McGill University

The Legal Nature of Bilateral Air Transport Agreements

by

Judith Cummings

A thesis submitted to the Institute of Air and Space Law in candidacy for the degree of Master's of Law.

Montreal, Quebec
September, 1986

ACKNOWLEDGMENT

In submitting this thesis to the Faculty of Graduate Studies and Research, McGill University, Montreal, I wish to thank my thesis supervisor, Professor P.P.C. Haanappel for his assistance and those unnamed who made it possible. For the views expressed however, the responsibility remains mine own.

ABSTRACT

This examination of the legal nature of bilateral air transport agreements has two main purposes. The first is to trace the origins and development of a new system for regulating international civil aviation. The new system would see international air transport as a trade in services through the issue of permits to do business. It could be organized within the framework of G.A.T.T. and a multilateral convention would cover the first two technical freedoms of the air. Such a change is needed as the present conceptual treaty basis for international civil aviation oftentimes proves illusory when domestic law is examined. The second purpose is to present the possibility of using a methodology of the social sciences for analyzing law. An economic analysis of predatory pricing was introduced to illustrate the benefits of admitting additional research tools.

The interdisciplinary approach has permitted clearer focus on the issues and buttresses the assertion that there is a need for changing the present system which is no longer supported by the facts.

RÉSUMÉ

Cet examen de la nature juridique des accords bilatéraux en matière de transport aérien a deux objectifs principaux. Le premier consiste à retracer les origines et l'évolution d'un nouveau système de règlement international dans le domaine de l'aviation civile. Celui-ci considérerait le transport aérien international comme un service commercial contrôlé par l'émission de permis d'activité. Il devrait être organisé dans le cadre du G.A.T.T. et une convention multilatérale couvrirait les deux premiers privilèges techniques aériens. Un tel changement est nécessaire étant donné que le fondement conceptuel actuel des traités dans le domaine de l'aviation civile se révèle souvent illusoire à la lumière du droit interne. Le deuxième objectif est de présenter la possibilité d'utiliser la méthodologie des sciences sociales pour analyser le droit. Une analyse économique des prix monopolistiques a été introduite pour illustrer les avantages de ces nouveaux outils de recherche.

La méthode interdisciplinaire a permis d'analyser plus clairement les questions et appuye l'affirmation qu'il faut changer le système actuel qui n'est plus en accord avec la réalité des faits.

TABLE OF CONTENTS

INTRODUCTION

History

The history of bilateral air transport agreements dates back to 1913 when France and Germany entered such an agreement. The first scheduled international air service in the world was begun on March 22, 1919. It was between Paris and Brussels. At the time of the Paris Convention in 1919 a policy of open skies analogous to maritime shipping was still possible but the phenomena of bilateralism prevailed. Once the multilateral approach was set aside, bilateral air transport agreements took their shape and content from the prevailing winds of change.

Developments since 1913 have been radical. Change has been rapid and constant. The world has witnessed the emergence of many new states and the virtual disappearance of colonialism. The world has become what Marshall McLuhan has called a global community. Air travel is commonplace; air transport is now a commercial enterprise which through perhaps its own innate nature and high visibility, is equally political. One need only think of hijacking. Markets have matured, as have states. In response to these various pressures, bilateral air transport agreements have gone through various stages of development. Some have been more liberal than others. There were the Chicago type bilaterals, Bermuda I and Bermuda II bilaterals, and there are the more

liberal bilaterals that are an exterior manifestation of the economic and political pressures underlying deregulation. It will be argued in this thesis that the phenomena of bilateralism may be on the wane and a period of multilateralism mixed with bilateralism is on the rise to correspond with changes in social, economic and political facts and theories. Deregulation, it seems, with its emphasis on free competition, is the response to sovereignty understood in its fullest amplitude, including the political and economic aspects.

Present Problems

Deregulation is producing the notion that bilateral air transport agreements are but international trade agreements. This must be understood in the context of the inherent historical duality. Since states are sovereign, permission must be granted to enter their airspace. This simultaneously involves a state's view of air transport as either a public utility or as private enterprise. It will be argued that the six freedoms of the air are severable, that multilateralism will prevail with respect to the first two technical freedoms and bilateralism will prevail in relation to the economic aspects and that these will be implemented in the simple form of agreements for trade in services. That this is a valid response to the change is supported by the fact that there is a basic problem that inheres in the present system if severability is not the preferred option. That problem

centres around the fact that in the majority of countries, bilateral air transport agreements are not treaties but are intergovernmental agreements where one needs domestic aviation legislation consistent with the bilateral and vice versa and domestic legislation that allows aeronautical authorities to implement the bilateral air transport agreement.[1] The history of bilateral air transport agreements thus reflects the history of states. It also reflects the history of the world community.

The history of the regulation of air navigation must be situated in the larger context of developments both at the national and international levels. The developments in Canada that led to full sovereignty are a case in point of the precarious interplay of domestic and international law. The issue of the legal nature of bilateral air transport agreements raises questions left unresolved at the Chicago Convention relating to the severability of economic issues. Severance of such issues would uncomplicate the entire system. If one could respond that bilateral air transport agreements are not treaties with respect to economic issues, the whole problem of implementation and enforcement of treaty obligations would also be severable. In diminishing the importance of the public international law aspects, solutions to often urgent economic issues would be more readily available. Rights would co-exist with remedies, issues of sovereign

immunity would be diminished and debtors and creditors would be the players. States would enter a multilateral treaty with respect to the first two freedoms and could no longer be embarrassed by domestic legislation that fails to implement the treaty obligation. The issue of whether a bilateral air transport agreement is a treaty thus relates to the issues of implementation and enforcement, and this varies in relation to the constitutional developments within a given state. The purpose of this study is to examine the limitations of the system of bilateral air transport agreements from the perspective of the domestic law of Canada, the United States, and France and to show the problems that arise when domestic law interlines with international law. The restructuring that is presently occurring in the regulation of international air transport will also be examined as a solution that is evolving in response to the present problems.

Methodology

The general function of methodology, as described by Marnière in Éléments de méthodologie juridique,[2] is the analysis of the various steps and the nature of the intellectual process used in a discipline. Following this definition, both an inductive and a deductive process of reasoning will be followed. In the inductive stage, argument by analogy will dominate the discussion of whether bilateral air transport agreements are treaties. In the deductive stage, the

fundamental constitutional principles of three countries will be deduced from their constitutional history, documents and constitutional norms. In the deductive stage, the perspective will be the domestic law of Canada, the United States and France with respect to bilateral air transport agreements as treaties. In the inductive stage, the relationship between international law and domestic law with regard to bilateral air transport agreements will be examined. This corresponds to Chapter I, entitled "Domestic Law" and Chapter II entitled "International Law". Chapter I will involve looking for a mirror effect. Chapter II will be from the outside looking in. In both, the data will be law itself. In Chapter III however, we endeavour a view from the bridge; we attempt a synthesis of law and life; we speculate on new forms that are evolving to fit new facts that are emerging; a two-tier system is conjectured involving a synthesis of trends and counter-trends that have been present since 1919. The view from the bridge will require both a shift in method and methodology. The third chapter is entitled "An Economic and Political Analysis of Law". The methodology will become synthetic, blending the induction and deduction of Chapter I and II with the not strictly legal data of Chapter III which will instead be political and economic in nature. Further work is indicated in the possible construct of a model based on the data relating to the effect of deregulation on international air transport agreements. The law and jurisprudence would be

temporarily bracketed in the economic analysis of law while the given facts could either support or lead to the rejection of the hypothesis. The same would apply to the political analysis although this shift in methodology will not be fully explored in this thesis. Chapter III will highlight the nature of the problem and will indicate that a shift in traditional legal methodology is an appropriate response to the facts. In looking at the legal nature of bilateral air transport agreements, one inevitably is looking from the bridge at various legal systems and at international law which must be dynamic and flexible. The premise upon which this thesis is based is that law is dynamic and flexible and adaptive to changes in the facts. The changes in the regulation of international air transport are a case in point.

Carbonnier, in his book Flexible droit, maintains that a law based on inductive or deductive logic in a closed system is without vigour and vitality. In effect this argument is based on law and society, law and life, simultaneous conceptual independence and interdependence. He has stated:[3]

> "Le droit est trop humain pour prétendre à l'absolu de la ligne droite. Sinueux, capricieux, incertain, tel il nous est apparu, dormant et s'éclipsant, changeant mais au hasard et souvent refusant le changement attendu, imprévisible par le bon sens comme par l'absurdité [...] Il faut commencer par le mettre à nu. Sa rigueur il ne l'avait que par affectation ou imposture."

Doing a legal analysis of law yields the known. It is like holding up a mirror and asking, like Alice, "Mirror mirror on the wall, who's the fairest of us all?". Yet sometimes one has to give up the mirror image and go through the doors of other perspectives. This is the purpose of posing the question "What is the legal nature of bilateral air transport agreements?". The question itself leads to an economic and political analysis of law and to the adaptation of the legal rules to new facts as well. The methodology adopted for this research itself reflects the tentative solutions that are evolving. As will be demonstrated, the problems relating to bilateral air transport agreements are multi-dimensional. The evolving solutions appear to reflect the need for co-existing conceptual independence and interdependence. Flexible law is clearly surfacing with the "sunsetting" of the CAB.

Plan

The plan that will be followed in this analysis has three main subdivisions. Chapter I will deal with domestic law; Chapter II will deal with international law and the problems inherent in the relationship between domestic law and international law. Chapter III will use the problems that have been identified in Chapter I and II as a point of departure for an economic and political analysis of law. Certain tentative conclusions will then be drawn from the facts and issues that have been raised. More specifically, in Chapter I

the domestic law of Canada, the United States and France with respect to constitutional developments that affect the implementation and enforcement of treaties will be examined. Next, it will be noted that there is a huge variance in the terminology used and this raises the question "What's in a name?". Then bilateral air transport agreements will be examined from an operational perspective as international trade agreements and the question will be raised "What's in a form?". In Chapter II we will examine bilateral air transport agreements from the outside looking in. We will look at them from the perspective of the Vienna Convention on the Law of Treaties, from the perspective of customary international law and conventional international law, and from the perspective of attempts to regulate international aviation problems by arbitration or through international bodies such as ICAO, the World Court, and the United Nations. In the third chapter entitled "An Economic and Political Analysis of the Law", we will watch the interplay of law and life as reflected in the tailoring of form and content to changing facts. In our view from the bridge we will witness the undoing of deregulation and tentatives in redoing. We will step back from the situation and reflect on law from a perspective outside itself. Our political analysis will focus on the notion of sovereignty and the effect of decolonization. Our economic analysis will focus on the market theory of deregulation and its underpinnings. It will then be argued that in posing the

question "Is it a treaty?," there inheres a second question. Should bilaterals continue to take this form? Is it not time to remove the regimental dress, put on a business suit and deregulate so that the feathered birds may leave the nest?

In the above, the history of bilateral air transport agreements has been briefly sketched. The seeds of the present problems, as indicated, trace themselves back through the historical development of bilateral air transport agreements. The central most problem today is the struggle for dominance of prevailing views that are at times at counterpoint. These central issues appear to be the countertrends of bilateralism and multilateralism, the thesis of oligopoly poised against the thesis of competition, and government control being challenged by deregulation, the aggregate of which appears to be coalescing into a tentative admixture of what hitherto appeared at times to be irreconcilable opposites. The present problem of how this admixture is going to take shape is the focus of this thesis. The methodology of this research will also reflect the mixed nature of the problem and its solution.

FOOTNOTES - INTRODUCTION

1. P.P.C. Haanappel, "Bilateral Air Transport Agreements, 1913-1980", (1978-80), The International Trade Law Journal 4-5, p. 241.

2. E.S. Marnière, "Éléments de méthodologie juridique, Paris, Librairie du journal des notaires et des avocats, 1976, p. 10.

3. J. Carbonnier, Flexible droit, 4th ed., Librairie générale de droit et de jurisprudence, R. Pichon and R. Durand Auzias, 1979, p. 2.

CHAPTER I: DOMESTIC LAW

An analysis of the legal nature of bilateral air transport agreements must occur in two preliminary stages. For the purposes of this survey, the analysis will begin with domestic law. Under this rubric, the bilateral air transport agreements of Canada, the United States and France will be examined, each within its own particular constitutional setting. Bilateral air transport agreements will be examined as intergovernmental agreements, as executive agreements, and as conventions or treaties respectively. An analysis of the nature of bilateral air transport agreements in international law will take place in Chapter II and will constitute the second preliminary phase of this inquiry.

Bilateral Air Transport Agreements in Canada and Great Britain

In Canada, bilateral air transport agreements are intergovernmental agreements entered into by the executive branch of government. That this is so derives from Canada's colonial past and in particular the assimilation of the concept of Crown prerogatives into the Canadian constitutional framework. With the acquisition of full independence came control over foreign affairs and the right to enter treaties. With full sovereignty came the capacity in international law to enter into treaty obligations. It is the purpose of this section to briefly outline the historical process of Canadian

constitutionalism that allowed this development. Issues that are of particular relevance in a study of the legal nature of bilateral air transport agreements will be focussed on, such as the formation of treaty obligations, their implementation and their ratification. Their form, content and nomenclature will be discussed at a later stage in this chapter.

Four events took place which were the basis for Canada becoming fully sovereign. They were the Constitution Act, 1867, the Imperial Conference of 1926, the creation of the Office of Governor-General in 1947, and the Constitution Act, 1982.

The first event, the passing of the Constitution Act, 1867, allowed Canada to become self-governing in domestic affairs but the capacity to enter most treaties was withheld. This derives from the fact that there is no specific provision in the Constitution Act, 1867 which deals with the treaty-making power other than section 132 which grants the federal Parliament the power to enact legislation to implement treaties between the "British Empire" and "foreign countries". This occurred because in 1867 the conduct of international affair was vested in the imperial government. Therefore the Constitution Act, 1867 was silent on the treaty-making power.

A second event took place which fleshed out Canada's independence. At the Imperial Conference in 1926, it was affirmed that Great Britain and the Dominions were "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or internal affairs".[1] This was followed by a third event in 1947 whereby the Office of Governor-General of Canada was created. Under clause 2, the Governor-General is authorized "to exercise all the powers of the Crown in respect of Canada."[2] Therefore, Canada acquired the formal treaty-making power in 1947 and it depended on a delegation of the power from Great Britain. The fourth event, the Constitution Act, 1982 achieved Canada's formal legal independence of the U.K. Parliament.

Another factor which should be mentioned is the common law. The Crown (the executive branch of Great Britain) under common law, has full power to conduct foreign affairs, which includes treaty making. The concept of the Crown prerogative was dealt with in Post Office v. Estuary Radio Ltd.[3] The English Court of Appeal considered the effect of the Crown ratifying the Convention on the Territorial Sea and the Contiguous Zone on March 14, 1960 which convention came into force in 1964, and an Order in Council of September 25, 1964, also dealing with territorial waters. The Court held that since the Order in Council is later in date, it is that document which must be given effect and construed. The Court stated:[4]

> "If its meaning is clear, we must give effect to it, even if it is different from that of the convention, for the Crown may have changed its mind in the period which elapsed between its ratification of the Convention on March 14, 1960 and the promulgation of the Order in Council and the Crown has a sovereign right, which the Court cannot question, to change its policy, even if this involves breaking an international convention to which it is a part and which has come into force so recently as fifteen days before."

The Court indicated that it was within the Crown prerogative to either extend sovereignty or abandon sovereignty and as part of the Crown prerogative, the authority of Parliament was not required. It went on to state:

> "and in this respect it differs from an international convention which requires legislation for its implementation, it deals with a subject matter which lies within the prerogative power of the Crown, videlicet a claim to exercise territorial sovereignty over an area of the sea adjacent to our shores."[5]

One may thus note in passing that the situation with respect to treaties in Great Britain is the same as in Canada insofar as the exercise of the Crown prerogative takes place free from the authority of Parliament. However, as pointed out above, the formation of treaty obligations as part of the Crown prerogative is an issue that is distinct from the issue of treaty implementation.

It was noted that the Crown can legislate in violation of international law as part of the Crown prerogative. What happens when the Crown does?

In Salomon v. Commissioners of Customs and Excise[6] the English Court of Appeal had to rule on the meaning of the term "normal price" contained in the Customs and Excise Act, 1952 for the purposes of valuation of a camera that was bought in the United States and imported into England. The statute was based on the Convention on Valuation of Goods for Customs Purposes, 1950 which the United Kingdom signed on December 15, 1950 and which was ratified on September 27, 1952, the ratification having occurred shortly after the Customs and Excise Act was passed. Diplock, L.J. stated:[7]

> "The convention is one of those public acts of state of Her Majesty's Government of which Her Majesty's judges must take judicial notice if it be relevant to the determination of a case before them, if necessary informing themselves of such acts by inquiry of the appropriate department of Her Majesty's Government. Where, by a treaty, Her Majesty's Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations. Once the Government has legislated, which it may do in anticipation of the coming into effect of the treaty, as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and

> unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see Ellerman Lines v. Murray; White Star Line and U.S. Mail Steamers Oceanic Steam Navigation Co. Ltd. v. Comerford), and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts."

Therefore, where suit is brought in a domestic court, the British Court of Appeal held that in interpreting the domestic law, a court should take judicial notice of a relevant treaty in interpreting an ambiguity on the grounds of international comity if aid is needed to construe an act patently intended to carry out its terms, even though that intention is not stated expressly in the Act. If one were to apply this reasoning by analogy to bilateral air transport agreements as they presently exist, assuming the impediments of locus standi and sovereign immunity have been overcome, in interpreting a provision in domestic law, the court should take judicial notice of both the bilateral air transport agreement and the Vienna Convention on the Law of Treaties to construe a domestic law implementing a treaty obligation even if the intention to refer to such a treaty is not stated expressly in the act. Yet why should judicial notice be taken of the treaty? Vanek has focused directly on the problem:[6]

> "In England the authority of international law is fortified and its application is extended by a doctrine of English law which bristles with implications bearing on the progressive development both of international and domestic law. According to this doctrine,

> international law is adopted by the common law and, therefore, is part of the law of the land. It has been called the doctrine of adoption or incorporation. The doctrine was stated by Blackstone, with reasonable clarity, in his Commentaries on the Laws of England, and was apparently regarded by him as an established doctrine of English law even in 1965. Blackstone observed:
>
> > ... the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those Acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the Kingdom without which it must cease to be a part of the civilized world."

The issue that will be dealt with next is how the attempt at reconciliation in a unitary state like Great Britain is compounded in a federation like Canada. The issue of the Crown prerogative in Canada appears to be a retrofitting of a doctrine that emerged in a unitary state into a federation that is not unitary but binary.

The Crown prerogative became part of Canadian constitutionalism both directly through the events of 1867, 1926, 1947 and 1982, and indirectly through the common law. Therefore, in Canada, treaty making is an act of the executive branch of government and there is no constitutional requirement that treaties which Canada enters into be placed before

Parliament. This issue is key in a study of the legal nature of bilateral air transport agreements insofar as the absence of any requirement for ratification relates to the issue of enforceability which will be dealt with in a subsequent chapter on the status of bilateral air transport agreements in international law.

Since treaties in Canada need not be placed before the legislature as a constitutional requirement, how then are treaties implemented? How does Canada ensure the performance of treaty obligations? The problem here derives from the fact that Canada is not a unitary state,

The issue of the Crown prerogative leads to the issue of who implements the prerogative in Canada. In his comment on the judgment in Reference re Power of Municipalities to Levy Rates on Foreign Legations and High Commissioners' Residences, the late Chief Justice of the Supreme Court of Canada[9] dealt with two issues of importance in relation to the interplay of international law and domestic law. The facts of the case were that the Ontario Assessment Act[10] empowered the municipality to levy tax on property owned by a foreign state and occupied as a legation. The act in question rendered all real property in Ontario liable to taxation with the exception of property owned by the Crown. The first issue raised is what is the position of a domestic court when domestic legis

lation is in violation of international law? The majority view, expressed by Duff, C.J.C. was based on the international law principle of the immunity of foreign legations from local land taxation and local jurisdiction. However, Laskin raises the issue that there is no such crystallized principle of international law and at best there is a principle of comity which does not extend to taxes for services such as light and water. The second issue that is raised by Laskin derives from the spectre of A.G. Canada v. A.G. Ontario[11] in which the Privy Council held that "no further legislative competence is obtained by the Dominion from its accession to international status and the consequent increase in scope of its executive functions".[12]

Laskin focuses on the problem of treaty implementation in Canada and states:[13]

> "It may seem somewhat incongruous that the Dominion's ability to play a dignified role in international affairs, from the standpoint of reciprocity in extending exemptions and immunities to property and diplomatic agents of foreign states, should depend on the willingness of the provinces, and especially of Ontario, to support the Dominion in the matter through provincial legislation."

However, that is the case and an attitude of reconciliation, flexibility and consultation has developed. On the interplay of domestic law and international law, Laskin gives the following summary of the attitude of a domestic forum when

adjudicating on an issue that involved the problem of whether international law is part of the law of the land. He states:[14]

> "... the courts when confronted with a matter of international concern, will seek to reconcile national and international law by expressing as propositions of national (domestic) law principles of international law, if this can be done consistently with statute, order-in-council or judicial precedent which would ordinarily be controlling in the courts, where they conflicted with international law. It might be, of course, that domestic law as applied by the courts in adjudication of the rights of parties, would give rise to a breach of international law on the part of the State in which such domestic law operated; but that would not alter the validity of the domestic law as a rule governing the adjustment of the rights of individuals within (or invoking the jurisdiction of the courts of) the State; provided of course that there was no constitutional requirement that superior effect be given to international law. The fact that a State might have to answer internationally for the operation of its domestic law is perhaps one reason why, as a matter of construction, domestic courts seek to harmonize their application of domestic law with the principles of international law."

Therefore, when there is a problem of the relationship between a domestic law and international law in Canada, the courts have attempted to harmonize the two so that effect can be given to both the treaty and domestic law.

The problem is further compounded by the fact that in Canada a dispute may arise in relation to which legislature is competent to enact the implementing legislation. In Johanneson v. West St. Paul,[15] the Supreme Court of Canada

held that the peace order and good government clause in the Constitution Act, 1867 gave the Federal Parliament jurisdiction over aeronautics as it was a distinct "matter which satisfied the Canada temperance test, ... it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole."[16] Therefore, when it becomes necessary to pass domestic legislation to implement treaty obligations, it is the Federal Parliament of Canada which possesses the power to legislate in matters of aeronautics, though this is not immune from contestation by the provinces. It is conceivable that at some future time aeronautics may be split in terms of jurisdiction. It will be argued in a subsequent chapter that bilateral air transport agreements may in fact be international trade agreement for services and divided control over economic regulation - fares and routes - might arise if bilateral air transport agreements were to be recharacterized internationally. Aeronautics in Canada might then become fragmented, with the Federal Parliament retaining exclusive jurisdiction over its navigational aspects and the economic aspects being subject to divided control. Local airlines would have an argument at their disposal.

Two approaches to treaty implementing in Canada are possible; one of reconciliation, consultation and flexibility and the other of a dualism based on severability. The

approach of reconciliation, consultation and flexibility which has developed as a response to Canada's binary system may not continue. It is in the opinion of Locke, J. in Johannesson v. Rural Municipality of St. Paul that one might find obiter dicta in support of a divided jurisdiction. He states:

> "In my opinion, the position taken by the province cannot be maintained. Whether the control and direction of aeronautics in all its branches be one which lies within the exclusive jurisdiction of Parliament, and this I think to be the correct view, or whether it be a domain in which Provincial and Dominion legislation may overlap, I think the result must be the same ..."[17]

> "The powers sought to be conferred upon the Municipal Council appear to me to be in direct conflict with those vested in the Minister of National Defence by the Aeronautics Act. Section 3(a) of that statute imposes upon the Minister the duty of supervising all matters connected with aeronautics and prescribing aerial routes and by s. 4 he is authorized, with the approval of the Governor in Council, to make regulations with respect to, inter alia, the areas within which aircraft coming from any place outside of Canada are to land and as to aerial routes, their use and control. The power to prescribe the aerial routes must include the right to designate where the terminus of any such route is to be maintained, and the power to designate the area within which foreign aircraft may land, of necessity includes the power to designate such area, whether of land or water, within any municipality in any province of Canada deemed suitable for such purpose."[18]

> "... The field of legislation is not in my opinion capable of division in any practical way."[19]

The first point that may be raised is that there may now be a way to separate the economic aspects from the navigational aspects since this is what appears to be the trend internationally, as will be argued subsequently in Chapter III. If a two-tier system whereby the issues of sovereignty that are involved in the first two freedoms of the air are agreed to in a multilateral framework and an economic approach of GATT is adopted for the commercial aspects of navigation, and this appears to be the logical extension of deregulation, it can be argued that the debate over whether aeronautics is indivisible in terms of subject matter under the Constitution Act, 1867 is not over. The argument based on property and civil rights could now be reasserted especially in view of the fact that bilateral air transport agreements appear to be asserting as a primary characteristic that they are trade agreements. The argument that it concerns the country as a whole may now be outdated. If one examines the facts on which Locke based his reasoning, one would have a further argument that aeronautics may now be divisible. He states:[20]

> "It is, however, desirable, in my opinion, that some of the reasons for the conclusion that the field of aeronautics is one exclusively within Federal jurisdiction should be stated. There has been since the First World War an immense development in the use of aircraft flying between the various provinces of Canada and between Canada and other countries. There is a very large passenger traffic between the provinces and to and from foreign countries, and a very considerable volume of freight traffic not only between the settled portions of the country but between those areas and the northern part of

> Canada, and planes are extensively used in the carriage of mails. That this traffic will increase greatly in volume and extent is undoubted. While the largest activity in the carrying of passengers and mails east and west is in the hands of a government controlled company, private companies carry on large operations, particularly between the settled parts of the country and the North and mails are carried by some of these lines. The maintenance and extension of this traffic, particularly to the North, is essential to the opening up of the country and the development of the resources of the nation."

It is submitted that this line of reasoning runs counter to the current trend of deregulation and to the substratum of economic, social and political theory on which it is based. The question in A.G. for Ontario v. Canada Temperance Federation, raised by Lord Simon, may again be re-examined:[27]

> "if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case, then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specifically reserved to the provincial legislatures."

After having critically examined four arguments for a provincial treaty-making power, Gerald L. Morris opts for the second approach of co-operation between the provinces and the federal government. He believes it makes the most sense given the fact that international obligations are being assumed and only states may sue in the International Court of Justice. If

the argument that Quebec has the power to enter into treaties is pushed to the extreme,[22] this implies that Canada would no longer be a federation but rather an association of sovereign states. As Morris has stated:[23]

> "In a federal state that still laid claim to national integrity, the difficulties could be compounded to the point of lunacy if central control over international commitments were substantially diluted. ... Would special status in 1940 have permited Quebec to conclude and implement agreements relating to scientific and industrial co-operation with Nazi Germany?"

His analysis of other agreements that a member state may enter into is of significance to bilateral air transport agreements. He emphasizes that public international law questions relating to treaties should not obscure the fact that provinces can enter private contracts with foreign entities. He states:[24]

> "In passing it should be noted that questions of public international law relating to treaties (or to other formal international agreements, by whatever name they are described) should not be blurred by references to the fact that provinces can enter into private contracts with foreign entities or can work out informal co-operative working arrangements with foreign authorities or can unilaterally offer formal assistance and co-operation to foreign jurisdictions on a reciprocal basis. These activities, which provide the practical means by which the provinces can carry out most of their operations with necessary extra-provincial elements, normally find their basis in municipal law or private international law and in general have little to do with public international law. They are no more objectionable than similar actions by large corporations that do not jeopardize the basic international requirement of ultimate central control in foreign affairs and the need for

> the nation to speak formally with one voice at the international level."

Therefore, in this period of deregulation of the airline industry, one may perhaps anticipate a new format for bilateral air transport agreements. What may evolve is a continuation of the treaty aspect in relation to issues involving sovereignty over one's airspace and a parallel system of private contracts dealing with the trade in air services.

In continuing the analysis of whether a treaty exists or not, and how it may be distinguished from a contract, in A.G. Ontario v. Scott,[25] the Supreme Court of Canada had to decide whether the Ontario Reciprocal Enforcement of Maintenance Orders Act[26] was an invasion of the federal treaty-making power. The statute provides for enforcement in Ontario of maintenance orders made by a reciprocating state and for sending maintenance orders made in Ontario to reciprocating states for enforcement. The majority opinion, written by Rand C.J., expressed the following view:[27]

> "a treaty is an agreement between states, political in nature, even though it may contain provisions of a legislative character which may by themselves or their subsequent enactment pass into law. But the essential element is that it produces binding effects between the parties to it. There is nothing binding in the scheme before us. The enactments of the two legislatures are complementary but voluntary; the application of each is dependent on that of the other: each is the condition of the others, but that condi-

> tion possesses nothing binding to its continuance. The essentials of a treaty are absent; ..."

Of importance in our analysis of bilateral air transport agreements is the statement made by Rand:[28]

> "That the province can confer such a benefit on a non-resident seems to me to be beyond serious argument. Rights in property and in action in non-residents are created by the law of Ontario in transmissions through death or in the course of business as everyday occurrences. In the former resort to the foreign law to determine the benefit or the beneficiary is a commonplace. I see no jural distinction between the creation and enforcement of a contract and the recognition and enforcement of a marital duty; the latter in fact arises out of, or is attributable to, a contract, that of marriage. A civil right within the province does not require that the province, in creating it should have personal jurisdiction over both parties to it; and in its enforcement, the plaintiff, by availing herself of the provincial judicature so far, submits herself to the authority of the provincial court. It is the same as if she had come to the province and enforced a right in the circumstances given her. If these considerations were not recognized, by keeping property in a province other than that of his own and a creditor's residence, a debtor could effectually put it beyond the reach of the latter: the province of the situs would be powerless by way of remedial right to apply it to his debts."

If bilateral air transport agreements were to be recharacterized as international trade agreements and if the matters relating to sovereignty were regulated perhaps in a multilateral convention, the problems of sovereign immunity and <u>locus standi</u> would be diminished, deregulation would

accelerate and bilateral air transport agreements would assume a role that more properly belongs to them. They would assume their true nature which is trade agreements that are easily enforceable rather than treaties involving the cumbersome apparatus of the state. The issue of whether an agreement is a treaty in fact contains the solution, both for the Scott case and in the evolving situation of the legal status of bilateral air transport agreements.

The implications of exercising the Crown prerogative while not being a unitary state have been briefly referred to above. The problem derives from the fact that in Canada, treaties are not in themselves part of the law of the land. Canada has been contrasted with Great Britain with respect to treaty implementation, one country being a unitary state and the other a federation. The situation is also different if the treaty is incorporated automatically. To highlight the issue of whether a treaty is part of the law of the land, an examination of bilateral air transport agreements under American law will follow.

Bilateral Air Transport Agreements in the United States

In contrast with the situation in Canada where a change in Canada's internal law may be required to implement a treaty, in the United States, under article 2, section 2, of the United States Constitution, the President of the United

States is empowered to enter a treaty provided there is Senate approval by a two-thirds majority. The methods of making treaties in Canada and the United States dictate whether implementing legislation is required. The fact that Senate approval has been obtained in the U.S. in the process of making a treaty results in its incorporation into the internal law of the United States.

Under American law, a further distinction must be made. Bilateral air transport agreements take the form of executive agreements. As such, they are entered into directly by the President and a foreign country and do not require Senate approval. Although executive agreements have been held not to be a "treaty" under article 2, s. 2(2) of the U.S. constitution, and are not subject to Senate approval, executive agreements have been held in other respects to be like treaties and are part of the supreme law of the land under article 6.[29]

Arthur W. Rovine[30] has dealt with the problem of executive agreements in the context of the separation of powers in the United States. He has analyzed various congressional attempts to limit what has seemed to them an encroachment by the executive on the legislature. He has attempted to locate the constitutional authority enabling the President to enter such agreements while by-passing Senate authority.

Rovine's historical analysis of executive agreements begins with the constitution. Though executive agreements are not mentioned in the constitution, they date back to 1792, when Congress adopted legislation approved by President Washington authorizing the Postmaster General to conclude international agreements.[31] It was a case of an executive agreement authorized by statute. The constitution was also used as authority for entering an executive agreement as early as 1799 when President John Quincy Adams concluded a claim's agreement with the Netherlands without the benefit of statutory or treaty authority.[32] In 1817, President James Monroe concluded the Rush-Bagot Agreement with Great Britain limiting armaments on the Great Lakes. President Monroe asked the Senate[33] if it was

> "such an arrangement as the Executive is competent to enter into by the powers invested in it by the Constitution, or is such a one as to require the advice and consent of the Senate ..."

The issue of distinguishing those international agreements that require Senate approval thus dates back to at least 1817.

Senator Sam Ervin's Subcommittee on the Separation of Powers of the Senate Judiciary Committee wrote:[34]

> "American constitutional law recognizes, in the Constitution itself and in judicial opinion, three basic types of international agreement. First in order of importance is the treaty, an international bilateral or

> multilateral compact that requires consent by a two-thirds vote of Senate prior to ratification ... Next is the congressional executive agreement entered into pursuant to statute or to a pre-existing treaty. Finally, there is the "pure" or "true" executive agreement negotiated by the Executive entirely on this authority as a constituent department of government.
>
> It is the prerogative of the Executive to conduct international negotiations; within that power lies the lesser, albeit quite important, power to choose the instrument of international dialogue."

Rovine has summarized the three types of international agreements that may be entered into that are not treaties. They include Congressional Executive Agreements that may be authorized by prior statute or by joint resolution of the Congress subsequent to negotiation. Other executive agreements are authorized by treaties or by a combination of statute and treaty. There are some authorized by a combination of statute and the Constitution. A last category includes the sole executive agreement entered into by the President on the basis of his independent constitutional power. However, the delimitation of what should be handled in treaty form and what should not generates problems.

The problem of whether a matter should be handled by treaty or by executive agreement arises daily. In 1905 John Bassett Moore wrote:[35]

> "The conclusion of agreements between governments, with more or less formality, is in reality a matter of constant practice, without which current diplomatic business could

not be carried on. A question arises as to the rights of an individual, the treatment of a vessel, a matter of ceremonial, or any of the thousand and one things that daily occupy the attention of foreign offices without attracting public notice; the governments directly concerned exchange views and reach a conclusion by which the difference is disposed of. They have entered into an international "agreement"; and to assert that the Secretary of State of the United States, when he has engaged in routine transactions of this kind, as he has constantly done since the foundation of the government has violated the constitution because he did not make a treaty, would be to invite ridicule. Without the exercise of such power it should be impossible to conduct the business of his office."

In attempting to solve the problem of lack of a clear rule, the Department of State set out the following guidelines for determining if a particular agreement should be a treaty or an executive agreement:[36]

"a. The extent to which the agreement involves commitments or risks affecting the nation as a whole;

b. Whether the agreement is intended to affect state laws;

c. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;

d. Past United States practice as to similar agreements;

e. The preference of the Congress as to a particular type of agreement;

f. The degree of formality desired for an agreement;

g. The proposed duration of the agreement, the need for prompt ~~conclu~~sion of an

agreement, and the desirability of concluding a routine or short-term agreement; and

h. The general international practice as to similar agreements."

This issue is important as there are no fixed rules, despite attempts by Congress to introduce legislation that would regulate the matter. The issue is important domestically because it involves a fundamental concept on which U.S. constitutional law is based, the system of checks and balances. Internationally, under the Vienna Convention on the Law of Treaties there is no distinction between international agreements and treaties as forms. However, the distinction remains valid under American law.

While it remains true that both executive agreements and treaties are part of the law of the land, the question arises as to whether it was a valid executive agreement or whether legislative powers are being usurped by the executive. In summary, bilateral air transport agreements in the United States are executive agreements, not treaties, and they are entered into by the President without the Senate approval. However, they can be characterized as Congressional-executive agreements insofar as they are entered into pursuant to a statute or pre-existing treaty. Like a treaty, these agreements are the law of the land superseding inconsistent state laws as well as provisions in earlier treaties or in other

international agreements or acts of Congress that are inconsistent with them.

Confusion may result from imprecise use of terminology. It is often said that the U.S. Senate ratifies treaties. This is not quite so. The International Law Commission has defined ratification as an "international act so named whereby a State establishes on the international plane its consent to be bound by a treaty".[37] In the international sense, ratification involves an exchange of instruments of ratification. In the internal sense it has the sense of approval by the legislative body concerned. Therefore, the Senate approves a treaty as a constitutional requirement with the exception of executive agreements which do not need such approval. When a treaty is made by the U.S., implementing legislation is therefore not required because of the method of making treaties. In contradistinction, in Canada treaty-making and treaty-implementing are separate issues. In Canada the basic principle of parliamentary supremacy would be interfered with if a treaty entered into by the executive could alter the law of the land. Both countries however offer an illustration of two federal systems that function differently. How bilateral air transport agreements function under the constitutional system in France will be examined next to illustrate how in a unitary state the distinction between treaty-making and treaty-performance may be of no great importance.

Bilateral Air Transport Agreements in France

Treaties in France are made pursuant to the French Constitution of 1958. The superior force in law of treaties is provided under the French Constitution. Under article 55 of the French Constitution of 1958, treaties that have been ratified or approved in due form and promulgated have superior force than statute law.[38] However, this is subject to the other party implementing such agreements or treaties. Under article 54 of the 1958 Constitution, a treaty that is in conflict with the Constitution can only be entered into by the use of a procedure of amending the Constitution prior to the passage of the statute authorizing ratification or approval of the treaty.

Article 52 of the Constitution distinguishes between treaties and other agreements with respect to how they are made. Treaties are negotiated and ratified by the President of the Republic while agreements may be negotiated and approved by the Prime Minister or by the Ministers, if the President of the Republic is informed of the negotiations.

Three rules apply to the ratification or approval of treaties and international agreements. They are regularly ratified and approved and from the time of their publication have an authority superior to statute law subject however to their application by the other party. They are subject to

ratification or approval. Parliament will vote an act authorizing the adoption of the international agreement into domestic law where it is a treaty of peace, a treaty of commerce, treaties in relation to international organizations, those which commit public finances, those which modify legislative provisions, those which affect civil status, those dealing with the ceding of territory or its exchange or acquisition. The consent of the population with an interest in territorial changes in required under article 33. The Conseil Constitutionnel may declare that an international agreement may have a clause that is contrary to the constitution but in such cases, there must be a constitutional amendment before the ratification or approval (article 54).[39]

In summary, under the French Constitution, it is the executive branch of government that enters into treaties and international agreements and such treaties or agreements are later ratified by the Parliament. Problems with respect to treaty implementation that one would encounter in a system where there is a distribution of power between the central government and its constituent states do not arise in a unitary state such as France. Further, since treaties are ratified, their status in international law under The Vienna Convention on the Law of Treaties is more secure. In a unitary state, like Great Britain, that consists of a single executive or single legislature, a government that can make a

treaty has the power to pass laws to implement it. In a civil law unitary state, like France, the procedure is simple ratification, subject to limitations imposed by the constitution. In a federal system such as that in the United States, treaties and executive agreements are the supreme law of the land. In a second type of federal system such as that which one finds in Canada, treaty implementation through legislation is always subject to the distribution of powers. These issues directly relate to the enforcement of treaty obligations.

As we have seen from the above comparison of how treaties are made in Canada, the U.S. and France, methods vary greatly. As Allan Gotlieb has stated:[40]

> "The law of treaties has developed on the basis of state practice over many centuries and it is therefore not surprising that national methods for making treaties should vary a great deal. Nor is it surprising that the laws governing the formation of treaties, their validity, interpretation, effects and termination should be highly complex, even intricate."

We have examined how treaties are made under the national law of Canada, the U.S. and France. The next focus of attention will be on the significance of the terminology. The issue is whether status as a treaty in international law is affected by the form the document or documents take.

The Form of the Document

In its codification of the law of treaties, the International Law Commission proposed that "treaty" be defined as:[41]

> "... an international agreement concluded between States, in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

The International Law Commission further stated:[42]

> "... even in the case of single formal agreements an extraordinarily varied nomenclature has developed which serves to confuse the question of classifying international agreements. Thus, in addition to 'treaty, 'convention' and 'protocol', one not infrequently finds titles such as 'declaration', 'charter', 'covenant', 'pact', 'act', 'statute', 'agreement', 'concordat', while names like 'declaration', 'agreement' and 'modus vivendi' may well be found given both to formal and less formal types of agreements. As to the latter, their nomenclature is almost illimitable, even if some names such as 'agreement', 'exchange of notes', 'exchange of letters', 'memorandum of agreement' or 'agreed minute' may be more common than others."

Sir Hersch Lauterpacht, the distinguished Special Rapporteur for the International Law Commission, when considering the diversity of terms, commented that "in most cases, there is no apparent reason for the variation in the terms used. They often create the impression that they were dependent upon a factor no more decisive than the mood of the draftsman."[43]

However, there is the key issue of whether the document is to be considered a "treaty" governed by international law and inconsistent use of terms by states adds to the uncertainty of whether or not a state, in using a term, intends to create binding legal obligations.

Nomenclature

In his article entitled "The Names and Scope of Treaties", Denys P. Myers maintains that words and phrases have legal significance.[44] Basing himself on the executive level at which various instruments are negotiated, their relation to the policy and treaty structure of the state concerned and the specific purpose of particular instruments, he claims that a pattern of treaty nomenclature emerges.

Meyers gives the following analysis of terms. Under Article 102 of the United Nations Charter, a distinction is made between treaties and agreements. A treaty emanates from the highest executive authority in a state and the other from subordinate executive authority, the one laying down the general and substantive relations between states and the other handling the ordinary intergovernmental business. Generally treaties are negotiated by plenipotentiaries, full powers are stated and they usually require ratification. A convention has the formal and technical characteristics of a treaty but it is distinguishable by its content. As Myers has said,

citing Calvos, "conventions are not used to establish rights and obligations in a fundamental field of inter-state relations, but are used to define or expand aspects of a field."[45] Myers continues by saying that agreements differ from conventions in that they deal with a narrower or less permanent subject matter. The form is flexible and they may be intergovernmental or interdepartmental. Entry into force for a party by signature acceptance or accession is common. Their formal characteristics often reflect the status of their makers. An exchange of notes is the most flexible treaty and it consists of an offer and an acceptance and the participants are usually the ministers of foreign affairs or their deputies and the heads of diplomatic missions acting in virtue of powers inherent in their offices. They rarely require ratification. They deal with minor precise and even transitory points in relations between states but the subjects may be of significance or of economic magnitude and may have important political effects or repercussions. Such intergovernmental agreements are made by officials of the executive branch of government under authority of the head of state. In summary what must be looked at is the relation that the document bears to the political system from which it emanates. The key issue is whether such a document is a treaty and therefore whether there are legal relations which the International Court of Justice has jurisdiction to adjudicate on under Article 38 of the statute. A dividing line must be ascertained separating

policy of states from obligations binding in international law. If it is less than a treaty, states deal with it by argument and accommodation.

It is the generally accepted view that the variation in terminology, though at times confusing, is not of paramount importance. Classification can be useful to the extent that it clarifies the real issues. In the case at point, the important issue is performance of treaty obligations and the underlying issue remains is it a treaty. The distinctions as to form do in fact matter on the domestical level. So as not to engage in the fine art of a false science, one should bear this fact in mind when making classifications for their own sake. To answer the question "What's in a name?", one might reflect on the comment of Read:[46]

> "a treaty may be likened unto evening dress with white tie; a convention to a dinner jacket; a protocol to morning coat; agreement, arrangement or declaration to business suits; an exchange of notes to shirt sleeves and overalls; while a statute or charter may be likened unto regimental full dress uniform with decorations".

It would therefore seem that nomenclature involving the classification of types of treaties relates more to questions of form. The legal clothing achieves its effect irrespective of design so long as the document in fact meets the criteria of "treaty" and differences may in fact be disputes about fashion. When one takes into consideration how individualis-

tic treaty-making by states is, and how it has evolved through the quirks of history, how could one expect the terminology to reflect anything but this diversity. The fact remains that the document must have a name. Biblically, naming as the act of calling forth into being, so a name does designate some kind of existence. Whether bilateral air transport agreements are called treaties, conventions, intergovernmental agreements or executive agreements is irrelevant to the extent that they allow states to function internationally. But what happens when the "guest" in the dinner jacket is in hot pursuit of the hostess in evening dress? What happens when the party is over and the participants are in dispute? At that point it becomes essential for the jurists and diplomats to determine if there is a common language. The pragmatic approach would be to respect such diversity, refrain from fraudulent nomenclature and remain a judicious heathen. This attitude can be sustained on the basis that change will make a case for itself on the basis of necessity irrespective of human design.

So far we have looked at how treaties are made, and what they are called within the context of bilateral air transport agreements. The next focus will be an operational perspective. What in fact do bilateral air transport agreements do? The reason for the shift in perspective is that a recharacterization of bilateral air transport agreements appears to be evolving with a potential for tremendous impact

on the airline industry. What we may be witnessing is a legal unfettering that will accommodate a shift in the political and economic context. A dynamic of change is apparent. For this reason, we will next examine bilateral air transport agreements as international trade agreements. The followup issue will center on a discussion of what is in fact being traded. Its characterization, naming it, will bear a relationship to its effect.

Content: An Operational Perspective: What Do Bilateral Air Transport Agreements Do?

In his article "Bilateral Air Transport Agreements 1913-1980",[47] Professor P.P.C. Haanappel undertakes a historical analysis of the underlying economic issues as they relate to bilateral air transport agreements. He has defined bilateral air transport agreements as "international trade agreements in which governmental authorities of two sovereign states attempt to regulate the performance of air services between their respective territories and beyond in some cases."[48] He has analyzed three generations of bilateral air transport agreement from the perspective of how predetermination and capacity control relate to economic philosophy. The range spans Bermuda I and Bermuda II bilaterals to the very liberal bilaterals that the U.S. entered beginning with the Carter administration. He has stated:[49]

> "In principle, bilateral air transport negotiations are conducted for the purpose of serving aviation interests. In practice, however, many other considerations often enter into the negotiating process. These other considerations may be political, military or economic in nature."

To bring this point into direct focus, one need only look at the present suggestion before the U.S. Congress to rescind the landing rights of South African airlines in the United States. The political, economic and military aspects are highly visible. Two aspects of bilateral air transport agreements that are of particular importance to our analyses are highlighted in Professor Haanappel's definition of bilateral air transport agreements as international trade agreements in which there is an attempt to regulate the performance of air services. First of all, Professor Haanappel speaks of an attempt to regulate. This highlights the fact that some attempts are subject to changes in the political and economic environment. Given the fact that the entire structure of bilateral air transport agreements is vulnerable from the point of view of the diverse constitutional structures from which they emanate, and given the fact that the contractual bases of the meeting of minds is itself at times unenforceable, the legal format and characterization that they have so far enjoyed has belied their basic "flightness". Now that we have several generations to look at, one is impressed by their non-legal character. When Haanappel speaks of an attempt to

regulate, he is digging beneath the legal trappings to disclose the political, military and economic substratum that makes bilaterals appear at times to elude regulation. The second aspect that is of interest is the focus on trade agreements. The word regulation connotes big government. In juxtaposition, trade agreements bring to mind contract law. Such recharacterization is significant. Of greater significance perhaps is the current debate of whether bilateral air transport agreements are agreements for the trade of services. If the current trend of seeing the exchange as one of services prevails, one may in fact see the disappearance of bilateral air transport agreement as we know them. While, as Haanappel has stated, in principle bilaterals serve civil aviation interests, oftentimes principles are belied by the facts. To discover the real nature of bilateral air transport agreements, the facts must be analysed and to do so, an ideological stripping to the bone must occur.

The words of P.P.C. Haanappel best summarize the issues raised by the question "Is the bilateral air transport agreement a treaty?":[50]

> "The implementation of bilateral air transport agreements into domestic law is done in accordance with the constitutional laws of each contracting party. In countries where bilateral agreements have the status of treaties - this is the exception rather than the rule - and are ratified by Parliament, they either form part of domestic law automatically (the civil law tradition) or they

> do so once implementing legislation has been passed (the British tradition). In the United States, bilateral air transport agreements have the status of executive agreements signed under the executive power of the President and not submitted to the Senate for advice and consent.
>
> In all those countries - and they are the majority - where bilateral air transport agreements do not take the form of interstate treaties but rather the form of intergovernmental agreements one needs (a) domestic aviation legislation which is consistent with the bilateral agreements and vice versa and (b) domestic legislation which is strong enough to give aeronautical authorities the power to implement the provisions of bilateral agreements. In the absence of enabling dometic legislation powers conferred in bilateral agreements often cannot be exercised."

The purpose of the next chapter on the international law aspect of this question is to emphasize its practical importance. The key issue of rights without practical remedies will be addressed next.

In summary, we have seen how constitutional structures affect the implementation of the agreements. We have looked at variations in form and we have seen that the nomenclature is not necessarily based on an underlying structure. All these facts illustrate the illusion of a secure system of bilateral air transport agreements. In Chapter II, the analysis will continue along these veins but from the international perspective. When the law of treaties is examined, its limitations in relation to the performance of obligations under

bilateral air transport agreements will be disclosed. When such an analysis has been completed, and when the analysis continues to shift to the economic and political sphere and when the current liberal policy which favours mature markets is fully comprehended, the reader will find himself analysing bilateral air transport agreements from the perspective first of Jonathan Swift as he sends Gulliver on his journey into the land of the Liliputians. When confronted with the necessity for change, the reader may give voice to the sentiments of Alice in Wonderland when she observes that this house is too large. It may then be time to shift our glance from the states, their negotiators and the styles of bilateral air transport agreements that have emerged to the services themselves and how the structure for their delivery may change.

FOOTNOTES - CHAPTER I

1. A.E. Gotlieb, Canadian Treaty Making, Butterworths, Toronto, 1968, p. 9.
2. Ibid., p. 5.
3. [1968] 2 Q.B. 740.
4. Ibid., at 757.
5. Ibid., at 755.
6. [1967] 2 Q.B. 116.
7. Ibid., at 143.
8. D.C. Vanek, "Is International Law Part of the Law of Canada", (1949-50) 8 U. of T. Law Journal, 251 at 252.
9. Bora Laskin, Case and Comment, (1943) 21 Can. Bar Rev. 506.
10. R.S.O. 1937, c. 272.
11. [1937] A.C. 326.
12. Ibid., at 352.
13. Laskin, op. cit., at 509.
14. Ibid., at 506.
15. [1952] S.C.R. 292.
16. Ibid., at 328.
17. Ibid., at 325.
18. Ibid., at 326.
19. Ibid., at 327.
20. Ibid., at 326.
21. [1946] A.C. 193 at 205.
22. For a detailed review of Quebec's position see A.M. Jacomy-Millette, L'introduction et l'application des traités internationaux au Canada, Paris, L.G.D.J., 1971, at 69 ff.

23. Gerald L. Morris, "The Treaty-Making Power: A Canadian Dilemma", (1967) 45 Can. Bar Rev., at 503.

24. Ibid., 502.

25. [1956] S.C.R. 137.

26. R.S.O. 1950, c. 334.

27. [1956] S.C.R. 137 at 142.

28. Ibid., at 140.

29. U.S. v. Belmont (1937) 301 U.S. 324; U.S. v. Pink (1942) 315 U.S. 203.

30. Arthur W. Rovine, "Separation of Powers and International Executive Agreements", (1976-77) 52 Indian Law Journal, 397.

31. Ibid., at 410.

32. Ibid., at 410.

33. Ibid., at 411.

34. Ibid., at 419.

35. Ibid., at 413.

36. Ibid., at 417.

37. Gotlieb, op. cit., p. 14.

38. See M. Prelot & J. Boulouis, Institutions politiques et droit constitutionnel, 9th ed., Paris, Dalloz, 1984, no 394B.

39. Dictionnaire de la constitution, Éditions Cujas, 1976 (Summary) pp. 344-347; 49-55; 19-21. See also G. Burdeau, Droit constitutionnel et institutions politiques, 18th ed., Paris, L.G.D.J. 1977, at 518 and ff.

40. Gotlieb, op. cit., p. 2.

41. Ibid., p. 20.

42. Ibid., p. 20.

43. Ibid., p. 21.

44. Denys P. Meyers, "The Names and Scope of Treaties", (1957) 51 American Journal of International Law 574.

45. Ibid., at 583.

46. J.E. Read, "International Agreements", (1948) 26 Can. Bar Rev., 520 at 522.

47. P.P.C. Haanappel, "Bilateral Air Transport Agreements, 1913-1980", (1978-80) 4-5 The International Trade Law Journal 241.

48. Ibid., at 241.

49. Ibid., at 263.

50. Ibid., at 263-264.

CHAPTER II: THE LEGAL NATURE OF BILATERAL AIR TRANSPORT AGREEMENTS: INTERNATIONAL LAW

In Chapter 1 we looked at various historical factors in Canada which produced a developmental and pragmatic approach to the treaty-making power since it could not trace its origins to a specific constitutional document. This has produced a situation in Canada where some treaties are ratified and some are not, depending not on a constitutional requirement but rather on the need for implementing legislation. We have also looked at the situation in France where under the Constitution, both treaties and agreements must be ratified. This position can be contrasted with the situation in the United States where, under the constitution, executive orders are the supreme law of the land. The focus has been three distinct constitutional systems viewed from the perspective of the systems themselves. In the second chapter, we will examine these three constitutional systems from the outside looking in. The three types of systems will be viewed first from the optic of the Vienna Convention on the Law of Treaties and secondly, from the viewpoint of international law as it pertains to rights and obligations arising under bilateral air transport agreements.

Treaties in International Law

The first issue to be dealt with is whether the agreement is a treaty in international law. The issue of what a

treaty is was raised in the Island of Palmas case in 1928. Max Huber, the sole arbitrator in the Island of Palmas case stated:[1]

> "As regards contracts between a State [...] and native princes or chiefs of peoples not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties."

From the above, one may extract one basic element required for a treaty to exist. That element is the existence of two sovereign states. Where the agreement that is concluded is between one sovereign state and a second body that is not a sovereign state, no treaty can arise. As a corollary issue, one should mention the fact that in international law a province such as Quebec cannot enter a treaty as Quebec is not a sovereign state. The agreements Quebec does enter are in fact transnational agreements which are, as McWhinney has stated, of an "administrative nature". He advocates a "pragmatic, empirically- based" distinction in which trans-national agreements can be characterized by the absence of political implications and by their administrative nature or concern with current affair.[2] It should also be added that in international law one is either sovereign or not sovereign. There are no half-states, semi-states, demi-states or semi-sovereign states that are persons in international law. Princes there are, and indeed princesses but they are not

subjects of international law to which the rights and obligations of sovereign states attach. From the foregoing analysis of the Island of Palmas case, one may thus assert that only a sovereign state may enter into a treaty in international law.

The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties in its preamble refers to "the codification and progressive development of the law of treaties achieved in the present Convention" and in the next paragraph affirms that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". Therefore, the Vienna Convention on the Law of Treaties[3] is a codification of the law of treaties in the international law sense of the word treaty. An immediate illustration of the point that this is a codification is afforded by Article 1 which in fact codifies the principle stated in the Island of Palmas case. Article 1 states that the convention applies to treaties between states and Article 3 further elaborates on those international agreements that are outside the scope of the Convention.

Our conceptual analysis of the Vienna Convention on the Law of Treaties will focus on two main issues. The first issue to be dealt with is whether or not the document in

question is a treaty under the Convention. The second issue which includes various sub-issues is whether or not the document in question is of continuing application. To begin, Article 2 states that "treaty" for the purposes of the Convention, "means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". This article would therefore cover treaties that Canada enters into that are in exchange of notes form, as there is no requirement that a treaty is comprised of a single document. Furthermore, the previous discussion in Chapter 1 of the variations in nomenclature has no bearing in assessing whether a document qualifies as a treaty under the Vienna Convention on the Law of Treaties. Whether the document is called a treaty, convention, executive agreement or exchange of notes is of no significance as long as the document meets the requirements under the Convention. Article 3 distinguishes certain international agreements that are not within the scope of the Convention. They include international agreements between states and other subjects of international law or between such other subjects of international law, or agreements not in written form. Therefore, an agreement between a state and an international organization is not covered by the Convention. The third element in the definition is that the

document must be an agreement entered into between states in written form.

The next issue is how do states signify that they have agreed to be bound. Put in other terms, how does a state acknowledge its consent to be bound by the agreement? Under Article 7, various classes of persons are considered as representing a state for the purposes of expressing consent to be bound or for the purposes of authenticating or adopting the text of a treaty. Those persons possessing full powers may express the consent but the article also extends recognition of authority for entering informal treaties. Under Article 7, paragraph 2, the following are considered as representing their state without having to produce full powers:

> "(a) Heads of state, Heads of Government and Ministers for Foreign Affairs, for the purposes of performing all acts relating to the conclusion of a treaty;
>
> (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited;
>
> (c) representatives accredited by states to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ."

Therefore, a bilateral air transport agreement in exchange of notes form entered into between Canada and the United States could be signed by the Minister of Foreign Affairs in Canada

and the President of the United States. Similarly, a bilateral air transport agreement entered into between Canada and France could be signed by the Governor-General of Canada and the President of France, if it was in Head of State form. The approach of the Vienna Convention on the Law of Treaties is to accommodate both formal and informal treaties and the diverse constitutional systems of the various signatories of the Convention. That there has been an acceptance of informal treaties in the Vienna Convention on the Law of Treaties is evidenced in Article 11 which states "The consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or by any other means if so agreed". Article 2, paragraph (b), further states "ratification", "acceptance", "approval" and "accession" means in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty". This article highlights the interplay of international and domestic law which will be discussed in the context of the Chateau Gai Wine case. The issue that the Canadian Court had to decide in that case was who could express the consent. It was key in determining whether or not a treaty did exist between Canada and France.

Since two federal systems are being examined in the light of the Vienna Convention on the Law of Treaties, mention

should also be made of Articles 19, 27 and 46. Article 19 permits a state, when signing, ratifying, accepting, approving or acceding to a treaty to formulate a reservation in some cases. However, Article 27 states "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty", that rule being without prejudice to Article 46 which states:

> "1. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith."

Hypothetically, a problem could arise where country X is bound internationally by an international obligation contained in a treaty but where there is no remedy through the domestic court since the international obligation was not made part of domestic law through the necessary implementing legislation. Again, one can see that this situation could arise in Canada from the fact of its federal structure whereas it could not in a unitary state such as France.

In summary, we have examined the Vienna Convention on the Law of Treaties from the perspective of whether a treaty does exist in international law. The various elements that

are required under the Vienna Convention on the Law of Treaties may be summarized as follows: it must be in writing; it must be conducted between states, states must express their consent to be bound, and ratification is not the only means of expressing consent. Both formal and informal treaties are covered. Assuming that these elements are present one must ask a further question. Assuming there is a treaty, is it of continuing existence under the Vienna Convention on the Law of Treaties?

The general provisions for the validity and continuance of treaties are contained in Article 42 which states in paragraph 1 that the validity of a treaty or the consent of a state to be bound by a treaty can only be impeached by applying the Convention. Under paragraph 2, it is stated as well that the termination, denunciation, or withdrawal of a party and the suspension of the operation of a treaty may only take place as a result of the application of the treaty or the convention. The invalidity of treaties is dealt with in Articles 46 to 53. We have already noted that a state cannot invoke the fact that its consent to be bound by the treaty is in violation of a provision of its domestic law. There are seven remaining grounds for invoking the invalidity of a treaty. They are a specific restriction on the authority to express the consent of a state (Article 47), error (Article 48), fraud (Article 49), corruption of a representative of a

state (Article 50), coercion of a representative of a state (Article 51), coercion of a state by the threat or use of force (Article 52), treaties conflicting with a peremptory norm of general international law (jus cogens) (Article 53). Of these eight Articles that deal with the invalidity of treaties, Article 46, which deals with the competence to conclude treaties, is of particular importance in the context of bilateral air transport agreements, especially where a contracting party is a federation. Also of interest is Article 53 which has been a source of continuing controversy. The argument is based on varying opinions as to what constitutes jus cogens. Third World countries have brought forward the argument that unequal treaties are contrary to jus cogens and have used this argument as a basis for repudiating their consent to be bound by such a treaty. In the context of developed markets and undevcloped markets as they relate to bilateral air transport agreements and air services generally, this argument could be made. Furthermore, if one examined the notion of most favoured nation status and the clauses that the U.S. has inserted to the benefit of only some of the parties with whom it has concluded bilateral air transport agreements, the unequal bargaining power of third world countries, especially those whose political structures and philosophies vary considerably with those of the U.S., comes into clear focus. This whole area of the law is in a state of flux since there is no agreement as yet as to what is a peremptory norm

of general international law on this point as some states accept the doctrine of unequal treaties as a ground for vitiating consent to be bound while other states oppose the principle.

Section 3 of the Vienna Convention on the Law of Treaties deals with the termination and suspension of the operation of treaties and Articles 54 to 64 of the Convention contain the specific circumstances. Article 54 states that the termination of or withdrawal from a treaty may occur under the provisions of the treaty or by the consent of the parties. Article 55 deals with a reduction of the parties to a multilateral treaty below the number necessary for its entry into force. Article 56 deals with denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. Article 57 deals with the suspension of the operation of a treaty under its provisions or by consent of the parties. Article 58 deals with suspension of the operation of a multilateral treaty by agreement of certain parties. Article 59 deals with the termination or suspension of the operation of a treaty as implied by the conclusion of a later treaty. Article 60 deals with the termination or suspension of the operation of a treaty as a consequence of its breach. There are four more conditions under which the operation of a treaty may be terminated or suspended. They are supervening impossibility of performance (Article 61),

fundamental change in circumstances (Article 62), severance of diplomatic or consular relations (Article 63), and the emergence of a new peremptory norm of general international law (Article 64). It should be recalled at this point that all of the foregoing grounds for the invalidity, termination and suspension of the operation of treaties must be placed within the context of general international law for Article 43 states "The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any state to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty." This point leads to the next subject that will be discussed which is the remedies that are available in two different situations, one where you have a valid treaty in international law but for one of the contracting states, the treaty is not law domestically on account of the absence, for example, of implementing legislation. The second situation that will be examined is if it is a valid for State A and State B both domestically and under international law, what remedies are available. Remedies under the Vienna Convention on the Law of Treaties, under the bilateral air transport agreement, arbitration, suit before the International Court of Justice, a domestic suit, and remedies under the U.N. Charter will be

discussed. When suit is brought in a domestic court, issues such as locus standi and the doctrine of sovereign immunity will be examined with special regard for the fact that the courts of different countries may have varying interpretations of such doctrines.

Remedies

We have examined so far what constitutes a valid treaty under the Vienna Convention on the Law of Treaties. Supposing that State A and State B conclude a treaty that satisfies the requirements of the Vienna Convention. What would be the situation if State A was unable to implement the treaty because one of the provisions of the treaty was outside the jurisdiction of the state and within the legislative competence of one of its constituent members? First of all, it should be recalled that a state may not invoke as a ground for invalidating its consent the fact that a treaty obligation that it consented to is in violation of a provision of its internal law, unless the rule of its internal law is of fundamental importance and the violation of its internal law is manifest. For example, suppose a bilateral air transport agreement permitted States X and Y each the right to three flights a week between New York City and Montreal of Concorde jets. Suppose that these flights were in contravention of zoning by-laws with respect to noise. Under the Constitution Act, 1867, general zoning would normally fall under property

and civil rights unless the matter was held to be of national importance which it was in the Johanneson case. If prior consent by the Province to change the by-law had not been obtained, Johanneson aside, Canada would have been in a position of having made an international commitment that it could not live up to. Nor could it invoke Article 46 as invalidating its consent. From the illustration above, one should note that such matters should be regulated prior to entering into a treaty. Yet what happens if such details are not arranged prior to entering into the treaty? The issue here is that one may have a valid treaty in international law, yet it may be of limited use. First, we shall examine the impediments to remedies in domestic courts and then we shall examine the remedies that are available in international law.

Remedies in Domestic Courts: Locus Standi

One might begin the discussion of remedies in domestic courts for breach of a treaty that is valid in international law by recalling that in order to sue there must be locus standi. If there is no basis for suit in terms of a statutory or common law right in a common law procedure in Canada because of an absence of implementing legislation, the right which arises in international law may be nugatory. A similar issue was raised in Bitter v. Secretary of State of Canada.[4] In this case the custodian on behalf of Canada became vested with property belonging to an enemy. Under the Treaty of Versailles the enemy was entitled to compensation from Germany

and under section 14 of the Consolidated Orders Respecting Trading with the Enemy, 1916. The plaintiff Bitter had locus standi to have the Exchequer Court determine any dispute as to whether property in fact belonged to an enemy as defined in the Order. Justice Thorson stated:[5]

> "While a Treaty of Peace can be made only by the Crown, it still remains an act of the Crown. While it is binding upon the subjects of the Crown without legislation in the sense that it terminates the state of war, it has never, so far as I have been able to ascertain, been decided or admitted that the Crown could by its own act in agreeing to the terms of a treaty alter the law of the land or affect the private rights of individuals."

He continues and summarizes the views of Anson:

> "that there is a limit on the treaty-making power of the Crown and that, where a treaty involves a charge upon the people, or a change in the general law of the land, it may be made, and be internationally valid, but it cannot be carried into effect without the consent of Parliament."

When he refers to carrying it into effect the reference is to the issue of locus standi. In this case, it was the Consolidated Orders Respecting Trading with the Enemy that gave Bitter the locus standi to have the Exchequer Court determine if the custodian had the right to retain his property. A second issue that could have arisen had there been a contestation of the situs of the contract debt would have been was the other party a signatory of the Treaty of Versailles and was there a need for implementing legislation and did such implementing legislation exist? The issue of locus standi for one

party may in fact be compounded in cases involving conflict of laws where there are competing claims by two countries, for example had there been competing claims by custodians of two different countries. The implications of the need for ratification of a treaty with respect to locus standi therefore relate to the issue of remedies which might be nugatory or somewhat limited in the absence of ratification.

Remedies in Domestic Courts: Sovereign Immunity

We have examined the situation where you have a valid treaty in international law for both State A and State B but one of the contracting states has failed to implement the treaty domestically. The issue of locus standi arises in such circumstances. The second issue that will be considered is that of sovereign immunity for it too is an impediment to suit in a domestic court. In Chateau-Gai Wines Ltd. v. Le Gouvernement de la République Française,[7] Justice Jackett of the Exchequer Court of Canada considered whether the Court had jurisdiction to remove the name of a foreign sovereign from a trade mark register kept in virtue of the Trade Marks Act. The French government did not submit to the jurisdiction of the Court and the doctrine of sovereign immunity was upheld. The Court held that an interested person could apply for an order striking off a registered mark registered to a foreign sovereign on the basis that there was no "existing right" as the proceedings were not and did not have the appearance of

being an impleading of the foreign sovereign in personam. A second issue that was dealt with in the Chateau-Gai Wine case on appeal[8] was the issue of whether a treaty had in fact been entered into by Canada and France. The issue was ratification. The Court held that approval of an international trade agreement can be expressed through the executive branch by note even in a case where there might be a need for ratification specified in the trade agreement. The formal ratification specified in the trade agreement was not essential and the Court concluded that a valid treaty did exist on the basis that:[9]

> "... all such questions are questions within the realm of responsibility of the executive arm of government and, being questions on which the state should speak with one voice, they are questions with regard to which the courts should accept from the appropriate Minister of the Crown a certificate as to Canada's position ... The result is that, even if I were of the view that the exchange of formal ratifications as contemplated by the first paragraph of Article 16 of the Canada-France Trade Agreement of 1933 was, on a proper interpretation of the agreement in accordance with the applicable principles of international law, a condition precedent to bringing the agreement into force, I would nevertheless feel constrained to accept the official view of the Canadian Government that the agreement had been brought into force without any such exchange of ratifications ... Having said that, I should add that ... the exchange of ratifications was not a condition precedent ... and that, on the material that has been put before the Court, Canada and France did fix a date for its coming into force by joint agreement as provided by Article 16.

The importance of the issue of ratification is illustrated by the foregoing as in the Chateau-Gai case, the issue related directly to the vary existence of a treaty. Once the existence of the treaty was established, the Court was able to strike out the registration of "champagne" in the name of the French government. The commercial significance of the decision is apparent and it turned on the issue of whether there was a valid treaty and on the issue of sovereign immunity. Since that decision, other producers are entitled to use the appellation "champagne" for marketing purposes.

The doctrine of sovereign immunity was subjected to further judicial interpretation in Flota Maritima Browning de Cuba S.A. and The Steampship Canadian Conqueror et al. v. The Republic of Cuba.[10] The controversy had arisen in virtue of Lord Atkin's minority opinion in The Cristina[11] case where he stated the following:

> "The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.
>
> There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or personal private property.

> In this country it is my opinion well settled that it applies to both."

In the Flota Maritima Browning de Cuba S.A. case, the majority felt it was not necessary:[12]

> "to adopt that part of Lord Atkin's judgment in The Cristina, supra, in which he expressed the opinion that property of a foreign sovereign state "only used for commercial purposes" is immune from seizure under the process of our courts, and I would dispose of this appeal entirely on the basis that the defendant ships are to be treated as (to use the language of Sir Lyman Duff) "the property of a foreign state devoted to public use in the traditional sense", and that the Exchequer Court was, therefore, without jurisdiction to entertain this action".

The fact that the issue is open and that there is as yet no settled doctrine on the matter was stated by Sir Lyman Duff, C.J. in Reference re Powers of the City of Ottawa and the Village of Rockcliffe Park to Levy Rates on Foreign Legations,[13] where he had occasion to state:

> "Parallel with this rule touching the immunity of legations, there runs the principle of the immunity of the property of a foreign state devoted to public use in the traditional sense. In The Parliament Belge, supra, it was held that this immunity applies to a ship used by a foreign government in carrying mail. The Supreme Court of the United States has held that it is enjoyed by a ship, the property of a foreign sovereignty and employed by the foreign government for trading purposes. Borizzi Brothers Co. v. S.S. Pesaro, (1926) 271 U.S. 562. It most certainly cannot be said that this is settled doctrine, in view of the opinions expressed in the Cristina case, although Lord Atkin, who delivered the judgment of the Judicial Committee in Chung Chi Cheung v. The King,

[1939] A.C. 160 at p. 175 uses a general phrase:

> The sovereign himself, his envoy and his property, including his public armed ships are not to be subjected to legal process."

Two points can be made from the above quotation. First of all, it should be emphasized that the decisions of courts may vary on the matter of seizure of property of a sovereign that is not devoted to public use. One might recall that in terms of entering into a treaty, there are no fractional states, half-states, semi-sovereign states. However, with respect to the property of sovereign states that may be seized, opinion appears to be divided as to its status. The second point that might be made in the context of air law is the emphasis on the fact that in The Parliament Belge, mail was being carried and immunity applies to a ship used by a foreign government in carrying mail. In a hypothetical situation where an Air Canada plane carrying mail has had emergency maintenance work done in Atlanta that has not been paid for, it would appear that sovereign immunity might prevent the plane from being seized. This will be discussed subsequently under the Foreign Sovereignty Immunities Act. Conversely, if the facts were changed and a Peoples' Express jet not carrying mail had emergency repairs done in Montreal, could the plane be attached in Montreal for the amount that is owing? This merely is illustrative of the fact that there may be severe limitations on the remedies that are available in domestic courts where a foreign state is involved.

The U.S. position with respect to limiting sovereign immunity became explicit in 1976 with the passage of the Foreign Sovereign Immunities Act[14] which has granted some immunity to airlines owned by foreign governments.[15] Previous to the passage of the Act, the common law doctrine that a foreign sovereign could not be used in an American court, had already undergone interpretation and an exception had already been made for cases in which the foreign sovereign could be sued. Those exceptions dealt with disputes arising out of commercial or private acts, but not public or sovereign acts. The stated purpose of the new act is:[15]

> "to determine the terms and conditions under which actions can be maintained against a foreign state or its entities in the courts of the United States and to set forth when a foreign state may properly invoke sovereign immunity."

The Act defines a foreign state to include an airline owned by a foreign government operated as a department or division thereof. What then would happen in the hypothetical situation of the Air Canada plane in Atlanta? As Young points out, there is the clear case and there is the ambiguous situation. Our hypothetical situation could fall into either category.

Under the Foreign Sovereign Immunities Act, a foreign sovereign is not entitled to assert sovereign immunity if there has been an express or implied waiver of immunity. Section 1605(a)(1) provides for express waiver. This is the

clear case since all foreign carriers operating in the United States must first obtain a foreign air carrier permit or exemption pursuant to the Federal Aviation Act of 1958. A condition for obtaining the permit is the waiver of all rights to assert any defense of sovereign immunity in actions arising from the carriers operations pursuant to the permit.[16] However, under section 1605(a)(2), a foreign sovereign has no jurisdictional immunity in an action based upon "a commercial activity carried on in the United States", or upon an act "performed in the United States in connection with a commercial activity of the foreign state elsewhere" or upon a commercial act committed outside of the United States which causes a direct effect in the United States.[17] Young refers to three leading cases in which it was held there was an exception to immunity. In the Sugarman case and in Arango, the plaintiffs were in privity with the airlines but in Aboujdid the plaintiffs asserted a cause of action solely in negligence. Young indicates that it is in the area of implied waiver that problems arise and she cautions:[18]

> "Failure to separate concepts of treaty jurisdiction under Warsaw, subject matter jurisdiction under the FSIA, and personal jurisdiction as limited by due process results in faulty analysis by counsel, poor reasoning in court decisions and bad law."

In summary, when the issue of breach of a treaty that is valid under international law arises, and the remedy of suit in a domestic court is considered, attention must be paid

to the problem of ratification of the treaty and locus standi, as well as to the doctrine of sovereign immunity and its scope in the jurisdiction in question.

We have considered the remedy of suit in a domestic court for breach of an obligation arising under a treaty and we have noted various limitations inherent in such an approach. The question then arises as to alternate remedies. The Vienna Convention on the Law of Treaties provides mechanisms for dispute settlement through judicial settlement, arbitration and conciliation. Their modes of functioning and limitations will be examined next.

Remedies Under the Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties establishes a procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty. Under Article 65, there is a requirement that the party invoking either a defect in its consent to be bound by a treaty or other grounds under the convention for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The party against whom the claim is made has not less than three months to raise an objection, except in cases of special urgency. If, after the expiry of the time period no objection has been raised, the party making the notifica-

tion may carry out the measure it has proposed following the procedure under Article 67. If an objection has been raised, the parties are obliged to seek a solution through the means indicated in Article 33 of the Charter of the United Nations. Under Article 66 of the Convention, if no solution has been reached within the period of 12 months following the date on which the objection was raised through the mechanism of Article 33 of the Charter of the United Nations, there are two possible remedies. Under Article 66, paragraph a, if the dispute concerns the application or interpretation of Article 53 (treaties void if they conflict with a peremptory norm of general international law (jus cogens)) or Article 64 (treaties void where they conflict with a new peremptory norm of general international law (jus cogens)) either of the parties may submit it to the International Court of Justice for decision unless by common consent the parties agree to submit the dispute to arbitration. Under Article 66, paragraph 6, where the dispute concerns the application or interpretation of any of the other articles in Part V of the Convention, a request for consultation may be forwarded to the Secretary-General of the United Nations and the procedure for conciliation under the Annex of the Vienna Convention on the Law of Treaties will be followed. The procedure for conciliation consists of each party to the dispute appointing two conciliators followed by the four conciliators then appointing a chairman. If no agreement can be reached on the Chairman,

the Secretary-General must appoint a chairman within 60 days following the time period for appointing a chairman by agreement of the conciliators. The time periods for appointing the four conciliators and a chairman are both sixty days. The Conciliation Commission thereby constituted must report within twelve months.

There are two main factors which render the procedure for conciliation under the Vienna Convention on the Law of Treaties totally unsuitable for settlement of disputes arising under bilateral air transport agreements. First of all, as stated in the Annex:[19]

> "The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute."

The second point is that the procedure for conciliation takes well over one year. In the context of bilateral air transport agreements which are highly commercial in nature, such time delays could not be tolerated. Furthermore, if a dispute were to arise, it would have a political substratum and in effect such a conciliation procedure would not solve it satisfactorily. Take for instance a situation where the doctrine of unequal treaties is being put forward. The choice of the Chairman would be determinative of the recommendation. It

seems highly unlikely that such a political decision which is not binding would have any influence on the parties at all. Such political views would be deeply entrenched in the cultures of each of the parties to the dispute.

Remedies Under Article 33 of the Charter of the United Nations

The procedure to be followed under Article 65 of the Vienna Convention on the Law of Treaties with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty requires that where an objection has been raised by any other party, "the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations." (Article 65, section 3). Article 33 of the Charter of the United Nations states:[20]

> "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
>
> 2. The Security Council shall when it deems necessary, call upon the parties to settle their dispute by such means."

To give a specific illustration of circumstances that are not uncommon which might sometimes give rise to the application of these provisions, one need only recall the shooting down of the JAL Flight over Soviet airspace. Had the issue escalated

into its fullest political potential, the maintenance of international peace and security could have been endangered. Such volatile situations could easily arise in areas like the Middle East . However, the efficiency of such a required procedure is in fact undercut by the fact that under Article 33, the parties shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice. When the second paragraph of Article 33, which gives the Security Council the power to call upon the parties to settle their dispute by such means, is read in conjunction with Article 66 of the Vienna Convention on the Law of Treaties, it becomes clear that Article 33, paragraph 2 will be used sparingly because of the time factor. Article 66 of the Vienna Convention on the Law of Treaties only requires that the parties seek a solution under Article 33 for a period of twelve months following the date on which the objection was raised. When no solution has been reached within the twelve month period, the parties are entitled to pursue the remedies in paragraphs a and b. The procedure under Article 66, paragraph (b) involves the submission of the dispute to mediators under the procedure established for such purposes in the Annex to the Vienna Convention on the Law of Treaties. The alternate procedure for the settlement of the dispute is outlined in Article 66, paragraph a of the Vienna Convention on the Law of Treaties

and involves submitting to dispute to the International Court of Justice or submission of the dispute to arbitration by the common consent of the parties. It should however be recalled that it is highly unlikely for the Security Council to get involved under Article 33, paragraph b because it would be advantageous for the parties to merely stall until they are entitled, after waiting the twelve months, to proceed with the options listed in Article 66 of the Vienna Convention on the Law of Treaties. The weaknesses under Article 33 of the Charter of the United Nations and in the procedure for mediation under the Annex to the Vienna Convention on the Law of Treaties, are not dissimilar. Both essentially relate to the non-binding nature of the procedures and the potential for simply perpetuating the non-settlement of disputes through the lapse of time. The question of whether there are better mechanisms for dispute settlement must be addressed.

Adjudication by the International Court of Justice

Article 66, paragraph a of the Vienna Convention on the Law of Treaties permits parties to a dispute involving treaties that are void if they conflict with a peremptory norm of general international law (jus cogens) or treaties that are void if they conflict with a new peremptory norm of general international law (jus cogens) to submit the dispute to the International Court of Justice for a decision. The key articles which outline the jurisdiction of the court are

Articles 36 and 38 which read:[21]

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 38[22]

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

The decision of the Court, as stated in Article 59, has no binding force except between the parties and in respect of that particular case. Two additional articles should be referred to because they highlight the ephemeral nature of the entire procedure. Article 53 states:[23]

1. Whenever one of the parties does not appear before the Court or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37 but also that the claim is well founded in fact and law."

Article 49 states:[24]

> "The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal."

As we have seen from the foregoing provisions, though the decision of the Court is binding, a state may refuse to appear by invoking the doctrine of sovereign immunity. In the event that such occurs and judgment is obtained against that party in default of an appearance, the problem remains. How will such a judgment be enforced against the state? Given the fact that we are considering bilateral air transport agreements and disputes arising under them that involve jus cogens or the emergence of a new doctrine of jus cogens, it would seem that the time may be at hand where the scope of the doctrine of sovereign immunity may be tested in the context of what property may in fact be seized. Assuming the bilateral air transport agreement is in fact a treaty within the meaning of the Vienna Convention on the Law of Treaties from the international perspective exclusively, and presuming that such a bilateral air transport agreement is an international trade agreement, one might reflect on the significance of the debate in the Cuba case over whether property of a sovereign that is used for exclusively commercial purposes is exempt from

seizure under the doctrine of sovereign immunity or whether a new doctrine of jus cogens has emerged. In fact, what one perceives in this view from the bridge is that the problem of remedies is similar whether the perspective is a suit in a domestic court or one before the International Court of Justice. Also susceptible of being tested in this context is the doctrine of unequal treaties referred to earlier.

Arbitration: Provisions in the Bilateral Air Transport Agreement

Bilateral air transport agreements themselves provide methods for dispute settlement. An illustration of settlement of a dispute through arbitration would be the Belgium-Ireland Air Transport Agreement Arbitration. It was a capacity dispute decided by sole arbitrator H. Winberg on July 17, 1981. The Bilateral Agreement in question contained in Article X, the following clauses with respect to dispute settlement:[25]

> "1. Any disputes relating to the interpretation and application of this agreement or the Annex thereto, which cannot be settled by direct negotiation shall be submitted to arbitration.
>
> 2. Any such dispute shall be referred for decision to the Council of the International Civil Aviation Organization.
>
> 3. Nevertheless, the contracting parties may, by mutual agreement, settle the dispute by referring it either to an arbitral tribunal or to any other person or body designated by them."

Since there had been no success in solving the dispute through direct negotiations as required in paragraph 1, both governments agreed to refer the matter to sole arbitrator H. Winberg for settlement. Less than two months after the proceedings were commenced, H. Winberg gave the following decision:[26]

> "The dapacity offered by the designated airlines on the Brussels-Dublin route is in certain respects significantly in excess of traffic requirements, which is in contradistinction with the principle of sound economic operations underlying the air agreement. In establishing their traffic programs in this way the airlines have not properly taken into account their mutual interests, which has led to undue effects on their respective services.
>
> A reduction of capacity during the period Sunday evening - Friday evening by two roundtrips for Aer Lingus and one roundtrip for Sabena is required as early as possible."

The procedure took less than two months and proved very effective. Both countries presented oral and written arguments and the arbitrator also met with the airline and government representatives from both countries. From the foregoing, one may observe that the procedure of a sole arbitrator is very practical and rapid for the settlement of disputes arising under bilateral air transport agreements. This procedure may be contrasted with a second arbitration procedure available through the International Civil Aviation Organization.

ICAO and Dispute Settlement

ICAO was established as a specialized U.N. agency under the Chicago Convention. The ICAO Council has the power to consider disputes arising under bilateral air transport agreements in virtue of Resolution A1-23, adopted in 1947 by the first ICAO Assembly. (See ICAO Doc. 9275). However, this machinery is rarely used since the ICAO Council is a political body whose members are elected by the ICAO Assembly. Reasons why states have resisted using this procedure have been offered by Professor Bradley:[27]

> "In the absence of authoritative statements, one can only surmise the reasons. Both parties lose control of the dispute. There is a danger of an adverse decision which would financially have more adverse results than a compromise. Suspicion exists as to the impartiality of arbitral tribunals. It is better to cut one's losses by compromise rather than suffer the losses from unilateral restrictions during the period - not less than twelve months - that the matter is under arbitration. Perhaps the major reason is that the benefit of a favourable decision may be lost by the losing state giving twelve months notice of termination of the agreement."

In addition, as Merckx has further pointed out, the ICAO Council is a political body and the representatives, who do not necessarily have special legal competence, act under instructions from their respective governments so that the machinery provided under ICAO proves to be slow, financially burdensome and politically risky.

The Need for Change: A Case for a New Method for Regulating International Civil Aviation

In summary, we have looked at the legal nature of bilateral air transport agreements in Chapter 1 from the perspective of domestic law. The frailty of the system has been further exposed in Chapter II from the perspective of remedies for breach of such treaty obligations. In particular issues of ratification and implementing legislation referred to in Chapter 1 are highlighted in Chapter II from the point of view of a right in international law that may be without a remedy in a domestic court because of issues such as locus standi and sovereign immunity. It has also been observed that remedies under the Vienna Convention on the Law of Treaties and through international adjudicative bodies suffer from the same drawbacks as in domestic courts. The time frames for dispute settlement under the Vienna Convention on the Law of Treaties, under the Charter of the United Nations, under ICAO and under the Statute of the International Court of Justice are generally too slow. This time factor may prove financially disastrous. The survivor in this quagmire appears to be arbitration by a sole arbitrator as evidenced by the Belgium-Ireland Air Transport Agreement Arbitration. Some, not all, bilateral air transport agreements have clauses allowing for such procedures. It is suggested that in future negotiations such a provision should be included. Perhaps emphasizing the treaty aspect of bilateral air transport agreements and their formal characteristics has obscured their

essential nature. They are international trade agreements that do not require extreme domestic or international machinery for dispute settlement but rather a quick and inexpensive mechanism that is more in tune with their true nature. One might even suggest that the concept of informal treaties has been the first stage in this adaptation as the world got smaller. As the world became a global community, the need for faster procedures for dispute settlement surfaced. In the process, the concept of informal treaties asserted itself as fictions often do in law as a response to changing circumstances. It has been said that changes in the law are preceded by changes in the facts. The evolution of bilateral air transport agreements offers an illustration of this observation. To return to the question raised in Chapter 1 in the section on nomenclature, naming is creating and that implies change. The whole notion of "informal treaties" may in fact be a legal fiction, a slight of hand to ease a transition. Can it now be said that the notion of "informal treaties" belongs to the period between colonialism and internationalism? It has become clear that informally, flexibility, and pragmatism have been the response to change. Focusing on the hierarchy of treaty making pinpoints the instability inherent in the structures that are in an evolving state. It is but another face of deregulation. Therefore, in our view from the bridge, we see the mutation of monolithic structures into deregulated agents. However, this adaptation

itself is not without its own weaknesses and seeds of change. In Chapter III we will examine the economic and political aspects of bilateral air transport agreements. James Joyce in his novel Ulysees defined a pier as a disappointed bridge. In Chapter III we will examine the notion that a peer may now be a disappointed state. In particular, in our economic and political analysis of the law, we will look more closely at the significance of unequal treaties, the importance of most favoured nation clauses in bilateral air transport agreements, and the relevance of mature and not yet mature markets. In trying to answer the question "What is the legal nature of bilateral air transport agreements?", an argument will be advanced that it is now appropriate to assess law by something other than itself. It has been argued that changes in the law are preceded by changes in the facts. Evidence has been presented that the cumbersome garb of colonialism is such that the host can no longer comfortably go to the party in his bilateral that does not fit. In such a situation, new legal clothing is required to fit the facts. For this reason, it becomes important to leave behind the conceptual framework of an analysis of law through law and to begin to assess the degree of change by focusing on an economic and political analysis of law to ensure that the evolving legal forms will be tailor-made in response to the facts as disclosed.

FOOTNOTES - CHAPTER II

1. A. Jacomy-Millette, Treaty Law in Canada, University of Ottawa Press, 1975, p. 2.

2. Ibid., at 260.

3. The Vienna Convention on th Law of Treaties, Text from the American Journal of International Law, Vol. 63, 1969.

4. [1944] 3 D.L.R. 482.

5. Ibid., at 498.

6. Ibid., at 498.

7. 61 D.L.R. (2d) 709.

8. [1970] Ex. C.R. 366.

9. Ibid., at 384, 386.

10. [1962] S.C.R. 598.

11. [1958] A.C. 379 at 394.

12. Flota Maritima Browning de Cuba S.A. et al. v. The Republic of Cuba, op. cit., 598 at 608.

13. [1943] S.C.R. 208.

14. Carol Young, "Defending Litigation Against a Foreign Airline Under the Foreign Sovereign Immunities Act", (1986) 51 Journal of Air Law and Commerce 461.

15. Ibid., at 462.

16. Ibid., at 466.

17. Ibid., at 467.

18. Ibid., at 494.

19. The Vienna Convention on the Law of Treaties, Annex, s. 6.

20. Shabtai Rosenne, Documents on the International Court of Justice, 2nd ed., Sijthoff & Noordoff, The Netherlands, 1979, p. 21.

21. Ibid., at 77.

22. Ibid., at 79.

23. Ibid., at 83.

24. Ibid., at 83.

25. A. Merckx, "The Belgium-Ireland Air Transport Agreement Arbitration", (1985) Belgian Review of International Law, p. 672.

26. Ibid., at 692.

27. Ibid., Bradley at 673.

CHAPTER III: AN ECONOMIC AND POLITICAL ANALYSIS OF LAW

The second stage of this analysis of the legal nature of bilateral air transport agreements will focus on the comprehensive nature of the law itself. The emphasis will be on law as a branch of the humanities. One of the proponents of this interdisciplinary approach to law is Glendon whose analysis of the family pinpoints the complexity of the concept that comprises political history, culture and economics. She examines the legal system for evidence of social change.[1] Lasche believes that law is perhaps the missing link between culture and history, on the one hand, and economic and political history on the other, between the study of culture and social structures, and between production and power.[2] This movement, which sees law in interdisciplinary terms, would have the jurist borrow the tools of other disciplines for analysing law.[3] For example, one might conduct an economic analysis of law by testing a hypothesis in relation to the facts. The hypothesis may be based on a mathematical model. One might examine law using the statistical tools of the social scientist or one might examine concepts like sovereignty, as the political scientist would do. In focusing on facts, one is able to step outside traditional legal reasoning which may be characterized as an exercise in deductive logic in a closed system. Allan Gotlieb has cited Holland's thesis that changes in constitutional law are based

upon and preceded by changes in constitutional facts.[4] Gotlieb goes on to state "a country's treaty-making is often a reliable indication of the political realities that characterize and shape its foreign policy."[5] It is submitted that foreign policy is inevitably an economic and political expression of the will of the state. It is for this reason that the author has raised the issue of what the legal nature of bilateral air agreements is. It is submitted that treaty-making is also a link between history and culture, political and economic history, social structures, production and power. It is an indice of change as well.

Theory

Positivist legal theory has dominated much of legal reasoning until recently. One central issue may be summed up in the question "Can a person oblige himself to quit smoking?". Austin's response would be no; a person may not oblige himself. External force is a necessary component of an obligation. It is argued that in promoting a flexible law, with notions like qualified sovereignty, legal reasoning is moving away from the absolutism of positivist thinking. The term qualified sovereignty may be a misnomer. The question may be raised: "Is everyone who enters a contract no longer an autonomous human being?". In terms of states, the very act of contracting is an exercise of sovereignty on the state level. One has extreme examples of cases of total surrender of

sovereignty in Puerto Rico and Newfoundland. In an attempt to realign law and life, we will presently examine sovereignty as a comprehensive concept. It is perhaps the most important concept in law itself, possibly surpassing family as a cornerstone of law. The question of what is true sovereignty is therefore seminal to an understanding of the interplay of national law and international law that is evidenced in a study of bilateral air transport agreements. It is an attempt at balancing dependency needs of independent state in a global community. The notion of informal treaty reflects this adjustment and is being paralleled by an understanding of sovereignty in less dogmatic and more flexible terms.

Peter Harbison has stated that "Both the country of origin and double disapproval systems can create legal difficulties under national legislation insofar as waiver of sovereign powers is necessary. The total withdrawal (albeit by mutual consent) of unilateral power to suspend a price created problems for the U.S."[6] The problem was whether the C.A.B. would be in violation of its mandated powers under the Federal Aviation Act under such a clause in an executive agreement. This raises the vary basic question of what sovereignty is.

Jessup, in A Modern Law of Nations, observed:[7]

"Sovereignty is essentially a concept of completeness. It is also a legal relation,

> and as such, is a paradox, if not an absolute impossibility, for if a state is sovereign in the complete sense, it knows no law and therefore abolishes at the moment of its creation, the jural creator which gave it being."

Waiver of sovereignty then does not violate its intrinsic nature conceptually, although legal adjustments may be required. As a concept which includes its waiver, it is analogous to the waiver of autonomy in marriage. Sovereignty does not mean unlimited freedom nor supremacy over law. As stated by Vanek:[8]

> "As a concept of international law, it can only be known or defined by subtracting from unlimited licence the sum of the restrictions imposed upon states by the rules and principles of international law. International law, therefore, is not inconsistent with the sovereignty of the state."

He further states:[9]

> "It implies a surrender of the supposed freedom of states under anarchistic conditions in exchange for the greater freedom enjoyed as persons of a legal system."

Sovereignty as a concept then raises the issue of complexity that inheres in any relationship. It dominates the dialogue between states as they express their sovereign wills. It is the link between national law and international law. Sovereignty is essential to treaty-making, as we have seen. In treaty implementing, the issue becomes more complex in federations. On the international level, it may be seen as an attempt by an independent state to satisfy its dependency

needs in a world community. The struggle to preserve this independence dominates the dialogue between Canada and the provinces. It involves the issue of colonialism understood in its expansive sense. The most important political fact in the century has perhaps been the emergence of many new sovereign states. As has been pointed out, this political fact is reflected in legal norms. A case in point is the changes in bilateral air agreements that are occurring. More sovereign states meant more treaties; this lead to informal treaty-making as a way of expediting procedures. A case in point would be the President of the United States entering executive agreements. Relations between states have become too complex and are too numerous to be handled through the treaty mechanism of states. It is argued that the political realities have led to the changes in form, content and legal mechanisms whereby states are organizing their interstate relations. A change in political facts has preceded a change in the form, content and structure of legal relations between states, as evidenced by the changes in the regulation of air transport.

Robert Hastings suggests that as a result of not reaching a compromise between sovereignty and freedom in a multilateral convention on international air law, the theme of nationalism has dominated. Since a state is sovereign over its national air space, the state has the absolute discretion

to allow or refuse entry of foreign aircraft. He has stated that "the history of the development of international air transport is largely the history of the diplomatic rivalries which accompanied the negotiations for franchises, concessions and operating rights."[10] Civil aviation could have been seen as commercial, its communication and transportation aspects dominating the political aspects. However, that was not the case and civil aviation was to develop as an instrument of national policy through bilateral air agreements. The first U.S.-Soviet Civil Air Agreement will be examined as an illustration of protracted negotiations reflecting the tenuous relations between the Soviet Union and the U.S. in the Cold War period. As Lissitzyn wrote:[11]

> "In reality, however, it is the military and political rivalry between the great powers, rather than the bargaining of the small states, that has been the greatest obstacle to freedom of the air."

The Legal Nature of Bilateral Air Transport Agreements: The Political Facts

Hans Heymann Jr. prepared an analysis of the U.S.-Soviet Civil Air Agreement for the Department of State in 1972. He has referred to the chronology of events occurring during the negotiation phase from 1955-1968 as "The Saga of a Civil Air Agreement". He has stated:[12]

> "The most striking feature of this case is the persistence with which a relatively trivial technical agreement became the subject of Presidential interest and a ploy of Presidential policy. Three successive Presidents,

> Eisenhower, Kennedy, and Johnson, alternately dangled the agreement before the USSR and pulled it away, using it as a political symbol, a bargaining chip, and a vehicle for signaling displeasure. Thus fluctuations in the fortunes of the agreement came to reflect quite accurately the changes in temperature of the Cold War and to reveal the ambivalence in the policy that all three Presidents were pursuing toward the USSR, alternating between containment and conciliation between firmness and détente."

Heymann gives the chronology of the saga in an appendix to his case study which is reproduced and attached as an appendix herewith. The chronology of events is in point form and covers 19 pages. He has highlighted the key events and juxtaposed them against the more minor events. The entire material is an interesting illustration of a political analysis of law based on facts shaped by individuals and organizations participating in the political process. Some facts in the political process leading to the conclusion of the U.S.-USSR bilateral which he isolates will presently be mentioned. Negotiations for the bilateral began in 1955 with Eisenhower's "open skies" proposal at the Geneva Convention. Shortly thereafter, in 1956, the Soviet suppression of the Hungarian Revolution resulted in a one-year disruption of talks. Events proceeded following a pattern of chill and thaw in relation to the Berlin confrontation, Camp David meeting of 1959, the U-2 incident of 1960, the release of the R.B.-47 crew in 1961 that had been detained by the Soviets since the aircraft was shot down on July 11, 1960 over the Barents Sea,

the draft agreement of 1961 referring to security aspects, export control, intermediate traffic points which the White House approved. In 1962 there were intensified State Department efforts to contain expansion of Soviet civil aviation in Latin America, Asia and Africa. Then came the Cuban missile crisis. A 1963 memo from Rusk to the President highlights the nature of the entire process of negotiations. It stated "there have been no developments in the international situation which ... make it any more desirable to sign this agreement now." The agreement would, in his view "seriously impair U.S. ability to persuade underdeveloped countries to refuse the USSR overflight and other air rights." His view was that there would have to be "some development representing a major step in improving our relations [e.g. nuclear test ban, modus vivendi over Berlin] before signing would be in our interest."[13] Harriman recommended in 1964 "that we should not prejudice the chances of an OAS agreement on the air and sea isolation of Cuba, by agreeing now to sign."[14] In 1965, the bilateral was put in a deep freeze because of Soviet assistance to North Vietnam. After an East-West reconciliation, it was signed November 4, 1966. Discussions followed with respect to future changes in air routes, a technical agreement and a commercial agreement on schedules and traffic matters. On July 15, 1968, the Aeroflot inaugural flight arrived at J.F. Kennedy Airport and the Pan Am inaugural flight departed for Moscow. On August 21, 1968 the Soviet army occupied

Czechoslovakia and on September 5, 1968, Secretary Rusk informed Ambassador Dobrynin that the second Aeroflot inaugural flight should be postponed "because of the current international situation."[15]

This brief summary of the chronology of events leading to the conclusion of the U.S.-USSR bilateral air agreement is intended to illustrate two points. First, one should recall the statement of Rusk in 1963 indicating the bargaining-chip approach. It offers an illustration of the interplay of politics and law. In fact, this approach to analyzing law from the perspective of non legal facts has been undertaken by P Deschamps and J. Farley:[16] the hypothesis is that when one examines cases that are settled out of court, one has an additional perspective on the legal system. Examining the bilateral air agreement from the perspective of the non legal facts also affords an interesting perspective on how law is made. Again the recurrent theme of this study, that changes in facts precede changes in law, is here in evidence. One should not, therefore, restrict oneself to analyzing law from the perspective of law itself. It does not exist in a vacuum and methods of analysis based on non-legal facts that are then tested against a hypothesis are valid methods for legal research. Technically, the distinction between facts and legal facts must remain but acknowledgment of the importance of non-legal facts leads to an appreciation of law as a

dynamic relationship. Where such a methodology for research is used in law, it provides evidence of real change that has percolated up from its bases in society. The subsequent modification of the law simply expresses in legal norms changes that have already occurred in fact.

From the foregoing chronology, the relationship between political events and law has been traced. The relationship between economic trends and law will be attempted next.

The Legal Nature of Bilateral Air Transport Agreements: The Economic Facts

At the beginning of international civil aviation in 1913 it appeared nations might adopt a policy of open skies. Article 15 of the Paris Convention is very liberal. It should be recalled that the Paris Convention took place in 1919, a period of economic prosperity. Bermuda I negotiations between the U.S. and Great Britain centred around two economic theories - economic regulation or free competition. Britain favoured intergovernmental economic regulation of civil aviation while the U.S. advocated free competition. Britain took a protectionist position because her air fleet was virtually destroyed during the war. The U.S., perhaps seeing its competitive advantage, wanted free competition. A compromise was reached but in 1977, Britain denounced Bermuda I. The issue was an economic one. The British claimed that

the traffic share of Pan Am and TWA by far exceeded that of British Airways. Capacity provisions and tariffs were not changed dramatically but Bermuda II was not to become a prototype as Bermuda I had become. Again, it was an economic fact that preceded legal change. In 1976-77, the full impact of the recession was felt, but the turnaround was at hand. The Laker experiment, with its reliance on marketplace logic, gained momentum and deregulation began. In mercantilism, the economic system is projected into competitive goals. One wonders, however, whether competition is espoused as a goal in itself or if the purpose is maintaining a competitive advantage. Is deregulation economic nationalism by another name? In the economic analysis that follows, a case will be made for the fact that mercantile theory is now dominant over the public utility theory. However, as a cautionary note, we may be witnessing organizational structures promoting internationalism concurrently with economic nationalism. This appears to be the trend. We are entering a new phase of the mercantilism - public utility debate in the international forum. The importance of economic issues in law will next be examined, first theoretically and then in terms of clauses in bilateral air transport agreements.

Joseph F. Brodley and George A. Hay[17] have undertaken an economic analysis of law using the methodology of the social sciences. As the title of their article indicates,

they trace the evolution of legal standards based on competing economic theories of predatory pricing. Their analysis focuses on the problems inherent in the attempt to use economic theory as a basis for evolving legal policy and legal norms. Their article is of particular interest for two reasons. First, the methodology illustrates the new approach to legal research. The article is divided into three parts, the first dealing with economic theories of predatory pricing, the second dealing with judicial application of economic predatory pricing theories with the application of the theories to hypothetical legal fact situations, and the third part deals with reflections on the judicial use of economic theory. The new methodology is most in evidence in the second part as the authors trace the legal significance of changes in economic theory. Their concern with predatory pricing is of importance because of the anti-trust laws and the attempt of the legal system to determine what is predatory pricing and illegal under The Sherman Act or under the Robinson-Patman Act. Predatory pricing then is a legal concept as well as an economic concept and illustrates the need for interdisciplinary analysis. It is also noted that the paradigm of analysis offered in this article would be fertile ground for future investigation in terms of economic theory and its relationship to law in the context of deregulation. It is worth noting in passing that it was in 1975 that the attempt was made to move beyond traditional methods of defining predatory pricing when

Areeda and Turner published their article on marginal cost pricing and it was subsequently introduced into legal argument.[20] The second important factor is the difficulty that arose in attempting to apply economic concepts to law. As the authors have stated:[21]

> "The recent history of predatory pricing indeed can be seen as a case study of the impact of economic theory on the courts. In particular, it raises questions, bound to become more pressing in a scientific age, of how courts should use new development in economic or scientific theory."

One important aspect of such an economic analysis of law lies in the fact that a certain predictability of results was seen to emerge from the data. Therefore, the fact that law does not exist in isolation becomes increasing clear and the pragmatic application of new methodologies makes a case for itself. However, as a cautionary note, the authors state:[22]

> "Finally, do not all of the preceding considerations suggest a renewed emphasis on the values and insights inlaid in long-standing judicial experience, built upon case-by-case adjudication and on the the advantage of incremental policy change, achieved gradually and with opportunity for self-correction."

The above analysis is intended to indicate to the reader a direction for further study of deregulation as it interrelates with economic theory, structural changes and their relationship to power.

One might cite two further illustrations of the importance of economic issues in the regulation of international air transport. In the Belgium-Ireland Air Transport Agreement Arbitration, the arbitrator had to consider the meaning of Article VIII(2) of the bilateral:[23]

> "the contracting parties will take into consideration their mutual interests so as not to affect unduly their respective services."

The issue was one of capacity; Sabena argued that the airlines were operating at abnormally low and economically unjustifiable load factors, and therefore that behavior was not in accordance with Article VIII(2). They argued capacity should be curtailed. The arbitrator gave due consideration to the underlying economic issues and decided a reduction in the number of flights was needed. He based himself on the principle that operations have to be economically justified and he extrapolated this principle from the capacity clause, from the tariff clause and from the Preamble of the Chicago Convention. The point that is made in this article is that this arbitration is unique in the extent to which economic realities are given full weight. The airline industry appears to be highly conducive to this legal approach.

P. Haanappel's analysis of deregulation gives a second illustration of the importance of economic issues in bilateral air agreements. He has listed eight general characteristics

of the "liberal" bilateral air agreements. They are unlimited multiple designation of air carriers, an open-ended scheduled route structure for U.S. airlines although foreign carriers do not get unlimited access to points in the U.S.A., free determination of capacity and frequency both for charter and scheduled service, no limitation on scheduled sixth freedom traffic, encouragement of low tariffs, minimal governmental interference, country of origin charterworthiness rules, provisions on fair commercial opportunities.[26] It is the multiple and permissive entry provision in those liberal air transport agreements that immediately attract one's attention. The question to be asked is whether free competition is indeed being promoted by deregulation or whether such bilaterals are in some ways predatory. Would marketplace theory be advocated by the weak? Are these bilaterals inherently unequal with respect to the contracting parties?

In the foregoing political and economic analysis of law, certain facts were revealed. Sovereignty in its fullest sense is seen to be comprised of both political and economic elements. The effect of the disappearance of colonialism and the emergence of new states has been indicated in terms of the need to simplify relations between states since interstate agreements have multiplied almost exponentially during the last fifty years. International air transport is now being viewed predominantly in economic terms, as illustrated in the

works of Haanappel. When one reviews the negotiation of the U.S.-USSR Bilateral Air Transport Agreement, one cannot dissociate the political from the economic realities. It is argued here that a strictly economic analysis of deregulation would shed new light on the issue. A detailed, country by country, airline by airline chart analysis under public utility theory and under mercantilism might in fact substantiate the thesis that deregulation is simply putting American interests first. The argument can perhaps even be asserted in stronger terms. Is deregulation not political, cultural and economic neo-colonialism?

With deregulation in its extreme form in the United States, the system became unglued and some airlines met the fate of Icarus. It could be argued that the so-called "liberal" bilateral air agreements at times have predatory characteristics. Professor Haanappel has indicated in a recent article[27] that there is a reluctance on the part of U.S. bilateral air agreement 'partners' to sign such agreements. Canada has in fact refused. Brodley and Hay, in the conclusion of their article, refer to the corrective stage of a theory after its initial introduction. They cite the apt words of Professor Stigler:[28]

> "The new idea does not come forth in its mature scientific form. It contains logical ambiguities or errors; the evidence on which it rests is incomplete or indecisive; and its domain of applicability is exaggerated in certain directions and overlooked in others. These deficiencies are gradually diminished

> by a peculiar scientific aging process, which consists of having the theory "worked over" from many directions by many men. This process of scientific fermentation can be speeded up, and it has speeded up in the modern age of innumerable economists. But even today it takes a considerable amount of time, and when the rate of output of original work gets too large, theories are not properly aged. They are rejected without extracting their residue of truth, or they are accepted before their content is tidied up and their range of applicability ascertained with tolerable correctness. A cumulative slovenliness results, and is not likely to be eliminated until a more quiescent period allows a full resumption of the aging process."

In the section which follows, an attempt will be made to demonstrate that international air transport policy is now in a corrective phase and that new organizational structures are consequently evolving.

The words of Charles Lindbergh in 1930 seem to reflect the foresight and creativity that his actions then demonstrated. He stated:[29]

> "Every advance in transportation has stimulated commerce and brought people into closer contact with each other. One after another the fears and prejudices of isolation have been overcome as methods of communication and transport improved. Aviation, with its great speed and freedom of movement, is too powerful an instrument of progress to be long confined by the remaining artificial restrictions left over from an age of provincialism. Constructive thought is turning more and more towards international cooperation and nothing is more important in this field than the simplification of communication and intercourse. Aviation does not concern one nation alone. Its ultimate value lies in bringing the various countries of the earth into

> closer contact. It is not possible to develop air transport and communication in its broadest aspect without the cooperation of the entire world."

Commerce then implies interdependence. The present trend towards multilateralism in combination with basic principles of contract treaty in fact is what Lindbergh foresaw as a necessary condition for realizing the "ultimate value" of transportation. In addition, this trend appears to reflect the maturing phase of two initially competing theories. In this corrective phase, both theories have their place. Changes in organizational structures and the legal agreements themselves parallel the ideological severance that is occurring. The economic issues and the political issues are being treated separately while at the same time full appreciation of the paradox of sovereignty and interdependence is never forgotten. Nor should one overlook the fact that the political and economic are inextricably bound together. However, for purposes of international regulation of civil aviation, issues are severable.

New Organizational Trends

Wassenbergh, in his address,[30] has indicated that in the past states have dominated the regulation and control of civil aviation and this has resulted in sovereignty being the pivotal concept. Basing himself on the severability of the first two technical freedoms of the air from the three commercial freedoms, he states:

> "Deregulation/privatisation turns air transport into a normal economic activity and this leads to the application of national laws to the airlines operating international air services, bringing them as business enterprises under national rules regarding the permissions required to do business; i.e. to sell air transportation in the territory of a foreign state and to carry that traffic from that state."

In his view, the right to offer air transportation services, irrespective of who sells it, would be subject to a "permit to do business" if it involves the import of services. He argues that if one views the activities of foreign airlines as an import of services in the country where the air transport is sold and uplifted, the G.A.T.T. system could apply to international air transport. However, this approach has not yet been adopted.

An additional illustration of multilateralism mixed with a continuing system of bilateral air transport agreements is the E.E.C. "Civil Aviation Memorandum No. 2" which constitutes a global intra-E.E.C. draft air transport policy. A new E.C.A.C. Agreement that would include aspects of the 1982 Compas Report is a further example.[33] Professor Haanappel reaches the following conclusion in a subsequent article:[34]

> "Eventually, however, the pendulum in Europe will probably swing towards some kind of airline deregulation of liberalization of air transport regulation. This seems almost inevitable, (a) because trends towards less governmental regulation can be detected in almost all large, "mature" air transport

> markets, thus also in Western Europe; and (b) because in an increasing number of Western industrialized nations there is a growing tendency towards less governmental involvement in the economy as a whole."

The G.A.T.T. principles of deregulation of international trade, multilateral reciprocity, non-discrimination, national treatment, special and differential treatment of developing countries, standstill and roll-back of protectionist measures for trade in goods[35] could extend to trade in services. Wassenbergh concludes that I.C.A.O. could fulfill the need for a common air transport policy for international air transport while the private approach would mean the nationality of the airline would diminish in importance. Limitation of the state's involvement would involve treating international air transport as a business enterprise and the issues relating to treaties would be bypassed. Otherwise, would it not, in Lindbergh's words, "be long confined by the remaining artificial restrictions left over from an age of provincialism?" Since the G.A.T.T. principles do make provision for developing countries, an opportunity for self-correction of the system is built into the system. As a new organizational trend, the G.A.T.T. principles, if incorporated into I.C.A.O., would seem to be the best solution to the problems raised by the legal nature of bilateral air transport agreements. It would solve the issues revolving around treaty status, and would provide practical solutions to problems which elude adjudication in international forums.

FOOTNOTES - CHAPTER III

1. M.A. Glendon, The New Family and the New Property, Toronto, Butterworths, 1981, p. 1 s.s.

2. C. Lasch, "The Seige of the Family", (1977) 24 The New York Review of Books 33, cited by M.A. Glendon, ibid., note 1, 1.

3. D. Poirier, "Quelques éléments d'une méthodologie juridique scientifique", (1984) 15 R.D.U.S., 183.

4. A.E. Gotlieb, op. cit., at 10.

5. Ibid., at 86.

6. P. Harbison, "Liberal Bilateral Agreements of the United States: A Dramatic New Pricing Policy", LL.M. Thesis, McGill University, November, 1982, p. 84.

7. D.C. Vanek, op. cit., at 293.

8. Ibid., at 293.

9. Ibid., at 293.

10. R. Hastings, "Some Political Aspects of International Air Transport", Thesis, Princeton University, 1945, p. 42.

11. Ibid., at 55.

12. H. Heymann Jr., The U.S.-Soviet Civil Air Agreement from Inception to Inauguration: A Case Study, prepared for the Department of State, Rand, R-1047-DOS, July 1972, p. v.

13. Ibid., at 44-45.

14. Ibid., at 47.

15. Ibid., at 54.

16. P. Deschamps and J. Farley, "L'évolution des poursuites en dommages-intérêts contre les professionnels de la santé intentées devant la Cour supérieure du district judiciaire de Montréal entre 1976 et 1980", Le médecin du Québec, octobre 1981, 47; P. Deschamps, "Les suicides et les tentatives de suicides reliés à la prestation des soins médicaux: étude des poursuites judiciaires intentées au Québec entre 1968 et 1977", Revue Can. de psychiatrie, Vol. 22, Oct. 1983, 475.

17. J.F. Brodley and George A. Hay, "Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards", (1981) 66 Cornell Law Review, 738.

18. 15 U.S.C. s2 (1976).

19. 19 U.S.C. s. 13(a) (1976).

20. G.F. Brodley and George A. Hay, op. cit., at 791.

21. Ibid., at 794.

22. Ibid., at 794.

23. A. Merckx, op. cit., at 670.

24. Ibid., at 675, 676.

25. P.P.C. Haanappel, "Deregulation of Air Transport in North America and Western Europe", Air Worthy, Kluwer Law and Taxation Publishers, Antwerp, 1985.

26. Ibid., at 101, 102.

27. Ibid., at 104.

28. J.F. Brodley and George Hay, op. cit., at 794.

29. R. Hastings, op. cit., at 154.

30. H.A. Wassenbergh, "Regulatory Reform in International Air Transport", Address on the occasion of the introduction of The International Institute of Air and Space Law, Leyden, 1986.

31. Ibid., at 2.

32. Ibid., at 3.

33. P.P.C. Haanappel, "An Analysis of U.S. deregulation of air transport and its inferences for a more liberal air transport policy in Europe", Council of Europe, Strasbourg, 1984 at 75.

34. P.P.C. Haanappel, "Deregulatioln in North America and Western Europe", op. cit., at 115.

35. H.A. Wassenbergh, op. cit., at 3.

CONCLUSION

One of the purposes of this analysis has been to trace the origins of the present system of regulating international civil aviation by means of bilateral air transport agreements. The undercurrent throughout has been that even in their short history, bilateral air transport agreements have undergone changes in relation to shifts in the economic and political environment. It has been argued that the treaty mechanism, which might include executive agreements, intergovernmental agreements, and conventions, depending on the perspective taken, is no longer the most efficient way to regulate international civil aviation. One purpose then has been to focus on the need for change.

The second purpose of this analysis of the legal nature of bilateral air transport agreements has been to suggest possible new directions. Professor Haanappel's emphasis on what bilateral transport agreements do is indicative of the change that is occurring. Focusing on questions like "Are they treaties?" is important insofar as the question is coupled with the further query "What do they do?". One might recall that from an operational perspective Haanappel defined bilateral trade transport agreements as international trade agreements.

Wassenbergh has extended this concept further. He is arguing that there is nothing to prevent international civil aviation from being regulated by means of trade agreements for the delivery of services through a system of permits to do business. This system would be coupled with a multilateral exchange of the first two freedoms of the air in a multilateral convention. The second purpose of this analysis then is to indicate that a restructuring along these lines will gradually gain acceptance. A new form of bilateral trade agreement will perhaps gain support internationally; just as there was the standard Chicago type bilateral and Bermuda I became a prototype, what might be referred to as a standard form G.A.T.T. trade agreement for the delivery of air services appears to be the next development. It would embody the G.A.T.T. principles as presently applied to goods. Provisions contained in present bilateral air transport agreements that relate to the first two technical freedoms would not be contained in this new trade agreement but would be exchanged multilaterally. From the evidence, it appears that the separation of the commercial aspects is in fact what is happening with accelerating speed. It appears that the legal forms will in all likelihood change along these lines to adapt to these changed facts.

The legal nature of bilateral air transport agreements, as indicated in the foregoing analysis of domestic law and

international law, defies explicit categorization. Their history may be characterized as developemental; they have been adaptive to change. The relationship between economic theory and organizational structures has been examined. In the context of international air transport, mercantilism has produced deregulation with the reorganization along the parallel lines of multilateralism and international contract theory. A political and economic analysis of the legal nature of bilateral air transport agreements in Chapter III was undertaken to indicate present changes and new trends in their legal nature as adaptation occurs. A non-legal methodology was even attempted to illustrate the fact that the methodology of law must itself adapt to change. It was for this purpose that the political analysis of the U.S.-USSR agreement was undertaken. Likewise, the economic analysis of deregulation was undertaken for illustrative purposes. These two case studies demonstrate the use of the methodology of the social sciences in an analysis of law. A hypothesis was presented, that law does not exist in a closed system of formal logic. The economic and political data was examined and the conclusion was affirmed that changes in fact precede changes in law. Had the author remained within the confines of the traditional legal analysis of law, this insight might not have surfaced so clearly, as illustrated by the traditional analysis of the legal nature of bilateral air transport agreements in Chapters I and II. The relationship between the

legal and non-legal nature of bilateral air transport agreements has been examined and paralleled by the use of a legal and non-legal methodology. The conclusion to be drawn is that law is inherently interdisciplinary and need not be strictly construed.

It has been said that with the acquisition of Canadian sovereignty, the ship of state set sail on foreign waters but it was still subject to watertight compartments. It might also be said that when the bird of state left the nest, legal draftsmen picked up their quills. Einstein's thought that the only constant is change seems fitting.

BIBLIOGRAPHY

Books and Articles

Abel, Albert S., Canadian Constitutional Law: Cases, Text and Notes, Toronto, Carswell, 1975.

Barron, Jerome & C. Thomas Dienes, Constitutional Law: Principles and Policy: Cases and Materials, 2nd ed., Charlottesville, Virginia, The Michie Company, Law Publishers, 1982.

Brodley, J.E. & George A. Hay, "Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards", (1981) 66 Cornell Law Rev. 738.

Burdeau, G., Droit constitutionnel et institutions politiques, 18th ed., Paris, L.G.D.J., 1977.

Carbonnier, J., Flexible droit, 4th ed., Paris, L.G.D.J., R. Pichon et R. Durand-Auzias, 1979.

Cas, Gérard, Les sources du droit des transports, Paris, L.G.D.J., R. Pichon et R. Durand-Auzias, 1964.

Cujas, ed., Dictionnaire de la constitution, 1976.

Deschamps, Pierre, "Les suicides et les tentatives de suicide reliés à la prestation des soins médicaux: étude des poursuites judiciaires intentées au Québec entre 1968 et 1977, Revue Can. de psychiatrie, Vol. 22, Oct. 1983.

Deschamps, Pierre & J. Farley, "L'évolution des poursuites en dommages-intérêts contre les professionnels de la santé intentées devant la cour supérieure du district judiciaire de Montréal entre 1976 et 1980", Le Médecin du Québec, octobre 1981, 47.

de Smith, S.A., Constitutional and Administrative Law, 4th ed., England, Penguin Books Ltd., 1981.

Esperou, Robert, 'La philosophie du bilatéralisme en matière d'accords de trafic aérien", Sirey, Revue de droit aérien, 1977.

Gardner, James, "The Law of Treaties" (Draft) (1935) 29 American Journal of International Law, Supp. p. 655.

Gibson, William M., "Bipartite Agreements on Aerial Navigation", (1931-32) 6 Temple Law Quarterly 57.

Glendon, M.A., The New Family and the New Property, Toronto, Butterworths, 1981.

Goodrich, Leland M., Edouard Hambro & Anna Patricia Simons, Charter of the United Nations: Commentary and Documents, 3rd ed., New York, Columbia University Press, 1969.

Gotlieb, Allan, Canadian Treaty Making, Toronto, Butterworths, 1968.

Haanappel, P.P.C., "An Analysis of U.S. Deregulation of Air Transport and its Inferences for a More Liberal Air Transport Policy on Europe", Strasbourg, Council of Europe, 1984.

_____, "Bilateral Air Transport Agreements 1913-1980", (1978-80) The International Trade Law Journal 4-5.

_____, "Deregulation of Air Transport in North America and Western Europe", Air Worthy, Antwerp, Kluwer Law and Taxation Publishers, 1985.

_____, Pricing and Capacity Determination in International Air Transport: A Legal Analysis, The Netherlands, Kluwer Law and Taxation Publishers, 1984.

_____, Ratemaking in International Air Transport: A Legal Analysis of International Air Fares and Rates, The Netherlands, Kluwer, 1978.

Harbison, Peter, "Liberal Bilateral Agreements of the United States: A Dramatic New Pricing Policy", LL.M. Thesis, McGill University, November, 1982.

Hastings, Robert, Some Political Aspects of International Air Transport, Thesis, Princeton University, 1945.

Heller, Paul P., The Grant and Exercise of Transit Rights in Respect of Scheduled International Air Services, LL.M. Thesis, McGill University, 1954.

Hogg, Peter W., Constitutional Law of Canada, Toronto, Carswell, 1977.

Hotchkiss, Henry, A Treatise on Aviation Law, New York, Baker, Voorhis & Co., 1938.

Heymann, Jr. H., The U.S.-Soviet Civil Air Agreement from Inception to Inauguration: A Case Study, Rand, R-1047-DOS, July, 1972.

Jacomy-Millette, A., L'introduction et l'application des traités internationaux au Canada, Paris, L.G.D.J., R. Pichon et R. Durand-Auzias, 1971.

_____, Treaty Law in Canada, Ottawa, University of Ottawa Press, 1975.

La Forest, G.V., "May the Province Legislate in Violation of International Law?" (1961) 39 C.B.R. 78.

Laskin, Bora, "Reference Re Power of Municipalities to Levy Rates: Case and Comment", (1943) 21 C.B.R. 506.

Marnière, E.S., Éléments de méthodologie juridique, Paris, Librairie du journal des notaires et des avocats, 1976.

Merckx, Alfred, "The Belgium-Ireland Air Transport Agreement Arbitration", Belgian Review of International Law, 1985.

Meyers, Denys P., "The Names and Scope of Treaties", (1957) 51 American Journal of International Law 574.

Morris, Gerald, "The Treaty-Making Power: A Canadian Dilemma", (1967) 45 C.B.R. 478.

Poirier, Donald, "Quelques éléments d'une méthodologie juridique scientifique", (1984) 15 R.D.U.S. 183.

Prelot, M. & J. Boulouis, Institution politique et droit constitutionnel, 9th ed., Paris, Dalloz, 1984, No. 394B.

Rand, Ivan C.J., "Some Aspects of Canadian Constitutionalism", (1960) 38 C.B.R. 135.

Read, J.E., "International Agreements", (1948) 26 C.B.R. 520.

Rosenne, Shabtai, Documents on the International Court of Justice, 2nd ed., The Netherlands, Sijthoff & Noordhoff, 1979.

---------- , Procedure in the International Court of Justice: A Commentary on the 1978 Rules of the International Court of Justice, The Hague, Martinus Nijhoff Publishers, 1983.

Rovine, Arthur W., "Separation of Powers and International Executive Agreements", (1976-77) 52 Indiana Law Journal 397.

Saye, Albert B., American Constitutional Law: Cases and Text, 2nd ed., St. Paul, Minn., West Publishing Co., 1979.

Scott, F.R., "Labour Conventions Case: Lord Wright's Undisclosed Dissent", (1956) 34 C.B.R. 114.

Sparkman, John, "Checks and Balances in American Foreign Policy", (1976-77) 52 Indiana Law Rev. 433.

Vanek, D.C., "Is International Law Part of the Law of Canada?", (1949-50) 8 U. of T. Law Journal 251.

Wade, E.C.S. & G. Godfrey Phillips, Constitutional and Administrative Law, 9th ed., London, Longman Group Limited, 1977.

Wassenbergh, H.A., "Regulatory Reform in International Air Transport", Address on the occasion of the introduction of the International Institute of Air and Space Law, Leyden, 1986.

Lord Wright of Durley, P.C., G.C.M.G., "Commentary on Privy Council's Decision: A.G. Ontario v. A.G. Canada", (1955) 33 C.B.R. 1123.

Young, Carol, "Defending Litigation Against a Foreign Airline Under the Foreign Sovereign Immunities Act", (1986) 51 Journal of Air Law and Commerce, 461.

Cases

A.G. Canada v. A.G. Ontario [1937] A.C. 326.

A.G. Ontario v. Canada Temperance Federation [1946] A.C. 193.

A.G. Ontario v. Scott [1956] S.C.R. 137.

Bitter v. Secretary of State of Canada [1944] 3 D.L.R. 482.

Blackburn v. A.G. [1971] 2 All E.R. 1380.

Chateau-Gai Wines Ltd. v. A.G. Canada [1970] Ex. C.R. 366.

Chateau-Gai Wines Ltd. v. Le Gouvernement de la République Française, 61 D.L.R. (2d) 709.

Flota Maritima Browning de Cuba S.A. and The Steamshp Canadian Conqueror et al. v. The Republic of Cuba [1962] S.C.R. 598.

In Re The Regulation and Control of Aeronautics in Canada [1932] A.C. 54.

Johanneson v. West St. Paul [1952] S.C.R. 292.

Post Office v. Estuary Radio Ltd. [1968] 2 Q.B. 740.

Reference re Powers of the City of Ottawa and the Village of Rockcliff Park to Levy Rates on Foreign Legations [1943] S.C.R. 208.

Salomon v. Commissioners of Customs and Excise [1967] 2 Q.B. 116.

The Christina [1958] A.C. 379.

U.S. v. Belmont (1937) 301 U.S. 324.

U.S. v. Pink (1942) 315 U.S. 203.

Statutes

Constitution Act, 1867, 30 & 31 Victoria, c. 3.

Constitution Act, 1982, enacted as Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11 (Royal proclamation of April 17, 1982, Canada Gazette Extra No. 2 of that date or 116 Canada Gazette, Part I, pp. 2927-8).

Diplomatic and Consular Privileges and Immunities Act, S.C. 1976-77, c. 31.

Foreign Sovereign Immunities Act, 28 U.S.C. (1982).

Ontario Assessment Act, R.S.O. 1937, c. 272.

Ontario Reciprocal Enforcement of Maintenance Orders Act, R.S.O. 1950, c. 334.

Robinson-Patman Act, 15 U.S.C. (1976).

Sherman Act, 15 U.S.C. (1976).

Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf.29/27, May 23, 1969.

APPENDIX

CHRONOLOGY

1955	
Spring	*The Soviet Union, reversing its earlier intransigence, agrees to an Austrian Peace Treaty, signaling a "thaw" in the Cold War, and thus opening way to Geneva Summit Conference.*
July 15	President Eisenhower places subject of U.S.-Soviet civil air agreement on the agenda of the Geneva Conference.
July 21	*At Geneva, Eisenhower's "open skies" proposal ushers in short-lived "Spirit of Geneva."*
October-November	At Geneva Foreign Ministers' Conference, three Western Powers (France, UK, U.S.) propose to USSR tripartite approach to exchange of air services between cities of the three Western countries and the Soviet Union. USSR declines proposal, preferring freedom of action to deal bilaterally with each country.
October 19	USSR concludes bilateral with Finland, permitting reciprocal air services between Helsinki and Moscow—first Soviet civil air agreement with a country outside the socialist camp.
1956	
March 31	USSR concludes bilateral with Scandinavian countries, permitting SAS to serve Moscow, and Aeroflot to serve Copenhagen, with "beyond rights" to London, Paris, Brussels, and Amsterdam. Aeroflot international route expansion begins in earnest.[2]

[2] Subsequently, USSR concluded bilaterals with the UK (December 19, 1957) and, during 1958, with Holland, France, Belgium, and India.

April 24	Soviet Embassy (Washington) approaches Pan Am Vice Presidents to discuss possible Pan Am service to USSR and Pan Am-Aeroflot commercial relations.
May 17	State and CAB authorize Pan Am to continue exploratory discussions; low-level negotiations in Moscow between Pan Am and Aeroflot lead to conclusion of routine interline ticketing arrangements.
June 29	Tripartite proposal for exchange of air services between Western countries and USSR is included in U.S. 17-point program for promotion of East-West contacts, recommended by NSC and approved by President.
November 4	*Soviet military suppression of Hungarian uprising puts temporary damper on enthusiasm for East-West contacts, resulting in one-year hiatus.*
1957	
October 28	U.S.-Soviet discussions on cultural exchanges begin in Washington. One of 52 proposals submitted by Soviet delegation offers "agreement in principle on the establishment of reciprocal direct air transportation between U.S. and USSR."
November 29	U.S. delegation supports the proposal, provided the air transport services would be conducted in accordance with Chicago Convention and standard provisions of more than 50 bilateral air agreements to which U.S. is already a party.
December 9	President approves new policy guidance on "U.S. Civil Aviation Policy toward Sino-Soviet Bloc." Stresses need to (1) base U.S.-Soviet civil air relations on principle of "equal benefits" and acceptance of established international conventions and standards; (2) protect U.S. internal security; and (3) persuade other Free World nations to join common policy to prevent Soviet exploitation of agreements for "penetration" and other nefarious purposes.
1958	
January 27	U.S.-USSR Cultural Exchange negotiations concluded with signing of "Lacy-Zaroubin Agreement." Section 14 of agreement deals with civil aviation: "Both parties agree in principle to establish on the basis of reciprocity direct air flights between the U.S. and the USSR. Negotiations on terms and conditions satisfactory to both parties will be conducted by appropriate representatives of each Government at a mutually convenient date to be determined later."

February-July	*Increased apprehension over Soviet policies in Middle East, culminating in dispatch of U.S. Marines to Lebanon (July 14), causes controversy and second thoughts on desirability of bilateral within U.S. government aviation community.*
June 18	Because of difficulty of reaching consensus on terms of bilateral, Economic Bureau of State urges Under Secretary to substitute interim technical discussions on limited charter services for full-fledged negotiation of bilateral.
July 21	Interdepartmental Committee on Internal Security (ICIS) completes extensive study of internal security aspects of entry into U.S. of Soviet Bloc civil aircraft. Report sets forth detailed internal security safeguards necessary before any agreement is concluded.
July 23	Premier Khrushchev, at Moscow reception, chides Ambassador Lewellyn Thompson for U.S. footdragging on bilateral, claims USSR ready to open negotiations "the next day"
August 12	Ambassador Thompson, in informal letter to head of State's Economic Bureau, protests delay, urges Department to move promptly to full negotiations to avoid Soviet charge that U.S. is stalling. Within Department, Thompson's views are strongly supported by Office of Eastern European Affairs (Foy Kohler)
September-October	Thompson-Kohler prodding leads to action: State meets informally with interested carriers to discuss problems of bilateral and to elicit their views (September 11); briefs CAB members in Executive Session and obtains their approval of bilateral in principle, provided "an economically feasible agreement can be worked out" (September 22); drafts note to Soviet government indicating U.S. readiness to open negotiations within 30 days after receipt of Soviet expression of its views (October 13).
October 18	Note approved by Acting Secretary Herter and presented to Soviet Foreign Office by Ambassador Thompson (October 24).
November	*Berlin confrontation heats up; Khrushchev announces (November 10) determination to end Western occupation of Berlin; informal note to Western powers (November 27) issues six-months' ultimatum for terminating present status, declaring intent to abrogate Soviet Berlin obligations. Resulting crisis puts off all thoughts of bilateral.*
December 25	Soviet Foreign Office informs U.S. Embassy Moscow that matters raised by U.S. note of October 24 were under consideration by the "competent Soviet organizations" and Embassy would

be informed as soon as their views were obtained. (In fact, Soviet Foreign Office response was not forthcoming until March 31, *1960*—see below.)

1959

June 16 — *Western concessions at Geneva Foreign Ministers Meeting ease Berlin crisis. Eisenhower invites Khrushchev to "informal" visit to U.S.*

July 25 — Pan Am President Juan Trippe, accompanying Vice President Nixon on "Kitchen Debate" visit to Moscow, meets informally with Col. Gen. Evgeniy Loginov, Chief of Aeroflot; discusses airline aspects of exchange of flights.

August-September — Preparatory technical discussions of negotiating problems resume within U.S. government, particularly between FAA, CAB, and State; detailed analysis made of UK-USSR agreement; decision reached to follow roughly same three-part format: (1) a basic agreement between the two governments, (2) a technical annex relating to safety matters—airworthiness, air traffic control, airports and avionics—and (3) an intercarrier agreement—subject to government approval—covering commercial and airline operating aspects, such as rates and capacity.

September 25-26 — *Khrushchev, at Camp David meeting with Eisenhower, withdraws time limit on Berlin in exchange for Eisenhower agreement to Big Four Summit in 1960. Ushers in "Spirit of Camp David."*

September 27 — General Loginov, accompanying Khrushchev on U.S. visit, again meets with Juan Trippe, at Pan Am headquarters in New York; Loginov eager to begin service by summer 1960; holds out prospect of 15,000–20,000 Soviet tourists; proposes exchange of airline technical delegations to inspect each others' airport and aviation facilities; suggests U.S. use its good offices to persuade Scandinavian countries to grant Aeroflot overflight rights on its route to New York. (Suggestion is in sharp conflict with U.S. government effort to develop "common policy" among NATO countries on Soviet civil aviation "containment" and insistence on strict reciprocity.)

October 3 — State (Office of Aviation) concludes USSR attempting to bypass U.S. government by having Aeroflot deal directly with Pan Am, in attempt to settle major issues between carriers to make subsequent governmental negotiations perfunctory; State asks Pan Am to refrain from further talks, not send technical delegation to Moscow.

November 21	Cultural Exchange agreement extended for two more years; provision on exchange of air services again incorporated in new agreement.
December 2	Congressman Ernest Gruening (Dem., Alaska), in letter to Khrushchev, expresses hope that regular air services might soon be established across Bering Strait between Alaska and Siberia.
1960	
February-March	U.S. Embassy Moscow gives informal indications to Soviet Foreign Office that if they wish to negotiate air agreement, they should reply to U.S. note of October 24, 1958.
March 31	Soviet Foreign Office informs U.S. Embassy Moscow that USSR is ready to open negotiations in April or May but submits no proposed draft agreement or substantive proposals.
April 22	U.S. replies, indicating April-May preempted by other commitments; proposes negotiations open July 18 in Washington, urges USSR to submit own proposed draft.
April-July	Intensive interagency preparations for forthcoming negotiations. Agencies agree to depart from U.S -standard liberal Bermuda-type agreement in Soviet case; on security and economic grounds, restrictive type is thought to provide greater security control and protection for U.S. carrier. CAB/FAA produce redraft of UK/USSR agreement, incorporating detailed safety provisions in technical annex, since USSR not member of ICAO, and detailed rate provisions in intercarrier agreement, since Aeroflot not member of IATA—carrier agreement to be supervised by government and subject to approval of CAB.
May 1	*U-2 shot down over Soviet territory; wrecks Four-Power Summit scheduled to open in Paris later in month, casts pall over U.S.-Soviet relations.*
May 26	General Loginov holds press conference in Moscow indicating Aeroflot still planning to negotiate air agreement—much to surprise of U.S. agencies, in view of post-U-2 atmosphere.
June 7	Soviet Foreign Office formally accepts July 18 date for opening of negotiations.
July 4	Soviet Foreign Office transmits Soviet draft civil air agreement through U.S. Embassy Moscow; draft subjected to intensive study by interagency preparatory group; found grossly inadequate on many points.

July 11	*RB-47 aircraft shot down by Soviet interceptors over Barents Sea; crew captured and detained.*
July 13	After consultation with NSC, State, Defense, and CAB, Secretary Herter telephones President Eisenhower at Newport informing him that, in view of the RB-47 incident, those associated with civil air negotiations "all want to see it postponed." Eisenhower approves text of aide-memoire to be delivered to Soviet government which states that ". . . Department does not believe present would be auspicious time to initiate negotiations."
July 14	Aide-memoire delivered to Soviet Foreign Office and press release issued in Washington.
August 1-23	Soviet Civil Air Transport Delegation headed by Aeroflot Deputy Chief Lt. Gen. G. S. Shchetchikov visits U S. as guests of FAA, under 1959 Cultural Exchange Agreement; inspect U.S. civil aviation facilities.
September 3-30	U.S. Civil Air Transport Delegation, headed by FAA Administrator Gen. Elwood R. Quesada, visits USSR as guests of Aeroflot, reciprocating Soviet visit to U.S. State instructs delegation that discussion of bilateral is inappropriate until Soviets release RB-47 crew.
1960-1961	
November-January	*Change of Administration (Eisenhower to Kennedy); Soviet Government unofficially signals readiness to release RB-47 crew once new Administration takes office.*
1961	
January 19	General Quesada, in letter to Secretary of State Designate Rusk, cautions that "it will be neither possible nor wise to negotiate a [standard] agreement with the USSR." Argues, on basis of recent delegation observations, that "it will be necessary to negotiate the most detailed of arrangements" if U.S. carrier is not to be placed at great disadvantage vis-à-vis Aeroflot.
January 20	*President Kennedy assumes office; launches diplomatic initiative to create less vituperative U.S.-Soviet atmosphere; instructs Ambassador Thompson to discuss with Khrushchev whole spectrum of U.S.-Soviet relations. As practical first step, suggests prompt review, through diplomatic channels, of past proposals presented by either side.*

January 24	Ambassador Thompson, in discussion with Khrushchev, indicates U.S. readiness to undertake negotiation of air agreement (as well as open discussions on establishment of U.S. Consulate General at Leningrad and Soviet Consulate General in New York)
January 24	*Khrushchev orders release of RB-47 crew; explains to Ambassador Thompson that act was deliberately timed to benefit the new Administration.*
January-February	Interagency working group (State, CAB, FAA, Defense, Commerce) reviews status of bilateral. Principal issues: (1) basic agreement—which version to adopt: U.S. redraft of UK-USSR version or CAB redraft of Soviet version? (2) technical annex—how to deal with airworthiness; (3) intercarrier agreement—Pan Am fears operation would be "fraught with problems and economic loss"; (4) security precautions—agreement on routes and technical stops; (5) U.S. aviation policy toward Soviet Bloc—inherent conflict between that policy and bilateral; (6) tactics, timing—U.S. versus Soviet initiative.
February 16	In memorandum to the President, Secretary Rusk seeks approval for extending invitation to Soviet government to reschedule negotiations "in general context of improving relations with the USSR."
February 21	President approves; Department gives Soviet Embassy aide-memoire indicating U.S. prepared to begin negotiations in Washington; promises to transmit draft agreement to Soviet government in 30 days.
February-March	Interagency position hammered out in five successive State drafts. Principal sticking points: (1) security aspects (Defense concern over flight paths, technical stops, alternate airports); (2) export control (Defense and Commerce objections); and (3) intermediate traffic points (CAB, reflecting carrier preferences). Differences largely resolved.
March 21	Draft 5 approved by White House; President requests preparation of statement of U.S. negotiating objectives for his approval.
March 24	Approved draft transmitted to Soviet government.
March 29	Copies of draft circulated to NATO and other friendly governments with assurances that agreement does not signify change in U.S. aviation policy.
March 29	CAB briefs U.S. carriers confidentially on special nature of proposed agreement. Points out that agreement departs sharply from normal Bermuda-type for reasons of security and

	because USSR not member of ICAO and Aeroflot not member of IATA. Restrictive characteristics: (1) provides for service only to terminals in each country, no "beyond rights"; (2) only one carrier designated by each country; (3) capacity predetermined; (4) capacity and rates fixed by agreement between carriers, subject to approval by both governments; (5) both airlines must begin services concurrently; (6) services of both can be suspended by either government; (7) agreement can be terminated on six months' notice.
April 14	Statement of U.S. negotiating objectives, prepared by State's Office of Aviation, receives President's approval, is distributed to members of U.S. delegation as negotiating instructions.
April 26	White House appoints James M. Landis, Special Assistant to the President, to head U.S. negotiating delegation.
May 12	*Khrushchev revives idea of meeting with President Kennedy; idea presumed dead after ill-fated Bay of Pigs landing (April 17); Khrushchev proposes meeting in Vienna, early June.*
May 20	Soviet Foreign Office proposes June 21 date for opening negotiations on air agreement; U.S. counterproposes later date of July 18. Reason: to give U.S. more time to observe Soviet behavior on Laos, nuclear test ban, and Berlin issues; if trend of increasing Soviet intransigence continues, U.S. prepared to declare another postponement.
June 3-4	*Kennedy has "somber" meeting with Khrushchev at Vienna.*
July 3	Soviet Foreign Office accepts July 18 date for opening negotiations.
July 18	Negotiations begin in Washington. U.S. delegation, chaired by Landis, includes State, CAB, FAA, Defense, Commerce representatives, and Pan Am Vice President as observer. Soviet delegation headed by Loginov, Chief of Aeroflot.
July 18-August 4	In cordial atmosphere, eleven plenary sessions and countless working-group sessions result in agreed text of intergovernmental air transport agreement, including two Annexes and Agreed Minutes.
August 5-17	Intercarrier agreement negotiated between Pan Am and Aeroflot. Pan Am team headed by Executive Vice President John Leslie, with Secor Browne of MIT as Consultant and Joseph Watson of CAB as U.S. government observer; Aeroflot team headed by Viktor Danilychev, Chief, International Relations Bureau, Aeroflot.

July-August	*U.S.-Soviet relations deteriorate steadily over Berlin.*
August 13-17	*East German troops occupy East-West Berlin crossing points; begin construction of Berlin Wall.*
August 18	President confers with Secretary Rusk and Assistant Secretary Kohler; decides time not appropriate to sign bilateral air agreement; authorizes that text agreed by negotiators be initialed to record satisfaction with agreement *per se*, but actual signing and implementation be postponed to "more propitious time."
August 21	Text initialed by Deputy Under Secretary U. Alexis Johnson for U.S. and Gen. Loginov for USSR—U.S.-Soviet aviation relations go into long, deep freeze.
1962	
Spring	Intensified State Department efforts to contain Soviet civil aviation expansion especially into Asia, Africa, and Latin America.
July 10	Joseph Fitzgerald appointed to head State Department's program to counter Soviet "aviation penetration." Launches policy reassessment.
October 15-28	*Cuban Missile Crisis—climax in U.S.-Soviet confrontation. In its aftermath, Khrushchev and Kennedy redouble efforts to return to "sensible norms of international relations."*
November 15-17	Lt. Gen. Shchetchikov, Deputy Chief of Aeroflot, on visit to Washington for ceremonial inauguration of Dulles Airport, informs FAA Administrator Najeeb Halaby that Soviet government has empowered him to sign bilateral; Department informs him that U.S. government considers time not yet propitious.
1963	
Winter-Spring	*Khrushchev more receptive on nuclear test ban talks.*
March 26	President asks Secretary Rusk if this is a good time to sign air agreement, as inducement to USSR to move on test ban treaty and other issues.
April 1	Rusk, in memo to the President, expresses Department's view that "there have been no developments in the international situation which . . . make it any more desirable to sign this

agreement now." Argues that conclusion of agreement would "seriously impair U.S ability to persuade underdeveloped countries to refuse the USSR overflight and other air rights." Feels there would first have to be "some development representing a major step in improving our relations [e g , nuclear test ban, *modus vivendi* over Berlin] before signing would be in our interest." Observes that Soviets appear to be in period of reassessment of policies toward West. "We do not feel that, at this juncture, our willingness to sign the air agreement, which is of relatively minor significance, would tip the scales."

April 4 — Secretary Rusk approves new policy statement on U S -Soviet bilateral, developed as part of Fitzgerald reassessment. Key portion of statement: "The entry of a U S. carrier into the USSR is of little economic value to the U S. and involves no significant element of national prestige. We should not enter into an air services agreement with the Soviets as long as the advantages to us are outweighed by the disadvantages, and especially while we can hope by such a policy to prevent or inhibit the penetration of developing countries by the Soviets through air services agreements. Soviet entry into the U S is, on the other hand, a matter of great political importance to them and is a substantial concession which the U S can make at an appropriate time .. Because of the political disadvantage for the U S. involved in bilateral U S.-USSR air services, the institution of such services should be considered only following a major improvement in general relations between the two countries"

June 10 — *President Kennedy offers "Strategy of Peace" to Communist world in major American University speech.*

July 28 — *Nuclear test ban agreement concluded by Khrushchev and Harriman in Moscow.*

August-September — Renewed consideration of pros and cons of air agreement within State and CAB

September 4 — CAB Chairman Alan Boyd, in letter to Secretary Rusk, reports Board's negative view of bilateral. Argues that, in aviation-economics terms, agreement disadvantageous to U.S: route of marginal value to U.S. carrier, of considerable value to Aeroflot; Soviet nonmembership in ICAO and IATA creates awkward technical and rate control problems; Board opposed to signing.

September 18 — Interagency Committee on International Aviation Policy (ICIAP), chaired by Under Secretary Harriman, convenes to discuss air agreement, in response to President's expressed desire to sign agreement now. Consensus of ICIAP: no insupera-

	ble difficulties to prevent consummation, if considered desirable for political reasons; however, since benefits of agreement are greater for USSR, U S should seek additional concessions, such as Soviet approval of leased teletype line to U S Embassy Moscow, or conclusion of Consular Convention
September 24	*Test ban treaty ratified by U.S. Senate.*
September 28	Secretary Rusk, during talks with Soviet Foreign Minister Gromyko at UN General Assembly session in New York, indicates U S considering initiating technical talks with USSR in connection with planned visit to USSR by FAA Administrator Halaby
October 10	President Kennedy, at signing of test ban treaty in Washington, informs Gromyko that U S is now ready to discuss technical aspects of air agreement, to carry forward momentum of post-test-ban atmosphere
October 11	Senator Mike Monroney (Dem , Oklahoma) during courtesy visit by Department officers, expresses opposition to bilateral both on economic and international relations grounds
November 22-26	*President Kennedy assassinated President Johnson, determined to sustain Kennedy momentum toward easing world tension, seeks "to find common ground on lesser problems to inject new life into talks with the Russians on several problems on which we had made little or no progress in the past "*[1]
November 26	Soviet Deputy Premier Anastas Mikoyan, in Washington for Kennedy's funeral, tells President Johnson Soviet government still very much interested in air agreement
December 7	President Johnson instructs Halaby "to solve any remaining technical problems impeding an air agreement" during his imminent visit to Moscow.
December 11-18	Halaby holds extensive technical discussions with Ministry of Civil Aviation officials in Moscow Agreement reached on agenda of technical issues to be resolved, but Soviet officials insist bilateral must be signed before technical issues can be dealt with. At subsequent press conference, Halaby indicates agreement expected to be signed within 30 days; flights to commence in Summer 1964. "The Russians are ready to sign now "
December 19	Halaby Report forwarded to Secretary of State with Ambassador Foy Kohler's recommendation for favorable decision on signing.

[1] Lyndon B Johnson, *The Vantage Point*, Holt, Rinehart & Winston, Inc., New York, 1971, pp 463-464

1964

January 8	*President, in State of Union message, announces U.S. intention to cut back enriched uranium production by 25 percent. U.S.-Soviet discussions on Consular Convention, Cultural Exchanges, and Leased Line agreement all show tangible progress.*
January 24	Senator Thomas Dodd (Dem., Connecticut) appeals to administration to reconsider wisdom of entering into air agreement with USSR; sees no advantage from such agreement.
January-February	Under Secretary Harriman solicits Department's and agencies' views on desirability of signing air bilateral. Ambassador-at-Large Thompson, arguing in favor, stresses "rather nebulous, but important, psychological advantages" of signing; Assistant Secretary (for Latin American Affairs) Mann, expressing strong opposition, foresees "serious adverse consequences" for our Cuban isolation and counter-Soviet penetration policies in the hemisphere; Assistant Secretary (for Congressional Relations) Dutton urges indefinite postponement, on grounds of domestic and Congressional considerations; Assistant Secretary of Defense Sloan reiterates long-standing Defense dissatisfaction with security and political aspects of agreement; canvass of 35 Foreign Service posts reveals none feel U S would be criticized for signing and most feel agreement would be welcomed.
February 13	Harriman, in memo to Secretary Rusk, summarizes divergent views; prepares draft Memorandum to the President listing advantages and risks and recommending "that we should not prejudice the chances of an OAS agreement on the air and sea isolation of Cuba, by agreeing now to sign."
February 22	*U.S.-Soviet Cultural Exchange Agreement for 1964-1965 signed.*
February 24	Rep. William Minshall (Rep., Ohio) inserts in *Congressional Record* Robert Hotz editorial in *Aviation Week*, strongly opposing bilateral.
March 20	Joint Senate-House Republican Leadership issues formal statement opposing signing of agreement. Statement points to repeated Soviet shootdowns of USAF aircraft over East Germany (T-39 in January, RB-66 in March); questions safety of commercial airlines in Soviet airspace; also cites unequal benefits of agreement, increased espionage danger, tacit encouragement of Soviet infiltration in Latin America.
April 4	In response to Presidential request, Secretary Rusk sends Memorandum to the President reviewing pros and cons of sign-

	ing now Proposes postponement of decision in view of likely Congressional and domestic opposition for following too closely on the heels of other agreements increasing ties with Russia and the T-39 and RB-66 incidents, and in order not to jeopardize pending OAS action on air and sea isolation of Cuba. Secretary recommends "that the desirability of signature be assessed again, once prospects for action under OAS resolution have been exhausted."
June 1	*Consular Convention, first bilateral treaty between US and USSR, signed in Moscow. Meets heavy Congressional opposition. (Senate ratification delayed almost three years!)*
July-November	Congressional opposition and requirements of Presidential election campaign keep air bilateral suspended even though OAS effort had failed.
October 15	*Khrushchev ousted, replaced by Brezhnev-Kosygin "collective leadership."*
November 10-12	Brief flurry of activity following Presidential election Department considers desirability of signing air agreement as goodwill gesture to new Soviet regime. Under Secretary Harriman and Ambassador Thompson advise Secretary Rusk not to raise subject with President, in view of uncertainty over new Soviet leadership, Soviet nonpayment of its UN dues, and possible negative effect on Senate ratification of Consular Convention
December 9	President Johnson and Secretary Rusk review with Soviet Foreign Minister Gromyko whole range of *multilateral* U.S -Soviet issues (nuclear proliferation, disarmament, "German Peace Settlement," Vietnam, East-West trade) President expresses desire to move ahead on *bilateral* issues, citing Consular Convention (now pending Senate ratification) and his hope to proceed with civil air agreement "after appropriate Congressional consultations."
1965	
February 15	FAA Administrator Halaby reminds Secretary Rusk of need to move fast on air bilateral if service is to begin in time for only profitable summer season. Ambassador Thompson replies (February 27) that "there has been no decision to sign and outlook for near future remains unclear "
August 5	Secretary Rusk, testifying before Senate Foreign Relations Committee in support of Consular Convention, explains to Senator Hickenlooper that air bilateral is stalled "because there have been some general problems in our relations that

have stood in the way, . [but it is an area] where it might be possible to move when the opportunity arises."

1965-1966 — *Deepening U.S combat involvement in Vietnam, and public resentment of Soviet assistance to North Vietnam put civil air bilateral in deep freeze once more*

1966

February 15 — ICIS issues revised guidelines on "Internal Security Safeguards" applicable to Soviet Bloc aircraft entering U.S., revisions designed to cover charter flights as well as scheduled services.

June 10-22 — Pan Am Board of Directors fly to USSR and Eastern Europe in Pan Am 707, on annual "familiarization tour", are cordially received in Moscow and Leningrad by Gen Loginov and Aeroflot officials.

June 13 — State Department's European Bureau takes initiative to revive air agreement issue. Argues in memo to Secretary Rusk that "air agreement is the only feasible step we can take at this time to give positive content to our repeated professions that we desire an improvement in our bilateral relations with the USSR." Prepares draft Memorandum to the President recommending President authorize Department to inform Soviet Government that U.S. is willing to conclude agreement in November or December.

June 13 — Within State's Economic Bureau, Deputy Assistant Secretary for Transportation Frank Loy, in memo to Assistant Secretary Anthony Solomon, reviews past arguments against signing the agreement. Finds that these arguments "become less cogent as time passes." Points out that (1) Japan and Canada, two other major holdouts, have signed bilaterals with USSR or are about to; (2) Aeroflot "penetration" of less-developed countries is no longer viewed as great menace; (3) by renegotiating better route exchange (such as intermediate stop for Pan Am in Europe), agreement could be made less disadvantageous for U.S. Recommends concurrence in European Bureau's draft Memorandum.

July 11 — Canada-USSR bilateral signed in Montreal, permitting exchange of services between Montreal and Moscow for Aeroflot and Air Canada.

July 15 — Secretary Rusk transmits to President previously drafted Memorandum; President holds action in abeyance, while making preparations for major new "peaceful engagement" initiative.

August 26	*President, in Idaho Falls speech, stresses determination to "seek areas of agreement [with USSR] . . despite serious differences arising over the Vietnam conflict, thereby helping to lessen international tensions." Continues work on preparing package of measures to increase East-West ties.*
September 10	President and Rusk decide to move toward signing of civil air agreement.
September 11-12	Assistant Secretary Douglas MacArthur II, at President's behest, consults with leading members of Congress, soliciting their views "before final action." Encounters absolutely no objection from either side of House or Senate.
September 13	Rusk, in cable to Embassy Moscow, informs Ambassador Kohler of decision; instructs him to convey to Gromyko U S proposal to sign soonest, preferably at UN session in October
September 13-16	State informs CAB, FAA, Department of Transportation, and Najeeb Halaby, now President of Pan Am.
September 20	Ambassador-at-Large Thompson meets with Soviet Ambassador Dobrynin; reaffirms U.S. decision to proceed with signing.
September 21	Ambassadors Thompson and Kohler meet with Pan Am President Halaby in New York. Halaby professes deep anxiety over commercial implications of agreement, claims it places Pan Am "between deficit and disaster "
September 22-24	*Rusk-Gromyko talks during UN General Assembly meetings achieve major breakthrough on nonproliferation treaty*
September 26	Ambassador Thompson reports Soviet Government ready to sign agreement, but prefers to "play down" the event.
October 2	Senator Warren Magnuson (Dem., Washington), on visit to Moscow, reveals possibility of signing.
October 3	Presidential Assistant Bill Moyers approves issuance day early of Press Release (coordinated with Soviet Embassy) announcing resumption of Pan Am-Aeroflot technical talks looking toward signature. "The air transport agreement," says State Department Press Officer McCloskey, "is perhaps the one area where we can make progress in a demonstrable and forthcoming fashion, without raising broader considerations of national policy."
October 7	*President Johnson, in major policy speech before National Conference of Editorial Writers, reveals "peaceful engagement" package long in preparation—series of concrete steps toward*

East-West reconciliation. Lists conclusion of civil air agreement as one of the proposals.

October 11 — Pan Am President Halaby, in meeting with CAB members and Department representatives, requests authority to institute revenue pooling arrangement with Aeroflot if this proves necessary. Alarm at potential Pan Am inability to obtain fair share of New York-Moscow traffic and possibility that Aeroflot might carry out "dumping maneuver" to justify increasing its frequencies. Board Chairman finds Halaby presentation unpersuasive. Board and State officials encourage Halaby to explore possibility of bolstering the marginal nonstop service with an intermediate traffic point.

October 17 — Deputy Assistant Secretary Loy, in letter to CAB Chairman Murphy, suggests that intermediate points in Europe be added to the route. (CAB subsequently indicates no objection to suggestion.)

October 18-25 — Series of State-chaired meetings held with CAB, FAA, Commerce, and Weather Bureau to bring 1961 agreement up to date and incorporate minor structural changes desired by USSR.

October 24-29 — Series of meetings held between Pan Am (led by Vice President Shannon) and Aeroflot (led by International Relations Chief Danilychev) in presence of State and CAB observers achieve compromises on proposals of both sides.

November 4 — AGREEMENT FINALLY SIGNED in Washington for U.S. by Acting Deputy Under Secretary Thompson and for USSR by Aeroflot Chief Loginov. Agreement comprises three separate documents: (1) main civil air transport agreement embodying basic principles; (2) supplementary agreement covering technical aspects of operating air services; and (3) exchange of diplomatic notes containing understandings on terms and concepts. Prior to signing, Loy and Danilychev exchanged letters (not for publication, though not classified) concerning modalities for making future changes in agreed routes. Expectation is that service can begin in late spring 1967, *provided* U.S.-USSR technical agreement (on safety, navigation, etc.) and Pan Am-Aeroflot commercial agreement (on schedules, traffic matters, etc.) are speedily concluded. From this point on, bilateral shifts from political to technical arena.

November 17 — Department transmits to USSR Ministry of Civil Aviation (MCA) "Action Plan" for implementation of agreement; lists steps remaining and tentative completion dates: (1) exchange of laws and regulations and data on facilities (November - December); (2) technical conferences in Moscow and New York

	(January - February 1967); (3) exchange of flight data (by February 1); (4) technical/operational certification of both carriers (by March 1); (5) technical proving flights by both carriers (by April 1); (6) inauguration (by May 1).
December 19	MCA approves action plan; insists on strict reciprocity in all steps.
1967	
January 23	U.S.-Soviet technical agreement and Pan Am-Aeroflot technical agreement signed in Moscow Pan Am sounds out Aeroflot on possibility of permitting each airline to choose one of six intermediate stops in Europe, without traffic rights between that stop and other country Aeroflot favorably inclined.
February 16	State asks CAB approval for addition of Stockholm, Copenhagen, London, as well as Amsterdam, Brussels, and Paris, as intermediate stops "to make route more economically attractive to Pan Am" than pure nonstop service. State prefers to limit list initially to first three cities, since these are of most interest to Pan Am. Prefers not to include Amsterdam, Brussels, and Paris, on grounds of "undesirable third-country negotiating consequences." Withholding of these three intermediate points is desired "to minimize chance of Aeroflot obtaining transit rights to Cuba via European points." (Sweden and Denmark had already granted such rights!)
March 9	CAB approval and DoD clearance obtained.
March 16	White House approves amending agreement to include three intermediate stops in Europe.
March 16	Aeroflot files application for Foreign Air Carrier Permit with CAB.
March 24	Serious technical difficulties arise in U.S.-Soviet talks in New York, mostly over Soviet turboprop TU-114 aircraft (noise problems, runway length requirements, inadequate airborne avionics, excessive holding-pattern speed). Aeroflot failure to provide detailed performance data blocks resolution of problems.
April 10	CAB Chief Examiner recommends granting Aeroflot air carrier permit.
April 24	Aeroflot files exception to carrier permit condition of USSR having to accept "absolute liability" under Warsaw Convention. CAB defers further action on carrier permit.

May 4	Assistant Secretary of State Anthony Solomon meets with Soviet Chargé and other Embassy officials to explain history and significance of "absolute liability" issue. Urges Russians to withdraw exception.
May	Technical talks essentially stalled; date of inaugural flight indefinitely postponed.
June 1	Aeroflot Chief Loginov informs Pan Am Chairman Juan Trippe of reluctant Soviet decision to abandon idea of using TU-114 in Moscow-New York service, await availability of new pure-jet IL-62, to be in service last quarter of year.
June 23-25	*President Johnson, Chairman Kosygin hold inconclusive, disappointing talks at Glassboro.*
October 24	Soviet Ambassador Dobrynin informs Assistant Secretary Kohler Aeroflot planning IL-62 proving flight to New York mid-November.
November 4	Soviet-Canadian bilateral amended to give Aeroflot "beyond rights" in Montreal for New York.
November 6	Soviet Embassy informs Department that Aeroflot proving flight scheduled to arrive in New York (via Montreal) November 20; technical delegations to arrive a few days earlier to resolve all outstanding problems. Soviets determined to hold on to November 20 date "like dog to a bone."
November 17	Aeroflot accepts U.S. route proposals, provided Montreal is added as intermediate stop. Pan Am agrees, provided stopover rights granted on all blind sectors.
November 21	IL-62 proving flight arrives in New York (J. F Kennedy Airport).
November 21-28	U.S. and Soviet technical groups conduct extensive technical discussions, airport checkout flights to Washington (Dulles), Philadelphia (International), and Boston (Logan).
November 28	Ambassador Dobrynin complains to Assistant Secretary Kohler about "confused maze" of U.S. multiagency technical requirements; asks Kohler to help "untangle the air negotiations."
November 28	Soviet aide-memoire withdraws exception to "full liability" clause in air carrier permit.
November 29	White House approves addition of Montreal as intermediate stop. Soviet and FAA delegations reach agreement on all out-

	standing technical questions, sign Memorandum of Understanding. Soviet delegation departs for Montreal on IL-62.
1968	
January-April	Prolonged haggling over choice of intermediate points and stopover privileges creates further delay in reaching agreement on route amendment. Possibilities considered include, for Pan Am, Frankfurt, Munich, Vienna; for Aeroflot, Prague, Warsaw, East Berlin; latter eagerly sought by Aeroflot, but would create great complications in tripartite access and air corridor problems.
May 6	Agreement finally reached by exchange of notes in Moscow Civil Air Transport Agreement amended to add Stockholm, Copenhagen, London, Montreal as intermediate points, with only one of these points to be served during any summer or winter season. Only air carrier permit formalities remain before inaugural flights can take place
May 16	Aeroflot files amended application for permit with CAB
June 3	Board Examiner recommends grant of permit
June 8	Board issues permit.
June 21	President approves permit
July 1	*Nuclear Nonproliferation Treaty signed at White House; agreement reached to begin SALT talks.*
July 15	Aeroflot IL-62 inaugural flight arrives at New York (J. F Kennedy Airport); Pan Am 707 inaugural flight departs for Moscow, on once-weekly service between the two cities.
August 21	*Soviet Army occupies Czechoslovakia.*
September 5	Secretary Rusk informs Ambassador Dobrynin that second Aeroflot inaugural flight should be postponed "because of the current international situation."