as they wish (237). The theory of reciprocity has been implemented in its most elaborate form in South America although the forms differ from one country to another. Its main aim is to bring the negotiating parties to an effective equality and to afford them equal opportunity to operate. For example, the award of Fifth Freedom rights as well as the designation of airlines are done, as a rule, on the basis of this principle (238). Reciprocity may be effective, potential or comprehensive.

- Effective reciprocity, which is assimilated with a perfectly balanced exchange of privileges, is tantamount to each party being on par in terms of services and traffic.

- Potential reciprocity, which applies when one of the partners cannot benefit directly from the division of traffic (for example, when its flag carrier is not in a position to serve the other party's territory), may result in trade-offs, with the choice being left to the State holding the privileges that are not exploited.

- Comprehensive reciprocity, which applies to an aviation agreement as a whole between the partners or forms part of their general bilateral relations, usually gives rise to

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(236) ITA Bulletin, supra, p. 892.

(237) Videla Escalada, "Derecho Aeronáutico", Tomo III, De Zavalia, Buenos Aires (1973), p. 628.

(238) Folliot, op. cit., p. 5 and 6.

> trade-offs in the form of barters either in the aviation field or economic and commercial relations as a whole (advantages in aviation are offset by concessions in the shipping or textile industries, etc.) (239).

To conclude this outline, one must remark that the clause of "fair and equal opportunity" (240), under the Ferreira doctrine exist side by side with such other notions in variance with the original Bermudian meanings as:

> (1) Predetermination of capacity which is retained and confirmed.
>
> (2) Stress on equal division of traffic between the parties.
>
> (3) Introduction, as a new item, of the notion of ownership of traffic by a State.
>
> (4) Complete ban of fifth freedom traffic or imposition, upon it, of the system of quotas or that of reciprocity.
>
> (5) A very elaborate reciprocity theory.

It is admitted that the "Ferreira doctrine" is the most distant one from the Bermudian principle of "fair and equal opportunity". The U.S., as a participant in the CRAC, voted against the recommendations agreed upon. It is noteworthy that the legal rationale used to vote against was linked with the Bermuda principles. The U.S. asserted that the contents of the recommendations contravened the terms of the

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(239) Ibid., p. 3.

(240) According to the collection of BATAs made by Ludovico Carcavallo, "Acuerdos Aerocomerciales Celebrados por la República Argentina" (1954), the "fair and equal opportunity" clause is usually incorporated in the Annex of the BATA rather than in the BATA itself.

Bermuda-type bilateral air transport agreements since those recommendations, according to the U.S.A., contained "arbitrary restrictions" (241).

The Ferreira doctrine, by declaring "ownership" of the traffic had, as its main objective, the preservation of 3rd and 4th freedom traffic to the carriers exercising these rights. This is a rightful aim in our opinion. The 5th freedom right is an interloper's traffic right vis-à-vis those carriers exercising 3rd and 4th freedom rights. This doctrine, despite being similar in some aspects to the principles laid down in the Mozambican "Diploma Ministerial" 97/80, has important differences. Instead of "ownership", Mozambique claims a mere "priority" for the national carrier to carry traffic paying in local currency.

For the Ferreira doctrine "fair" is to divide traffic in a 50-50 basis, no matter which State is generating the traffic. That is crucial for Mozambique and constitutes the corner-stone of the "Diploma". In Mozambique "fairness" is expressed in a very concrete way: the amount of traffic generated in the country, not an arbitrary division. Mozambique does not elaborate on reciprocity like the Ferreira doctrine does.

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(241) Aréchaga, op. cit., p. 76-77.

The comparison of the Ferreira doctrine with the American view on priority for the country originating most of the traffic leads to a striking result: both aimed at protecting the national carriers. What is different is the name, the result being equal.

6. THE BERMUDA II AGREEMENT

On June 22, 1976, the United Kingdom denounced the Bermuda I Agreement, because in its opinion it no longer corresponded satisfactorily to the conditions of the 1970's. After negotiations with the United States, another agreement, known as the Bermuda II Agreement, was entered into on July 23, 1977. The background of Bermuda II can be briefly stated as follows:

British Airways, in 1973, carried the equivalent of five empty Boeing 747 Jumbo jets, daily, between New York and London. In that same year, scheduled flights across the North Atlantic carried several million empty seats. Overcapacity on the North Atlantic had reached serious proportions. The capacity principles of Bermuda I Agreement were no longer feasible to limit capacity effectively (242). In 1976, U.S.A. carriers earned $375 million on the North Atlantic route, while state-owned British Airways collected $274 million. Fifth freedom rights beyond London to other European capitals and to the Far East

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(242) MacDevitt, op. cit., p. 239-40.

had garnered $ 170 million for U.S. carriers during 1976, whereas British carriers received only $ 8.5 million for fifth freedom rights beyond the continental United States (243).

The British did not succeed in obtaining their initial goal of intergovernmental predetermination of capacity and frequency as well as a 50-50 split of the transatlantic market they sought (244). However, this new agreement was said to be more restrictive than that of Bermuda I. For example, in Grays' opinion, Bermuda II

> "has reduced the number of gateway cities from which more than one U.S. carrier may serve England. It has reduced Fifth Freedom rights drastically. It has afforded U.K. carriers rights into every city served by U.S. carriers on a non-stop basis to London and it embraces drastic capacity controls which Bermuda I never had. Finally, Bermuda II did nothing about charter rights as a condition for entering into Bermuda II" (245).

It was even blamed for being

> "the most anticompetitive understanding ever entered into by the United States, as it gave up in large part, multiple designation and established controlled designation. It drastically curtailled fifth and sixth freedom rights for U.S. carriers. It established a complex regime for capacity and schedule limitations" (246).

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(243) Ibid., p. 266.

(244) Ibid., p. 254.

(245) Robert Gray, "The Impact of Bermuda II on Future Bilateral Agreements", 3 Air Law (1978), p. 18.

(246) Edward J. Driscoll, opening testimony at the (U.S.) International Aviation Senate Hearings, "Senate Aviation Subcommittee, 95th Cong., 1st Sess., p. 28 (1977).

In our analysis of Bermuda II we are going to concentrate, as heretofore, on the clause of "fair and equal opportunity".

To understand the regulation of capacity in Bermuda II, one has to read the Agreement itself together with its Annex 2.

Article 11, paragragh 1 of the Bermuda II Agreement sets forth the "fair and equal opportunity" language of the Bermuda I Agreement in this way:

> "The designated airline or airlines of one Contracting Party shall have a **fair and equal opportunity to compete** with the designated airline or airlines of the other Contracting Party" (Emphasis added).

In the same way, paragraghs 3(a), (b) and (c) repeat the identical third, fourth and fifth freedom provisions of Bermuda I. It is important to note that paragragh 4 of article 11 says that capacity and frequency must be related to "public demand", taking into account the provision of "adequate service to the public" and the "reasonable development of routes and viable airline operations". Capacity is also to be provided at levels appropriate to accomodate the traffic at load factors consistent with tariffs which are based on the criteria enumerated in Article 12 dealing with tariffs. Paragragh 5 recognizes that excess capacity can be "counter to the interests of the travelling public".

Annex 2, paragragh 2 states that

> "The purpose of this Annex is to provide a consultative process to deal with cases of excess provision of capacity, while ensuring that designated airlines retain adequate scope for managerial initiative in establishing schedules and that overall market share achieved by each designated airline will depend upon passenger choice rather than the operation of any formula or limitation mechanism".

Reverting to the "fair and equal" clause, we observe an absence of formal definition. However, several clues exist leading to the conclusion that the clause remains a non-descriminatory one. This is reflected , for example, in Article 10 dealing with "user charges". Paragraph 1 of the said article states that such charges must be "just and reasonable" (247). One of the tests to see whether such charges are "just and reasonable" is that they must not be higher than those imposed on its own designated airlines operating similar international air services (248). Another example of application of this clause is Article 13, paragragh 1, regarding commissions, whereby,

> "The airlines of each Contracting Party may be required to file with the aeronautical authorities of both Contracting Parties the level or levels of commissions and all other forms of compensation to be paid or provided by such airline in any manner or by any device, directly or indirectly, to or for the benefit of any person (other than its own bona fide employees) for the sale of air transportation between the territories of the contracting Parties. The aeronautical authorities of each Contracting Party shall exercise their best efforts to ensure that the commissions and compensation paid by the airlines of each Contracting Party conform to the level or levels of commissions and compensation filed with the aeronautical authorities".

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(247) Bermuda II, Article 10.

(248) Ibid., paragragh 2. Article 15 of the Chicago Convention deals also with the same subject, with similar language.

It is further stated that the laws and regulations governing the level of commissions and other forms of compensation

> "shall be applied on a non-descriminatory fashion" (249).

Tariffs are traditionally embraced by the concept of "fair and equal opportunity" (250). Therefore, after requiring the approval of tariffs to be used "between the territory of the other Contracting Party and the territory of a third State", the tariffs may not be the source of discrimination among the airlines because the Contracting Parties are not allowed to require

> "a different tariff from the tariff of its own airlines for comparable service between the same points" (251).

Dumping of capacity that traditionally falls under the "fair and equal" clause is explicitly regulated in Article 11, paragragh 5 in these terms:

> "The Contracting Parties recognize that airline actions leading to excess capacity or to underprovisions of capacity can both run counter to the interests of the travelling public".

As in Bermuda I, the "fair and equal opportunity clause rejects predetermination of capacity and frequencies and, instead, affirms managerial decisions on these subjects by the airlines themselves. In the agreement it is stated that

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(249) Ibid., Article 13, paragragh 2.

(250) See ,for instance, Baker, op. cit., p. 254.

(251) Ibid., Article 12, paragragh 3.

> "The purpose of this Annex is to provide a consultative process to deal with cases of excess provision of capacity, while ensuring that designated airlines retain adequate scope for managerial initiative in establishing schedules and that the overall market share achieved by each designated airline will depend upon passenger choice rather than the operation of any formula or limitation mechanism" (252).

In closing this discussion, one may say that, if competition has lessened under Bermuda II, it derives from other causes (restrictions on airline designation and fifth freedom traffic, for example), but not from the giving up of the basic Bermudian I idea whereby "fair and equal opportunity" means air operations governed solely by the market forces provided that the guidelines laid down in the BATA are respected: this goes on in a healthy manner.

In connection with this, one must note that in Bermuda I the airlines had a fair and equal opportunity "to operate" while in Bermuda II they have a fair and equal opportunity "to compete". This makes perhaps a substantive change. Taking into account that the U.S.A. for so many years has been defending the doctrine of "freedom in the air", for the U.S.A. the change may be a clarification rather than an amendment (253).

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(252) Ibid., Annex 2, paragragh 2.

(253 Peter Harbison, "Liberal Bilateral Agreements of the United States: a Dramatic New Pricing Policy", McGill University LL.M Thesis (1982), p. 64.

7. THE CAB v. KLM CASE

In 1974, a dispute between the CAB and KLM arose on the subject of KLM's scheduled services in the North Atlantic. The dispute centered around the capacity clauses, namely the "fair and equal opportunity" clause existing in the BATA between the U.S. and the Netherlands (254). In this dispute, a dramatic change in the American view of fair and equal opportunity came to the fore.

The capacity provisions of the original BATA, spelled out in Article 8, 9 and 10, are the very same which appear in Bermuda I capacity provisions. Therefore the primary justification traffic was that of third and fourth freedom (U.S.-The Netherlands) and fifth freedom traffic had merely the character of "fill-up" traffic (between those nations and third countries). A clarification must however be done that till then, no one had established a ratio between primary and secondary justification traffic and that the U.S. itself had for years resisted efforts to attach numbers to the primary/secondary dichotomy in the Bermuda formula (255). This holds true until today.

The Americans charged that KLM was carrying four times more traffic than Pan Am did and that this traffic was constituted, by far, of traffic from third countries via the Netherlands to the U.S. and

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(254) The Liberal Agreement was concluded on April 3, 1957. TIAS 4782.

(255) Lowenfeld, op. cit., p. 5 and 6.

vice-versa, and that a situation of overcapacity had been created by KLM.

This, in the opinion of U.S., was a violation both of articles 9 and 10 of the relevant BATA (256).

At that time according to some sources (257), Pan Am had indeed a poor share of the market, just about 11.4 percent, while KLM had a handsome figure of 86.3 percent. KLM had the competitive advantage that it was offering much more flights than Pan Am, in offering 26 wide bodied jets a week on each direction against Pan Am 12 narrow-bodied aircraft (258).

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(256) Article 9 stated: "In the operation by the airlines of either Contracting Party of the air services described in this Agreement, the interests of the airlines of the other Contracting Party shall be taken into consideration so as not to affect undully the services which the latter provide on all or part of the same route".

The relevant parts of Article 10 are:

> "The air Services made available to the public by the airlines operating under this Agreement shall bear a close relationship to the requirements of the public".
>
> "... services provided by a designated airline under the present Agreement shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such airline is a national and the countries of ultimate destination of the traffic".

(257) Lowenfeld, **supra**, p. 11 and 12.

(258) **Ibid.**, p. 12.

According to the U.S., only 32,4 percent of KLM traffic came under the primary justification traffic in contrast to the 97 percent of Pan Am (259). KLM claimed however that it carried fifty to fifty-five percent primary objective traffic. However it seems true that over fifty percent of the traffic carried by KLM was transit traffic. In fact, a considerable amount of traffic taken on board in the U.S., was carried to the Netherlands and transported from there to onward destinations, and vice-versa (260).

This touches upon the sixth freedom issue. According to then favoured American interpretation, this freedom is nothing but a sort of fifth freedom characterised, however, by being carried via the carrier's homeland. This being so, they argue(d) that the same restrictions placed on fifth freedom should be applied upon it, namely to be considered secondary justification traffic and therefore to have a character of "fill-up" traffic. However it is objected that the difficulty with this approach as a legal matter is that there is no way of determining whether it is really a freedom (because no restraints are written into the pure Bermuda-type agreements) or it is a violation

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(259) Hans Pieter Sprokkreeff, "The Regulation of Capacity In International Air Transport", McGill LL. M Thesis (1976), p. 136.

(260) Haanappel, "Background of the Dutch-American Aviation Conflict", 1 Annals Air & Space L. (1976), p. 65-6.

(because no permission is written into the agreement) (261). Another view defended by most nations is that sixth freedom is merely a combination of third and fourth freedoms under two different BATAs (with different routes) which have nothing to do with one another (262).

One must bear in mind that the distinction between primary justification traffic and secondary is implicit in Bermuda I and therefore restraint in respect of secondary justification traffic was consistent with the provisions of the agreement. Further, deviations with that regard could be rectified through the **ex post facto** review mechanism existing in the agreement.

However, it should be noted that an exchange of notes in 1969, between the U.S. and the Netherlands amending the capacity clauses, stated that provision of capacity adequate to the demands of passenger traffic stopping over for 12 hours or more at a point in the country of which such designated airline is a national en route to or from could be added to primary justification traffic. This amendment makes that sixth freedom traffic is covered under article 10 and does have the character of "primary justification" as long as the traffic stopped in the Netherlands for 12 hours or more.

To answer whether or not KLM was abusing the agreement one has to

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(261) Lowenfeld, **supra**, p. 15.

(262) Haanappel, **supra**, p. 252.

examine whether, in actual fact, KLM carried too much of this transit traffic. This is outside the scope of this paper, however. What matters is the analysis of the reasoning of the U.S. aviation authorities during the negotiations and the remedial actions taken by the CAB against KLM following the failure of said negotiations.

The idea with which the U.S. started the negotiations with the Netherlands was to amend the 1957 BATA in such a way that the incoming traffic would be shared on a fifty-fifty basis between the designated airlines. Transit traffic also would have to be limited (263).

The negotiations did not however come to a satisfactory result. This compelled the U.S. Aviation Authorities to resort to remedial actions.

Under Part 213 of CAB's Economic Regulations approved in 1970, the holder of an air carrier permit can be required at any time to file its schedules to and from the U.S. if the board is of the opinion that the government that had designated the carrier had, over the objections of the United States Government, taken action which impairs, limits, terminates or denies operating rights of an American carrier provided for in a BATA. Following the filing of schedules, the Board can, with or without a hearing but subject to stay or disapproval by the President of the U.S., issue an order notifying the carrier that its operation, or any part thereof, "may be contrary to applicable law or

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(263) MacDevitt, supra, p. 254; Haanappel, supra, p. 66.

may adversely affect the public interest". This can result in a non-inauguration of air services or in a discontinuance of them within 30 days. In doing so the regulation allows the CAB to convert the "interpretation of the air transport agreements from a bilateral to a unilateral task" (264).

The situation forseen in the regulation, despite some similarity to the dispute that was pending, was not close enough. The Netherlands had not "limited, terminated or denied" to Pan Am operating rights neither had it applied discriminatory measures against that airline. The Dutch said that they had combined an attractive service with aggressive salesmenship - that was what the American view of competition was all about (265).

In order to make it applicable to the dispute, the CAB, in 1974, amended Part 213, paragragh 3(c), under which the CAB could also base its order to a foreign carrier which holds its operating rights pursuant to a bilateral agreement, to file its schedules where it finds that the public interest so requires and, in addition, when the foreign government has

> "otherwise denied or failed to prevent the denial of, in whole or in part, the fair and equal opportunity to exercise the operating rights provided for in such air transport agreement, of any U.S. air carrier designated thereunder with

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(264) Lowenfeld, supra, p. 10 and 18.

(265) Ibid., p. 12.

> respect to flight operations to, from, through, or over the territory of such foreign government" (266). (Emphasis added).

By Order 74-11-83, of November 1974, the CAB required KLM to file its schedules. In the Order, **inter alia**, it was stated that KLM operated to a capacity in excess of the actual needs of the U.S.A.-Netherlands primary markets, and further that KLM was carrying too much sixth freedom traffic. This had resulted in depriving Pan Am of a "**fair and equal opportunity**" to exercise its operating rights (267). The CAB also charged the Dutch that they had, allegedly, refused to discuss excess capacity on sixth freedom traffic in consultations with the U.S.A and that they did not want to deter KLM from continuing to operate what in American's opinion was excess capacity. In doing so the Netherlands government had contributed to deny the U.S.A. carriers a "**fair and equal opportunity**" to operate the agreed services.

Putting aside the details of the follow-up of this case, this paper will hilight the "**fair and equal opportunity**" issue, this being the basic U.S.A. ground for its disagreement with the Netherlands.

As to this issue, a completely different approach was taken. First of all it was the claim of fifty-fifty share of the traffic between the designated airlines. At Bermuda, the concept under analysis did not allow for "**arbitrary division of air traffic**", according to the press

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(266) Amendment no. 4, CAB Reg. ER-870.

(267) CAB Order 74-11-83, Docket 27184 (19 Nov. 1974), p. 2

statement of September 1946 already quoted above (268). On this very same subject, George Baker, Chairman of the U.S. Delegation to the negotiations at Bermuda, was positive in rejecting this by stating that

> "There was certainly no intention that free opportunity to compete on a fair basis and the right to do half the business were, as concepts, even distantly related (269).

The clause, as originally intended, was to protect against unfair trade practices. Stressing this point and with reference to the dispute under analysis, Prof. Lowenfeld states that if the Netherlands had prevented Pan Am from operating air services, in whole or in part, or prohibited services by Pan Am with certain types of equipment, or had imposed on Pan Am user charges not applicable to KLM, then there would have been a denial of "fair and equal opportunity" within the meaning of the Agreement. He goes on to assert that "the clause is a non-discrimination clause, not an equality of traffic clause" (270). This latter situation, indeed, would ultimately amount to predetermination because the only end-result from the CAB's point of view would logically be an order reducing the frequencies, the capacity and controlling the equipment.

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(268) See p 95

(269) Baker, **supra**, p. 254.

(270) Lowenfeld, **supra**, p. 18.

8. THE FREE-DETERMINATION SYSTEM

As a result of the exportation of the U.S.A. domestic deregulation policy on air transport to the international arena in the late 1970's, the U.S. started to conclude BATAs which became known as "liberal agreements". The first very liberal BATA was concluded with the Netherlands in March 1978 (271). According to Harbison, six factors, inter alia, have contributed most for the rising of this new type of agreement:

- Domestic deregulation
- "Small government"
- The industry and economic climate
- The new Carter team
- Bermuda II
- The Laker Skytrain (272)

These new bilateral agreements generally have the following characteristics:

1. Unlimited multiple designation of airlines;
2. A liberal route structure, i. e., U.S. airlines may serve foreign countries from any point in the U.S., via any intermediate point and to any beyond point;
3. Free determination by the designated airlines of capacity, frequencies and types of aircraft to be used unhindered by the Bermuda I capacity clauses;

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(271) Haanappel, "Bilateral Air Transport Agreements", p. 262.

(272) Harbison, supra, p. 21.

4. No limitation on the carriage of sixth freedom traffic;

5. Encouragement of low tariffs, set by individual airlines on the basis of the forces of the marketplace without reference to the ratemaking machinery of IATA;

6. Minimal governmental interference in tariff matters. In BATAs favouring "the country of origin rule", tariffs can only be disapproved by the aeronautical authority of the country where the traffic originates. In those favouring "the dual or mutual disapproval rule", tariffs can only be invalidated by disapproval of the aeronautical authorities of both contracting parties;

7. Inclusion of provisions on charter flights, i.e., the availability of cheap charter air services is encouraged and charterworthiness is governed by the country of origin rule (273).

As to fair and equal opportunity" laid down in paragragh 1 of the capacity clause, it is no longer "to operate", as in Bermuda I, but, instead, as in Bermuda II, is "to compete" (274). This shift in terminology must be regarded as carrying a clarification on the main purpose of the airlines (275). Confirming the already existing meaning in Bermuda I, that "fair and equal opportunity" does not allow for "unfair trade practices", liberal agreements make clear that the

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(273) Haanappel, "Pricing and Capacity Determination in International Air Transport", p. 42.

(274) For example, paragraph 1 of the ICAO liberal capacity clause (ICAO Doc. 9440, p. 21) states:
"Each Party shall allow a fair and equal opportunity for the designated airlines of both Parties to compete in the international air transportation covered by this Agreement". (Emphasis added)".

(275) See, Harbison, supra, p. 123

parties shall endeavour to eliminate all forms of descrimination or unfair competition practices that can be detrimental to the competition (276).

Decision on the capacity, the frequencies, and the equipment to be used is left entirely at the discretion of the airline, in full accordance with the traditional view embodied in Bermuda I (277).

Another innovation is that while Bermuda I, II and the predetermination clause have standards on the provision of capacity, the liberal agreements have no standard at all.

For instance, Bermuda I stated that capacity should bear a close relationship to the requirements of the public for air transport; and further, that the primary objective of the provision of capacity was to

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(276) Paragraph 2, op. cit. supra 274.

(277) Ibid. Paragraphs 3 and 4 read:

> "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 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".

meet third and fourth freedom traffic, while the fifth freedom traffic had a subsidiary character and should be related:

a) to traffic requirements between the country of origin and the countries of ultimate destination of the traffic;

b) the requirements of through airline operations, and

c) the traffic requirements of the area through which the airline passes, after taking account of local and regional services.

Under liberal agreements, however, no standards of any kind exist to limit the level of total capacity. No reference to any of the freedoms of the air, no primary or secondary traffic are referred therein. Instead, there is a prohibition against unilateral capacity limitation of the other party's designated airlines (278).

Liberal bilateral air transport agreements are low-price oriented agreements. To attain this goal, the agreements provide that each airline is entitled to establish its own prices. However, these prices must be established taking into account commercial considerations.

As to pricing, the "fair and equal opportunity" language finds its most clear expression, as to liberal agreements, in the provision dealing with tariffs and rates. This clause, after stating that each airline is free to set its own tariffs, goes on asserting that the intervention of governments shall be limited to:

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(278) Ibid., paragraph 3.

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;

c) protection of airlines from prices that are artificially low because of direct or indirect governmental subsidy or support (279).

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(279) Article 12, paragraph 1(a), (b) and (c).

B - RELEVANCE OF THE MATERIAL RELATING TO BERMUDA I TO THE INTERPRETATION OF OTHER BILATERAL AIR TRANSPORT AGREEMENTS OF A SIMILAR TYPE ENTERED INTO BY THIRD COUNTRIES

Some views have been expressed that L.A.M.'s claim of a first entitlement to carry certain types of traffic under the Diploma Ministerial no. 97/80 is contrary to the "fair and equal opportunity" clause. However, the analysis of the capacity clauses laid down in different BATAs entered into by Mozambique shows that such views spring out from the Bermudian idea that this principle does not allow for an "arbitrary division of traffic"(280)

The value of this assertion as an argument depends entirely on the relevance of the Bermudian interpretations on other BATAs which happen to use the same or similar phraseology, or in other words, on whether third countries may be deemed bound to those extraneous interpretations. It is hoped that the discussion which follows below will show how ill-founded is the abovementioned view.

It is well known that bilateral air transport agreements are international trade agreements in which governmental authorities of two sovereign States attempt to regulate the performance of air services between their respective territories and at times beyond them.

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(280) Baker, supra, p. 254.

Under the principle of privity in agreements, the bilateral air transport agreement can only have a binding effect as between the contracting parties.

It can accurately be said that, as a rule, an agreement concluded between States represents a compromise of different positions (which reflect each one's interests) between the contracting States. As a matter of fact, no State is equal to another State either politically, socially, economically or geographically. The differences among States on the above items will, beyond doubt, imply a specific aviation policy which is in accordance with the immediate or future interests of a given State.

For instance, at the Chicago Conference, the divergent policies advocated mostly by the U.S.A. and the U.K. (which reflected different economic strengths) impeded the conclusion of a multilateral agreement on commercial rights. Again at Bermuda, a compromise had to be sought between the parties due to their different points of view.

A country, for example, with a strong economy and a very well established powerful airline will pursue, as a rule, a more liberal approach to air transport: total capacity will generally be left to the discretion of the airlines, innovative fares will be put forward as the result of its airlines' lower operating costs, and , almost invariably, fifth freedom traffic (intermediate and beyond) will be insisted upon.

In sharp contrast, newly emerging countries will still be fighting their economic battle and, not surprisingly, air transport will not be among their first priorities. They will not pursue an "open sky" policy but, rather, their infant aviation industry will receive the benefits of a firmly advocated protectionist policy turned towards third and fourth freedoms and regional traffic.

The real intention of the parties when drawing up a treaty, despite the similarity of phraseology with another treaty that might exist, has to be sought taking into account the above described factual background and not on the basis of negotiations which took place between a different pair of States. This is so - it may be recalled - because bilateral treaties constitute closed bilateral agreements which are **"res inter alias acta"** (281).

The factual background that has existed in Bermuda I will not be found repeated anywhere between different pairs of States. Under these circumstances, it would be unreasonable to find that by using the same or similar terminology those States mean what the U.S.A. and the U.K. meant at Bermuda.

Another thing to be taken into account is that the same parties, at different times and to suit their current interests, have interpreted the very same phraseology in different ways. For instance the clause of

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(281) Aréchaga, supra, p. 78.

"fair and equal opportunity" has been interpreted differently on some occasions both by the U.S. and the U.K. In dealing with the U.S. doctrine of an "equal exchange of economic benefits" in negotiating BATAs, we noted that U.S. aviation authorities vis-à-vis most European countries were trying to couple it with the first entitlement theory according to which, because the U.S. is the largest international traffic generating country worldwide, the American carriers should have a first entitlement to carry the traffic originating in the U.S. (282). The U.S. is the great proponent of "fair and equal opportunity" in air transport. However, according to Loy, the "fair and equal opportunity" principle is incompatible with the doctrines of passenger nationality and the country of travel origin that claim a primary entitlement for the carriage of traffic by a given airline (283).

Another example of fluctuation in the meaning of the said clause is the CAB v. KLM dispute, in which the Americans attempted to transform it from a "non-discrimination" into an "equality of market" clause (284). In the years immediate preceding Bermuda II, the U.K., relying on the "fair and equal opportunity" language, clamoured for fifty-fifty split of the transatlantic market. Even after Bermuda II was signed, Great Britain hinted that a fifty-fifty division was its ultimate goal. They

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(282) Wassenbergh, supra 217, p. 236.

(283) Loy, op. cit., p. 184

(284) See text, supra, p. 131.

even stated that "the fact remains that we do not have an equal opportunity to compete on all routes" (285). Under these circumstances, why should third countries be supposed to subscribe the Bermuda interpretations if even the parties to it, from time to time, interpret differently the agreement?

A number of other reasons dissuade the use of such materials. First of all is the widespread use of confidential Memoranda of Understanding among governments negotiating BATAs. These memoranda are a highly undesirable practice because they "often totally change the meaning of bilateral air transport agreement, for instance, from a Bermuda I type agreement into a predeterminaton type agreement (286).

Of course, those Memoranda of Understanding are not known by third parties that have used the agreement as a model and therefore they cannot avail themselves of those documents and, therefore, they are misled (287).

Another reason for not using these materials resides in that they may be affected also by interpretations contained in "travaux préparatoires" that as in the case of secret Memoranda of Understanding, they are most of the time not available to third

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(285) MacDevitt, **op. cit.**, p. 254.

(286) Haanappel, **supra**, p. 263.

(287) M. A. Bradley, "International Air Cargo Services: the Italy-USA Air Transport Agreement Arbitration", 12 McGill L. J. (1966), p. 320.

States (288).

A reference has to be made here to the advisory opinion of the tribunal on the Italy-USA Air Transport Arbitration, of July 1965. The dispute centred around whether all-cargo services were permissible under the agreement (a Bermuda-type agreement dated February 6, 1948) which, in Section III of the Annex, granted to the designated airlines commercial rights for "passengers, cargo and mail". The service was stopped in May 1950, and resumed in October 1958. In January 1964, the Americans were prepared to operate with Jet airplanes their all-cargo services to Italy. The Italian carrier, ALITALIA, did not correspondingly operate similar aircraft as the Americans. Therefore, the Italians denied authorization both for the services and for the equipment to be used, arguing that cargo services were not covered by the agreement and were performed only on the basis of temporary concessions (289). They asserted further that the word "and" was used in cumulative sense and therefore only mixed services were granted operating rights.

The tribunal decided the case in favour of the Americans saying that "passengers, cargo and mail" was equivalent to "passengers, cargo or mail, separately or in combination".

The tribunal found much weight in the conduct of the parties which in its opinion evidenced that they did not intend to exclude all-cargo

(288) Ibidem.

(289) Decision of Tribunal, 4 Intenational Legal Materials, p. 977.

services. Another fact that was relied upon was that the Italian Ministry of Foreign Affairs, after the conclusion of the disputed agreement had, in 1948, acknowledged that the agreement was based on the Bermuda formula: this showed that Italy was well acquainted with the regime established by the Bermuda Agreement and therefore Italy should have been aware that the Americans, by proposing a Bermuda-type agreement, aimed at securing the adoption of rules corresponding to those provided under the Bermuda Agreement (290).

The Bermuda formula, according to the tribunal, clearly allowed for all types of air transport to be governed by the agreement. However, the tribunal recognized that the Bermuda Agreement could not be regarded as "travaux préparatoires" since Italy was not a participant in the Bermuda negotiations (291).

However, learned jurists found the tribunal reasoning as bad law and therefore it should not be followed.

They argue that, in accordance with established rules of international law and treaty interpretation, it seems to be beyond dispute that the text, the "travaux préparatoires" and other comparable materials between the United States and the United Kingdom are irrelevant for the interpretation of capacity provisions or other provisions of a treaty even if it is a Bermuda type agreement. Therefore, they conclude, the

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(290) **Ibidem**, p. 982.

(291) **Ibidem.**

exchanges which took place between the United States and the United Kingdom cannot legitimately be used to ascertain the scope and interest of a treaty among other parties: such extraneous documentation and external circumstances should not be allowed to infiltrate the text of a different treaty (292).

Hence, according to this view, the BATAs entered into by Mozambique ought to be interpreted autonomously inasmuch as they have their own factual background: this interpretation may very well be in divergence with the normally held Bermudian views.

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(292) Bradley, **supra**, p. 302; Aréchaga, **supra**, p. 78.

CONCLUSION

A SUGGESTED VIEW OF "FAIR AND EQUAL OPPORTUNITY" IN A REALISTIC SITUATION

As it was said above, the fact that the "fair and equal opportunity" language was first used in Bermuda I may not imply that, when used in another agreement, it retains its original meaning. This is so because, as a matter of fact, the environment in which the agreements are concluded are completely different. At Bermuda, two major world powers with well established airlines were trying to harmonize their interests. Despite their occasional differences they adopted a liberal approach to air transport and were mainly interested in the development of fifth freedom traffic (293).

In contrast, the People's Republic of Mozambique remains an underdeveloped country with a needy economy. Its long-haul national

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(293) Aréchaga, op. cit., same page. It is noteworth that Folliot, op. cit., on p. 1 has stated : "the pronounced liberalism of the United States in air traffic is due to a world balance of strength in its favour, as the same country takes a protectionist attitude in sea transport or in the steel industry, for strictly the opposite reasons".

This demonstrates that States do not take such and such position by idealistic motivations. They are reacting according to their interests.

airline has a fleet of only 5 aircraft as stated in Chapter I of this paper. The airline is expected to play an important role in the country's economy. To accomplish this, it should be economically viable and self-supporting. The airline is not expected to capture big profits in foreign currency through its commercial operations. It is essential for the airline, for the time being, to serve as an alternative carrier vis-à-vis foreign air carriers and, by doing so, to help the balance of payments of Mozambique. In fact, if traffic flies the national airline, that will avoid substantial remittances to be transferred to the foreign carriers' homelands. Quoting Wassenbergh,

> "one could make a distinction...between the uplift and the disembarkation of traffic by foreign airlines. The first adversely affects the balance of payments of the country. The latter benefits the balance of payments (import of tourist services). Travel abroad adversely affects the balance of payments of a country and travel abroad on a foreign airline is even worse" (294).

Very elucidative for countries with a modest aviation industry like Mozambique, is the view expressed by an author on Bermuda I according to which,

> "the freedom of the air the United States has long advocated under the Bermuda principles is a special kind of freedom: the freedom of the stronger (in terms of traffic generating capability and bargaining power) to freely compete with the weaker" (295).

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(294) Wassenbergh, op. cit. 222, p. 8.

(295) Diamond, supra, p. 462.

Under these circumstances it is unthinkable that Mozambique, when entered or entering into BATAs, intended to pursue a liberal aviation policy (296). Hence, the "fair and equal" principle has to have a different connotation: pure Bermudian philosophy would not favour the growth of the country's aviation industry and most probably would, indeed, contribute to render it more and more rickety.

The fact, however, is that the BATAs entered into by Mozambique are not of the Bermuda-type, but predetermination-minded agreements. Therefore, those relying on pure Bermudian interpretations to interpret them are not embarking on a sound undertaking. The only thing resembling pure Bermuda-type agreements in the BATAs of Mozambique is the little sentence spelling out the "fair and equal" language. As to this, we have seen earlier that the principle has a different meaning in the predetermination method of fixing capacity since, here, the clause lies side by side with division of traffic by the aeronautical authorities. The "Diploma Ministerial" no. 97/80 does nothing but to go along with this, dividing traffic into two categories and establishing different entitlements for their carriage. For the traffic paying in local currency (which rightfully may be termed "national traffic") the national airline has a first entitlement to carry it; that paying in foreign currency is subject to competition, according to the capacity

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(296) Here, we are stressing Mozambique's probable intention. But, of course, to ascertain the intentions in a treaty, one should look at both Contracting Parties. In this case, whether other countries would have entered into such BATAs if they had known, beforehand, that the major traffic would not be available to their carriers.

provisions laid down in the agreement. Details on this can be found, supra, from page 16 through 19.

Next to this introduction and to finalize this paper, a discussion will be held, first of all, on the issue of the priority of all national airlines, in general, over foreign airlines, with regard to the carriage of the "national traffic", as a whole, i.e., without specification of its different components; next, a survey on how the different types of traffic are dealt with by countries will be done; finally a view of "fair and equal opportunity" currently suited to the actual interests of Mozambique will be suggested.

The first entitlement theory outlined above has been put forward as a policy argument several times by major aviation powers even under Bermuda-type agreements. The basic premise of this theory is that if a given country generates more traffic than the other, then it should have the first entitlement to carry it.

Claims like this seem to be very common among nations negotiating air transport agreements and, indeed, do make part of their bargaining power. For instance, nations offering a large number of passengers with origin in its terrritory will emphasize the percentage of total traffic which is composed of its citizens. The country attracting traffic will, conversely, emphasize the strong appeal which it offers to travelers (297).

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(297) R. Thornton, "International Airlines and Politics", p. 48-49.

However, as between traffic generating capability and traffic attracting capability, the former is the more important bargaining counter because the country may be able to choose alternative landing sites upon refusal of a given traffic attracting State to accept its viewpoint (298).

Wessberge, for example, has stated that "under different labels -first the "quid pro quo" doctrine, then the principle of the exchange of economic benefits - the United States has traditionally pursued three main objectives: firstly, obtaining from other countries a maximum of routes and traffic rights which are largely open to it within the liberal framework of Bermuda I and through the power of the United States in bilateral negotiations; secondly, finding a trade-off for the exercise of the Sixth Freedom which gave certain partners, particularly in Europe, substantial advantages that were not open to US airlines; and the recognition of the priority for US airlines in the operation of an international traffic mainly generated by the United States" (299). This author goes on to state that the U.S. justifies this position asserting that "the contribution of the national market is considered as national property" and so assimilated in bilateral diplomacy with a right (300).

Wassenbergh, after explaining the main U.S. intent in the CAB v. KLM

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(298) Diamond, supra, p. 437.

(299) Eric Wesseberge, "Fair Exchange of Benefits", ITA no. 32, September 1981, p.824.

(300) Ibidem, p. 826.

dispute discussed earlier in this paper, says that "in the US philosophy, US traffic should be considered as the property of the US flag carriers for carriage on international routes" (301) (emphasis added). The same author quotes U.S. documents in which it is said that "US citizens are regarded as chattels which belong by right of nationality to US flag carriers and foreign airlines are mere interlopers who divert this property from its rightful owners" (302) (emphasis added).

If the statements quoted above are accurate, there is not much difference between this U.S. position and the claim by Prof. Ferreira of Argentina with regard to "ownership of traffic".

Prof. Lissitzyn, writing on the above subject, says that because of the unfavourable United States balance of international payments, it sometimes is asserted in governmental circles that "the percentage of passengers carried by United States-flag airlines should correspond to the percentage of United States citizens (or residents) among the passengers" (303).

Stoffel, joining the above authors, writes that the United States

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(301) Wassenbergh, op. cit. supra 197, p. 24.

(302) Ibid., note 16.

(303) O. J. Lissitzyn, "Bilateral Agreements on Air Transport", 30 J. Air L. & Com. (1964), p. 256.

maintains that since the majority of the traffic is of United States origin or destination, United States carriers should have a right to a majority proportion of such traffic (304).

Summing up, quoting Diamond, one can say that "the U.S. view, has consistently been that it desires "only" to have a fair and equal opportunity to carry an amount of traffic equal to the amount of traffic it generates" (305). As a clarification, the same author adds: "that is, the lion only deserves a lion's share" (306).

At the light of the above stated, Mozambique's assertion that its view of "fair and equal opportunity" passes for the recognition of its airline to have a priority in the carriage of "national traffic" is shared not only by such major aviation powers as the United States, but even by most other countries, according to Wassenberghs's view when he states:

> "In essence, the above mentioned "philosophy" of a balance of revenues means that States recognize the right of each State to have its "own" traffic carried on its own airlines and the right to compensation for the carriage by a foreign airline of one's own traffic in excess of the carriage by one's own carriers of the own traffic of the foreign State

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(304) Albert W. Stoffel, "American Bilateral Air Transport Agreements on the Threshold of the Jet Transport Age", 26 J. Air L. & Com. (1959, p. 132.

(305) Diamond, op. cit., p. 462.

(306) Ibid., note 249.

> concerned. A State's "own" traffic in principle is here its third freedom traffic, in practice its third and fourth (and sixth) freedom traffic" (307).

This claim is not ill-founded since it contains a great deal of fairness and justice. Indeed, if Mozambique originates most of the traffic moving along the long-haul routes (308), it means that the biggest slice of revenue traffic comes from this country and the contribution of other partners is modest. In other words, the market values are not equivalent. The application of pure Bermudian principles would lead to a situation of unfairness and injustice: the foreign countries, through their better equipped carriers with more commercial acumen thanks to their experience, would limit themselves to uplift the traffic without any kind of investment on their side. While Mozambique, the one that contributes the most revenue traffic would have a poor share as the result of situations that are due not to airline mismanagment, but to extraneous factors. Certainly, this would be far from being fair since those countries would harvest where they have not sown.

Another view that some legal authors have expressed which goes to meet the first entitlement doctrine is the one holding that there is no reason why air transport would not be treated like any other article of commerce, in commercial operations. This is clearly the teaching of Prof. Ferreira who, as seen above, holds that "air traffic is the

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(307) Wassenbergh, supra, p. 21

(308) See, for example, figures on the route Maputo-Lisbon on p. 87.

property of the State and traffic between two countries accrues to them in equal shares".

This seems to be also the American viewpoint however disguised behind the doctrine of a fair route exchange. Loy, explaining it, states:

> "It is our belief that bilateral air transport route exchanges must be viewed within the general framework of over-all commercial policy, and that we should follow similar commercial trading concepts in making exchanges. Under these principles the appropriate test for route exchanges, we are convinced, is an equitable exchange of economic benefits" (309).

In support of this opinion, it has been said that air transport is a form of commerce, bearing strong similarities to other forms of commerce, and should not be considered, as it often is, as a thoroughly unique form of commercial enterprise in which the ordinary rules of economics do not apply. Air transport should, therefore, be regarded as a subprocess of the world process of international exchange of goods and services (310). In clarifying this, Dr. Goedhuis points out that

> It should be observed that, since one cannot construe a difference between traffic and other forms of production, it is difficult to see why, in the field of aviation, there should be a claim for equal division which is not made for the production of grain, machinery, frozen meat, etc. (...) No valid argument can be advanced why it should not be permissible for a given country to furnish a part of its exports in the production of

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(309) Loy, supra, p. 189.

(310) Diamond, supra, p. 458-9; Lissitzyn, supra, p. 92.

> traffic services since it is perfectly permissible to do so in the case of other forms of production" (311). (Emphasis added).

If air transport is to be assimilated to an article of commerce, to a national product of a given State, then it should be subject to the system governing other products, which, as well known, implies, inter alia, protection against competition and absolute priority for national operators.

The former aspect has traditionally been achieved through the granting of routes, traffic rights and regulation of capacity. The latter could very well be accomplished by giving priority to the national airlines to carry the "national traffic" in the meaning that this expression has under the regulation being discussed.

Turning now to the question of types of "national traffic" whose carriage is entrusted to the national airline, government traffic comes first: this comprises not only officials but also civil servants and trips associated with government contracts which may include individuals of private enterprises. State enterprises employees, by the fact that they are state officials, are assimilated to government employees as long as they travel on official duty.

The cases referred above have, by and large, widespread use in the aviation industry according to a report by the U.S. Government. There it

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(311). D. Goedhuis, "Changes in the Approaches to International Air Agreements", 77 The Aeronautical Journal 745 (1973), p. 27.

is stated, for example, that "official government travel and freight movements are required to use (the national airline) as much as possible, a normal or usual requirement on the part of national governments" (312). However, it is also stated that the category of those considered as officials is often very much wider than what is meant in the U.S. This restrictive interpretation holds good for the U.S. Of course, each country is free to set up its own standards of officials.

The next category is that of citizens, or expatriates who have been residing in Mozambique for more than 3 years who do not transfer any part of their wages to their homelands, in private trips every other year, in the national airline network. It has already been largely explained above why general traffic originating in Mozambique was required to travel on the national airline and therefore no more comments will be added. It suffices to say, as an example, that the "Fly U.S. Flag" programme not only required that any trip associated with government contracts should be on U.S. carriers but also official pressure was exercised on the travel industry to achieve a greater use of U.S. flag carriers by U.S. passengers and shippers (313).

In relation to cargo, shippers are exhorted to use the national carrier

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(312) International Air Transportation Competition Hearing Before the H. R. Com. on Interstate & Foreign Commerce, 93rd cong. 2nd sess. (1974), in Vlasic & Bradley, op. cit., Sup. 1 (1976), p. 132.

(313) Wassenbergh, note 197, p. 29.

both in export and import. In contrast to other categories of traffic, cargo must be paid always in foreign currency if shipped from Mozambique, except temporary export. As seen in the quotation above, the use of national airlines for the carriage of cargo is accepted and widespread among the governments.

In addition to the policy arguments outlined supra (which as such Mozambique should try to incorporate into its BATAs) the following two arguments of a juridical nature can be advanced:

(i) The "fair and equal opportunity" principle, in the bilateral air transport agreements of Mozambique, is always incorporated in the capacity clause. As such, it should be regarded purely as a capacity provision with its scope limited to capacity. This being so, it may not function as a general principle whose scope embraces all the agreement.

(ii) The referred "Diploma Ministerial" is not discriminatory, since it is based on a general law applying uniformly to all airlines and all corporations without any distinction whatsover.

As concluding remarks, it is suggested that the "fair and equal opportunity" clause be construed in such a way that this principle ought to recognize that traffic originating in a country, particularly that paid in the local currency in countries providing for different methods of payment, is one's country traffic. As such traffic

would be considered as a mere production like anyone else.

Therefore, the allocation of capacity and frequency by the aeronautical authorities should take into account the different contributions for the revenue traffic achieved by the Contracting Parties, in such a way that "fair" would be to allow the airline whose country generates more traffic to have a corresponding proportional percentage share in the carriage of that traffic. This share would include, first of all, the whole of "national traffic" in the meaning assigned to it in this paper. In the case of shortage of capacity by the national airline to carry all of its own traffic, the excess could be carried by the foreign airline, may be, for a consideration or on a revenue sharing basis.

As to "equal opportunity", it should mean that notwithstanding the fact that the foreign country does not have an equivalent market value, its airline, even so (borrowing Adriani's expression), "still has the same - equal - fundamental right to operate... and should as well be enabled to have its place under the sun" (314).

However, the situation is not so gloomy as envisaged by Adriani because, according to the national regulation, the national airline has no priority with regard to the traffic paying in foreign currency, and so the foreign airline can vigourously fight for this traffic. This is

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(314) Adriani, supra, p. 410.

so because, since that traffic is paying in foreign currency, theoretically there is little harm to the country's balance of payments.

Departures from what is not clearly allowed in the regulation should be regarded as "unfair trade practices" and, as such, in contravention of the principle of "fair and equal opportunity".

The construction of the "fair and equal opportunity" clause otherwise, for example, using Bermudian approaches and ignoring the particular aspects of Mozambique outlined above, would lead to an injust situation such as the country contributing most to the revenues of a given route getting the least share of revenues.

In a metaphor, one has rightly observed addressing somebody that

> "The application of Bermudian principles to Mozambique would be tantamout to allow you to go with your hand into my pocket, take my money out and use it according to your wish".

SELECTED BIBLIOGRAGHY

THESES

Abdulaziz, Alzurgani
Bilateral Air Transport Agreements in Libya (McGill 1982).

Harbison, Peter
Liberal Bilateral Agreements of the United States: A Dramatic New Pricing Policy (McGill 1982).

Lehtonen, Lasse Oskari Johannes
The Bilateral Air Transport Agreements of Finland (McGill 1977).

Sprokkreeft, Hans Pieter
The Regulation of Capacity in International Air Transport (McGill 1976).

Popescu, Dumitra
Bilateral Air Agreements of Socialist Countries and International Law: A Comparative Study (McGill 1970).

Leshem, Moshe
The International Air Transport Policy of Israel (McGill 1978).

Martono, K.
Route, Capacity and Tariff Clauses of Selected Bilateral Air Transport Agreements Concluded by Indonesia (McGill 1980).

BOOKS AND MAGAZINES

British Ready to Renegotiate on Bilateral, in "Aviation Week & Space Technology", July 26, 1976.

Brownlie, Ian
Pronciples of Public International Law (Clarendon Press, Oxford - 1966).

Carcavallo, Ludovico
Acuerdos Aerocomerciales Celebrados por la República Argentina (1954).

Cheever, Daniel S.
Organization for Peace, International Organization in World Affairs (Harvard University, 1954).

Chen, Bin
The Law of International Air Transport (Stevens, London, 1962).

10. Cooper, J. C.
The Right to Fly (Henry Holt, New York, 1947).

Digest of United States Practice in International Law (1978).

Gidwitz, Betsy
The Politics of International Air Transport (Lexington Books, Lexington, Toronto, 1980).

Haanappel, P. P. C.
Price and Capacity Determination in International Air Transport (Kluwer Law and Taxation Publishers - Deventer, The Netherlands) 1984.

Matte, Nicolas
Treatise on Air-Aeronautical Law, ICAL, McGill Univ., Montreal/The Carswell Co. Ltd., Toronto, 1981).

McWhinney Edward & Bradley, M. A.
Freedom of The Air (Sijthoff, Leiden, Oceana Publications, Dobbs Ferry, N. Y., 1968).

Thornton
International Airlines and Politics; A Study in Adaptation to Change.

Videla Escalada
Derecho Aeronáutico (Tomo III, De Zavalia, Buenos Aires, 1973).

Vlasic, I. A. & Bradley, M. A.
The Public International Law of Air Transport (McGill University, 1974) vol. I, II and Supplement I (1976).

Wassenbergh, H. A.
Aspects of Air Law and Civil Air Policy in the Seventies (Martinus Nijhoff, The Hague, 1970).
Post-War International Civil Aviation Policy and the Law of the Air (Martinus Nijhoff, The Hague, 1962).

Wheatcroft, Stephen
Air Transport Policy (London, Michael Joseph, Live Issues, 1946).

CONVENTIONS AND TREATES

Convention On International Civil Aviation, of December 1944 (ICAO Doc. 7300/6).

Multilateral Agreement On Commercial Rights of Non-Scheduled Air Services in Europe, of 1956 (ICAO Doc. 7695).

Multilateral Agreement On Commercial Rights of Non-Scheduled Air Services Among the Association of South East Asian Nations, of March 1971.

International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services, of July 1967 (ICAO Doc. 8681).

Vienna Convention On the Law of Treaties, of May 22, 1969.

International Air Transport Agreement, of December 1944.

International Air Services Transit Agreement, of December 1944.

Convention On Offenses and Certain Other Acts Committed on Board Aircraft, of September 1963 (ICAO Doc. 8364).

Convention for the Suppression of Unlawful Seizure of Aircraft, of December 1970 (ICAO Doc. 8920).

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, of September 1971 (ICAO Doc. 8966).

BILATERAL AIR TRANSPORT AGREEMENTS

Bilateral Air Services Agreement U.S.A.-U.K. (Bermuda I), of February 1946, TIAS 1507.

Bilateral Air Services Agreement U.S.A.-U.K. (Bermuda II), of July 1977, TIAS 8641.

Bilateral Air Transport Agreement Mozambique-German Democratic Republic, of July 1978.

Bilateral Air Transport Agreement Mozambique-Portugal, of January 1977.

Bilateral Air transport Agreement Mozambique-Romania, of March 1979.

Bilateral Air Transport Agreement Mozambique-USSR, of February 1976.

Bilateral Air transport Agreement U.S.A.-Beelgium, of October 1980.

ARTICLES

Adriani, P. van Der Tuuk
The "Bermuda" Capacity Clauses, 22 J. Air L. & Com. (1955).

Aréchaga, Eduardo Jiménez
South American Attitudes Towards The Regulation of International Air Transportation, in "Freedom of the Air", by McWhinney & Bradley (1968).

Azzie, Ralph
Lecture given to the Institute of Air and Space Law, McGill University, January 12, 1966.

Baker, George P.
The Bermuda Plan as the Basis for a Multilateral Agreement, in "The Public International Law of Air Transport" (McGill University, 1974), vol. I.

Bradley, M. A.
International Air Cargo Services: The Italy-U.S.A. Air Transport Agreement Arbitration, 12 McGill L. J. (1966).

Cribbet, George
Some International Aspects of Air Transport, Journal of the Royal Aeronautic Society (1950).

Cooper, J. C.
The Chicago Convention After Twenty Years (University of Miami Law Review, no. 3).

Diamond, Barry
The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements, 41 J. Air L. & Com. (1975).

Dold, Gaylord L
The Competitive Regime in International Air Transportation, Air Law, vol. V, no. 3, 1980, p. 139.

Ferreira, Enrique A.
Doctrine Argentine en Droit International aérien, 3 Revue Française de Droit Aérien (1949).

Folliot, Michel G.
South American Protectionism in Air Transport, in ITA Bulletin, May 1982.

Goedhuis, D.
Changes in the Approaches to International Air Agreements, 77 The Aeronautical Journal 745 (1973).

Gray, Robert
The Impact of Bermuda II on Future Bilateral Agreements, 3 Air Law (1978).

Haanappel, P. P. C.
Bilateral Air Transport Agreements - 1913-1980, vol. 5, Int'l Trade L. J. (1979).
Background of the Dutch-American Aviation Conflict, 1 Annals Air & Space L. (1976).

Johnson, D. H. N.
Rights in Air Space, in "The Public International Law of Air Transport", by Vlasic & Bradley (McGill University, 1974) vol. I.

King, John R. & Roosevelt, Susan C.
Civil Aviation Agreements of the People's Republic of China, 14 Harv. Int'l L. J. (1973).

Lissitzyn, Oliver J.
Freedom of the Air: Scheduled and non-Scheduled Air Services, in "Freedom of the Air", by McWhinney & Bradley (1968)
Bilateral Agreements On Air Tramsport, 30 J. Air L. & Com. (1964).
Change of Aircraft on International Air Transport Routes, 14 J. Air L. & Com. (1947).

Lowenfeld, Andreas F.
The Future Determines the Past: Bermuda I in the Light of Bermuda II, 3 Air Law (1978).
CAB v. KLM; Bermuda at Bay, 1 Air Law (1975).

Loy, Frank E.
Bilateral Air Transport Agreements: Some Problems of Finding a Fair Route Exchange, in "Freedom of the Air (1968), by McWhinney & Bradley.

MacDevitt, Kathleen
The Triangle Claims Another Victim: A Watery Grave for the Original Bermuda Agreement Principles, 7 Den. J. Int'l L. & Pol'y 2 (1978).

Masefield, Peter
The Air Charter Challenge, in "Flight International", April 1973.

McCarrol
The Bermuda Capacity Clauses in the Jet Age, in "The Public International Law of Air Transport" (McGill University, 1974), vol. I.

McClurkin, R. J. G.
The Geneva Commission On a Multilateral Air Transport Agreement, J. Air L. & Com. (1948).

Stoffel, Albert W.
American Bilateral Air Transport Agreements on the Threshold of the Jet Transport Age, 26 J. Air L. Com. 2 (1959).

Thomka-Gazdik
Co-Existence of Scheduled and Charter Services in Public Air Transport, 77 The Aeronautical Journal 745 (1973).

Wassenbergh, H. A.
Aspect of the Exchange of International Air Transportation Rights, Annals Air & Space L. (1981).

Wessberge, Eric
Reciprocity in Air Transport Bilaterals: Realities, Illusion and Remedies. Part one: Fair Exchange of Benefits, in ITA Bulletin, no. 32, September 1981.

OTHER DOCUMENTS AND CASES

Political Constitution of the People's Republic of Mozambique (official English translation issued in 1984), by Eric B. Blanstein and Steven Lessick, Oceana Publications, Inc. Dobbs Ferry, New York.

"Estatutos e Programa do Partido FRELIMO" (1983), colecção 4° Congresso, Instituto Nacional do Livro e do Disco, Maputo (Mozambique).

Law no. 2/81, of September 1981 (Mozambique).

Decree no. 8/80, of November 1980 (Mozambique).

Decree no. 9/80, of November 1980 (Mozambique).

"Diploma Ministerial" no. 97/80, of October 1980 (Mozambique).

"Portaria" no. 83/76, of April 1976 (Mozambique).

Presidential decree no. 18/83, of May 1983 (Mozambique).

Presidential decree no. 5/85, of May 85 (Mozambique).

Pan-American World Airways v. Department of Trade (1976), 1 Lloyd's L. R. 257.

Proceedings of the International Civil Aviation Conference, Department of State Publication 2802, International Organization and Conferences, Series IV, 1948, vol. I.

ICAO Doc 9440, "Policy and Guidance Material on International Air Transport Regulation and Tariff" (1948).

Department of State Release no. 510, of July 25, 1946.

ICAO Doc. 9199, SATC (Special Air Traffic Conference)(1977).

TIAS 1507 and 4782.

Press Releases, 14 U.S. Dep't of State Bulletin 302-306 (1946); 15 U.S. Dep't of State Bulletin 577-578 (1946).

ICAO Doc. A16-WP/33 - EC/5, 8/7/68, "Exchange of Commercial Rights".

ITA Bulletin, no. 36, October 1978.

(U.S.) International Aviation Senate Hearings "Senate Aviation Subcommittee, 95th Cong., 1st Sess., (1977).

Amedment no. 4, CAB Reg. ER-870

CAB Order 74-11-83, Docket 27184 (19 Nov. 1974).

4 International Legal Materials (Decision of the Tribunal on the Italy-USA all-cargo services dispute).

BOLETIM DA REPÚBLICA

PUBLICAÇÃO OFICIAL DA REPÚBLICA POPULAR DE MOÇAMBIQUE

SUPLEMENTO

SUMÁRIO

MINISTÉRIOS DOS CORREIOS, TELECOMUNICAÇÕES E AVIAÇÃO CIVIL E DAS FINANÇAS

Diploma Ministerial n.º 97/80

de 22 de Outubro

Os encargos resultantes do transporte aéreo internacional, com origem na República Popular de Moçambique, realizado quer na linha aérea nacional quer nas linhas aéreas estrangeiras, traduzem-se por pagamento em moeda convertível, com significativo peso no fundo cambial do País.

É pois necessário estipular normas respeitantes à emissão de documentos de transporte aéreo que sejam instrumentos operacionais para uma correcta gestão dos recursos cambiais afectos ao sector da aviação civil.

Assim, os Ministros dos Correios, Telecomunicações e Aviação Civil e das Finanças determinam:

ARTIGO 1

Definições

Para efeitos deste diploma os termos a seguir apresentados significam:

Transportadora Aérea Nacional — L. A. M — Linhas Aéreas de Moçambique.

Transportadoras Aéreas Internacionais — outras companhias aéreas que operam de e para Moçambique devidamente autorizadas;

Bilhete — o bilhete de passagem e de registo de bagagem que inclui todos os talões incorporados inclusive o do passageiro, emitido pela companhia transportadora e que se destina a servir como prova de pagamento do direito de viajar em dado percurso e em determinadas condições.

Bilhete de Excesso de Bagagem — recibo emitido por um transportador para um passageiro, como prova de pagamento por este de um excesso de bagagem;

PTA — Prepaid Ticket Advice — mensagem enviada a um escritório emissor, pedindo a emissão de determinado documento de transporte, a favor de determinada pessoa sendo o seu valor pago no local de emissão da mensagem.

MCO — Miscellaneous Charges Orders — documento emitido por um transportador ou seu agente, requisitando a emissão de um bilhete ou a prestação de um serviço à pessoa nele mencionada;

Exchange Orders — documento emitido por um transportador ou seu agente requisitando a emissão de determinado bilhete ou a prestação de determinado serviço à pessoa nele indicada;

Carta de Porte — AWB — Air Way Bill — documento emitido pelo transportador ou por sua conta e que certifica o contrato celebrado entre aquele e o expedidor para o transporte de mercadorias nas linhas do transportador ou de outras companhias com as quais o transportador tenha acordos.

Documentos de tráfego — entendem-se como tal:

— Bilhete de passagem aérea e registo de bagagem.
— Bilhete de excesso de bagagem.
— PTA — Prepaid Ticket Advice
— MCO — Miscellaneous Charges Orders.
— Exchange Orders.
— Carta de Porte.

ARTIGO 2

Âmbito de aplicação

O presente diploma aplica-se

— À transportadora aérea nacional;
— Às transportadoras aéreas autorizadas a operar de e para Moçambique;
— Aos utilizadores dos serviços de transporte aéreo internacional.

ARTIGO 3

Da actividade de venda de documentos de transporte aéreo internacional

1. O exercício da actividade de venda de documentos de tráfego das transportadoras aéreas internacionais na República Popular de Moçambique fica sujeita a prévio licenciamento do Ministro dos Correios, Telecomunicações e Aviação Civil

2. As transportadoras que já venham exercendo esta actividade devem, no prazo de trinta dias a contar da data da publicação deste diploma, solicitar ao Ministro dos Correios, Telecomunicações e Aviação Civil o seu licenciamento em processo donde conste:

— Nome da transportadora;
— Localização da sede;
— Localização das instalações na República Popular de Moçambique e sua área.
— Nome dos trabalhadores nacionais e seus vencimentos.
— Nome dos trabalhadores estrangeiros recrutados localmente, seus vencimentos e condições contratuais;
— Nome dos trabalhadores estrangeiros destacados da sede e seu vencimento em Moçambique.
— Número de telefone e telex;
— Descrição sumária de como está organizado o escritório, a contabilidade, ou quaisquer outros serviços que execute.
— Nome do delegado ou representante;
— Previsão de evolução de alguns indicadores económicos, tais como volume de tráfego e valor de receitas.
— Previsão de expansão do estabelecimento em área, número de trabalhadores e actividades

3. Os escritórios de venda das transportadoras aéreas internacionais devem mensalmente apresentar relatórios da sua actividade em Moçambique. Estes relatórios devem ser entregues até ao dia 10 de cada mês, ao Ministério dos Correios, Telecomunicações e Aviação Civil.

Os relatórios devem conter informações respeitantes a:

— Relação discriminada das vendas realizadas;
— Estatística de tráfego de passageiros, carga e correio nos dois sentidos;
— Cópia dos documentos entregues ao Ministério das Finanças para pagamentos de taxas e impostos.
— Balancete de actividade mensal.

4. A apresentação destes relatórios mensais não dispensa a entrega do processo de contas anual ao Ministério das Finanças nos termos da legislação fiscal em vigor.

5. Os documentos de tráfego das transportadoras aéreas internacionais estão sujeitos a declaração e registo junto do Ministério dos Correios, Telecomunicações e Aviação Civil nos dez dias seguintes ao da sua entrada na República Popular de Moçambique.

ARTIGO 4

Da venda de bilhetes

1. Os bilhetes para viagens aéreas internacionais à partida de Moçambique são vendidos em moeda convertível

2. Exceptuam-se do disposto no número anterior os bilhetes emitidos para:

— Organismos estatais em missões oficiais.
— Empresas estatais em missões de serviço.
— Outras empresas nacionais quando destinadas a missões de serviço, devidamente sancionadas pelo Ministro de tutela;
— Casos cobertos por actos ou contratos celebrados com sancionamento do Governo da República Popular de Moçambique.
— Cidadãos nacionais, em viagem privada, no quadro de rotas da L. A. M., para uma viagem por ano;
— Cidadãos estrangeiros, residentes há mais de três anos na República Popular de Moçambique, que não tenham direitos de transferência, para uma viagem por ano no quadro, de rotas da L. A. M.

3 O tratamento das excepções previstas no número anterior é obrigatoriamente processado através da L. A. M.

4. Os bilhetes pagos em moeda nacional levam obrigatoriamente a restrição:

«Somente reembolsável no país de origem»
«Only refundable in country of issue»

ARTIGO 5

Da emissão de PTA'S

1 A emissão de PTA'S é exclusiva da transportadora aérea nacional.

2. A emissão de PTA'S será apenas autorizada pelo Ministério dos Correios, Telecomunicações e Aviação Civil para

a) Casos cobertos por actos ou contratos celebrados com sancionamento do Governo da República Popular de Moçambique;
b) Pais de moçambicanos que comprovadamente não disponham de meios para pagamento de passagens ou filhos menores de moçambicanos, em voos da transportadora aérea nacional. Quando os filhos menores forem estudantes devem apresentar prova de aproveitamento no ano lectivo anterior.

ARTIGO 6

Do transporte de carga e bagagem

1. O transporte aéreo de carga de ou para o País deverá ser efectuado preferencialmente no quadro de rotas da transportadora aérea nacional.

2 Todas as entidades e empresas coordenarão obrigatoriamente com a transportadora aérea nacional todas as importações e exportações que envolvam o transporte aéreo.

3. O frete de todas as cargas a transportar do País para o exterior será pago em moeda convertível.

4 Serão excepções ao pagamento em moeda convertível as exportações temporárias.

5. Os passageiros portadores de bilhetes de passagem pagos em moeda nacional poderão à partida de Moçambique pagar em moeda nacional o excesso de bagagem e ou bagagem não acompanhada até ao limite de 10 kg.

ARTIGO 7

Da cobrança em moeda convertível

1. As transportadoras aéreas internacionais depositarão diariamente em conta em moeda externa no Banco de Moçambique o produto das suas vendas em moeda convertível.

2. A transferência dos saldos das contas referidas no parágrafo anterior para as sedes das transportadoras aéreas internacionais só poderá realizar-se nos termos dos respectivos acordos aéreos e após parecer favorável do Ministério dos Correios, Telecomunicações e Aviação Civil.

ARTIGO 8

Da fiscalização e contrôle

1. O cumprimento das obrigações impostas por este diploma será fiscalizado pelo Departamento de Auditoria

do Ministério das Finanças, Departamento de Aviação Civil e Gabinete de Planificação do Ministério dos Correios, Telecomunicações e Aviação Civil

2 O Departamento de Auditoria do Ministério das Finanças poderá, nos termos legais, examinar os livros e documentos de escrituração das empresas com obrigações inerentes a este diploma e o das pessoas ou empresas que com elas tenham ligação ou mantenham relações comerciais, bem como requisitar para exame e verificação cópias dos respectivos documentos e quaisquer outros elementos de que careçam para efeitos de fiscalização das obrigações contidas neste diploma.

3. O Departamento de Auditoria realizará auditorias às transportadoras aéreas pelo menos uma vez por ano.

ARTIGO 9

Das penalidades

1 O não cumprimento do estabelecido no n.º 3 do artigo 3 do presente diploma será punido com a pena de suspensão da actividade de venda ou de operação que será graduada até um ano

2. A falta ou inexactidão da declaração dos documentos de tráfego entrados na República Popular de Moçambique, a que se refere o n.º 5 do artigo 3, dentro do prazo estabelecido, ou a sua inexactidão implicará a não transferência de divisas que poderia resultar da emissão desses documentos

3 Compete ao Ministro dos Correios, Telecomunicações e Aviação Civil a aplicação destas penas.

4. A falsidade nos elementos de escrita ou nos documentos exigidos neste diploma, bem como a inexistência ou a recusa da exibição dos livros e demais documentos, e também a sua ocultação, destruição, inutilização ou viciação serão punidas nos termos da legislação em vigor

ARTIGO 10

Disposições finais

1. Todas as cláusulas que envolvam o transporte aéreo de passageiros e carga a serem incluídos no âmbito de qualquer acordo ou contrato a celebrar devem ser previamente submetidos a aprovação do Ministério dos Correios, Telecomunicações e Aviação Civil

2. Os documentos de tráfego já emitidos à data da publicação do presente diploma mantêm-se válidos para viajar por um período de trinta dias, exceptuando-se os bilhetes utilizados para efeitos de retorno, que mantêm a sua validade.

3. Os documentos de tráfego das transportadoras aéreas internacionais que já se encontram no País deverão ser declarados e registados nos termos do n.º 5 do artigo 3 no prazo de quinze dias

4 As dúvidas que surgirem da aplicação deste diploma serão resolvidas por despacho do Ministro dos Correios, Telecomunicações e Aviação Civil.

5. Este diploma entra imediatamente em vigor.

Maputo, 21 de Outubro de 1980. — O Ministro dos Correios, Telecomunicações e Aviação Civil, *Rui Jorge Gomes Lousã*. — O Ministro das Finanças, *Rui Baltasar dos Santos Alves*

Diploma Ministerial n.º 98/80
de 22 de Outubro

Os custos de exploração do transporte aéreo têm sofrido sucessivos agravamentos nos últimos anos motivados nomeadamente pela constante subida dos preços dos combustíveis e peças sobressalentes.

Apesar deste agravamento dos custos, não foram ajustadas as tarifas praticadas pela transportadora nacional no serviço doméstico, quer de passageiros quer de carga e correio desde 1974.

A título exemplificativo os preços do combustível para aviação desde aquela data atingiram valores superiores ao triplo.

Isto conduziu por um lado a uma desproporcionada utilização deste tipo de transporte, com sérias implicações a nível da capacidade de resposta da transportadora e por outro lado, a uma progressiva deterioração da sua situação económica e financeira eliminando qualquer possibilidade de uma gestão sã

Torna-se necessário portanto ajustar as tarifas de transporte aéreo de passageiros, carga e correio a praticar pela L. A. M. — Linhas Aéreas de Moçambique nas suas rotas domésticas, a um nível adequado.

Simultaneamente, é necessário aplicar normas disciplinadoras do tráfego, como forma de terminar com situações de indefinição e mesmo de desorganização que têm vindo a perturbar a regularidade e qualidade do serviço público do transporte aéreo.

Desta forma os Ministros dos Correios, Telecomunicações e Aviação Civil e das Finanças determinam:

ARTIGO 1

Definições

Para efeitos deste diploma os termos adiante designados terão o seguinte entendimento

Bagagem

Artigos, bens e outros objectos pessoais dos passageiros, considerados necessários ou apropriados para o seu uso, utilização, conforto ou conveniência durante a viagem.

Bagagem registada

Bagagem que o transportador toma à sua exclusiva responsabilidade e para o qual emite um bilhete de bagagem.

Bagagem não registada

Toda a bagagem do passageiro que não é registada, vulgarmente designada por bagagem de cabine.

Bilhete

O documento designado por *Bilhete de Passagem e Registo de Bagagem*, emitido pelo transportador; compreende as condições de transporte e avisos, bem como os talões de voo e o talão para o passageiro, nele contidos.

Bloqueio de lugares

Conjunto de lugares previamente contratados com a transportadora com reserva confirmada.

No-Show (falta de embarque)

É um passageiro com reserva confirmada que falta ao embarque.

Passageiro

Qualquer pessoa, excepto membros da tripulação, transportada ou a ser transportada num avião, com o consentimento do transportador

Reserva

É a acomodação do passageiro em determinado voo.

Stop-over (interrupção de viagem)

Interrupção internacional de viagem por parte do passageiro, acordada previamente com o transportador, num ponto intermédio entre o local de partida e o de destino

Transportador

A L A M — Linhas Aéreas de Moçambique

Transporte doméstico

Significa o transporte efectuado pelo transportador entre pontos de território nacional ainda que haja sobrevoo de territórios estrangeiros, incluindo escala sem *stop-over* nesses territórios

ARTIGO 2

Tarifas de passageiros

1. São aprovadas as tabelas de tarifas domésticas para passageiros, constantes da Tabela I anexa a este diploma
2. Quando o passageiro realiza uma viagem com *stop-over* a tarifa a praticar será o somatório dos percursos envolvidos.
3. O preço do bilhete incluirá além da tarifa da Tabela I os impostos e taxas aplicáveis por lei

ARTIGO 3

Descontos

1. Os passageiros com idade compreendida entre 0 – 2 anos e 2 – 12 anos beneficiarão, respectivamente, de uma redução de 90% e 50% sobre as tarifas mencionadas no n.º 1 do artigo 2

2 Beneficiarão de uma redução de 50 % sobre as tarifas de passageiros, para uma viagem anual, os estudantes que simultaneamente

a) Frequentem estabelecimento de ensino de nível ou especialidade não existente na província de residência dos pais ou de quem os tiver a cargo e pretendam passar as suas férias junto daqueles no fim do ano lectivo;

b) Tenham tido aproveitamento escolar no ano lectivo que acabam de concluir;

c) Sejam estudantes em tempo inteiro e não exerçam actividade remunerada;

d) Realizem a viagem no período de férias lectivas determinadas pelo Ministério da Educação e Cultura.

3. A atribuição de redução de tarifa é feita mediante apresentação de documento certificativo de que o aluno preenche todos os requisitos das alíneas estabelecidas no n.º 2 do artigo 3

4. A autenticidade do documento é da responsabilidade da Direcção Provincial de Educação e Cultura para as instituições de nível médio e pelo próprio estabelecimento de ensino para o nível superior.

5 No momento da aceitação para embarque, o aluno deve identificar-se mediante a apresentação de respectivo bilhete de identidade

ARTIGO 4

Validade do bilhete

1. O bilhete é válido para o efeito de transporte durante noventa dias a contar da data da sua emissão, ainda que só tenha sido utilizado em parte.

ARTIGO 5

Reservas

1 A reserva é confirmada mediante a emissão do bilhete.
2 A emissão de bilhetes, sem indicação da data de embarque, não é permitida.
3. A reserva é feita pelo nome do passageiro ou número do bilhete emitido conforme instrução do transportador.
4 O cancelamento da reserva confirmada só é aceite até quarenta e oito horas antes da partida do voo; o cancelamento posterior equivale a *No-Show*.
5. A taxa de *No-Show* é de 50 % do preço do bilhete correspondente ao percurso não voado.
6. Cessa o disposto no número anterior nos casos de doença devidamente comprovada por atestado médico.

ARTIGO 6

Bloqueios

1. O bloqueio de lugares à partida de qualquer escala deverá ser regulado pelas condições de contrato acordado com o transportador
2 A desistência, no todo ou em parte, dos lugares bloqueados deverá ser comunicada ao transportador até quarenta e oito horas antes da hora prevista para partida de voo; aos lugares não utilizados aplicar-se-á taxa de *No-Show*.

ARTIGO 7

Período de aceitação para embarque

A aceitação dos passageiros para o embarque processa-se até trinta minutos antes da hora prevista para a partida do voo Os passageiros com reserva confirmada que se apresentem para embarque após aquele período terão tratamento em tudo idêntico ao dos passageiros em lista de espera, sendo inscritos no fim daquela lista no momento da sua apresentação

ARTIGO 8

Bagagem

1. Os passageiros com idade superior a 2 anos têm direito ao transporte de bagagem registada, livre de franquia, até ao limite de 20 kg
2. É permitido o transporte de excesso de bagagem acompanhada mediante o pagamento da taxa mencionada na Tabela II anexa

ARTIGO 9

Absorção de despesas

1. Nos casos de cancelamento ou atraso de voo, por razões de ordem técnica o transportador não suporta os encargos de alimentação e alojamento dos passageiros, embora com reserva confirmada, desde que não tenham ainda sido aceites para embarque.
2. Fora dos casos referidos no número anterior se, por razões alheias ao transportador e ao passageiro, algum passageiro com reserva confirmada que se tenha apresentado para embarque não puder viajar, o transportador deverá sempre que possível garantir o alojamento e alimentação. as despesas daí resultantes serão suportadas pela entidade que originou a anomalia

ARTIGO 10

Reembolso

1. O bilhete ou fracção não utilizado dará direito ao reembolso dentro do período de cem dias seguintes à data da sua emissão

2. Pela operação do reembolso, o transportador deduzirá da tarifa constante do bilhete a taxa da Tabela III anexa, por bilhete reembolsado ou totalidade dos bilhetes, quando estes sejam emitidos em conjunção.

3. O bilhete extraviado é unicamente passível de reembolso após o seu período de validade para efeitos de transporte, pelo que em caso algum poderá ser objecto de reemissão.

4. O extravio do bilhete deverá ser comunicado de imediato à transportadora.

ARTIGO 11

Carga e correio

1. São aprovadas as tarifas domésticas de carga e correio constantes das Tabelas IV e V anexas.

2. Sempre que o julgue vantajoso, o transportador poderá acordar tarifas especiais.

3. O transportador poderá recusar a aceitação de carga sempre que a sua embalagem não satisfaça os requisitos de transporte.

ARTIGO 12

Disposições finais

1. As dúvidas surgidas na aplicação do presente diploma serão resolvidas por despacho do Ministro dos Correios, Telecomunicações e Aviação Civil.

2. Este diploma entra em vigor cinco dias após a sua publicação.

Maputo, 21 de Outubro de 1980. — O Ministro dos Correios, Telecomunicações e Aviação Civil, *Rui Jorge Gomes Lousã.* — O Ministro das Finanças, *Rui Baltasar dos Santos Alves*

TABELA I

Tarifas de passageiros em serviço doméstico

	Tarifa — MT
De Maputo para:	
Beira	3632,00
Tete	4166,00
Quelimane	4166,00
Nampula	5525,00
Pemba	5525,00
Lichinga	5525,00
De Beira para:	
Maputo	3632,00
Tete	2515,00
Quelimane	2515,00
Nampula	3195,00
Pemba	3195,00
Lichinga	3195,00
De Tete para:	
Maputo	4166,00
Beira	2515,00
Quelimane	2030,00
Nampula	2030,00
Pemba	2030,00
Lichinga	2030,00
De Quelimane para	
Maputo	4166,00
Beira	2515,00
Tete	2030,00
Nampula	2030,00
Pemba	2030,00
Lichinga	2030,00
De Nampula para	
Maputo	5525,00
Beira	3195,00
Tete	2030,00
Quelimane	2030,00
Pemba	1448,00
Lichinga	1448,00
De Pemba para.	
Maputo	5525,00
Beira	3195,00
Tete	2030,00
Quelimane	2030,00
Nampula	1448,00
Lichinga	1448,00
De Lichinga para	
Maputo	5525,00
Beira	3195,00
Tete	2030,00
Quelimane	2030,00
Nampula	1448,00
Pemba	1448,00

TABELA II

Por cada quilograma de excesso de bagagem . 60,00 MT

TABELA III

Por cada operação de reembolso 250,00 MT

TABELA IV

Tarifas normais de carga em serviço doméstico

	M MT/KG	N MT/KG	O MT/KG
De Maputo para:			
Beira	93,46	23,40	14,90
Tete	93,46	25,20	19,60
Quelimane	93,46	25,20	19,60
Nampula	93,46	32,70	22,40
Pemba	93,46	32,70	22,40
Lichinga	93,46	32,70	22,40
Da Beira para			
Maputo	93,46	23,40	14,90
Tete	93,46	13,10	9,30
Quelimane	93,46	13,10	9,30
Nampula	93,46	23,40	15,90
Pemba	93,46	23,40	15,90
Lichinga	93,46	23,40	15,90
De Tete para:			
Maputo	93,46	25,20	19,60
Beira	93,46	13,10	9,30
Quelimane	93,46	18,70	14,00
Nampula	93,46	18,70	14,00
Pemba	93,46	18,70	14,00
Lichinga	93,46	13,10	9,30
De Quelimane para:			
Maputo	93,46	25,20	19,60
Beira	93,46	13,10	9,30
Tete	93,46	18,70	14,00
Nampula	93,46	13,10	9,30
Pemba	93,46	13,10	9,30
Lichinga	93,46	13,10	9,30
De Nampula para			
Maputo	93,46	32,70	22,40
Beira	93,46	23,40	15,90
Tete	93,46	18,70	14,00
Quelimane	93,46	13,10	9,30
Pemba	93,46	9,30	7,00
Lichinga	93,46	9,30	7,00

BOLETIM DA REPÚBLICA

PUBLICAÇÃO OFICIAL DA REPÚBLICA POPULAR DE MOÇAMBIQUE

SUPLEMENTO

SUMÁRIO

PRESIDENCIA DA REPÚBLICA

Convocatória

Nos termos do artigo 47 da Constituição, convoco a Assembleia Popular, na sua 8.ª Sessão, para o dia 6 de Outubro de 1981, pelas 8,30 horas, em Maputo.

Presidência da República, em Maputo, 1 de Outubro de 1981. — O Presidente da República, SAMORA MOISÉS MACHEL.

COMISSÃO PERMANENTE DA ASSEMBLEIA POPULAR

Lei n.º 2/81

de 30 de Setembro

Lei da Organização e Funcionamento das Empresas Estatais

O III Congresso do Partido FRELIMO atribuiu ao Estado, como tarefa prioritária, a organização do sector produtivo de modo a assegurar a direcção centralizada da economia, promover a sua gestão planificada, desenvolver e consolidar o sector estatal de produção o qual deve ser dominante e determinante nos domínios económicos fundamentais.

A consolidação e o desenvolvimento do sector estatal da economia cria as condições objectivas que permitem a elevação do nível da consciência de classe e reforça o papel dirigente do operariado no desenvolvimento da sociedade.

As empresas estatais, constituem, pois, um dos elementos principais na construção da base material, política e ideológica para a edificação da sociedade socialista e para o desenvolvimento económico planificado com vista à satisfação das necessidades fundamentais do povo.

O Conselho de Ministros aprovou em 28 de Abril de 1977 o Decreto-Lei n.º 17/77, sobre normas e princípios quanto à organização, funcionamento e gestão das empresas estatais, definindo o respectivo estatuto-tipo.

As profundas transformações políticas, económicas e sociais ocorridas nestes dois anos, consagraram e aprofundaram o carácter socialista da nossa revolução.

Na verdade, a formação e entrada em funcionamento das Assembleias do Povo a todos os níveis, a estruturação do Partido, a reestruturação dos Governos Provinciais, a criação dos Conselhos Executivos e as ricas experiências de trabalho entretanto acumuladas, determinaram um novo ritmo de desenvolvimento sócio-económico no nosso País, exigindo uma urgente revisão do regime legal aplicável às empresas estatais

Importa, efectivamente, clarificar determinados conceitos e princípios particularmente quanto à direcção e responsabilidade individual do dirigente, à gestão económica, bem como redefinir as estruturas e competências das empresas estatais

As empresas estatais, como principal impulsionador do desenvolvimento da economia nacional, devem assumir a responsabilidade prioritária de materializar os objectivos definidos pelo Estado para cada um dos sectores ou ramos de actividade, à luz das orientações do Partido FRELIMO

As suas relações económicas e financeiras com outras empresas e organismos públicos e privados, devem fazer-se de harmonia com as leis objectivas da economia socialista e do direito.

Prevê-se, assim, que as empresas estatais devem desenvolver a sua actividade com base no princípio do cálculo económico, aumentando e melhorando permanentemente a sua produção, produtividade e rentabilidade, de modo a constituirem a principal fonte de receitas do Estado.

Neste contexto, impõe-se que as empresas estatais trabalhem vinculadas a um plano em que se definam correctamente as metas de produção, os meios e as capacidades de que dispõem

A fim de assegurar a realização de tais objectivos exige-se a aplicação do princípio do centralismo democrático, conjugando a direcção centralizada com a participação activa dos trabalhadores

Com efeito, a direcção das empresas na sociedade socialista organiza-se no interesse das massas trabalhadoras e apoia-se na sua iniciativa criadora, o que não exclui a direcção e responsabilidade individual do dirigente no cumprimento das suas funções

Institucionaliza-se assim, nas empresas estatais os colectivos de trabalho a todos os níveis, como meio de assegurar a participação dos trabalhadores na direcção da empresa, combinando a discussão conjunta com a decisão e responsabilidade individual do dirigente

Dentro desta perspectiva, o Conselho de Direcção deixa de figurar como órgão da empresa, transformando-se em colectivo de direcção para apoio do director-geral na tomada de decisões e sua implementação

É ainda fundamental que as nossas empresas estatais reflictam de uma forma clara o papel importante da organização dos trabalhadores no enquadramento destes e na direcção e controlo da produção como uma das grandes vitórias da nossa revolução

Neste sentido, as Assembleias de Trabalhadores deixam igualmente de figurar como órgãos da empresa, passando a constituir reuniões de trabalhadores, dirigidas pela respectiva organização, cujo funcionamento deverá por ela ser regulamentado

Estabelece-se, entretanto, que o director-geral da empresa sempre que julgar conveniente convocará reuniões com trabalhadores, por local de trabalho, para proceder à ampla discussão de assuntos relativos à vida da empresa

O director-geral, estabelecerá assim, um contacto directo com todos os trabalhadores não só para proceder à explicação das questões mais importantes da vida da empresa, como também para fazer com que os trabalhadores participem na busca das soluções adequadas para os problemas da empresa.

Prevê-se igualmente que os directores-gerais das empresas estatais possam, caso a caso, e por incumbência do dirigente do órgão central do aparelho de Estado que superintende o ramo ou sector de actividade exercer, para além das atribuições fixadas neste diploma, funções específicas de orientação e controlo das empresas do sector, incluindo empresas privadas e mistas

Também se estabelece que as empresas estatais possam assumir funções de apoio ao sector cooperativo

O presente diploma ao definir as regras pelas quais se regem as empresas estatais, substitui a forma de estatuto-tipo que se mostrou ultrapassado

Nestes termos e ao abrigo do disposto na alínea *a*) do artigo 44 da Constituição, a Comissão Permanente da Assembleia Popular determina.

CAPÍTULO I

Princípios gerais

ARTIGO 1

Definição

1. São empresas estatais as unidades sócio-económicas, propriedade do Estado que as cria, dirige e afecta os recursos materiais, financeiros e humanos adequados à ampliação do seu processo de reprodução no cumprimento do plano, no sentido de consolidar e aumentar um sector estatal que domine e determine a economia nacional.

2. As empresas estatais devem ser modelo em cada ramo, na transformação revolucionária das relações sociais de produção, no aumento e melhoria constante da produção, produtividade e rentabilidade e na elevação da sua organização e eficácia, nomeadamente através da organização científica do trabalho

3 As empresas estatais realizam a sua actividade no quadro do cumprimento do plano

ARTIGO 2

Elevação do nível político, técnico, científico e cultural dos trabalhadores

1. As empresas estatais como importantes células da sociedade socialista onde se forja o Homem Novo, têm particulares responsabilidades em garantir de acordo com os princípios do Partido FRELIMO, a constante elevação do nível político, técnico, científico e cultural dos trabalhadores.

2. Neste sentido implementam cursos de alfabetização e de formação profissional, incentivam a elevação do nível de escolarização básica e de qualificação profissional dos trabalhadores e promovem a melhoria das suas condições de vida e de trabalho.

ARTIGO 3

Emulação socialista

As empresas estatais devem garantir a criação de condições e o desenvolvimento da prática da emulação socialista, em colaboração com a organização dos trabalhadores, como um meio poderoso para impulsionar a iniciativa criadora dos trabalhadores gerando o entusiasmo pelo trabalho e espírito inovador, com vista ao aumento da produção e da produtividade, da qualidade dos produtos e serviços, da rentabilidade e ao cumprimento do Plano

ARTIGO 4

Respeito e defesa da propriedade do Estado

1. Como conquista de todo o povo, o património das empresas estatais, deve ser especialmente protegido e defendido.

2. Nas empresas estatais todos os trabalhadores e o director-geral, em particular, são responsáveis pela protecção, defesa, manutenção e correcta utilização do património que está afecto à empresa

3 Constitui obrigação de todos os trabalhadores da empresa estatal participar nas tarefas de vigilância revolucionária e apoiar as estruturas criadas para a defesa da propriedade do Estado.

4 Qualquer destruição, deterioração ou má utilização do património das empresas estatais que resulte de acções dolosas, culposas ou negligentes, da ocultação ou não denúncia de tais acções implicam responsabilidades nos termos da legislação em vigor.

ARTIGO 5

Personalidade e capacidade jurídica

As empresas estatais gozam de personalidade e capacidade jurídica.

ARTIGO 6

Criação e subordinação

1. As empresas estatais são de âmbito nacional ou de âmbito local.

2. As empresas estatais de âmbito nacional são criadas por decreto do Conselho de Ministros que define o órgão central do aparelho de Estado a que se subordinam.

3. As empresas estatais de âmbito local são criadas por diploma ministerial conjunto dos Ministros do Plano, das Finanças e do dirigente do órgão central do aparelho de Estado que superintende no ramo ou no sector de actividade.

O diploma ministerial de criação, define o órgão do aparelho de Estado a que ficam subordinadas

4 As propostas de criação são acompanhadas dos adequados estudos técnicos, económicos e financeiros, bem como do projecto de estruturação orgânica da empresa com os pareceres da Comissão Nacional do Plano e do Ministério das Finanças

ARTIGO 7

Relações com o Aparelho de Estado

1. A subordinação referida no artigo anterior não prejudica a obrigatoriedade das empresas estatais de qualquer âmbito de cumprir a legislação geral e demais actos normativos emanados quer dos órgãos centrais quer dos órgãos locais do aparelho de Estado encarregados de actividades funcionais, tais como a planificação, finanças, trabalho e outras.

2. As relações das empresas estatais de âmbito nacional e suas delegações com os órgãos do aparelho de Estado a nível da província e de distrito onde se situam serão de informação, coordenação e em nenhum caso de subordinação hierárquica.

ARTIGO 8

Diploma de criação

1 O decreto ou diploma ministerial que cria cada empresa estatal contém obrigatoriamente:

a) Denominação completa da empresa;
b) Âmbito da empresa;
c) Sede e área geográfica em que exercerá a sua actividade,
d) Órgão do aparelho de Estado a que se subordina,
e) Objecto e atribuições,
f) Fundo de constituição.

2. A denominação das empresas estatais deve ser precedida ou seguida das letras «E. E.», abreviatura de «Empresa Estatal».

3. Por decisão do dirigente do órgão central do aparelho de Estado que superintende no ramo ou sector de actividade, pode a empresa ser autorizada a abrir delegações.

ARTIGO 9

Apoio ao sector cooperativo

Às empresas estatais de qualquer âmbito, podem ser atribuídas pelo órgão do aparelho de Estado a que se subordinam funções específicas de apoio ao desenvolvimento do sector cooperativo.

ARTIGO 10

Participações financeiras

As empresas estatais de âmbito nacional podem subscrever participações financeiras para constituição de empresas mistas, desde que sejam devidamente autorizadas pelo dirigente do órgão central que superintende o ramo ou sector de actividade

ARTIGO 11

Registo

A constituição das empresas estatais e as respectivas alterações estão sujeitas a registo.

ARTIGO 12

Regulamento interno

1. O Regulamento Interno de cada Empresa Estatal deve ser submetido pelo director-geral à aprovação do dirigente do órgão central do aparelho de Estado que superintende no ramo ou sector de actividade no prazo de noventa dias, a contar da data da publicação do diploma de criação da empresa.

2. No caso de empresas estatais de âmbito local, o director-geral da empresa submeterá o regulamento interno a parecer do órgão local do aparelho de Estado a que se subordina, que por sua vez, o remeterá para aprovação do dirigente do órgão central do aparelho de Estado que superintende no ramo ou sector de actividade.

3. O regulamento interno deve conter nomeadamente o seguinte:

a) Estrutura orgânica, compreendendo a organização interna, o organigrama, descrição de funções e sistema de comunicação;
b) Atribuições dos dirigentes, incluindo os das delegações;
c) Funcionamento do colectivo de direcção e outros colectivos;
d) Organização do trabalho e salários.

4. As alterações ao regulamento interno devem obedecer ao regime estabelecido para os n.os 1 e 2 do presente artigo

CAPÍTULO II

Planificação e controlo

ARTIGO 13

Plano

1 O plano da empresa estatal como parte orgânica do plano da economia nacional, constitui o instrumento cientificamente fundamentado e obrigatória para a realização e desenvolvimento da sua actividade compreendendo

— Planos perspectivos.
— Planos plurianuais.
— Planos correntes anuais.

2. O plano, de acordo com o princípio do centralismo democrático é elaborado, executado e controlado com a mais ampla e activa participação dos trabalhadores, o que contribui para assegurar a sua responsabilidade pelo cumprimento.

3. O plano de cada empresa estatal obedece à metodologia aprovada pela Comissão Nacional do Plano para o órgão estatal de que aquela depende, contando nomeadamente com as seguintes componentes, de entre outras:

a) Plano de produção;
b) Plano de força de trabalho,
c) Plano de aprovisionamento,
d) Plano financeiro;
e) Plano de Investimentos.

4. De acordo com a forma estabelecida no respectivo regulamento interno, a empresa estatal obrigatoriamente criará condições para organizar, realizar e aperfeiçoar sistematicamente o trabalho de planificação e aumentar a eficiência económica da produção.

5. O controlo do cumprimento do plano é obrigatoriamente feito pela empresa estatal e de acordo com um sistema único de informação aprovado pelo órgão do aparelho de Estado a que esta se subordina

CAPÍTULO III
Sistema de direcção e organização

ARTIGO 14
Princípios

As empresas estatais organizam-se e funcionam a todos os níveis de acordo com os princípios de unidade política e económica das decisões, do centralismo democrático, da direcção e responsabilidade individuais conjugados com a participação colectiva dos trabalhadores, materializando-se em:

— Solução de qualquer questão da empresa de acordo com a política do Partido FRELIMO e os interesses gerais do Estado;
— Observância rigorosa da disciplina estatal e subordinação dos interesses da empresa aos interesses gerais da economia nacional;
— Subordinação dos escalões inferiores aos superiores;
— Conjugação da direcção individual e centralizada com a iniciativa criadora dos trabalhadores;
— Determinação precisa das faculdades, das obrigações e da responsabilidade de cada trabalhador e prestação de contas sobre as actividades desenvolvidas,
— Responsabilização individual pela execução das decisões adoptadas pelas omissões no exercício das faculdades conferidas;
— Discussão colectiva como forma de garantir a adopção de decisões correctas e a participação consciente dos membros dos colectivos na sua materialização

ARTIGO 15
Director-Geral

1. A direcção de cada empresa estatal é exercida pelo respectivo director-geral, dirigente que possui os mais amplos poderes de decisão, praticando todos os actos e operações necessários à realização das atribuições da empresa e ao cumprimento do Plano.

2. São atribuições do director-geral, nomeadamente:

a) Garantir a elaboração, a execução e o controlo do plano da empresa, dentro das directivas estabelecidas,
b) Garantir a óptima utilização e economia dos recursos humanos, materiais e financeiros da empresa, nomeadamente através da organização científica do trabalho,
c) Garantir a manutenção dos componentes do fundo básico;
d) Desenvolver e planificar uma adequada política de selecção e formação de quadros da empresa;
e) Tomar medidas para se realizar, em tempo, o aprovisionamento da empresa, dentro das normas de gastos e existências estabelecidas,
f) Informar o órgão central do aparelho de Estado a que se subordina a empresa, sobre o desenvolvimento da sua actividade e das dificuldades encontradas, propondo medidas para a sua solução;
g) apresentar o relatório anual de gestão e contas e da execução do plano;
h) Representar legalmente a empresa, celebrar contratos e outros actos jurídicos;
i) Submeter à aprovação o regulamento interno da empresa, nos termos do artigo 12;
j) Designar os dirigentes dos diversos escalões da empresa, incluindo os das delegações com excepção dos referidos no artigo seguinte,
l) Admitir, promover, transferir e demitir trabalhadores, nos termos legais e regulamentares,
m) Submeter à aprovação do dirigente do órgão central do aparelho de Estado que superintende no ramo ou sector de actividade as categorias profissionais e tabelas de remuneração do pessoal, tendo em conta as orientações do Ministério do Trabalho;
n) Exercer a disciplina, de acordo com a lei e regulamento interno da empresa;
o) Tomar medidas no sentido de garantir o cumprimento das normas sobre segurança e higiene no trabalho,
p) Garantir a elaboração e propor a aprovação do tipo e qualidade dos bens a produzir ou serviços a prestar;
q) Garantir a elaboração e propor a aprovação dos preços a praticar pela empresa,
r) Decidir sobre a venda de desperdícios ou resíduos em poder da empresa,
s) Solicitar autorização para vender bens componentes do fundo básico não necessários à empresa, nos termos do n.º 2 do artigo 27,
t) Averiguar a responsabilidade pela destruição de fundos e apresentar, quando se justifique o respectivo relatório ao órgão a que se subordina;
u) Incentivar a participação activa dos trabalhadores na preparação, cumprimento e controlo do plano e nas decisões sobre a forma de melhorar racionalizar e inovar a actividade da empresa
v) Contribuir activamente para a transformação revolucionária das relações sociais de produção, promovendo a entreajuda e a cooperação no processo de trabalho,
x) Adoptar medidas no sentido de garantir pela empresa a protecção física das suas instalações

3. O director-geral da empresa estatal pode exercer, por incumbência do dirigente do órgão central do aparelho de Estado que superintende no ramo ou sector de actividade, funções específicas de orientação e controlo das empresas do sector, incluindo as privadas e mistas.

4. O director-geral da empresa estatal deverá manter informados os órgãos do Partido FRELIMO e organizações dos trabalhadores na empresa sobre os aspectos fundamentais de actividade desta, articulando constantemente a sua actividade com estes órgãos

5 O director-geral da empresa estatal pode delegar competências estabelecendo as respectivas condições e limites no quadro da distribuição interna de funções. A forma de substituição do director-geral no caso de ausências ou impedimento será por este determinada

6 O director-geral da empresa estatal deve prestar conta da sua actividade ao dirigente competente do órgão central ou do órgão local do Aparelho de Estado a que se subordina.

7. O director-geral da empresa estatal está sujeito às Normas de Trabalho e Disciplina do Aparelho de Estado.

ARTIGO 16
Directores

1. O director-geral da empresa estatal pode ser assistido por um ou mais directores sempre que a dimensão da empresa ou a importância de certas funções o justifique

2 Os directores são os executivos imediatos do director-geral, implementando as suas decisões e desempenhando as funções que forem definidas no regulamento interno.

3. Os directores estão igualmente sujeitos às Normas de Trabalho e Disciplina do Aparelho de Estado.

ARTIGO 17

Nomeação e demissão

1. O director-geral da empresa estatal é nomeado, mandado cessar as funções e demitido por despacho do dirigente do órgão central do aparelho de Estado que superintende o ramo ou sector de actividade.

2 Os directores, sob proposta do director-geral da empresa estatal, são nomeados, mandados cessar funções e demitidos por despacho do dirigente do órgão central do aparelho de Estado que superintende no ramo ou sector de actividade.

ARTIGO 18

Colectivos

1. Os colectivos de trabalho são um meio de assegurar a participação colectiva dos trabalhadores na direcção da empresa e na organização do processo produtivo, combinando a discussão conjunta com a decisão e responsabilidade individual do dirigente.

Existem na empresa tantos colectivos quantos níveis de dirigente, sendo cada colectivo constituído pelos trabalhadores que lhe são directamente subordinados, assim como pelos representantes do Partido FRELIMO e da organização dos trabalhadores

2 Em cada um destes níveis, o colectivo de trabalho é dirigido pelo dirigente respectivo, cabendo-lhe a responsabilidade da sua convocação de acordo com a periodicidade estabelecida no regulamento interno da empresa e sempre que o referido dirigente o convoque Os dirigentes dos colectivos de nível inferior são membros dos colectivos de nível imediatamente superior.

3 Aos colectivos de trabalho de cada nível cabe nomeadamente:

— Contribuir para a elaboração, execução e controlo do plano da empresa, alertando sobre os desvios que impeçam o cumprimento do plano e submeter propostas para as superar,
— Estudar as melhores formas de organização científica do trabalho;
— Analisar a distribuição e cumprimento das tarefas por cada trabalhador;
— Promover a emulação socialista no quadro do plano da empresa;
— Analisar as propostas, reclamações e recomendações dos trabalhadores com o objectivo de resolver os problemas existentes.

ARTIGO 19

Colectivo de direcção

1 O colectivo de direcção é um colectivo de trabalho do director-geral para o apoiar na tomada de decisões e sua implementação, podendo assmuir composição restrita ou alargada.

2. O colectivo restrito é composto por:

— Director-geral;
— Directores;
— Representante do Partido FRELIMO na empresa;
— Representante da organização dos trabalhadores na empresa.

3. O colectivo alargado é composto por:

— Director-geral;
— Directores;
— Dirigentes das delegações e dos sectores da empresa, de acordo com a organização definida no seu regulamento interno;
— Representante do Partido FRELIMO na empresa,
— Representante da organização dos trabalhadores na empresa.

4. Podem ser convocados pelo director-geral outros trabalhadores da empresa para participar no colectivo restrito ou alargado de direcção, atendendo à natureza dos assuntos a tratar.

5. Cabe em especial ao colectivo alargado de direcção pronunciar-se sobre a elaboração, execução e controlo do plano e outros aspectos fundamentais da vida da empresa

ARTIGO 20

Reuniões com trabalhadores

O director-geral da empresa pode convocar reuniões com trabalhadores, por local de trabalho, sempre que julgar conveniente a ampla discussão de assuntos relativos à vida da empresa

CAPÍTULO IV

Gestão económico-financeira

ARTIGO 21

Cálculo económico

1. A gestão económico-financeira das empresas estatais baseia-se no cálculo económico, com vista a obter a maior eficiência na produção e no cumprimento do plano

O cálculo económico, como método de gestão, fundamenta-se nos princípios da rentabilidade, independência económica e operativa, responsabilidade material pelos compromissos, controlo monetário de actividade das empresas estatais, interesse material por parte das empresas e dos trabalhadores na actividade destas.

2. A gestão económica e financeira das empresas estatais realiza-se de acordo com o plano, nos termos do artigo 13

ARTIGO 22

Relações económicas e financeiras

1. As relações económicas e financeiras entre as empresas estatais e entre estas e outras empresas e organismos devem ser estabelecidas através de contratos, penalizando-se o não cumprimento dos seus termos

2. O cumprimento do plano faz-se através da celebração de contratos entre as empresas que são materialmente responsáveis pelos compromissos assumidos.

3. Pelas obrigações assumidas pelas empresas estatais respondem exclusivamente os meios próprios da empresa, isto é, o património O património das empresas, por sua vez, só responde pelas obrigações que por elas sejam assumidas

ARTIGO 23

Fundos de constituição básico e circulante

1. O Estado dota as empresas estatais de um fundo de constituição que assegura a sua gestão equilibrada.

2. O fundo de constituição compreende o fundo básico, representativo dos meios de produção e um fundo circulante, representativo de uma parte dos meios circulantes da empresa.

ARTIGO 24

Fundos financeiros

1. A dotação e utilização dos fundos financeiros, nomeadamente de amortização e de investimento das empresas estatais deverão obedecer ao que for regulamentado pelo Ministério das Finanças

2. Na falta de regulamentação geral neste campo, o Ministério das Finanças e o órgão central do aparelho de Estado que superintende no ramo ou sector de actividade decidirão, empresa a empresa e com base nos balanços e contas por esta apresentados, sobre a constituição e utilização anual daqueles fundos.

3. A constituição e utilização do fundo social dos trabalhadores será objecto de regulamentação especial

4. As empresas estatais devem efectuar a amortização para a reposição do seu fundo básico nos termos da lei em vigor

ARTIGO 25

Crédito

1. As empresas estatais podem contrair empréstimos bancários a curto prazo para o financiamento corrente da sua actividade.

2. As empresas estatais podem contrair empréstimos bancários a médio e longo prazos quando este estiver considerado nos planos de investimento aprovados para as empresas ou desde que obtenham a prévia autorização do órgão do aparelho de Estado a que se subordinam e do Ministério das Finanças

3 As empresas estatais são obrigadas à utilização dos créditos para os fins para que foram concedidos e devem garantir o seu reembolso e o pagamento dos respectivos juros, nos termos contratados.

ARTIGO 26

Relações com o Orçamento do Estado

1. Às empresas estatais será reservado o papel de fornecer o essencial das receitas do Estado, através das transferências de lucros e impostos, que devem ser cumpridos com prioridade.

2. Sob proposta do órgão do aparelho de Estado a que se subordina, o Ministério das Finanças determinará em cada ano, o montante das transferências para o Orçamento do Estado dos lucros das empresas estatais

3 As subvenções do Orçamento do Estado, quando tal se justificar, serão igualmente determinadas pelo Ministério das Finanças, nos termos da lei orçamental aprovada

ARTIGO 27

Património

1. As empresas estatais devem efectuar em cada ano a inventariação física e avaliação exacta do seu património, dos elementos do activo e do passivo.

2. A alienação dos bens que compõem o fundo básico das empresas estatais por razões de melhor aproveitamento ou conveniência de gestão efectuar-se-á apenas com a autorização do órgão central do aparelho de Estado que superintende no ramo ou sector de actividade.

3. As empresas estatais devem proceder ao seguro dos seus bens nos termos definidos pelo Ministério das Finanças

4. As condições em que a disposição dos bens prevista no n.º 2 pode ter lugar e as suas formas serão objecto de regulamentação pelo Ministério das Finanças.

ARTIGO 28

Contabilidade e prestação de contas

1. Cada empresa estatal deve possuir a contabilidade organizada de acordo com o Plano Nacional de Contas e as regras e normas fixadas pelo Ministério das Finanças

2. Até 31 de Março de cada ano todas as empresas estatais deverão apresentar ao órgão central do aparelho de Estado que superintende no ramo ou sector de actividade o balanço e contas referentes ao exercício económico anterior

3 O balanço e contas de todas as empresas estatais, acompanhado do parecer do órgão central do aparelho de Estado referido no número anterior, serão submetidos ao Ministério das Finanças até 31 de Maio de cada ano para aprovação

4. No caso das empresas estatais de âmbito local os elementos referidos no n.º 2 do presente artigo devem ser também apresentados ao respectivo Governo Provincial, dentro do mesmo prazo

5. Nas empresas estatais, por incumbência do director-geral, o responsável das finanças e contabilidade controla a execução correcta dos planos financeiros da empresa, tendo em atenção o objectivo de racionalizar e tornar mais eficaz o aproveitamento de todos os recursos materiais e financeiros de que a empresa dispõe

6 Cabe ao responsável das finanças e contabilidade garantir o cumprimento das normas e orientações definidas no seu campo pelo Ministério das Finanças

7 Todas as empresas estatais estão sujeitas à auditoria do órgão central do aparelho de Estado que superintende no ramo ou sector de actividade e do Ministério das Finanças.

8. Nas empresas estatais de âmbito nacional a auditoria interna tem carácter regular e obrigatória

9. Nas empresas estatais de âmbito local, a existência de auditoria interna e o seu carácter são definidos pelo órgão central do aparelho de Estado que superintende no ramo ou sector de actividade

CAPÍTULO V

Disposições finais e transitórias

ARTIGO 29

Lei aplicável

As empresas estatais regem-se pela presente lei, pelos respectivos regulamentos internos e por demais legislação que lhes for especialmente aplicável.

ARTIGO 30

Actos e contratos

1. Os actos e contratos realizados pelas empresas estatais e bem como todos os actos que importem a sua revogação, rectificação ou alteração podem ser titulados por documento particular.

2. Quando se trate de actos sujeitos a registo, o documento particular deve conter o reconhecimento autêntico das assinaturas.

3. Os documentos através dos quais as empresas estatais formalizem quaisquer negócios jurídicos, bem como os documentos por elas emitidos em conformidade com os elementos constantes da sua escrita, servem sempre de título executivo contra quem por eles se mostra devedor das referidas empresas, independentemente de outras formalidades exigidas pela lei comum

ARTIGO 31

Litígios

1. Os litígios económicos e contratuais entre empresas estatais ou entre estas e os órgãos do aparelho de Estado são resolvidos por decisão de órgãos de arbitragem estatal.

2. Salvo o disposto no número anterior, compete aos tribunais populares o julgamento dos demais litígios em que seja parte uma empresa estatal.

3. Transitoriamente, os litígios referidos no n.º 1 deste artigo são resolvidos por decisão do órgão ou órgãos centrais do aparelho de Estado que superintende o ramo ou sector de actividade.

ARTIGO 32

Trabalhadores

1. Aos trabalhadores das empresas estatais aplicam-se as leis gerais do trabalho, nomeadamente, quanto a contratação, horario de trabalho e ao pagamento de imposto nos termos gerais.

2. Podem exercer funções nas empresas estatais, em comissão de serviço, trabalhadores do aparelho de Estado, ficando os mesmos sujeitos no que respeita às relações com os quadros de origem ao regime sobre comissões de serviço aplicável ao respectivo quadro.

3 Os trabalhadores das empresas estatais podem exercer funções no aparelho de Estado ou noutras empresas estatais, em comissão de serviço em regime idêntico ao aplicável aos trabalhadores do aparelho de Estado.

4 O vencimento dos trabalhadores em comissão de serviço constitui encargo da entidade para quem esteja a exercer efectivamente funções.

5. As mesmas empresas estatais que tenham ao seu serviço trabalhadores do aparelho de Estado nos termos do n.º 2 deste artigo, obrigam-se a proceder aos descontos legais a que aqueles estejam sujeitos e à entrega nos cofres do Estado, nas condições legalmente estabelecidas.

ARTIGO 33

Empresas Estatais constituídas anteriormente

1. Às empresas estatais constituídas anteriormente à entrada em vigor do presente diploma são aplicadas as disposições desta lei.

2. Os directores das empresas estatais referidas no número anterior devem submeter à aprovação do órgão central do aparelho de Estado que superintende no ramo ou sector de actividade os regulamentos internos elaborados nos termos do artigo 12 desta lei, no prazo de noventa dias a contar da data da publicação do presente diploma.

ARTIGO 34

Revogação do Decreto-Lei n.º 17/77

São revogados o Decreto-Lei n.º 17/77, de 28 de Abril, e o Estatuto-Tipo das empresas estatais aprovado pelo mesmo decreto-lei.

Aprovada pela Comissão Permanente da Assembleia Popular.

Publique-se.

O Presidente da República, SAMORA MOISÉS MACHEL.

Quarta-feira, 19 de Novembro de 1980 I SÉRIE — Número 46

BOLETIM DA REPÚBLICA

PUBLICAÇÃO OFICIAL DA REPÚBLICA POPULAR DE MOÇAMBIQUE

SUMÁRIO

CONSELHO DE MINISTROS

Decreto n.º 8/80

de 19 de Novembro

O serviço público de transporte aéreo de passageiros e carga, nacional e internacional, é na época actual um factor cada vez mais importante no desenvolvimento económico de cada país.

Em Moçambique, este serviço vem sendo realizado ao longo das últimas quatro décadas pela DETA, criada em 1936 como uma divisão de exploração dos Serviços dos Portos e Caminhos de Ferro.

A sua existência como companhia aérea caracterizou-se por uma primeira etapa de rápido desenvolvimento, respondendo essencialmente às necessidades criadas pelas ligações ferroviárias estabelecidas com os territórios vizinhos.

Em meados da década de 40 este desenvolvimento é condicionado ao monopólio exercido pela empresa portuguesa concessionária do transporte aéreo.

O desenvolvimento da Luta Armada de Libertação Nacional coloca a DETA ao serviço directo do exército colonial o qual, exigindo um transporte de grande capacidade, veloz e seguro, leva à modernização da frota e à consequente reactivação da DETA.

Com a vitória da Luta Armada e a Independência Nacional, os objectivos da DETA alteram-se radicalmente. É-lhe então exigida uma maior capacidade e melhor qualidade viradas totalmente para a prestação do serviço público, agora não apenas numa perspectiva interna e regional mas também intercontinental.

Contudo, a DETA foi incapaz de assumir esta nova perspectiva.

De facto, criada e gerida como departamento dos Serviços dos Portos e Caminhos de Ferro, nunca adquiriu uma autonomia que lhe permitisse uma gestão económica e financeira sã, nem sentido de austeridade uma vez que os seus prejuízos eram sempre suportados pelos elevados lucros provenientes da exploração dos Portos e Caminhos de Ferro.

A Ofensiva Política e Organizacional desencadeada pela Direcção do Partido atinge directamente a DETA.

A constatação da falta de objectivos integrados no contexto nacional, da ausência de plano, de uma gestão ruinosa, de métodos de trabalho incorrectos, de desorganização, da má qualidade do serviço prestado, da falta de respeito para com o público, de irregularidades e da existência de horários desajustados impõe a sua extinção.

Para alcançar os objectivos traçados para a década da ruptura com o subdesenvolvimento são necessárias ligações aéreas rápidas, regulares e dimensionadas às necessidades, como complemento indispensável das outras formas de transporte.

Há pois que dotar o País de uma estrutura que dê resposta a estas solicitações.

Esta estrutura, a ser criada sob a forma de empresa estatal, deverá tornar-se um dos principais agentes executivos e dinamizadores dos objectivos definidos pelo Partido FRELIMO para o sector de transporte aéreo.

Desta forma, ao abrigo da alínea *h*) do artigo 60 da Constituição, o Conselho de Ministros decreta:

Artigo 1 — 1. É criada a empresa LINHAS AÉREAS DE MOÇAMBIQUE, E. E., mais adiante designada por LAM.

2. A LAM é uma empresa estatal [illegible]

Art. 2 — 1. A LAM é uma empresa de âmbito nacional, com sede em Maputo, sob tutela do Ministério dos Correios, Telecomunicações e Aviação Civil.

2. A LAM poderá abrir delegações ou outras formas de representação no País e no estrangeiro mediante autorização do Ministro dos Correios, Telecomunicações e Aviação Civil.

Art. 3 — 1. A LAM tem como objectivo principal o serviço público de transporte aéreo de passageiros, carga e correio de âmbito internacional de longa distância, internacional regional e nacional com carácter regular e não regular, exercendo a sua actividade no quadro do cumprimento do plano.

2. A LAM poderá ainda exercer actividades comerciais, industriais e financeiras relacionadas directa ou indirectamente, no todo ou em parte, com a sua actividade.

3. A LAM poderá fazer parte de associações ou organismos nacionais e internacionais relacionadas com as actividades por ela exercidas, mediante autorização do Ministro dos Correios, Telecomunicações e Aviação Civil.

Art. 4 — 1. É extinta a DETA — Divisão de Exploração dos Transportes Aéreos, dos Serviços dos Portos e Caminhos de Ferro de Moçambique.

2. É extinta a Empresa Estatal Agência Nacional de Viagens — ANAVIA, E. E.

Art. 5 — 1. A LAM é dotada de um fundo de constituição de um milhão e duzentos mil contos.

2. Farão parte do fundo de constituição todos os meios básicos da DETA e ANAVIA agora extintas.

3. A responsabilidade pela resolução das dívidas activas e passivas da DETA e ANAVIA será definida por despacho conjunto dos Ministros dos Correios, Telecomunicações e Aviação Civil e das Finanças.

4. O disposto no n.º 2 deste artigo constitui título justificativo de transferência para todos os efeitos legais, incluindo o do registo, sendo em caso de dúvida título bastante a simples declaração feita pela LAM e confirmada pelo Ministério dos Correios, Telecomunicações e Aviação Civil de que os bens se encontravam afectos às entidades nele referidas.

5. A transmissão dos bens, direitos e obrigações resultantes da aplicação do disposto no n.º 2 deste artigo, será efectuada mediante averbamento e fica isenta de quaisquer impostos incluindo o do selo, sisa, taxas e emolumentos.

Art. 6. A LAM assumirá todos os direitos e obrigações derivados de actos ou contratos, praticados ou celebrados pela DETA e/ou ANAVIA.

Art. 7. Os trabalhadores pertencentes aos quadros de pessoal da DETA, à data da extinção desta, são integrados na LAM com todos os seus direitos e obrigações.

Art. 8. As dúvidas que se suscitarem na execução deste decreto serão resolvidas por despacho do Ministro dos Correios, Telecomunicações e Aviação Civil ou por despacho conjunto deste e dos Ministros competentes em razão das matérias quando a dúvida a resolver respeitar a mais de um Ministério.

Art. 9. O presente decreto produz efeitos a partir de 14 de Maio de 1980.

Aprovado pelo Conselho de Ministros.

Publique-se.

O Presidente da República,

Decreto n.º 9/80

de 19 de Novembro

No limiar da década da ruptura com o subdesenvolvimento, torna-se necessário criar as condições básicas para o arranque dos grandes projectos, para o desenvolvimento acelerado da nossa economia.

Há que concentrar esforços na criação e organização de estruturas que permitam no seu campo de actividade prestar um apoio efectivo a todas as acções envolvidas nesta exaltante batalha.

É neste contexto que se torna necessário dotar o País desde já de uma infra-estrutura de prestação de serviços de transporte aéreo de passageiros e carga, que vá a todos os nossos distritos, a todos os nossos complexos agrícolas, a todas as grandes unidades de produção industrial disseminadas no País.

Simultaneamente, esta estrutura deverá organizar-se para a prestação de toda a actividade de trabalho aéreo ligada à pulverização aérea, cartografia, pesquisa geológica, construção rodoviária, ferroviária e linhas de transporte de energia, permitindo assim um apoio indispensável quer à elevação dos rendimentos da agricultura, quer na criação das condições para o arranque dos grandes projectos, quer ainda na tarefa imensa de socialização do campo.

Esta estrutura deve ainda estar apta a responder com eficácia a actividades sociais, como sejam o apoio sanitário e em operações de busca e salvamento.

Nestes termos, ao abrigo da alínea *h*) do artigo 60 da Constituição, o Conselho de Ministros decreta:

Artigo 1 — 1. É criada a EMPRESA NACIONAL DE TRANSPORTE E TRABALHO AÉREO, E. E., mais adiante designada por TTA.

2. A TTA é uma empresa estatal dotada de autonomia administrativa, financeira e patrimonial.

Art. 2 — 1. A TTA é uma empresa de âmbito nacional sob tutela do Ministro dos Correios, Telecomunicações e Aviação Civil.

2. A TTA tem a sua sede em Maputo.

Art. 3 — 1. A TTA exerce a sua acção no quadro do cumprimento do plano e tem como actividades principais:

— realizar o serviço público de transporte aéreo de passageiros, carga e correio de âmbito interterritorial com carácter regular e não regular;
— efectuar o serviço público de transporte aéreo de passageiros, carga e correio de âmbito interprovincial e internacional com carácter não regular, ou regular quando assim for determinado;
— realizar o trabalho aéreo de apoio a actividades económicas e sociais e o respeitante às operações de busca e salvamento.

2. A TTA poderá ainda exercer actividades comerciais, industriais e financeiras relacionadas directa ou indirectamente, no todo ou em parte, com as suas actividades principais.

3. A TTA poderá ainda fazer parte de associações ou organismos nacionais e internacionais relacionadas com as actividades por ela exercidas mediante autorização do Ministro dos Correios, Telecomunicações e Aviação Civil.

Art. 4 — 1. São integrados na TTA os meios aéreos e seus acessórios e sobresselentes actualmente pertença do Ministério da Saúde.

2. O disposto no número anterior constitui título justificativo da transferência para todos os efeitos legais, incluindo o do registo, sendo em caso de dúvida título bas-

pelo Ministério dos Correios, Telecomunicações e Aviação Civil de que aqueles meios se encontravam afectos àquela entidade.

3. A transmissão dos bens resultantes da aplicação do disposto no n.º 1 deste artigo será efectuada mediante averbamento e fica isenta de quaisquer impostos, incluindo o do selo, taxas e emolumentos.

Art. 5. À TTA é atribuído um fundo de constituição no montante de quatrocentos mil contos.

Art. 6. É extinta a Empresa Estatal Helicópteros de Moçambique — HELMO, E. E., criada pelo Decreto n.º 2/78, de 21 de Fevereiro.

Art. 7. As dúvidas que se suscitarem na execução deste decreto serão resolvidas por despacho do Ministro dos Correios, Telecomunicações e Aviação Civil, ou por despacho conjunto deste e dos Ministros competentes em razão das matérias quando a dúvida a resolver respeitar a mais de um Ministério.

Art. 8. O presente decreto produz efeitos a partir de 1 de Novembro de 1980.

Aprovado pelo Conselho de Ministros.

Publique-se.

O Presidente da República, SAMORA MOISÉS MACHEL.

Decreto n.º 10/80

de 19 de Novembro

Ao atingir-se a Independência Nacional, o País dispunha de uma extensa rede de infra-estruturas aeronáuticas, afectas quer aos Serviços da Aeronáutica Civil, quer à administrações locais, quer ainda a entidades privadas.

Aos Serviços de Aeronáutica Civil estavam cometidas funções de intercâmbio, normativas e de fiscalização da actividade da aviação civil e atribuídas também a exploração e o desenvolvimento das infra-estruturas aeroportuárias e de navegação aérea. Essas funções encontravam-se à partida restringidas, nomeadamente em tudo o que respeitasse a quaisquer formas de relação e intercâmbio internacionais. Um dos aspectos mais negativos desta limitação consistiu na obstrução a que a então «colónia» viesse a dispor de um aeroporto internacional dimensionado, de modo a assegurar a realização de voos intercontinentais sem escalas intermédias, protegendo e garantindo assim a elevada rentabilidade da denominada «linha imperial», que aproveitava à concessionária nacional portuguesa do transporte aéreo.

Por outro lado, nos últimos anos do colonialismo assistiu-se a uma acentuada e anárquica proliferação de pistas e outros apoios à navegação aérea, visando contrariar o impetuoso avanço da Luta Armada de Libertação Nacional, que não deixava outra alternativa de movimentação rápida das tropas coloniais senão através do transporte aéreo.

Esta precipitada actividade atingiu também o estabelecimento, exploração e a melhoria operacional dos complexos aeroportuários civis que foram radicalmente desviados do seu objectivo essencial de factor de apoio ao desenvolvimento sócio-económico, o que conduziu a uma completa distorção de perspectiva.

As construções e os sistemas de apoio à navegação aérea eram concebidos, executados, adquiridos e montados de forma expedita, obedecendo prevalecentemente a critérios de rapidez e baixo custo em detrimento da qualidade.

Herdámos, em consequência, uma infra-estrutura em degradação acelerada, desguarnecida e desprovida de meios eficientes de produção, e incorrectamente dimensionada.

Após a Independência Nacional, ficam criadas as condições de ultrapassar os estrangulamentos e a distorção a que tinha estado submetido o sector de aviação civil. É assim criada, em Abril de 1976, a Direcção Nacional de Aviação Civil, que passou a superintender toda a actividade aérea civil no País. Contudo, não ficaram definidas as fronteiras de actuação com os Serviços de Aeronáutica Civil.

A Ofensiva Política e Organizacional desencadeada pela Direcção do Partido FRELIMO, no princípio de 1980, detectou de imediato a existência no sector de estruturas incapazes, carecentes de uma definição clara de objectivos e com métodos de trabalho incorrectos.

Há que realizar um processo de ruptura total com o passado, de que a situação detectada é ainda consequência.

Os nossos aeroportos devem desempenhar neste contexto um importante papel. Eles são a nossa sala de visitas; eles transmitem a primeira e última imagem que os visitantes retêm do nosso País.

Impõe-se, portanto, criar uma estrutura de elevado dinamismo que planifique, implemente e assegure uma eficiente gestão e manutenção do nosso património aeroportuário em moldes empresariais.

Nestes termos, ao abrigo da alínea *h*) do artigo 60 da Constituição, o Conselho de Ministros decreta:

Artigo 1 — 1. É criada a Empresa Nacional de Aeroportos de Moçambique, E. E., mais adiante designada por AEROPORTOS DE MOÇAMBIQUE.

2. A empresa AEROPORTOS DE MOÇAMBIQUE é uma empresa estatal dotada de autonomia administrativa, financeira e patrimonial.

Art. 2 — 1. A empresa AEROPORTOS DE MOÇAMBIQUE é uma empresa de âmbito nacional sob tutela do Ministério dos Correios, Telecomunicações e Aviação Civil.

2. A empresa AEROPORTOS DE MOÇAMBIQUE tem a sua sede em Maputo.

Art. 3 — 1. A empresa AEROPORTOS DE MOÇAMBIQUE tem por objecto principal o estabelecimento e exploração do serviço público de apoio à aviação civil, exercendo a sua actividade no quadro do cumprimento do plano.

2. Compete-lhe em especial:

— dirigir e controlar o tráfego aéreo;
— assegurar a partida e a chegada de aeronaves;
— criar condições para o embarque, desembarque e o encaminhamento de passageiros, carga e correio;
— planificar, executar e explorar a rede de infra-estruturas aeroportuários e assegurar a sua manutenção;
— promover a captação de receitas em fontes internas e externas a serem aplicadas na gestão, operação, manutenção, expansão e embelezamento das infra-estruturas de navegação aérea.

3. A empresa AEROPORTOS DE MOÇAMBIQUE poderá ainda exercer actividades comerciais, industriais e financeiras relacionadas directa ou indirectamente, no todo ou em parte, com a sua actividade principal.

4. A empresa AEROPORTOS DE MOÇAMBIQUE poderá fazer parte de associações ou consórcios nacionais