VENEZUELA'S BILATERAL AIR TRANSPORT AGREEMENTS AND PROBLEMS OF INTERPRETATION IN THE JET ERA

by

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Preface

The subject of this study was chosen mainly because of its interest for the author, but in as much as it deals with a current controversy - the interpretation of Venezuela's bilateral air transport agreements - it is hoped that it will also be of interest to the student of international air law and regulation.

General studies in this field were begun at the Institute of International Air Law, McGill University, under the experienced and informed supervision of Dr. Eugene Pepin in 1958, and the early part of 1959. The research for this paper was continued during 1959, 1960 and 1961 in Venezuela, where I am employed by Pan American World Airways, Inc., and have had the opportunity to witness the developments described herein.

The facilities of the Law Libraries at the University of California at Los Angeles and of the University of Miami were utilized for recent research; the staffs have lent courteous cooperation. The records of Pan American World Airways, Inc. have been a valuable source of information, for which I also wish to express gratitude.

This study deals with the impact of the jets on the interpretation of Venezuela's bilateral air transport agreements, and is preceded by a brief summary of the historical development of regulation as background to the current questions. While international civil aviation admittedly involves military, political, social and technical considerations, the scope of this study is limited to problems raised in the economic regulation of commercial carriage of passengers in

scheduled international air services.

Finally, I wish to state that I have tried to maintain an impartial attitude toward the issues discussed herein, despite my professional affiliation with one of the American air carriers involved in the controversy.

D.M.B.
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TABLE OF CONTENTS

TABLE OF CONTENTS

VENEZUELA'S BILATERAL AIR TRANSPORT AGREEMENTS AND PROBLEMS OF INTERPRETATION IN THE JET ERA

Introduction

Aviation is dynamic. In air transportation progress constantly outstrips the most optimistic predictions, and the great post-World War II advances in the aeronautical sciences have produced a new dimension in air transportation: the commercial turbo-jet aircraft.

In referring to these new aircraft, one writer states, "It is not adequate to simply say that they are just a faster, bigger aircraft. They are so much faster and so much more productive (than piston and turbo-prop aircraft) that they require a complete review of the patterns of air transportation." (1)

For several years now, aeronautical engineers, traffic controlers, government authorities, as well as airline operations and traffic experts have given considerable time and effort to the study of the technical changes required by the new giants of the sky.

Less attention has been devoted to the non-technical aspects, and one of the most pressing problems which currently demands thorough examination is the impact of this "new dimension" on the exchange of commercial traffic rights along the world's air routes. (?) More precisely, what is the effect of the jets on that part of public international air law which deals with the regulation of air transport among nations?

The general principles contained in international conventions on civil aviation, the terms of bilateral treaties and exchanges of diplomatic notes, and the unilateral granting of concessions by which international air transport has been regulated, were drawn up when piston aircraft dominated air

travel. And general revision of these arrangements was not undertaken with the introduction into service of gradually larger and faster piston and turbo-prop aircraft.

But how are these agreements to be interpreted when aircraft of a radically different nature are put into service? Can such terms as "capacity" and "frequency" be applied in the same traditional way when one jet can do the work of three piston aircraft? What is the meaning of "fair and equal opportunity" and "reciprocity" when the airlines of one nation possess jets and the airlines of the other party to a bilateral agreement do not?

The overwhelming competitive advantage of the jets makes modern piston and turbo-prop aircraft obsolete on long routes in terms of public demand. Is a protectionist policy justified on the part of a nation whose national carrier does not operate jets in order to prevent undue competitive advantage by the foreign flag carrier having jets? Assuming that some measures must be taken to make adjustments to this new situation, should existing agreements be revised or is the answer to be found in a multilateral convention?

Some of these problems created by the jets were anticipated in a general way several years ago. In June of 1958 the Air Transport Committee of ICAO published a study on the economic aspects and suggested "...governments may find it necessary to reexamine certain aspects of their air transport policies in the light of the economic position of their carriers. Among the matters possibly requiring such reconsideration are...bi-lateral or multilateral agreements on the exchange of commercial rights, taking into consideration the new conditions of competition and cooperation and the new pattern of air services." (3)

The following observations, made in 1959 are quite apropos of present difficulties: "For the time being jets can fit into the trans-oceanic

routes without great trouble, but as more and more jets are put into operation and as they fly to the outposts of the world, problems will begin to arise."

"Smaller national carriers may not feel able to get involved in the large investment program required for the expensive jets and may abandon some of the trans-oceanic rights which they now have. Any change along these lines may require a reconsideration of the patterns and terms of the international exchange of air rights. ...The seriousness of the capacity problem will soon be doubled in the same way that the jets now on order will within a few years double the capacity that the airlines can carry. There will be a stronger competitive urge to fill that capacity and those carriers who do not get jets may insist that restrictions be imposed for their protection." (4)

That these forebodings were well founded is demonstrated by recent developments in international air transportation. With full scale jet operations witnessed in 1960 many jet equipped airlines have run into an ever hardening policy of protectionism on the part of countries whose airlines have not kept pace with the re-equipment race. This is especially true in Latin America, and recent trends in Venezuela's aviation policy toward restrictive interpretation of her various bilateral air transport agreements serve as outstanding examples of the issues raised by the attempt of international airlines to place more and more jets into service on world routes.

The Venezuelan situation presents an excellent basis for the study of the mentioned problems for two reasons. First, several of the world's most important international airlines (Pan American, Air France, K.L.M.) linking this country with other parts of the Western Hemisphere and Europe, operate under different types of agreements which include the most frequently used

terms and conditions for the exchange of commercial air transport rights, and some unusual ones as well.

With attempts by major airlines to introduce jet equipment on their routes to Venezuela thwarted for two years by differences of interpretation of the bilateral air transport agreements, the issues thus raised are real, practical and far-reaching. Experience gained in this situation can be applied to similar problems arising in other parts of the world, since the type of agreements to be discussed form the basic pattern of today's bilateral regulation of world air transport.

Secondly, the issue is squarely presented of a conflict of interpretation of these agreements due solely to the introduction of jet equipment. When a United States carrier was denied permission in 1959 to place Boeing 707 aircraft in service on certain of its designated routes, the views of the carrier and the official position of the United States government were that under the "Bermuda type" bilateral agreement with Venezuela, such matters as changes of equipment were at the discretion of the operating companies and were permitted by the agreement.

On the other hand, the Venezuelan Government maintained that the use of modern jet equipment gave rise to "new situations and problems" not foreseen by the parties at the time of celebrating the mentioned agreement, and revision would be required since substitution of jet aircraft for piston equipment contravened the principles of "reciprocity" and "fair and equal opportunity" as well as capacity provisions of the bilateral agreement. The position that Venezuela was justified in denying permission to the United States carrier to operate jet aircraft, in order to protect the national carrier, Linea Aeropostal Venezolana (LAV), from this additional competition when its all-piston aircraft operations were in critical financial condition, was a philosophy vigorously attacked and heatedly defended.

Part I - Regulation of International Air Transportation

Section A - Before the Chicago Conference of 1944

Problems of interpretation of today's bilateral air transport agreements can be fully appreciated only against the background of the development of international regulation. Current principles and practices in the exchange of commercial air traffic rights among nations are directly related to a process of evolution which has taken place over the last half-century. For the purposes of this study, the development is divided into two periods: before and after the Chicago Conference of 1944.

(1) Freedom of the Air vs. Sovereignty

The first successful manned flight took place in a balloon on Nov. 21, 1783 near Paris. Of historical interest in the regulation of air transportation is the decree issued by the Lt. General of Police of Paris in 1784 which required that a police permit be obtained before ascents were made. (5) But only in 1903 at Kitty Hawk, U.S.A., was it proved that controlled air navigation in heavier-than-air craft was feasible, and it wasn't until the Frenchman, Luis Bleriot, crossed the English Channel in 1909 in an airplane that the need for regulation of international air navigation was generally recognized.

Several years before that security-shattering flight over the Channel, European writers had discussed the legal implications of the new prospect of manned flight across national borders. In a work published in 1901 on the legal problems relating to flights in balloons, the French theorist, Fauchille, presented his views on the "Freedom of the Air", (6) and the following year, at a meeting in Brussels of the Institute of International Law, he proposed a code of international air law, based on the principle that the air,

like the sea, was free and no nation should have the authority over it except to the extent necessary to protect national interests. One of his chief opponents was the English law professor, Westlake, who argued that each country has sovereignty over the airspace above its territory, but should, nevertheless, grant the privilege of "innocent passage". Expression was given to the two extremes of complete freedom, and complete sovereignty, and to various intermediate theories, including zones of control up to certain altitudes. (7)

The weight of opinion at that time apparently favored the freedom theory subject to some special rights of the subjacent state, and the Institute of International Law in 1906 adopted a resolution to that effect. (8) Later, in 1910, the French Government called the first diplomatic conference on the regulation of international air navigation. (9) While agreement was achieved on some technical matters such as the registration and nationality of aircraft, the main issue of freedom vs. sovereignty was not resolved, (10) and the commercial aspect of regulations for putting down and taking on of passengers was not discussed as it was evidently assumed that aircraft would receive the same liberal treatment as ships. (11)

Shortly after this Conference the British Parliament adopted legislation on aerial navigation and authorized the Home Secretary to regulate the entrance of foreign aircraft over British territory and to establish prohibited zones. (12) Then, on July 26, 1913, the first bilateral agreement on air navigation was celebrated when the French Ambassador in Berlin and the German Secretary for Foreign Affairs exchanged notes which provided that military aircraft of either nation could fly over the territory of the other nation only upon invitation, and that civil aircraft could do likewise only upon the completion of certain specific requisites, including departure certificates

to be obtained from the consular offices of the respective countries. The right to reserve certain areas as prohibited zones was recognized and a network of many such zones was immediately established. (13)

(2) Acceptance of the Principle of Sovereignty

With the coming of World War I many European nations closed their aerial frontiers and aircraft of belligerent countries which flew over neutral territory were often obliged to land and the crews were interned as though they had crossed national boundaries on land without permission. In the Western Hemisphere at the meeting of the Pan-American Aeronautic Federation in Santiago, Chile in 1916, a set of principles was formulated and adopted for application to international aviation operations. It was declared that each nation owns the airspace above its territory, but that navigation of the airspace of the Americas should be "free" to all citizens of the Americas and to all aliens domiciled therein. (14)

When the Peace Conference was held in Paris after the War an "Aeronautical Commission" was created to deal with the problem of German air power and to prepare a convention on international air navigation in peacetime. This Commission began discussions on the basis of the draft prepared at the 1910 Paris Conference, a new British draft and another prepared by the French. Although the British proposed a compromise between the extreme views on national control (15) it was not accepted and the "Convention on the Regulation of Aerial Navigation of October 13, 1919" was adopted with these provisions included:

Art. 1 - The High Contracting Parties recognize that every power has complete and exclusive sovereignty over the air space above its territory.

Art. 2 - Each contracting State undertakes in time of peace to accord

freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed.

Art. 15 - Every aircraft of a contracting State has the right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place... The establishment of international airways shall be subject to the consent of the States flown over.

The right to carry passengers, goods, and mail between two points in the territory of the same state (cabotage) was reserved to each State under Article 16. The other provisions of this Convention primarily concerned technical subjects, as did the several Annexes. A permanent body, the International Commission for Aerial Navigation (ICAN) was created to further develop the technical regulations through constant revision of the Annexes, and the work of this Commission was largely responsible for the technical regulation of international air navigation until the Chicago Conference of 1944.

Of the 27 States at the Peace Conference, 21 signed the Paris Convention and three others later acceded to it. Three never signed or acceded. Before being superceded by the Chicago Convention, 38 states had become parties to the Paris Convention. The United States, however, which had played a prominent role in the drafting of the Convention, (16) signed but never ratified it. "The acceptance in that convention of the principle of sovereignty of the airspace is the basis of almost all the subsequent international law of the air, even in those countries which were not bound by the convention." (17)

(3) Restrictive Interpretation of the Paris Convention

While the basic principle of sovereignty was firmly established in inter-

national air law through the Paris Convention (and two later conventions, the "Ibero-American Convention on Aerial Navigation", Madrid, 1926, and the "Pan American Convention on Commercial Aviation", Havana, 1928, both of which followed most of the provisions of the Paris Convention) (18) still the requirements for the establishment of international commercial air transport services were not clear. (19)

The right of innocent passage contained in Art. 2 of the Paris Convention, (20) and the procedures for obtaining permission required by Art. 15 for "the establishment of international airways" were openly debated at several annual meetings of the I.C.A.N. At a special meeting of this Commission in Paris in June, 1929 the Belgian representative argued for a restrictive interpretation as proposed the year before by Dr. Alfred Wegerdt, Advisor to the Ministry of Communications of Germany, to the effect that the "establishment and the operation of regular air lines of a Contracting State in or over the territory of another Contracting State, with or without landing, is subject to a special agreement between the two States in question". (21)

On the question of the right to establish international services as implied by Arts. 2 and 15, the United States delegate adhered to the British position of the "greatest liberty of flight" and stated that "...international regulations requiring that a special agreement should be concluded for the establishment and operation of each international air line, would create numerous obstacles liable to render the development of air traffic very difficult." (22) This observation was an accurate prophecy of things to come.

But only the United States, Britain, Holland and Sweden favored this liberal interpretation, and they were opposed by 27 delegations. A new text

for Art. 15 was adopted, which became the official one, and stated in part: "Every contracting State may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory." (23) Joint efforts toward achieving freedom of commercial traffic in the air by multilateral agreement, were abandoned, and each country could exclude the scheduled air services of another country at will. (24)

(4) The Pattern of Permits and Special Agreements

The growth of international commercial aviation between World War I and II is quite surprising in view of the many difficulties in obtaining permission to establish services, due in large part to the narrow framework fixed by the Paris Convention and the Protocol on Article 15. Beginning in 1919 with KLM several European companies were formed after World War I to carry on international air transport services. Countries with overseas possessions were quick to realize the benefits of a system of aerial communications between the homeland and far flung territories.

In the Western Hemisphere, the oldest commercial airline, AVIANCA, was founded in 1919 and completed several years of domestic and international operations before Pan American Airways started a company in 1927 that was to play a dominant role in Latin America. In addition to Pan American and its affiliates, including the American company, Pan American Grace Airways (PANAGRA), air services were established in Latin America by German and French companies in addition to national enterprises.

During the 1930's, fledgling European and Western Hemisphere companies extended their international air routes as soon as permission could be obtained from foreign governments and as fast as the necessary aviation

facilities and adequate aircraft could be constructed and put into use. These were the great pioneering years of commercial aviation. By 1935 a transpacific route had been successfully established by Pan American and that airline and Imperial Airways of the UK competed for initiation of transatlantic services. PAA had the flying equipment, but landing rights had to be obtained from Canada, Britain, Ireland, Portugal and France. Permission was finally obtained and PAA undertook the first commercial transatlantic flight in aircraft in the summer of 1939, several years after the technical capacity to do so had been achieved.

On the eve of World War II, commercial air services had been inaugurated between the countries of Europe and all the continents of the globe were connected by air routes. The United States carriers had gained a leading position in Latin America and had crossed the Atlantic and Pacific Oceans. The British served Europe, the Middle East, Africa, Australia and North America. The Dutch had air links with their colonies in the Far East and had built up a net work in the Caribbean, while the Belgians and Italians had services to Africa, and the Germans were very active in Europe and in South America. The French companies also had developed an extensive system in Europe and in South America. (25)

While it is true that these networks were not served by numerous aircraft nor had frequent schedules, and that the facilities were quite rudimentary, yet the foundation for the future development of international commercial had been successfully laid. It would have been more fully exploited except for the restrictions imposed by nations which could close access to their airspace at their own discretion (26)

Because of the world-wide acceptance of the principle of sovereignty in the airspace and the restrictive interpretation of the Paris Convention,

national legislation on aviation usually included a requirement that foreign airlines or governments had to obtain special permission from the government of each country into whose airspace it was necessary or commercially worthwhile to fly. But the pattern of permits and special agreements which developed was by no means uniform.

In some cases the permission to establish commercial air services was granted on the basis of a bilateral air navigation treaty or a treaty dealing specifically with commercial air transportation. In other cases the less complicated device of an exchange of diplomatic notes achieved the same results. Finally, it was not uncommon, especially in the Western Hemisphere, for an airline to negotiate directly with governments of Latin American nations for permits or concessions. Even when operating rights were exchanged in formal treaties, it was usual to require that an additional specific authorization from the respective aeronautical authorities be obtained before initiating services. Examples of these various types of agreements in effect before the Chicago Conference of 1944 show the marked lack of uniformity.

With particular regard to provisions in air navigation agreements between European nations, special authorization for the establishment of international air services was usually required via diplomatic channels or through aeronautical authorities rather than by direct negotiations carried out by the airlines themselves. (27) For instance, the air navigation agreements celebrated by Germany between 1922 and 1926 specified that the "commercial carriage of persons or goods to, from or within its territory", and the establishment of airlines, either may be or was actually subjected to the requirement of a special "authorization" or "permit" or "concession" issued by the respective authorities. (28)

After 1926, the agreements celebrated by Germany contained the following

provision: "The establishment and operation of scheduled air services of an air navigation enterprise of one of the High Contracting Parties in the territory of the other or across it, with or without intermediate stopovers, is subject to a special agreement between the respective aeronautical authorities of both States." (29)

With respect to the conditions under which special permission to begin air services would be granted, most bilateral agreements of this period were silent. But the air navigation agreements between the USA and Sweden (1933), Norway (1933), and Denmark (1934), state in Art. 4, Par. 3: "Each Party to this agreement agrees that its permission for operations above its territory by air transport enterprises of the other party, may not be refused for unreasonable or arbitrary motives. The consent may be made subject to special regulations relative to air safety and public order." (30)

Occasionally exclusive rights were obtained in these agreements, such as the exclusive right of the French Company, Aeropostale, to serve the Azores on the route from Europe to South America. (31) Hard bargains were often made the price of landing rights. Italy refused to grant landing rights to a British Airline unless that airline agreed to an equal division of revenues over a part of the route. (32)

Usually commercial matters such as routes, rates, type of equipment, frequencies and capacity, were not specified in the air navigation agreements or the special authorizations. However, this was not a universal practice and the treaty signed by Italy and Greece on June 30, 1936 and ratified on January 15, 1938, is an example of a treaty on air services which deals with commercial matters within the text of the basic instrument. In this agreement the routes to be flown were specifically set forth (Art. 1, 2), and exploitation of certain routes by airlines of both nations was to be agreed upon between the airlines themselves, subject to approval by the respective

aeronautical authorities (Art. 11). Matters such as frequency, schedules, tariffs, type of equipment, etc., were to be freely determined by the airlines involved (Art. 10) (33)

The agreements between Germany and Spain, signed on Dec. 9, 1927 are unique in that Art. 2 of the basic first instrument on the technical aspects of air navigation specified that commercial matters were to be the subject of a second special treaty. This second treaty dealt with matters of frequency, tariffs, schedules and type of equipment, but under Art. 6 of this latter treaty, routes to be operated were subject to special additional authorization to be obtained from the respective aeronautical authorities. (34)

In the Western Hemisphere the first bilateral air transport agreement was a treaty between Argentina and Brazil signed on May 18, 1922. In relatively simple terms it provided for the exchange of a general right to fly over the territory of the respective states and to transport persons and goods subject to the reservation of cabotage. About the only restriction specified was the requirement to cross borders at determined points and to utilize airports to be subsequently indicated. No further special permission was required for initiating services and commercial subjects were not even mentioned. (35)

While formal treaties on air navigation or air transport services were the customary basis for the exchange of rights between European nations, in the Western Hemisphere, on the other hand, the right to establish commercial air services was more commonly granted through approval of an application for a permit or concession which resulted from negotiations directly carried out by the airline itself. This was true of most operating rights obtained from Latin American nations, not only by the United States, but by European carriers as well. (36)

The United States became the most powerful nation in the Americas in air transportation, and in the handling of international operations it was quite inconsistent. In dealing with Latin American nations the principal inter-

national airlines of the United States, Pan American Airways and PANAGRA, generally conducted their own negotiations for landing rights. But the first bilateral agreement of the United States was with Colombia and was in form of an exchange of diplomatic notes. (37) This was not an air navigation agreement, but a very simple exchange of operating rights, providing that American commercial aircraft were to be allowed to fly and land along the coasts of Colombia, and that Colombian commercial aircraft were to receive similar privileges along the coasts of the United States and in the Canal Zone. The agreement did not lay down specific conditions as to routes, schedules, etc.

In dealing with European nations, however, the United States preferred the exchange of diplomatic notes for air navigation agreements, since such "executive agreements" do not require ratification as a treaty under U.S. constitutional law. (38) The first air navigation agreement between the United States and a European nation was celebrated by an exchange of notes on Oct. 13, 14, 1931 with Italy. In this agreement traffic rights were specified in some detail, but routes were not set out specifically. Initiation of services was made subject to prior consent of the U.S. Government, on the basis of reciprocity. The most-favored-nation clause was also made reciprocal. This agreement was termed "an arrangement". (39)

In the air navigation agreements entered into by the United States with Germany (1932), Union of South Africa (1933), Sweden (1933) and Norway (1933), and Denmark (1934), Art. 4, Par. 2 provided: "It is agreed that the establishment and operation of scheduled air routes by an air transport company of one of the parties within to or across such territory, with or without intermediate stopovers, will be subject to the prior consent of the other party, given upon the principle of reciprocity and upon application of the party

whose nationality is possessed by the air transport company". (40)

While the agreements between the United States and European countries in the period before World War II were generally air navigation agreements which did not include provisions on commercial matters, the exchange of notes with Great Britain, Canada, and Ireland after a conference in December of 1935 provided for simultaneous operation of twice-weekly air services for 15 years by an American company, and by Imperial Airways or a company controlled by it, between the United States and Great Britain, with landing rights in Canada, New foundland, Ireland and Bermuds. (41)

One of the most comprehensive air transport agreements celebrated before World War II, one which showed the progress made in drafting technique and the trend toward more and more detailed specification of commercial matters, as contrasted to the relatively brief and simple agreements of the 1920's and early 1930's, was that celebrated between the United States and France, effective August 16, 1939. (42)

This agreement provided for the exchange of operating rights into the territory of the respective parties of aircraft engaged in conduct of transatlantic air transport services. It allowed at least two frequencies per week by aircraft of each nation, with additional frequencies to American aircraft engaged in transatlantic services, including the right of such aircraft to fly into, through and away from France to and from a final point of destination in other countries, with traffic rights in France on these additional frequencies.

It was a requirement that the companies of each party should qualify before the competent aeronautical authorities of the other party, and it was within the power of such authorities to fix the terms of the permits, the airports to be used, and the routes to be flown within the respective terri-

tories, as well as the frequency of schedules and "other appropriate details" of the services.

The permits were to be valid only so long as the carrier held proper authorization from its own government and complied with the laws, rules and regulations of the respective governments. The permits could be revoked on two years notice. Under the terms of the agreement the American and French enterprises could enter into technical and commercial agreements, subject to the approval of the respective governments.

Both nations agreed not to impose any restrictions as to airports, routes, connections and facilities in general, "which might be competitively or otherwise disadvantageous to the air carriers of the other party." The aircraft of each carrier were obliged to comply with the airworthiness requirements of their government. It was provided that the authorities "may communicate with a view to bringing about uniformity of safety standards", and the parties "may enter into an agreement prescribing such uniform safety standards". It was expressly stated that the agreement was negotiated pursuant to Art. 4 of the air navigation arrangement signed by the two nations on the same date, and that operations were to be conducted subject to the terms of that arrangement. There was a provision permitting termination of the air transport agreement after expiration of two years notice.

From these few examples it can be seen that there was certainly little uniformity in the bilateral air navigation and air transport agreements celebrated before World War II. The form and content of such agreements varied considerably between nations and even a single nation might use several different devices for the exchange of operating rights. Restrictions were common, especially in Europe.

The Post-War period promised great development in international civil

aviation. The lack of uniformity, the limitations imposed, and the many other difficulties, contributed to the general recognition that a new multilateral convention based on equitable exchange of rights was an urgent requirement for the expansion of world air services.

Section B - The Chicago Conference of 1944 and After

Although operations along international air routes were curtailed during World War II, once again while hostilities were still raging men of vision began to consider the problems of international civil aviation in the post-War period. In the "Agreement of Cooperation" concluded at Canberra on Jan. 21, 1944 between Australia and New Zealand, the need for a new world-wide convention on civil aviation was recognized. A new international body was envisaged which would not only establish regulations for the safety of air navigation, but the idea was put forth that "... The air services which are used on the principal trunk lines should be operated by an international air transport authority." (43)

The Hon. C.D. Howe presented to the Canadian Parliament in March of 1944 a proposal for a convention on international control of world civil aviation. Mr. Howe mentioned the constant and difficult negotiations involved in the system of bilateral agreements, the excessive competition resulting in uneconomical operations and large subsidies, and the questionable basis of national prestige as the reason for entering the field of international air transportation. He suggested that after the War, international rivalries would be even sharper.

His proposal called for the creation of an international entity which would fix the routes, frequencies, tariffs, and would issue permits to the operators of international air services much in the way of the C.A.B. of the United States. Parties to a new convention would reciprocally grant privileges of transit and commercial rights. (44)

Shortly thereafter the Labour Party in England published a pamphlet entitled: "Wings for Peace - the Post-War Civil Aviation Policy of the Labour Party; the Organization and Control of Civil Aviation." This publica-

tion lauded the agreement between Australia and New Zealand and urged the creation of regional and worldwide organizations that would carry out the internationalization of air transport.

The official position of the British Government was formulated in a "White Paper" (Command 6561, Oct. 1944) on "International Air Transport," which called for a new international convention and the creation of an "International Aeronautical Authority" with considerable powers to control commercial aspects of international air services. The plan argued for a proper balance between capacity and traffic demands, the elimination of prejudicial and uneconomical competitive practices, for control of subsidies, for regulation of frequencies, tariffs, routes , and the issuance of operating permits.

Informal talks were held between the British and American Governments and members of the British Commonwealth met in London to study the future of international civil aviation. On Sept. 11 of this same year, 1944, the Government of the United States (45) issued an invitation to more than 50 "governments and authorities" which included "all members of the United Nations," "nations associated with the United Nations in this war," and "the European and Asiatic neutral nations," and the Danish and Thai Ministers in Washington , in their personal capacities. (46)

The objectives suggested for this Conference by the United States were: the establishment of provisional world routes together with an agreement to grant landing and transit rights necessary for these services; the establishment of an Interim Council to act as a clearing house and advisory agency during the transitional period; and the agreement upon the principles to be followed in setting up a permanent international aeronautical body, with a multilateral aviation convention dealing with the fields of air transport, air navigation and aviation technical subjects. (47)

(1) The International Civil Aviation Conference

Of all the nations and authorities invited to take part in this International Civil Aviation Conference, only Saudi Arabia and the U.S.S.R. failed to attend. The representatives met at Chicago from Nov. 1 to Dec. 7, 1944 and used as a basis for discussion the texts of drafts prepared by the U.S.A. (48), the United Kingdom (49), Canada, and Australia and New Zealand jointly, which drafts reflected the positions of the various nations as announced in the above mentioned pre-conference proposals.

At an early point in the discussions of Committee I (Multilateral Aviation Convention and International Aeronautical Body) the proposal of Australia and New Zealand for the international ownership and operation of civil air services on world trunk routes was rejected. This indicated the tendency of the Conference away from extensive international control.

The Canadian plan (50) received considerable attention. In addition to calling for the creation of an international air authority similar to the C.A.B. of the United States, it proposed the exchange of what the Canadian delegation called "the four freedoms of the air": transit without landing; landing for servicing; taking on of passengers, mail and cargo at the country of origin to any place in the world; taking on passengers, mail and cargo at any place in the world for carriage to the country of origin (the country whose nationality the aircraft possessed.)

Operating certificates issued by central and regional councils would automatically include the "four freedoms of the air." The freedom " to handle traffic originating in a foreign state and destined for a foreign state would be secured, not under the international convention, but as a result of special bilateral agreements between the governments concerned." This division of the types of traffic and the right to carry same was found

to be a convenient classification for discussion, and later, with certain refinements was to become the standard terminology of international air transportation.

As the discussion at the Conference progressed, it was apparent that the United States, Great Britain and Canada differed mainly on the degree of control to be exercised by an international authority in the commercial field. The United States desired to give only consultative powers to an international body, while the British wanted a considerable degree of control over routes, rates, frequencies and capacities. The British position reflected a general fear prevailing among smaller nations that the United States, if allowed to put into practice an "open skies" policy, would dominate world air transportation and destroy competition.

The Canadian delegation attempted to achieve a compromise between the widely divergent views and suggested an international authority with limited powers to allocate routes, review rates, and determine frequencies based on fixed formulae.

Since agreement on the vital matters relating to the extent of control could not be reached quickly, Committee I suspended open meetings and the delegations of the United States, the United Kingdom , and Canada met continuously for a week in an attempt to reach compromise. Finally, a joint "partial draft" was prepared and submitted to the Conference. When this draft was presented it was clear that the real basis of disagreement was the degree of control of traffic taken on in a foreign country and destined to a foreign country, or, in the terms suggested by the Canadian delegation, "fifth freedom traffic." It was apparent that if agreement could not be reached on this subject, then it would be necessary to revert to the pre-War system of bilateral negotiations.

No formula could be found to satisfy all viewpoints and the United

States proposed that separate agreements, including the exchange of the five "freedoms of the air", should be prepared by the Conference and opened for signature.

(2) The Agreements Produced at Chicago

As a result of the deliberations at the Chicago Conference, four major agreements were produced: the Convention on International Civil Aviation; the International Air Services Transit Agreement; the International Air Transport Agreement; and the Standard Form of Agreement for Provisional Air Routes.

(a) The Convention on International Civil Aviation

Although this multilateral treaty, known as the "Chicago Convention" , did not regulate many important commercial matters, yet it established a modernized international agreement for the orderly development of civil aviation. It was chiefly in the technical field that the Conference is recognized as a land-mark in international aviation. Referring to the technical annexes to the Convention, a commentator states : "This comprehensive body of technical material undoubtedly represents the most striking advance ever achieved at a single conference in the field of international technical collaboration." (51) Today, with more than 80 states parties to this Convention, the Annexes ("International Standards and Recommended Practices") developed during and after the Conference have served as a guide for the progressive development of aviation, both national and international, throughout the world, and are a basic factor in the extraordinary expansion of international civil aviation since World War II.

Part I ("Air Navigation") of the Convention deals in general terms with several aspects of international flight. The principle of sovereignty is reaffirmed in Art. 1 : "The contracting States recognize that every State

has complete and exclusive sovereignty over the airspace above its territory." While a limited right of transit, stops for non-traffic purposes and commercial traffic rights are granted under Art. 5 to "aircraft not engaged in scheduled international air services", Art. 6 states that "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization." This is very similar to the restrictive Protocol (on Art. 15) of the Paris Convention. Cabotage is reserved to each State by Art. 7.

Part II is entitled "The International Civil Aviation Organization", and provides for the establishment of this body, which is made up of "an Assembly, a Council, and such other bodies as may be necessary". (Art. 43) On April 4, 1947, the "ICAO" replaced a temporary organization, the Provisional International Civil Aviation Organization ("PICAO"), which had functioned since June 26, 1945 under an "Interim Agreement" also signed at Chicago. With headquarters in Montreal the ICAO is a specialized agency related to the United Nations. The Air Navigation Commission provided for in Arts. 56 and 57 has taken over the work of "ICAN" of the Paris Convention, and has proved to be one of the most important organs of ICAO, constantly at work revising the technical standards and practices for international civil aviation operations. (52)

Other important organs of ICAO are the "Air Transport Committee" mentioned in Art. 54(d) and the Legal Committee, which is appointed by the Council. These and other groups work under the supervision of the Council and carry out recommendations formulated at periodic meetings of all the member states when the Assembly meets.

Although matters dealing with commercial aviation are scattered throughout the Convention, Part III is entitled "International Air Transport" and

includes provisions on the filing of reports and information with ICAO, improvement and financing of air navigation facilities, technical assistance and the promotion of joint operating organizations or pooling of air services.

In Part IV, "Final Provisions", Art. 80 indicates that contracting states undertake to denounce the Paris Convention of 1919 and the Havana Convention of 1928, and the Chicago Convention is to replace these earlier treaties. This Part also provides for the registration of all aeronautical agreements in existence on coming into force of the Convention and the registration of new arrangements. The settlement of disputes is the subject of Art. 84-88. The adoption of technical annexes is specified by Art. 89 and ratifications, adherences, amendments and denunciations of the Convention are taken up by Arts. 91-95.

In Art. 96 an attempt is made to define certain terms. "Air Service" is "any scheduled air service performed by aircraft for public transport of passengers, mail or cargo". "International air service" is to mean "an air service which passes through the airspace over the territory of more than one State", and "airline" is "any air transport enterprise offering or operating an international air service". The other term defined is "stop for non-traffic purposes" which is to mean "a landing for any purpose other than taking on or discharging passengers, cargo or mail".

But nowhere in the Convention is there to be found a definition of "scheduled", and the precise meaning of this term is important in view of the distinction made between "aircraft not engaged in scheduled international air services" under Art. 5, and "scheduled international air services" under Art. 6. The Council of ICAO in 1952 adopted and has since reaffirmed a definition to serve as guidance, as follows: (53)

"A scheduled international air service is a series of flights that

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

(b) The International Air Services Transit Agreement

This Agreement (54) generally known as the "Transit" or "Two Freedoms Agreement", was signed at Chicago by 32 states and has been accepted by a majority of the large and small nations members of ICAO. It derives its popular name from Art. 1, Sec. 1, which grants to contracting states: "the following freedoms of the air in respect of seheduled international air services: (1) The privilege to fly across the territory without landing; (2) The privilege to land for non-traffic purposes".

The Agreement provides for designation of the routes to be followed within the territory of a contracting State, the airports to be used, and allows just and reasonable charges for the use of facilities. Substantial ownership and effective control of an airline by nationals of a contracting State are requirements for a permit. Art. II deals with consultation and settlement of differences, while Art. III sets out a one year period for denouncing the agreement. Some 50 members of ICAO have signed and ratified this agreement.

(c) The International Air Transport Agreement

The common name of this Agreement (55) is the "Transport" or

"Five Freedoms Agreement", since it provides for the exchange of the first two freedoms of the "Transit Agreement", and these additional "freedoms of the air": (3)"the privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses; (4) the privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses; (5) the privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory."

Not only is the "Fifth Freedom" limited to traffic between contracting states, but Art. 1, also states that "with respect to the privileges specified under paragraphs (3), (4) and (5) of this Section, the undertaking of such contracting States relates only to through services on a route constituting a reasonably direct line out from and back to the homeland of the State whose nationality the aircraft possesses".

The remaining provisions of the agreement are basically the same as under the "Two Freedoms Agreement", with the exception of Art. 1, Sec. 4 reserving the right of cabotage, Art II Sec. 1, which specifies that this Agreement abrogates all obligations and understandings between contracting states which are inconsistent therewith. Also, Art. III adds a proviso which was later included (in different forms) in many bilateral agreements: "Each contracting State undertakes that in the establishment and operation of through services due consideration shall be given to the interests of the other contracting States, so as not to interfere unduly with their regional services or to hamper the development of their through services". Finally, the granting of the "Fifth Freedom" is subject to the optional reservation that this vital right may be made dependent upon reciprocity. There were no specific provisions on capacity or routes, or rates included

in this Agreement.

This "Five Freedoms Agreement" was signed at Chicago by 20 states, but although offered by the United States as a step toward a broad general multilateral agreement, it did not receive widespread acceptance. It was not ratified by the United Kingdom, and there was considerable criticism of it in the U.S. Congress. On July 25, 1946 it was denounced by the U.S. Dept. of State, and today only a handful of states are still parties to this agreement. (56)

(d) The Standard Form of Agreement for Provisional Air Routes

Faced with the probability of a return to the general pre-World War II system of bilateral agreements, the Chicago Conference set forth in Recommendation No. 8 of the Final Act, a "Standard Form of Agreement for Provisional Air Routes" with the purpose of eliminating exclusive or discriminatory arrangements and to develop some degree of uniformity in this field. (57)

This form of agreement became known as the "ICAO Recommended Type" or the "Chicago Standard Form", and contains 10 articles with a provision in Art. 1 for an Annex which would specifically describe the routes and rights granted and other details of the agreement. This type of agreement has been used by many nations, as a guide for the basic bilateral air transport agreements.

Art. 1 of the "Chicago Standard Form" provides in general terms for a mutual grant of the rights necessary for the establishing of the international civil air routes described in the Annex. Under Art. 2 each contracting party may designate an airline or airlines to operate such routes subject to the requirement that such designated airlines must "qualify before the competent aeronautical authorities of the contracting party granting the

rights under the laws and regulations normally applied by these authorities". The designated airlines must also be able to show that "substantial ownership and effective control (as required by Art. 7) are vested in nationals of a party to this agreement". If the designated airlines meet the several requirements, then the respective aeronautical authorities are obligated under Art. 2 to issue the appropriate operating permits.

Previously granted operating rights are to continue as provided therein (Art. 3) and to prevent discriminatory practices, Art. 4 allows each party to impose "just and reasonable charges for the use of airports and other facilities", which shall not be higher than those paid for by national aircraft of the party supplying the services". Also, the application of customs duties, inspection fees on fuels, oils, spare parts brought into a country shall be subject to "most-favored-nation treatment", and these supplies and regular equipment retained on board aircraft of the contracting parties are exempt from such fees or other charges.

Certificates of airworthiness, licenses, etc., rendered valid by one contracting party shall be recognized by the other (Art. 5). Aircraft of the contracting parties are subject to the laws and regulations of the other contracting party for admission, operation and departure, without distinction as to nationality. And the laws and regulations of a contracting party as to admission and departure from its territory of passengers, crew or cargo must also be complied with (Art. 6).

Requirements for showing substantial ownership and effective control are set out in Art. 7, along with other requirements, and Articles 8 and 9 deal with registry of the agreement and all related contracts with ICAO, and contain provisions on arbitration. Art. 10 provides that if a general multilateral air transport convention comes into force it shall supersede the present agreement, and meanwhile one year's notice is required for

denunciation. No mention is made of rates, capacities, frequencies, etc., as these matters are left for the Annex. There is likewise no provision on choice of equipment to be operated.

(3) The Bermuda Agreement

At Chicago, the two major air powers, the USA and the UK, were unable to reconcile their divergent views on the extent of control to be given to an international authority, and with the subsequent failure of the UK to ratify the "Five Freedoms Agreement", the two nations held a "Conference on Civil Aviation" at Bermuda from Jan. 15th to Feb. 11, 1946. On the latter date the representatives of the two governments signed an agreement on air services to be established between the two countries.

In addition to the "Agreement" proper, which follows provisions of the "Chicago Standard Form", there is an "Annex" providing for the exchange of the "Five Freedoms", with a reference to the rate making machinery of the International Air Transport Association, and detailed specification of the routes to be operated. But it is in the "Final Act" of the Conference, to which the Agreement and Annex are attached, that certain principles are found for the determination of capacity and frequency and guides for regulation of competition. (58) These principles have been adopted, with variations, by a majority of nations with important international air services for inclusion in air transport agreements or their annexes, and are known as the "Bermuda principles".

These principles represented a compromise between the leading air powers of the world regarding their approaches to the exchange of air rights, The United States recognized a limitation on its basically no-economic-controls philosophy, and agreed to certain control of rates (through reference to the rate-making machinery of the International Air Transport Association -

IATA) while the British made concessions toward lesser degree of control for regulation of capacity and frequency than they had originally favored. On Sept. 19, 1946, the United States and the UK made a joint statement announcing this type of arrangement as the standard plan to be used by them for all future agreements on air transportation. In the same year the USA concluded 11 similar agreements and 16 more in 1947; at the present there are more than 50 such agreements in existence between the USA and other nations. A study made by ICAO (59) in 1955 showed that of 67 bilateral agreements affecting Europe, 44 are based on the "Bermuda principles".

"The Bermuda principles approach international air transportation from a basically liberal point of view. Nevertheless they provide certain safeguards for those countries which fear their more powerful competitors and would prefer to exercise considerable control over the operation of foreign airlines servicing their countries." (60)

When included in bilateral agreements, the "Bermuda principles" are usually set forth in an Annex to a basic Agreement, but are contained in Arts. 3, 4, 5 and 6 of the Final Act of the Bermuda Conference. The parties agreed in Art. 3: "That the air transport facilities available to the traveling public should bear a close relationship to the requirements of the public for such transport". While quite vague, yet this would prohibit unfair competition in the form of a carrier's making available an exaggerated number of seats in order to force down the revenue per seat mile and cause a competitor to discontinue operations or suffer heavy losses.

Referring to this Article, the British Minister of Civil Aviation, Lord Winster, stated, "As regards the control of capacity operated on the routes, it has been recognized that predetermination on the basis of estimated traffic potentials is beset with practical difficulties, and instead, it has been agreed that the principle for which we stand, namely the maintenance

of a close relationship between capacity operated on the various routes of mutual interest and traffic offering, can best be put into practical effect by providing an 'ex post facto' review on the basis of this principle". (61)

Art. 4 of the Final Act stipulates: "That there shall be a fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories (as defined in the Agreement) covered by the Agreement and its Annex". On referring to this part of the Final Act, the Joint Statement of Feb. 11, 1946 included the following: "...The fair and equal opportunity referred to above does not imply the allocation of frequencies by agreement but only the right of each nation to offer the services it believes justified under the principles agreed to." (62)

These two provisions and indeed the whole of the Bermuda principles on capacity are quite general and open to interpretation. But on the question as to whether predetermination or post-determination of capacity was intended, both the delegations and the comments by respected authors definitely indicate that the regulation of capacity was to be achieved by subsequent adjustment rather than prior determination of frequencies and capacities. (63)

Another clause of the Final Act, especially designed to allay the fears of smaller carriers, was Paragraph 5: "That, in the operation by the air carriers of either Government of the trunk services described in the Annex to the Agreement, the interests of the air carriers of the other Government shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes."

Paragraph 6 of the Final Act reads: "That it is the understanding of

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

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

(b) to the requirements of through airline operation; and

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

This Paragraph 6 is the cornerstone of the "Bermuda principles" as it deals with the all-important "fifth freedom" traffic, and was a major stumbling block of the Conference until agreement on it was finally reached. "...The US and UK delegates deliberated for a whole month, day and night, on this one paragraph!" (64)

This provision makes the carriage of 3rd and 4th freedom traffic the principal purpose of the air services established pursuant to the agreement and sets out very general principles for governing capacity offering on fifth freedom routes. (65)

The general position of the delegations was expressed in the Joint Statement and indicated that the Bermuda plan contemplated "...Freedom of each country to determine the frequency of operations of its airlines" and "Freedom to carry Fifth Freedom traffic in accordance with defined

principles subject to adjustment in particular cases where such adjustment may be found to be necessary in the light of experience". In describing the Annex, the delegations added "...The Conference has placed no specific limitation on frequencies. Each nation operating under the principles agreed to is to be free to determine for itself the number of frequencies which are justified; services being related to traffic demands." (66)

(4) Further Attempts to Achieve a Multilateral Convention on Commercial Rights and Recent Trends Towards Regionalism and Cooperative Arrangements

Interest in achieving a multilateral convention on exchange of commercial rights did not fade with the failure of the Chicago Conference to reach agreement on this vital subject. The Air Transport Committee presented a draft of a multilateral convention on commercial air rights to the PICAO first Interim Assembly, at Montreal in 1946. (67) The basic plan put forward here was a system of rate differentials as a limitation on fifth freedom traffic. These were to operate much in the way of protective tariffs, with higher charges for passengers on trunk routes than on local or regional airlines. The United States was opposed to such a system and a myriad of proposals resulted, including one by China for a tax to be levied on fifth freedom traffic. But general agreement on use of rate differentials or any similar device was not reached and the Assembly rejected the draft. (68)

Recognizing the continued interest in a multilateral approach to the question of exchange of commercial rights, a special "Commission" was opened up for membership and participation by any and all member states of ICAO, for further discussions. The Commission met at Geneva in 1947 and a new draft was presented. (69) This draft proposed certain controls

on fifth freedom and included the plan of opening up a reasonable number of airports in all countries to be accessible to all members, primarily for 3rd and 4th freedom traffic.

But at Geneva, an alternative system was put forward, of retaining bilateral approach to route exchanges, while utilizing multilateral convention for exchange of 5th freedom rights. This plan was supported by the US, UK and China. This "partial multilateral system" retaining bilateral route negotiations was acceptable to the previously dissident nations: the US, the UK, France, the Netherlands and the members of the British Commonwealth. But the nations with less fully developed air transport facilities were not satisfied. They wanted additional guarantees of protection as the price for entering the sort of partial multilateral system on which the major operating states were ready to agree. General agreement could be reached only upon the recognition of third and fourth freedom traffic rights as primary rights.

A Mexican proposal on allowing the unilateral withholding of fifth freedom rights brought the matter to a head. Such a proposal as part of the partial multilateral system was unacceptable to the major operating states, and the Conference stalled completely.

After several years of effort toward achieving a multilateral convention on exchange of commercial rights, the failure of the Geneva conference to produce any concrete agreement indicated that in 1947 the time was not yet ripe for such a system. (70)

Since 1947 the regional approach to civil air transportation has accelerated in Europe, the Middle East and in Latin America. (71) Various schemes for pooling of services and of dealing with air transport matters in regional blocs is evident. Shortly after the European Steel and Coal Community Plan was approved in 1948, three major plans were suggested for

the integration of air transport in Europe and the "European Civil Aviation Conference" (ECAC) was created in 1954 with headquarters in Paris. (72) ECAC in 1959 made definite recommendations on standard clauses for Bilateral agreements dealing with commercial rights of scheduled air services. (73)

At several meetings of European aviation experts there was considerable discussion of ways of dividing the market, increasing utilization of aircraft, fixing of differential fares and rates, and of sharing of profits and use of the same equipment. Germany, Holland, France, Italy and the Benelux countries favored integration but Great Britain, the Scandinavian nations, Switzerland, Austria and Portugal did not, and these nations formed the economic blocs of the European Common Market and the "Outer Seven", respectively.

The Scandinavian Airlines System and Swissair designed a cooperative agreement, including leases, equipment interchange and maintenance arrangements, and this encouraged the proposal in April 26, 1959 of a single consortium for Europe, to be called "Air Union" and to be composed of integrated services of Germany, Benelux countries, France and Italy. KLM was to have become a part of "Air Union" but withdrew. The plan calls for pooling of revenue and redistribution according to fixed ton-mile quotas. The nationality of each member airline is to be preserved. It is expected that each national airline will claim all the rights and privileges due it under bilateral agreements with the "outside" nations. Inside Europe, equipment, frequencies, capacity, fares, losses and earnings will be fixed and controlled by the cooperative agreement.

Similar, although not as yet fully implemented, plans have been developing in Latin America for formation of a single Latin American airline to include Colombia, Chile, Ecuador, Panama and Peru, with equal participation

in a consortium envisaged.

SAS and GUEST of Mexico have been cooperating closely under a contract for technical and administrative management by the former, while KLM and VIASA of Venezuela have adopted a contract embodying extensive cooperation in traffic and sales matters, leasing of jet equipment, etc.

The British Commonwealth airlines have entered into interline agreements - BOAC, Air India and Quantas agreeing to pool services over various networks. The Arab League is considering a Pan-Arab airline for service initially in the Middle East; and in the Far East, Thai Airways and SAS have combined. Also, Air France and Japan Airlines have a cooperative arrangement.

These trends toward regionalism in the regulation of civil aviation and cooperative arrangements on commercial matters are due in part to the new pattern of world air transport brought about by the widespread use of long-range jet aircraft. The arrangements cited all tend to reduce costs, avoid needless duplication of routes and schedules and attempt to make air transport enterprises as efficient as the jets which created the new patterns.

Some of the thorniest problems presented by the huge capacity of the jets and new route patterns and methods of operation relate to interpretation of the bilateral air transport agreements. These will be discussed in succeeding pages, with attention focused on the current situation in Venezuela.

Part II - Venezuela's Bilateral Air Transport Agreements

The "jet controversy" in Venezuela is typical in many ways of the present critical situation of international air transportation as it enters the jet era. Venezuela was the first Latin American country to be served by large jets on scheduled passenger operations, and the impact of the jets on interpretation of Venezuela's bilateral air transport agreements has given rise to problems of aviation policy which are worthy of careful examination during this transition period.

Section A - Venezuelan Civil Aviation Policy

The civil aviation policy of a nation is the result of the interplay of many pressures - the desire for prestige in having the national flag carrier serve important world centers; the demand of national carriers for protection against excessive foreign competition; the need to maintain a well trained group of pilots and crews and aviation facilities for military reasons; the impetus to develop trade which necessitates adequate means of commercial intercourse; the requirement of maintaining rapid and constant communications with overseas possessions; the urge to foment tourism as an ever-increasing supply of foreign exchange. These and many more considerations motivate governments to enter into bilateral air transport agreements and shape the terms thereof in accordance with the national interest.

Scheduled international passenger services of Venezuelan aviation enterprises have been conducted principally by two companies: Linea Aeropostal Venezolana S.A. (LAV) and Aerovias Nacionales de Venezuela, S.A. (AVENSA).

In 1933 the Venezuelan Government bought out the French enterprise which first established international air services with Venezuela and formed LAV. AVENSA on the other hand is a privately owned company, with some 30% of the stock held by Pan American World Airways, which helped organize the company in 1944. Both LAV and AVENSA operated domestic and international routes until 1960 when the new company, Venezolana International de Aviacion S.A. (VIASA) was formed by a fusion of capital of the two companies with the purpose of taking over the international operations of LAV. (74)

AVENSA served the Netherlands West Indies, Jamaica, New Orleans, on its international routes, and now also serves Miami. Until 1960 when certain international routes were abandoned by LAV, this carrier operated regional services to Port-of-Spain, and Barbados, and routes from Caracas to Miami via Havana, to New York, to Panama along the North Coast of South America, to Bogota and Lima, and a mid-Atlantic route to Europe via the Bermudas.

Before World War II, Venezuelan aviation enterprises did not compete seriously in the international field. It was then the Government's attitude that it was in the national interest to give concessions and to provide facilities to foreign companies so that adequate services could be obtained for Venezuela. Even the usually sacred area of domestic service was not reserved for Venezuelan companies, and for years Pan American, for example, operated several routes between points within Venezuela.

But in 1946 the Venezuelan Government began to follow a protectionist policy and to restrict concessions on the basis of the principle of reciprocity and in defense of the national carrier's operations on international routes. Venezuela ratified the Chicago Convention and anchored its policy in Art. 6 of said Convention respecting the requirement of special permission for the establishment of international air services. It also signed the

"Two Freedoms Agreement" and the "Five Freedoms Agreement" and ratified these on March 26, 1946. Later on June 3, 1954, the "Five Freedoms Agreement" was denounced on the basis that certain aspects of the agreement were not in accord with Venezuelan views on sovereignty and that the acceptance of this agreement by other countries was not sufficiently general to make it effective. (75)

The celebration of bilateral air transport agreements was considered by the Venezuelan Government to have as its objective the providing of an adequate opportunity for participation of the national carriers in the international air traffic potential. On signing bilaterals with France and the Netherlands in 1954 and with Portugal in 1957, restrictions were imposed on foreign companies on routes which were served by Venezuelan carriers or on which service could be established by national enterprises. No specific restrictions on fifth freedom routes nor express limitations on frequency or capacity were included in the bilateral signed with the United States in 1953.

In addition to the foreign airline operations under the mentioned bilateral air transport agreements, the carriers of Italy, Spain, Colombia, Great Britain, Brazil, Mexico and Argentina also operate to Venezuela on the basis of administrative permits. With the notable exception of carriers of the United States, companies operating to Venezuela have been expressly restricted under the bilateral agreements or administrative permits, either on fifth freedom sections of certain routes, or in the number of passengers originating in or destined for Venezuela, or on the number of frequencies per week, or combinations of these limitations. This policy of protectionism has impeded the celebration of additional bilateral agreements to take the place of concessions (76)

In view of the fact that this policy of protectionism is the very heart

of the current controversy over the introduction of jets by foreign airlines serving Venezuela, a review of the experience of some of the foreign companies before the advent of the jets is indicated here.

Under the original bilateral with France there were not specific limitations on the number of frequencies per week. AIR FRANCE began operations with one flight per week from Paris to Caracas via Lisbon and other points, and beyond to Bogota. The frequency was increased to two flights per week in 1955 with the proviso that the number of full-fare east-bound passengers originating in Caracas, as well as west-bound passengers terminating in Caracas, would be limited to 35 per week. This limitation was changed in 1956 to 55 passengers per week in each direction. It was typical of Venezuelan civil aviation policy in the piston era that increases in frequencies and capacities were not allowed on the basis that such increases would result in a surpassing of "normal limits of capacity".

The experience of US carriers operating to Venezuela in the piston era is even more instructive in understanding the attitudes which led directly to the problems of interpretation of the bilaterals in the jet era.

When the "Chicago and Southern" airline (later merged with Delta) as the designated airline to operate the route from New Orleans to Caracas, sought to increase the frequency of flights per week from three to a daily schedule, under the bilateral agreement signed in 1948 (but never ratified by Venezuela), the Venezuelan aeronautical authorities pointed out that since the route was also served by the Venezuelan carrier LAV, the US carrier would be restricted to the original 3 flights per week for the carriage of passengers between Maiquetia and Havana, a fifth freedom sector of the route.

Representatives of the United States Government in Caracas questioned this order and were informed that, although not yet ratified by Venezuela,

the 1948 agreement was considered "provisionally binding" and the prohibition of increased passenger service between Havana and Maiquetia was based on the concept that capacity on competitive routes should be in accordance with the known available traffic.

Another case which reflected Venezuelan policy in the period of piston aircraft operations occurred in 1951. In that year Pan American World Airways planned to inaugurate non-stop service between Caracas and New York, but the Venezuelan Government at first refused to grant authorization for such operations. Diplomatic efforts failed to achieve an understanding and the US Civil Aeronautics Board issued a "show cause" order (Docket 5165) with the implied threat of imposing similar restrictions upon LAV's permit, unless the principle of reciprocity urged by the US were recognized. This direct exercise of power brought about the authorization for such non-stop services by the American carrier. (77)

While the above related incidents occurred before the current bilateral agreement was signed on Aug. 14, 1953, problems of interpretation under the new agreement (which closely followed most of the provisions of the 1948 agreement) soon manifested themselves. Pan American was not allowed to substitute DC-6B equipment on certain of its routes until the agreement became officially effective on Aug. 22, 1953.

Beginning in 1956 the Venezuelan Government imposed capacity limits on the United States carriers through refusal to grant increases in frequencies or increases in capacity resulting from the use of more modern equipment.

Venezuelan policy regarding the introduction of jets by foreign companies on services to Venezuela is examined in detail in following sections of this study, but will be briefly described here. Air France was refused permission to initiate jet service in 1960 and a supplemental agreement was signed in

the latter part of that year providing frequency and seat limitations but allowing Air France to begin services with jets in April 1961 after the proposed initiation of services by a Venezuelan aviation enterprise.

In 1959, after first receiving refusals for proposed jet operations Pan American was able to obtain permission for one jet flight per week, and this authorization later was raised to twice weekly service between New York and Buenos Aires via Caracas and Asuncion. For many months the "jet controversy" was discussed in aviation circles, official and private, and finally, in Nov. 1959 a major policy statement was made on the need for revision of Venezuela's bilaterals due to the new element of jet operations. The policy statement declared, in part, "...the introduction into service of jet aircraft, which constitutes a new system of flight, has given rise to a series of international problems of a technical, economic and juridical nature. This situation has led to the application on the part of the National Government of extraordinary measures during the current period of transition with the purpose of protecting national aviation from damage which could be irreparable, due to the differences in time in which air transport companies are able to adapt to the requirements of the new era of air transportation..." It was recognized that the position maintained by the Government in relation to operations of commercial jet aircraft had provoked controversies of international scale. The critical situation of LAV was mentioned with the hope that an adequate solution to its failing financial position could soon be found.

It was suggested that all of Venezuela's bilateral agreements would have to be revised, as well as the administrative permits, in order to adjust these to the new requirements of the jet era. In fact, diplomatic consultations did take place between the representatives of the governments of the

United States and Venezuela, in Washington in December of 1959. Unfortunately, no agreement was reached on the jet problem. The bilateral with France was revised through a supplementary agreement permitting jet operations under severe restrictions as mentioned above.

During 1960 officials of LAV, with support from the Venezuelan Government held discussions with representatives of various foreign airlines, including SAS-SWISSAIR, TWA, and Pan American, on the possibility of entering into some sort of arrangement which would include lease of jets to LAV and extensive technical assistance. Finally, however, in the latter part of 1960, the solution was sought in the creation of a new and independent Venezuelan company, Venezuela International de Aviacion S.A. (VIASA), formed with capital partly of AVENSA and partly of LAV. This new company will operate the international routes formerly operated by LAV, and the latter will continue as a domestic carrier.

While this major reorganization was an important step toward solving LAV's problems, yet there remained the urgent need for jet equipment in order to be competitive in the international field. Since neither LAV nor AVENSA was in a position to obtain jet equipment, an agreement of cooperation was celebrated with KLM. Under this agreement, signed early in 1961, VIASA was to begin jet services to Europe in April on a twice weekly basis, with DC-8's leased from KLM. Close cooperation in the technical, administrative and traffic and sales aspects were provided for.

With these efforts at catching up with the jet era offering a degree of protection to the national carrier, the Venezuelan authorities apparently relaxed their opposition to jet operations by foreign companies. In March of 1961 Pan American had not yet been authorized to augment its current two weekly jet flights, but BOAC, KLM, ALITALIA and AIR FRANCE were authorized

to begin jet services to Venezuela after April 1961. But these authorizations carried restrictions on the number of frequencies or seats offered or both.

Although the precise terms of the KLM-VIASA agreement are not as yet made public, it is believed that a pooling of revenue is contemplated. In Sept. 1960 the Caracas press reported a "new development" in Venezuelan civil aviation policy. It was stated that the government was convinced that Venezuelan carriers are entitled to 50% of the revenue from traffic with this country, whether or not such revenue is actually received from carrying 50% of the traffic. (78)

It was reported that Venezuelan aeronautical authorities began conversations with Pan American World Airways with a view to arriving at some arrangement whereby Pan American could increase its jet flights between Caracas and New York, so long as the Venezuelan carrier was guaranteed 50% of the revenue produced by both Venezuelan and American carriers on this route.

One further development in Venezuelan civil aviation policy which deserves comment is the trend toward "regionalism". Venezuelan aeronautical authorities and VIASA were reported as supporting the enforcement by Latin American countries of limitations on all fifth freedom traffic rights under the bilateral agreements now in force. (79)

Section B - Comparative Analysis of Venezuela's Bilaterals

As of March 1961 Venezuela had concluded bilateral air transport agreements with four nations: the United States (1953); France (1954); the Netherlands (1954); and Portugal (1957). These agreements are analyzed on a comparative basis with particular attention devoted to the provisions on the exchange of operating rights, the specification of routes, the regulation of competition and capacity and unique features.

(1) General Form and Content

The bilateral air transport agreements of Venezuela with the United States, France and Portugal consist in each case of the basic "Agreement" itself, which is modeled after the "Chicago Standard Form", and one or more "Annexes" in which the specific operating rights and provisions on regulation of competition and capacity are set out, together with schedules of authorized routes. In the mentioned agreements the period for effecting denunciation is six months, whereas the "Chicago Standard Form" recommended one year, and certain definitions are included which are not found in the "Chicago Standard Form".

The Annex to the Agreement with the United States includes the "Bermuda Principles", while the Annexes to the Agreements with France and Portugal set forth limitations on capacity and competition in different, more restrictive form, especially as regards fifth freedom traffic. Also, the US bilateral does not contain express limitations on fifth freedom traffic over sectors of routes as in the case of the French and Portugese bilaterals. The Agreement with the United States is in the form of an exchange of diplo-

matic notes, while those with France and Portugal are treaties requiring ratification.

In clear contrast to the three mentioned sets of instruments, the agreement with the Netherlands, in the form of an exchange of diplomatic notes, is unique in that there is no annex at all, and the Agreement itself does not follow either the form or content of the "Chicago Standard Form". The routes are made part of the Agreement, together with specific limitations on the number of frequencies to be operated over each route.

Moreover, the operating rights, which are set out in terms of the five freedoms in the Annexes to the three mentioned Agreements, are not found enumerated in the Dutch bilateral, although the term "fifth freedom" is used in the text of the latter. Neither the "Bermuda principles" of the United States Annex nor the more strict provisions on competition and capacity in the Annexes to the Agreements with France and Portugal are expressed in the Netherlands Agreement. There is merely a statement in broad terms of certain factors to be considered in relation to capacity, the mentioned frequency limitations on each route, and Dutch companies are prohibited from carrying fifth freedom traffic on certain sectors of the authorized routes.

(2) Exchange of Operating Rights

While the specification in bilateral agreements of routes to be operated provides a relatively definite method of regulating international air services, the clauses which actually grant operating rights are more general in nature. The mutual granting of operating rights on the designated routes is accompanied by terms which regulate many features of competition, especially the extent of freedom in choosing the frequency and capacity to be offered. Regulation of the vitally important fifth freedom rights was the insurmountable

obstacle to general agreement at Chicago, and subsequent attempts to achieve multilateral convention at the PICAO First Interim Assembly in 1946 and at Geneva in 1947. Regulation based on "freedom" classifications and "Bermuda principles" emerged as the post-Chicago framework for limiting competition. For successful operation of international air routes the carriage of fifth freedom traffic is essential, and the airlines with world trunk routes are impelled to obtain the greatest freedom possible in order to make long-haul routes profitable. At the same time, smaller, regional or local international operations generally seek protection against the larger more powerful operators, and the method of obtaining such protection is seen in varying degrees of limitation on fifth freedom traffic, and in express limitations on frequency and capacity. Recently, limitations on use of jet aircraft have been imposed in certain countries as a means of restricting competition.

Under the influence of the "Chicago Standard Form" as a model for bilateral air transport agreements, it has been customary to include a general statement on the exchange of rights in the basic Agreement, and a more specific breakdown of rights granted, in terms of the five freedoms, in the Annex to the Agreement. In this respect, the Agreement between Venezuela and the United States is identical to the Chicago Standard Form provision (Art.1 of the Chicago Standard Form and Art. 2 of the United States bilateral), as follows: "The contracting parties grant the rights specified in the Annex hereto necessary for establishing the international civil air routes and services therein described, whether such services be inaugurated immediately or at a later date at the option of the contracting party to whom the rights are granted".

The Agreements with France and Portugal, while generally following the "Chicago Standard Form" vary somewhat in terminology, as is seen in the

provision on mutual exchange of operating rights. Art. 2 of the French bilateral is worded: "The Contracting Parties mutually recognize the rights specified in Annex I for the establishment of the international air services enumerated in the Annex, which services shall be designated herein by the expression 'agreed services' ". The Portugese bilateral has a similar provision.

On the other hand, the Dutch bilateral, quite different from the three mentioned agreements, is not modeled on the "Chicago Standard Form", has no Annex, and does not contain an express exchange of operating rights in terms of the five freedoms. The operating rights are derived from the general statement in Art. 1: "Both parties mutually recognize the rights of exploitation of the following international air services..."

The Annexes to the Agreements with the United States, France and Portugal repeat, in slightly different language and organization, the general exchange of rights to conduct air transport services (Sections I and II of the United States Annex and Section I of the French Annex) and, in addition, set out traffic rights in terms of the five freedoms.

Under Section III of the US Annex, one or more of the designated airlines of the contracting parties "Will enjoy in the territory of the other contracting party, the rights of transit (first freedom) and of stops for non-traffic purposes (second freedom) as well as the right of commercial entry and departure for international traffic in passengers, cargo and mail (third and fourth and fifth freedoms) at the points enumerated on each of the routes specified in the Schedules attached."

In similar terms, the first and second freedoms are set out in Section II of the French Annex and the third, fourth and fifth freedoms are expressed in Section III as: "The right to take on and discharge in international

traffic, passengers, mail and goods at the points mentioned in the attached Schedules." The Portugese Annex has like provisions.

In the French and Portugese Annexes cabotage is specifically excluded from the exchange of rights, but such an exclusion is not found in the US Agreement or Annex, or in the Dutch bilateral. The specification of routes in the US Annex does not include service between two points within the territory of the United States. The route specified in Paragraph (d) of Art. 1 of the Dutch bilateral, which is open to service by airlines of both nations, originates at "a point in the territory of the Netherlands" and includes Paramaribo as part of the same route terminating in Curacao. Theoretically then, a Venezuelan carrier could take on passengers in Amsterdam for carriage to Paramaribo or Curacao. This problem will arise when the new Venezuelan carrier "VIASA" initiates its announced jet service between Caracas and Amsterdam via Curacao, in April of 1961.

In the express grant of fifth freedom rights in the Annexes to the Agreements with the US, France and, by implication, of the general grant contained in the Dutch bilateral, the right to carry international traffic is limited by reference to the routes or "points enumerated on each of the routes specified in the attached Schedules". Had the language of the specification of routes under any of the agreements of Venezuela included the term "via intermediate points", then the grant of fifth freedom rights at points along the designated routes would allow picking up traffic at any other "intermediate" point and destined for one of the respective countries, and vice versa.

(3) Specification of Routes

The specification of routes to be operated by parties to bilateral agreements provides an opportunity for the exercise of considerable control

over the competitive services of foreign-flag carriers, and negotiations on this matter may even drag on for several years. A nation with well developed international aviation enterprises wishes as much as freedom as possible for its carriers in the choice of schedules and flexibility of operations, and liberty to develop the more profitable long-haul routes. Thus, such a nation finds it advantageous to use the term "From", followed by the name of the country whose nationality the carrier possesses, rather than names of cities. At terminal points in the territory of the other party to the agreement, such a nation will try to include the phrase "and beyond". Considerable freedom is gained by the term "via intermediate points", instead of specific mention of stop-over points which may be served. If intermediate points must be named, then the phrase "via a point in _____ country" is preferable.

As aircraft with longer range are used on intercontinental routes, a valuable provision, one which has been widely employed in bilateral air agreements, is that which allows the elimination of any or all intermediate points at the discretion of the designated carrier. While many countries have adopted the policy of authorizing one of its airlines as a "chosen instrument" to operate all international routes, the United States has in the last decade followed a policy of "regulated competition" by designating more than one carrier to serve a foreign country, although not usually on the same route. Thus, for the United States at least, the naming of a specific carrier to operate designated routes would be considered as an undesireable limitation. Even for those countries with but one company offering international services, specific mention of the carrier to operate authorized routes would not be attractive, since any change in designated carrier could result in considerable delay and expense while approval is obtained for the operations by the new carrier. In general, it has not been

customary in bilateral agreements to name the carrier to operate authorized routes.

With the tempo of competition growing each year in the field of international civil aviation, and with the emergence of full-fledged policies of nationalism and protectionism evident in recent years, the specification of routes in bilateral air transport agreements has become more and more detailed as a means of regulating competition and protecting national aviation interests. While restrictions on fifth freedom traffic are usually found in the form of the general guide lines of the "Bermuda principles" or more restrictive provisions, in many instances the specification of routes is used to expressly limit competition on fifth freedom routes or sectors of routes, especially when these routes are also served by the carrier of the nation desiring to follow a protectionist policy.

The manner of specifying of routes in Venezuela's bilaterals is not uniform. In the case of the Dutch agreement, the routes are included in the Agreement itself as part of Article 1. In the other three agreements, however, the routes are set out in "Schedules" attached to the Annexes. An examination of the different modes of specifying routes in these agreements will show considerable variety of approach. Also, routes to be operated by carriers of each country, as specified in the four bilaterals, were not always the same for both countries, and in the case of the French supplementary Agreement and Annex, the "onesidedness", or advantageous bargaining position of Venezuela, resulted in lopsided route exchange which was only part of the price France paid for permission to operate jets.

In the Dutch bilateral, each nation, by virtue of Art. 1 of the Agreement, was authorized to operate five different routes, and sometimes the intermediate points were specified as cities and sometimes as countries.

These are the routes: "(a) Local service Caracas-Curacao and vice versa; (b) Local service Caracas-Aruba and vice versa; (c) Service between a point in the Netherlands Antilles - Maracaibo and vice versa; (d) Service between a point in the Netherlands Antilles, Maracaibo, Barranquilla, Panama, San Jose (Costa Rica) and vice versa; with exclusion of fifth freedom traffic between Maracaibo and Panama; Service between a point in the territory of the Netherlands, via Frankfurt, Zurich or Geneva, Nice, Madrid, Lisbon, the Azores or Cape Verde Islands, Bermudas, Paramaribo (optionally), Trinidad or San Juan (Puerto Rico) or Martinique, Caracas, Curacao and vice versa, with exclusion of fifth freedom traffic between Bermudas, Trinidad, Puerto Rico, Martinique and Caracas."

It will be noted that the exclusion of fifth freedom traffic applies only to the Dutch carriers, as the traffic between the mentioned points is third and fourth freedom traffic for Venezuela and is competitive on some parts of routes operated by the Venezuelan carrier LAV at one time. Also, the express authorization for the elimination of intermediate points, as found in Venezuela's other three bilaterals is not part of the Dutch agreement. While the right to eliminate intermediate stopovers is important in view of the constant extension of operating range of more modern aircraft, particularly jets, yet due to the signing of an agreement of cooperation between the new Venezuelan carrier VIASA and KLM, in 1961, it is unlikely that the absence of this provision would prohibit KLM from overflying one or more intermediate points on its authorized routes.

In the Schedules of routes attached to the Portugese Agreement, the routes to be operated by Portugal and Venezuela are expressed separately. The Portugese routes are set out in Schedule I in the form of two complete alternatives, as follows: "From Lisbon, via the Azores, or Salt Is.,

Puerto Rico, to Caracas and beyond to Bogota or Manaos and Rio de Janeiro;" or "From Lisbon, via the Salt Is., Recife or Natal and/or Belem, and/or Paramaribo, and/or Georgetown, and/or Trinidad, to Caracas and beyond to Bogota."

The specification of intermediate points on the alternate route in terms of "and/or" is somewhat unusual in bilaterals and would seem to be unnecessary in view of Note No. 2 to the Schedule I which permits elimination of any or all intermediate points. Thus, the use of the disjunctive "or" by itself would be a limitation, whereas the inclusion or the word "and" would seem to vitiate the limitation.

The Venezuelan routes are set out separately as Schedule II and do not have the "and/or" expression, but are in the alternative, as follows: "From Venezuela, via the French West Indies, Bermuda, Azores, to Lisbon and beyond to Madrid and beyond to: (a) Rome (b) Paris and Frankfurt, in both directions; for operational convenience this route may be substituted by the following: From Venezuela via Trinidad, Island of Salt, to Lisbon, and beyond to Madrid and from there to: (a) Rome (b) Paris and Frankfurt in both directions."

Note No. 1 to the Portugese routes prohibits carriage of fifth freedom traffic between Venezuela and Colombia and between Venezuela and Trinidad. A similar restriction on the Venezuelan route prevents Venezuelan carriers from carrying traffic between points in Portugal and Spain, and between points in Portugal and France. Such restrictions on fifth freedom traffic are similar to those in the French and Dutch bilaterals, but are not to be found in the United States Agreement. This concept of "regional traffic" rights restricting carriage of fifth freedom traffic to neighboring countries has been widely used in the last several years, especially in Latin America.

Notes No. 2 in both Schedules, allowing the elimination of intermediate stops, is a common provision in bilaterals, and is seen in Venezuela's agreements with the U.S. and France, but not in the Dutch bilateral. But in Note No. 2 to the Venezuelan routes, there is an additional clause which makes obligatory a stop in Lisbon (except if waived by prior arrangement) when a flight is to cross Portugese territory. This is similar to the restrictions imposed by Portugal before World War II, and since Portugal has not yet initiated service to Venezuela, this provision is a guarantee of service until such time as Portugese service is established.

With respect to the specification of routes under the French agreement, the separate Schedules of Routes contained in Annex I to the 1954 Agreement indicated 2 nearly equal routes to be operated by carriers of both countries. But this equality of routes was changed considerably by the Annex to the supplementary agreement signed by France and Venezuela in 1960, and the acceptance by France of more limited routes as part of grounds for use of jets, indicates the importance of jet operations to Venezuela in the eyes of the French.

Under the 1954 arrangement the French routes were: (1) "From France, via Madrid, Lisbon, the Canary or Azores Islands, the Bermudas, the French Antilles to Caracas and beyond to Colombia and beyond; (2) From France via Madrid, Lisbon, Dakar, Cayenne, the French Antilles to Caracas and beyond to Colombia and beyond". The Venezuelan routes included the same points, beginning "From Venezuela" with final points "Paris and beyond to Rome and beyond". French carriers were not permitted fifth freedom rights beyond Caracas, and the Venezuelan carriers were under a similar restriction beyond Paris.

The Annex to the 1960 supplementary Agreement, however, modified the

former routes and rights in important aspects. Under the new Annex, the French routes are: "From France, via Lisbon, the Azores, the French Antilles and French Guiana, to Caracas or Maracaibo and beyond in both directions", while the Venezuelan routes are "From Venezuela via Cayenne, the French Antilles, the Azores or Canaries, Lisbon, Madrid, to Paris or Nice and beyond..."

The restrictions on fifth freedom traffic "beyond" the respective countries was again stipulated but with these changes. In regard to traffic rights "beyond" the French cities, the French authorities grant the "definitive right" to the companies designated by Venezuela to carry traffic beyond France to Great Britain, Germany, Italy, Switzerland, Greece, Turkey, Lebanon and beyond. On the other hand, for their part, the Venezuelan authorities authorize Air France to provisionally exercise traffic rights beyond Venezuela to Ecuador, Chile and beyond to Papeete.

But this provisional right of the French carrier is limited by a further proviso that when a Venezuelan company serves any of the mentioned points beyond Venezuela, the Venezuelan authorities may revoke the provisional rights exercised by Air France between Venezuela and such points, upon three months notice. Such unbalanced granting of "beyond" rights is not found in Venezuela's other bilateral agreements, and in none of them is there a specific mention of a carrier by name. Obviously, France paid a high price for permission to operate jets to Venezuela, which was the reason for the negotiations in 1960. With the formation, early in 1961, of the new carrier VIASA, service to Ecuador and Chile may soon be initiated by this new company, thus the "provisional" rights of Air France between Venezuela and these countries may prove to have been quite illusory.

The bilateral air transport agreement in effect between Venezuela and

the United States was signed on Aug. 14, 1953 and became effective on Aug. 22 of the same year. However, this was not the first such agreement, as one was signed in 1948 but never ratified by Venezuela. While the two Agreements were basically the same, the Annex to the 1948 Agreement was quite different from the Annex to the 1953 Agreement, especially with respect to the specification of routes.

In the 1948 Annex (Section 1) each of the routes was described as "The United States of America to..." or "The United States of Venezuela to...". Several routes terminated with "and beyond". This terminology allowed considerable latitude in the selection of final points of departure from the respective countries and in the development of long-haul routes connecting the country of destination with points in neighboring and more distant nations. These terms were in keeping with the United States liberal approach of giving as much discretion as possible to the operating companies for conducting economical air services. However, during the subsequent years of negotiations the attitude of the Venezuelan Government became more protectionist, resulting in demands for more detailed and restrictive specification of routes in the Annex to the 1953 Agreement.

In the negotiations for a new agreement in 1953, Venezuela insisted on using the terms "From the Eastern Zone of the United States" or "From the Central Zone of the United States", and attempted to include specification of intermediate cities rather than countries or "via intermediate points". The United States finally agreed to the use of the "zones" concept but refused to accept specific mention of all intermediate points. The Venezuelan routes were still described in the 1953 Schedule of Routes as "From Venezuela".

But while giving in to the "Zone approach" the United States obtained an understanding through an exchange of notes on the same date, Aug.14, 1953, which defined such zones in general terms and added "...The significance of the designation of the zones ... only concerns the location and identification of the last points of departure from the territory of the Contracting Party to whom the related route or routes have been granted and the location and identification of the first point of arrival in said territory". An examination of all of the bilateral air transport agreements currently in effect between the United States and other countries reveals that this agreement with Venezuela is the only one wherein the concept of "zones" is used to specify routes.

Under the 1953 Annex (as amended by exchange of notes effective Dec. 30, 1954 which modified slightly Venezuela's routes) the United States routes are set out in Schedule One as follows: "(1) From the Eastern Zone of the United States, via Puerto Rico and the Netherlands West Indies, to Caracas and beyond to Brazil and beyond; (2) From the Eastern Zone of the United States except New York, via Cuba, Haiti, the Dominican Republic and the Netherlands West Indies to Caracas; (3) From the Eastern Zone of the United States except New York, via Cuba, Jamaica and Colombia, to Maracaibo; (4) From the Central Zone of the United States, via Cuba, Jamaica, and the Netherlands West Indies to Caracas; (5) From the Canal Zone (served through Tocumen Airport in the Republic of Panama) via Colombia, to Maracaibo and Caracas, and beyond to Trinidad and beyond."

In keeping with the United States policy of regulated competition among national carriers, two airlines are designated to serve these routes, Pan American World Airways, Inc., for Routes 1, 2, 3 and 5, and Delta Airlines serves Route 4. Venezuela also designated two carriers, Avensa and LAV to

operate its routes, which are not the same as those authorized for United States carriers. The Venezuelan routes are set out in Schedule Two: "(1) From Venezuela, except Maracaibo, via Netherlands West Indies and the Dominican Republic, to New York and beyond to Canada and beyond; (2) From Venezuela via the Netherlands West Indies, Jamaica and Cuba to Miami; (3) From Venezuela, via Jamaica, to New Orleans.

In the additional exchange of notes which took place on Aug. 14, 1953, three matters were clarified. It was stated that no provision of the Agreement or Annex prohibited: (A) the operation of flights on Route No. 5 of the United States, which originate in, or have as destination, zones of the United States which are not in the Canal Zone and which include commercial stops in the territories of third countries en route between such zones and the Canal Zone; (B) the utilization of any single aircraft on two or more routes or parts of the same in succession; (C) the use of different aircraft on successive segments of the same route. These actions are permitted so long as the other provisions of the Agreement and Annex are complied with.

Thus, under Point A above, Pan American World Airways operates flights from California, via Central America to Caracas and beyond (Flight 515). Point B, for example, allows PAA to operate flight 433 from Miami to Haiti, Curacao, and Caracas under Route No. 2, and then to continue with the same aircraft as a flight to Port-of-Spain, under the"Caracas and beyond to Trinidad" sector of Route 5. The provision C allows "change of gauge", not utilized under present operating conditions, or a consolidation of traffic where overlapping occurs. This flexibility is extremely advantageous for operations and sales reasons.

(4) Provisions on Regulation of Competition and Capacity

Bilateral air transport agreements are essentially instruments wherein the framework for the regulation of air services between two nations is formally set out. Many factors influence the provisions in these agreements respecting the degree of control to be exercised over commercial subjects. Nations which find it advantageous to formalize in a treaty or exchange of diplomatic notes the guidelines for the conduct of commercial air transport services, are subject to the military, economic, social, geographic and political considerations which make up civil aviation policy.

In the post-World War II years leaders in Venezuelan aviation circles, both official and industry, have called for a policy of protection against excessive competition by foreign flag carriers. The advent of the jet has served to focus attention on this matter and to crystalize a growing demand for limitations on commercial rights of foreign carriers serving the rich Venezuelan air travel market, which in the last several years has produced between twenty and thirty million dollars in annual revenue.

The exercise of control of competition through provisions on operating rights and through specification of routes was discussed above. With over 80 airlines participating in the International Air Transport Association, governments have found it more practical to accept the regulations of IATA on tariffs, seating arrangements and classes of services and many other details, rather than to attempt to set standards in each case and to keep up with the rapid developments in the field. But there is another facet of operations which is subject to regulation by governments in framing bilateral air transport agreements and this is the number of flights per week to be authorized and the number of passengers which may be carried on any or all routes.

A variety of provisions and principles on competition and capacity

have been utilized by Venezuela in its air transport agreements. The United States bilateral contains the "Bermuda principles", while the agreements with France and Portugal include some of the same principles but with others of a more restrictive nature, especially as regards fifth freedom traffic. The Dutch agreement simply specifies a certain number of flights per week on each designated route, but does not expressly limit the number of passengers which can be carried on these frequencies.

More specifically, Section IV of the Annex to the agreement with the United States sets out the "Bermuda principles" as taken directly from the Final Act of the Bermuda Conference. Thus, Paragraph (a) of this Section states the general principle that air transport facilities "shall bear a close relationship to the requirements of the public for such transport". The clear purpose of this principle is to prevent a "flooding of the market". Of course, such "close relationship" is not set out in a mathematical formula, as was suggested by several delegations at the Chicago Conference, with the plan that when utilization dropped below 40% over a reasonable period, frequencies should be reduced, and conversely, capacity could be increased when the load factor was consistently above 65%.

Also, it is the underlying assumption that the "facilities available" refer to the quantity of facilities - the number of seats available or the frequencies - and not the quality of facilities. This clause has probably never been used to justify a requirement that tariffs be lowered to accommodate public demands for more economical travel facilities. In any case, the reference in most bilaterals to the rate-making machinery of IATA is the controlling factor in the matter of tariffs. The main concern of the parties to the Bermuda agreement was the regulation of capacity offering, and thus, this clause must be interpreted in the light of the main issue at Bermuda -- the quantity of services and not the quality.

While the general provision just mentioned is found in the Annex to the United States Agreement only, the next principle in that Annex, Paragraph (b), is part of the French and Portugese Annexes, but is not found in the Dutch bilateral. This provision in the US Annex reads: "There shall be a fair and equal opportunity for the airlines of the contracting parties to operate on any route between their respective territories (as defined in the Agreement) covered by this Agreement and Annex".

This provision is expressed in the French annex (Sec. III-c) and the Portugese Annex (Paragraph 9) as follows: "The company or companies designated by each of the contracting Parties, shall have the right to enjoy fair and equal treatment, with a view to having equal possibilities for the operation of the agreed services between their respective territories". The meaning of "fair and equal opportunity"is fully discussed below in the section on issues raised by the jet controversy in Venezuela.

The next general provision of the US Annex on regulating competition and capacity (Paragraph (c) of Section IV) states: "In the operation by the airlines of either contracting party of the trunk services described in the present Annex, the interest of the airlines of the other contracting party shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes".

Such a provision is not included in the Dutch agreement, but is expressed in the French Annex (Sec.III Para. c) and in the Portugese Annex (Para. 6) as follows: "The airline or airlines designated by each of the two Contracting Parties, shall take into consideration on their common routes their mutual interests so as not to affect unduly their respective services". This is another provision so vague as to be open to a myriad of interpretations. One author suggests that these general provisions "amount to little more

than a promise by both parties to eschew the results of unrestricted competition, coupled with the evident intention that the method of avoiding such results is to be subsequent adjustment rather than prior determination of frequencies and capacities". (80)

The thorniest problem in regulation of capacity and competition has always been fifth freedom traffic. Due to the failure to reconcile divergent views on this subject, the Chicago Conference did not produce a generally acceptable multilateral convention with stipulations on control of fifth freedom. And the later attempts at Montreal and Geneva also failed in this respect. The "Bermuda principles" were the result of strenuous efforts to arrive at a workable compromise and included the clause which appears as Paragraph (d) of Sec. IV of the US Annex, which was set out in full in Section B of Part I of this study.

Here again the Dutch bilateral is silent, but the French and Portugese Annexes have similar though more restrictive provisions for the control of fifth freedom capacity. In Section III Paragraph d of the French Annex and in Paragraph 7 of the Portugese Annex, it is stipulated that on each of the routes specified in the attached schedules, the agreed services "Shall have as their primary objective the offering, with a reasonable load factor, of capacity adequate for the normal and foreseeable demands of international air traffic which originates in or is destined to the country to which the aircraft which operates such services belongs".

The part which differs from the original "Bermuda principles" and is more restrictive in establishing the primacy of third and fourth freedom traffic over fifth freedom traffic, is underlined in the paragraph above. Thus, the introduction of the term "at a reasonable load factor" presents a new element in the measurement of relative capacity offering between the

third and fourth and the fifth freedom categories. Also, while the basic idea in applying the "Bermuda principles" is that there shall be no predetermination of capacity, the terms "normal and foreseeable demands" open the door to considerably more control than embodied in the compromise arrangement arrived at in Bermuda.

Within the capacity limitations stipulated in the mentioned clause of the French and Portugese Annexes, an additional clause allows, "as complimentary" to the carriage of third and fourth freedom traffic, the designated companies "to satisfy the transportation needs between the territories of third states situated on the agreed routes and the territory of the other Contracting Party". The Portugese Annex adds "...in so far as such needs are not satisfied by local or regional services". Here is an added qualifying factor to the restriction on fifth freedom traffic, also not a part of the "Bermuda principles".

In the French Annex (Sec. III Para. e) and the Portugese Annex (Para. 8) additional capacity is allowed for carriage of fifth freedom traffic, so long as this is justified by the transportation needs of the countries served on the route. A special agreement is required in each case, and is granted for a stipulated period only.

The more general "Bermuda principles" of the US Annex, after stating the primary objective of third and fourth freedom, condition fifth freedom traffic carriage upon "general principles of orderly development". And carriage of fifth freedom traffic is to be related to 1) traffic requirements between the country of origin and the countries of destination; 2) to the requirements of through airline operation; and 3) to the traffic requirements of the area through which the airline passes, after taking into account local and regional services.

But both the French and Portugese Annexes have a much stronger provision on the relation of carriage of fifth freedom traffic to local and regional carriers, in the identical clause (Sec. III-e and Para. 9, respectively) : "...development of local and regional services constitutes a fundamental and primary right of the countries interested in the route".

In addition to these general provisions on the regulation of competition and capacity, express restrictions on carriage of fifth freedom traffic was indicated above in the section on specification of routes. It was noted that each of the bilaterals, with the exception of that between Venezuela and the United States, specified limitations on carriage of fifth freedom traffic on certain routes or sectors of routes. Also, there were specific frequency or capacity limitations in some cases, not, however, in the agreement with the United States.

It should also be mentioned that in an exchange of diplomatic notes on the same date as the signing of the US bilateral, Aug. 14, 1953, the parties to this agreement set out definitions of third, fourth and fifth freedom traffic, in relation to application of Sec. IV of the Annex: "... traffic which has its origin or final destination as demonstrated in the corresponding ticket or air waybill, in the territory of one of the High Contracting Parties, shall be considered as Third or Fourth Freedom traffic of that party. Traffic which does not have its origin or final destination, also demonstrated in the respective ticket or in the air waybill, in the territory of one of the Contracting Parties shall be considered as Fifth Freedom of that Party. The fact that traffic crosses an area under the jurisdiction of one of the Contracting Parties (as well as the Canal Zone served by means of the National Airport at Tocumen) does not change its Freedom classification."

The defining of these three freedoms in this exchange of notes is most

unusual, although these terms so frequently used are not actually defined in the agreements or annexes of Venezuela, in the Chicago Standard Form, the Bermuda principles or Agreement, or the Chicago Convention. They are, however, set out in narrower terms in the "Five Freedoms Agreement" formulated at the Chicago Conference.

In describing the specification of routes under the Dutch bilateral, it was seen that for each route an express number of frequencies per week were authorized by Art. 2. There was no limit, however, on the number of seats which could be offered on each frequency. But Art. 2 of the Dutch bilateral should be read with Art. 7: "The respective Governments shall authorize the aviation companies of the other Party to utilize the equipment which the companies may consider most convenient for the efficient operation of their services, so long as there are no opposing technical reasons or that the change of equipment does not involve a substantial alteration in the capacity offered to the public".

Thus, not only is the frequency specifically limited on each route, but in effect, the capacity in terms of the number of seats is also restricted to a gradual increase through introduction of more modern aircraft. When KLM attempted to put DC-6 B aircraft into use on some of the routes, this question was raised, but later operations were permitted with this more modern, larger, non-jet aircraft. Of course, before 1961, this clause could have been used to limit the number of seats offered, if KLM had wished to put long range jet aircraft into service. Now, there is little likelihood of such an objection since KLM received authorization in March of 1961 to operate DC-8 equipment on two weekly flights serving Venezuela on the route to Europe.

The 1954 French Agreement and Annexes did not have specific capacity

or frequency limitations. But the supplementary Agreement and Annex signed in November of 1960, in addition to containing "one-sided" limitations on "beyond rights", thus restricting carriage of fifth freedom traffic by AIR FRANCE, also expressly limits the service with jets to two frequencies per week. (Par. III) This article also stipulates "...Moreover, the trans-atlantic traffic of AIR FRANCE, proceeding from or destined to Venezuela will be initially limited to a quota of 80 passengers per week, each way".

Para. IV of the Agreement, in referring to this numerical limitation on capacity, adds "Within this limit, the traffic of AIR FRANCE between Venezuela and Lisbon will be initially limited to a quota of 8 passengers per week each way, applied on an annual basis". This quota is to be revised each year and when a Portugese company is serving the route the Venezuelan and French Aeronautical Authorities will consult on the appropriate measures to be taken to divide the traffic between the companies exploiting the fifth freedom, to the end of assuring the primacy of companies exploiting third and fourth freedom traffic.

There is a statement in the Agreement (Para. V) that the frequencies and the quotas cannot be revised except by agreement between the Aeronautical Authorities of the two countries. To this end, they should consult regularly, the first consultation to take place, at the latest, three months after the beginning of operations of AIR FRANCE with jet aircraft. The intention to make every effort that this revision result in less and less restrictive limitations, with the reservation that this reevaluation should not prejudice the interests of the designated companies, is expressed in Para. VI. Also part of this paragraph is the proviso that if, "by reason of exceptional circumstances, it should be necessary to maintain the limitations at the same level, or revise them in a more restrictive sense, the Aeronautical

Authorities should avoid any unnecessary prejudice to the interests of the companies and should take into consideration the traffic demand between the two countries".

In the consultations provided for in Paragraph V, and with a view to the revision of the frequencies and quotas, Paragraph VI provides that the Aeronautical Authorities may take into consideration, among other criteria, the following factors: (a) the development of international air traffic at the Venezuelan airports; (b) the development of transatlantic air traffic; (c) the development of international world air traffic.

Aside from the express limitations on frequency found in the Dutch bilateral, numerical limitations, such as are part of the 1960 French agreement, are not found in the other bilaterals; such a limitation was certainly a high price to pay for the privilege of operating jet aircraft on services to Venezuela. Whether the jet operating rights, including a through service to the South Pacific (Papeete) via Ecuador and Chile, justify this harsh bargain, will be seen in the near future after initiation of the services covered by the supplementary Agreement and Annex.

Even though the French authorities wanted to assure the inauguration of their jet services at the earliest possible date, and thus gain a firm foothold in the lucrative air travel market of Venezuela, the acceptance of these many severe limitations would seem to have been too hasty in view of the subsequent granting, in March 1961, of permits to KLM, BOAC, VIASA and ALITALIA to operate jet equipment on mid-Atlantic routes between Venezuela and Europe. (81)

(5) Unique Provisions

With the agreements between Venezuela and the United States, France and Portugal generally following the terms of the "Chicago Standard Form", many of the provisions are identical or quite similar. The main differences among

these bilaterals concern the specification of routes and the regulation of frequency, capacity and competition.

But each of the bilaterals has one or more features which is unique and is not found in the other agreements. The uncommon form of the Dutch bilateral has already been treated above, as well as the provision on change of equipment in relation to capacity. Likewise, the definitions of freedoms of the US exchange of notes was mentioned and the rare terminology of "zones" in specification of routes.

Of additional interest is part of Annex II of the 1954 French bilateral, which deals with a subject not mentioned in Venezuela's other bilaterals. Revenue obtained in the territory of one of the parties shall be used to cover expenses of operation in such territory, and the excess of revenue over costs shall be freely transferable in the currency of the country of the company concerned, based on the official rate of exchange recognized as valid for the collection of revenue.

In view of the relatively unstable currency situations frequently found in Latin American countries, this provision is very realistic and farsighted, and is applicable to recent developments in Venezuela. In November of 1960 the Venezuelan Government established a system of "exchange control", which, in effect, limited the availability through the central government bank, of foreign exchange at the previously prevailing official rate of 3.35 Bolivars to one U.S. dollar. In the early months of this new system the "free market" rate of exchange fluctuated around 4.50 Bolivars to one U.S. dollar, and the airlines were able to obtain sufficient foreign exchange at the former official rate for meeting normal remittances. However, in March of 1961, the regulation pm foreign exchange was changed again, substituting a "free market" rate, which at that time was about 4.70 Bolivars to one U.S. dollar. Thus, the provision

in Annex II is an important safeguard for future commercial operations.

The Annex to the Agreement with Portugal contains a provision not found in Venezuela's other Agreements. By virtue of Paragraph 10, when and if airlines of each of the respective countries serve the same routes or portions thereof, negotiations between the airlines themselves are permitted for developing a "formula of cooperation", which formula shall be submitted to the respective aeronautical authorities for approval. Also, Paragraph 13 states that the parties are "free" to conclude agreements on the division of traffic with any of the countries served by the routes mentioned in Schedules I and II. There is a provision that such agreements shall not restrict the rights conferred by the Agreement and the Annex for the operation of services on the whole or part of such routes.

With the most significant trend in recent years, in international civil aviation, being the establishment of pooling agreements among airlines having common interests, this provision might well become a routine part of bilaterals.

Part III - Problems of Interpretation in the Jet Era

When Pan American World Airways attempted in 1959 to introduce jet equipment in substitution for piston equipment on some of its routes serving Venezuela, the Venezuelan aeronautical authorities initially refused permission and until March, 1961 restricted the number of jet flights to two per week in each direction.

In the initial refusal and subsequent limitation of jet services to be operated by Pan American, three main issues were raised: 1.) Did use of the jets present situations and problems not provided for in the bilateral agreement? 2.) Did use of the jets contravene the principle of "fair and equal opportunity" contained in Sec. IV (b) of the Annex?, and 3.) Did use of the jets violate other provisions on the regulation of capacity? These issues were raised in the order indicated and will be discussed separately in the same order below.

Section A - Did Use of Jets Present Situations and Problems Not Provided For in the Bilateral with the U.S.?

The first issue was raised in response to Pan American's request of April 6, 1959 to use Boeing 707 equipment on its flight 201 Southbound and 202 Northbound, on a route New York-Caracas-Asuncion-Buenos Aires. The usual stopovers at Rio de Janeiro and Sao Paulo were to be eliminated since the airports of these cities were not at that time ready to handle jet operations.

The Venezuelan Dept. of Civil Aeronautics answered this application with its Communication No. 437 of April 28, 1959, which stated in part

"...Nevertheless, this office considers that the use of modern jet aircraft presents situations and problems not provided for in the present Air Transport Agreement between Venezuela and the United States; therefore this office cannot accept the introduction in the future of such changes as indicated by you in the mentioned correspondence of the 6th of this month, until by mutual agreement between the interested parties, the mentioned situations and problems are resolved."

The elimination of the stops in Brazil was accepted only on a "provisional basis" since the proposed operating plan would introduce a "substantial alteration in reference to the direction of the route, which has been traditionally determined by the mentioned stop in the territory of Brazil". The order terminated with a statement that the company should submit information on proposed class of service, configuration, capacity and tariffs.

Here then, was the first official indication by Venezuelan aeronautical authorities in response to a definite proposal to introduce jet aircraft, that such a change would be unacceptable according to the Venezuelan interpretation of the bilateral.

The objection to the change in the existing route of flight 201/202, which resulted in overflying Brazil, was without foundation. Route No. 1 of Schedule One of the Annex to the Agreement reads as follows: (1) From the Eastern Zone of the United States, via Puerto Rico and the Netherlands West Indies, to Caracas and beyond to Brazil and beyond". But Paragraph B of this same Schedule One states: "Points on any of the specified routes may at the option of the designated airline be omitted on any or all flights". Thus, it was clearly within the terms of the Annex for Pan American to eliminate the stops in Brazil.

However, the outstanding feature of the refusal to accept the proposed

changes in operations was the objection to the type of equipment. While in the years before the advent of the jet Venezuelan authorities objected to introduction of more modern piston aircraft, or equipment with different configuration, the objection was always based on an alleged unwarranted increase in capacity. As mentioned in the Section on Venezuelan civil aviation policy, the number of seats offered on certain routes were limited to the same or similar number as when such routes were first operated under the agreement. In at least one of those instances reference was made to Section IV of the Annex which set forth the "Bermuda principles" on capacity.

But in the Communication No. 437 there was no specific reference to any section of the Agreement or Annex. After further insistence by Pan American the Venezuelan authorities finally granted permission for one jet flight, 203/204, with the proposed schedule, in substitution of one piston flight, 201/202. The Communication of the Department of Civil Aeronautics of June 10, 1959 was extremely brief, stating: "...this office is pleased to authorize the mentioned flight". No reasons or further explanation were given.

Pan American initiated the first scheduled commercial jet service to a Latin American country, with Caracas as the first city served, in July of 1959. Then, on September 2 this company filed a plan calling for one additional New York-Caracas-Asuncion-Buenos Aires flight and three New York-Caracas flights per week, in each direction, to begin on November 1. To this application, the Department of Civil Aeronautics replied with its Communication No. 1076 which stated in part "...based on the reasons already presented to your company in our Communication No. 437 of April 28 of this year, and in view of the fact that the extension of services proposed has economic effects and others of a type not provided for in the United

States-Venezuela Air Transport Agreement, this Ministry cannot accede to the aspirations of your company until by mutual agreement between the parties, the conditions under which the newly proposed services could be conducted are determined...It is the opinion of this office that the questions raised are matters which must be decided between the aeronautical authorities of Venezuela and the United States".

After continued attempts by Pan American to obtain the permission to operate additional jet flights, which efforts included the intervention of the U.S. Embassy in Caracas, on Oct. 26, Pan American, not having received an indication that its proposal was being favorably considered, notified the Venezuelan authorities that it would substitute one piston flight, 201/202 with service of Boeing 707 aircraft in according with the company's interpretation of the bilateral. Communication 1115 of October 28, 1959 granted permission to operate this proposed additional jet flight, with the observation that since the purpose of this flight was service between the United States and the country of ultimate destination of the traffic, in this case the country or countries to the south beyond Venezuela, "This office has no objection to make, since this circumstance is provided for in Paragraph (d) of Section IV of the Annex..."

This section of the Annex concerns regulation of fifth freedom capacity, which will be discussed more fully below. It is submitted that the restrictions on PAA's jet operations in 1959 were really based on the Venezuelan policy of protectionism, as reported in the Caracas press. An article appearing in the Caracas newspaper "El Universal" on October 28, 1959 expressed the view that the refusal to approve additional jet flights was based on "an adequate policy of protection of the Venezuelan civil aviation in full development...In accordance with the new civil aviation policy, which

tends to protect national air transport companies, the Dept. of Civil Aeronautics has denied or at least postponed an authorization solicited by PAA to replace all its services to Maiquetia (airport serving Caracas) with jet aircraft...Other observers indicated,...that the new civil aviation policy which the Govt. desires to establish, suggests the adviseability of adjusting the bilateral agreement to the demands of development of aviation with jet aircraft".

There were really two separate questions involved - did the jets intended for service to Venezuela, Boeing 707, represent a radical departure from piston aircraft operations, and if so, did such a radical departure amount to new conditions and problems and have economic effects not provided for in the bilateral, to the extent that restrictions or demands for revision of the agreement were justified?

As to the first question, neither the bilateral agreement, nor the Annex thereto, contained provisions as to type of aircraft. Under the additional exchange of notes on August 14, 1953, "the use of different aircraft on successive segments of the same routes" was permitted. This provision is based on the "change of gauge" stipulation found in the Bermuda Agreement (Sec. V) and refers only to use of a different, smaller aircraft on shorter segments of trunk routes served by large aircraft. Thus, this clause could not be the basis for a right to substitute jet aircraft for piston planes.

While the bilateral and annex do not expressly mention use of jets, neither do these documents mention use of piston aircraft. Of course, such piston aircraft were the basis of international operations when the Agreement was signed. In order to evaluate the "new situations" argument, the equipment in use at the time of the agreement must be considered.

Pan American initiated scheduled operations with Boeing 707 aircraft

on October 26, 1958 with its transatlantic flight, but prior to this, the British had been using Comet I type turbo-jets since 1951. Also, the Russians were using their TU-104 in regular operations. Widespread publicity was given to these operations and use of jet aircraft in scheduled flights was common knowledge in aviation circles at that time.

LAV had entered negotiations for Comet aircraft in 1954, and crews were being trained in England. But with the Comet crashes the contemplated purchases were cancelled. (82) There is no evidence that the Venezuelan Government considered the introduction of these jet aircraft such a radical departure from normal operations as to necessitate revision of the bilateral.

But it should also be recognized that, while the Comet and TU-104 are pure jet aircraft, yet in terms of speed, range and especially capacity, they are not comparable to the Boeing 707 or Douglas DC-8 aircraft. (83) While it could be said that the Venezuelan authorities must have been aware of commercial jet operations in 1953, yet the US-Venezuela bilateral was a copy of the basic terms of the "Chicago Standard Form" produced in 1944 and the "Bermuda agreement" provisions on capacity were formulated in 1946, years before extensive jet operations were established.

The first prototype of the Boeing 707 was flown in July of 1954 and this event was widely commented on. Certainly the manufacturers of turbo-jet aircraft and commercial airlines attempted through advertising to create the impression that the large jet aircraft were radically different from existing piston, turbo-prop or small jet aircraft. The 707 with a maximum cruise speed of 885 kilometers per hour was compared to the Douglas DC-7C, with a maximum cruise speed of 515 Kmph (or 636 kmph of the Bristol Britannia). As to range, the maximum performance of a DC-7C with capacity payload was 7,443 kilometers, while the Boeing 707 could fly 8,047 kilometers.

But the radical change to be observed in the jet operations was the impact of the jets on the factor of capacity, and the great competitive advantage they afforded.

While passenger traffic on international air routes has continued to show a steady increase in the last decade (84) there are several factors in the current situation which are causing grave concern to airline companies and governments alike. All indications are that 1961 will prove to be the most fiercely competitive year in the history of international civil aviation. Some of the new factors in the present situation are the huge investments in jet equipment by large and small companies, together with difficulties in disposing of piston aircraft; the rapidly rising costs of operations; and the increase in the number of airlines operating on the same or parts of the same routes. These elements have caused net profits to shrink to such an extent that if there is a profitable operation, the profits represent a comparatively small return on capital investment. The majority of airlines having international operations are subsidized in one form or another and the drain on government funds is huge.

But the outstanding feature of the present picture is the available seat-miles at present, and those soon to be available with the introduction of medium and long-range turbo-jet equipment. At the end of 1960 only about one-half of the turbo-powered aircraft ordered were delivered. In the next two years the total pure jet aircraft that will have been delivered is estimated at more than 700, with an additional 800 turbo-prop aircraft also in operation. The capital investment here represented is over three billion dollars. Some 80 carriers will have jet equipment. (85)

The largest pure-jet aircraft have a passenger carrying capacity of from 110 to 160 passengers, as compared to the 62-105 seat capacity of a DC-7C. One DC-8 or Boeing 707 with a 160 seat configuration can, with only

five weekly round trips, carry more passengers in a year than a 40,000 ton passenger ocean liner. One large jet can provide the lift of 3 DC-7C's or Super-Constellations. As to public acceptance of these new turbo-jet aircraft, here again actual experience has exceeded expectations. The load factor of the jets on international routes is considerably above average as compared to piston equipment. But while international passenger traffic is increasing at a good rate, by the end of 1962 when some 300 large jets will be in operation, the seats offered will be equivalent to 1500 DC-7's or 500 Queen Marys. When the current orders are all filled for large and medium size jets, and with the continued availability of piston equipment, the critical nature of the capacity problem can only be guessed at, but indications are that an excess of capacity will soon be evident. (86) All this is without considering the prospect of "super-sonic" jet transports which might be produced within the next 15 years and which could cause a similar revolution in air transport patterns.

In support of their viewpoint the Venezuelan Government might have referred to the study published in 1958 by the ICAO Air Transport Committee, entitled "The Economic Implications of the Introduction into Service of Long-Range Jet Aircraft" (87) wherein was stated: "The turbo-jets, on the other hand, display certain radical differences from piston engined and turbo-prop aircraft which places them outside the general trend and gives rise to the economic problems studied in this report". Table 3 of that study gives a comparison of statistics to support this view. With regard to the specific problem of regulation of competition in the bilateral agreements, the comments of the Air Transport Committee suggest that "governments may find it necessary to reexamine certain aspects of their air transport policies in light of the economic position of their carriers. Among the

matters possibly requiring such reconsideration are...bilateral or multilateral agreements on the exchange of commercial rights, taking into consideration the new conditions of competition and the new pattern of air services". (88)

Several authors have stated that the use of jets raises many new problems not present in the piston aircraft era. (89) One writer stated the opinion in 1958, that "Introduction of jet transports on international routes is bringing about sweeping changes in relations between U.S. airlines and foreign flag carriers that will call for a complete re-drafting during the next 12 months of most bilateral air pacts now in effect". It was related that France denounced its bilateral air agreement with the U.S. on grounds that "principles agreed to in 1946, date of last agreement signed, covering operations of Douglas DC-4's and DC-3's, no longer have any significance in route planning for turbojet transports". (90)

In commenting on the value of the Bermuda principles as a durable compromise arrangement, Wassenburgh stated in 1957 that such principles are worthy of continued support and "only if structural changes were to take place in civil aviation could this be otherwise (e.g. in the event of further development of jet-propelled transport planes!?) ". (91)

Also the comments of Stoffel are pertinent. "It is not adequate to simply say that they are just a faster, bigger aircraft. They are so much faster and so much more productive (than piston and turbo-prop aircraft) that they require a complete review of the patterns of air transportation."

When full scale jet operations were initiated on international routes the IATA traffic conferences adopted special charges for flights on these aircraft, and in 1960 the whole fare structure on the North Atlantic was changed from the former system of surcharges for jets, to complete tariffs for jets and another set of tariffs for piston flights. The same is now

true for transpacific fares, and in the Western Hemisphere the jet surcharges are still applied in international and domestic US tariffs. IATA members without jet equipment or without full-scale jet operations wanted this tariff protection.

It should be concluded that the jets did represent a radically new factor in civil aviation. The patterns of international air transportation are definitely changing to accomodate them. But merely because the jets represented a new factor was insufficient reason for denying their use under existing bilateral air transport agreements. The essential element in the jet controversy was whether the general principles of the agreement were applicable to this new factor or whether use of the jets violated any part of the agreement, particularly those on competition and capacity which were the radically new features of turbo-jet operations.

After the initial denials of permission to operate jets, based on vague references to "new situations and problems" and "economic effects", subsequent communications of the Venezuelan Department of Civil Aeronautics, the views expressed in the diplomatic note presented to the U.S. Embassy in Caracas in November of 1959, and the official position of the Venezuelan delegation to the consultations in Washington in December of 1959, all indicated that the real impact of the jets on interpretation of the agreement was their effect on competition and capacity.

The "new situations" argument is thus bound up and inseparably merged with interpretation of the provisions on regulation of competition and capacity. These issues are dealt with in the following sections.

Section B - Did Use of Jets Contravene the Principle of "Fair and Equal Opportunity" of Sec. IV -(b) of the Annex?

After many months of difficulties in attempting to substitute jet aircraft for piston planes on its services to Venezuela, Pan American enlisted the support of the US Government in its efforts to convince the Venezuelan authorities that restrictions on jet operations were not in conformity with the US-Venezuela bilateral.

On November 3 or 1959 the US Embassy in Caracas delivered a formal note of protest (Note No. 138) to the Venezuelan authorities. The note expressed the US position as follows: "...The Government of the United States wishes to emphasize again, and continues to maintain, the opinion that capacities, frequencies, types of equipment and other phases of services offered by the designated airlines on their routes, are subject only to the demands of traffic and efficiency of operations, as determined by the respective airlines, until one of the contracting parties is in a position to demonstrate in consultations contemplated by Art. 10 of the Agreement, that the operations of a designated airline violate Sec. IV of the Annex to the Agreement".

In reply to this note, the Ministry of Foreign Affairs of Venezuela stated its position that the unregulated use of the jets would contravene certain principles of the agreement: "It is fitting to observe that this opinion (of the US Government) which was put forward from the period of negotiations concerning the Air Transport Agreement between the two countries, but which does not form part of its text nor of its Annex, has been accepted by the Government of Venezuela with the reservations which were opportunely made known to the Government of the United States of America; however, the

Aeronautical Authorities of Venezuela have arrived at the conclusion that such a viewpoint cannot be applied absolutely in an extraordinary situation of transition such as that which has been presented by the substitution of ordinary equipment by Boeing 707 aircraft in some of the routes provided in Schedule I of the Air Transport Agreement".

"In effect, it can be affirmed generally that the use of modern jet aircraft gives rise to situations and problems not foreseen by the parties at the time of celebrating the above Agreement, since what is involved is a totally different air transportation system as expressed by Pan American in its informational pamphlets for the public. And in such exceptional circumstances it would not be adviseable to apply strictly the procedures used in periods of normal evolution, since, according to these, it would be impossible to regulate those modifications which in this transitory period could alter completely the principle of reciprocity which must exist in the field of air traffic exploitation, in conformity with the spirit of the Agreement and of the Annex thereto, and in particular with the principle contained in the latter (Sec. IV Subsection b) which establishes:

'(b) There shall be a fair and equal opportunity for the airlines of the contracting parties to operate on any route between their respective territories (as defined in the Agreement)...'

"Therefore, the Government of Venezuela has considered it necessary to submit to the requirement of prior authorization changes of equipment which have the objective of establishing services with jet aircraft, in such a way that these changes will not depend exclusively on the unilateral decision of the airlines and to maintain such a situation until both parties can agree upon a mutually satisfactory formula to resolve questions of this nature. It is the opinion of the Government of Venezuela that the present

period of transition in the change of equipment must not be accomplished precipitously, especially on certain routes because this could have ruinous consequences for some companies, since all of them have not been able to adapt with equal speed to the requirements of the new era of air transportation. Naturally, this concept of gradual transition could not be used to justify unreasonable delays and restrictions, which would prevent progress in aviation and would deprive the public of the related benefits."

In December of 1959 delegations of Venezuela and the United States met in Washington to discuss the interpretation of the bilateral air transport agreement. In the State Department Press Release No. 837 of December 4, it was stated "...The Venezuelan Government requested consultations in order to arrive at a mutually satisfactory procedure for the introduction of jet aircraft on international flights".

During the consultations the United States reaffirmed its position and presented statistics to show the growth of traffic between Venezuela and the US and to substantiate estimates of future traffic potential which justified additional jet services. The Venezuelan delegation insisted on the views which they had expressed earlier. They also presented statistics with the different basis that third, fourth and fifth freedom traffic figures included all carriers on a particular route. The United States statistics, on the other hand, were based on the idea that these statistics should be separate for each carrier. There was some discussion as to whether or not the figures presented by both delegations represented "true origin and destination" statistics. After several days the consultations were discontinued as there was no reasonable expectation that agreement could be reached on additional jet service.

As seen from the diplomatic note from the Venezuelan Government and from the consultations in Washington, the real basis for the Venezuelan inter-

pretation restricting jet services by United States carriers was that the use of jets by foreign carriers would seriously damage the economic position of the national carrier, Linea Aeropostal Venezolana, and thus would contravene the specific provision in the Annex on "fair and equal opportunity" (Sec. IV(b)) and the "principle of reciprocity" which is taken to mean the same thing.

In effect, this interpretation recognized the overwhelming competitive advantage of the jets; and the key statement in the Venezuelan note of November 1959 was the mention of "ruinous consequences for some companies".

Certainly, the Venezuelan airline, LAV, was in dire financial circumstances just at the time when Pan American wanted to introduce jet equipment. In a statement to the press (93) the then Minister of Communications, Dr. J.M. Dominguez Chacin, frankly admitted the grave concern of the Government over the financial losses sustained by LAV in its international operations. These were estimated by him at several thousands of dollars daily. The Government and LAV were urgently searching for a solution to the crisis through some formula for pooling of services or a cooperative arrangement with European airlines (SAS-Swissair and others), or a fusion of LAV and AVENSA capital to form a new company. The problem of the huge additional investments required for purchase of jet equipment was also mentioned.

The financial losses of LAV had been reported to be as high as $30,000 daily at one period, (94) and over 35 million dollars in two years. (95) Articles also appeared in the foreign press, reporting on the restrictions imposed by the Venezuelan authorities: "The Government of Venezuela denied Air France permission to operate jet aircraft in that country. Why? Simply because Venezuelan aviation is not in condition to compete with foreign aviation." (96)

In the article "Jets Restricted in South America", appearing in the New York Times of June 12, 1960, the situation was well summed up: "The rejection by Venezuela in the last week of an application of Air France for jet flights to Caracas establishes a type of protectionism that has developed in some South American countries since the advent of the jet era, in the opinion of some observers. Venezuela has been particularly strict. The Government has refused permission to Pan American World Airways for more jet flights to Caracas. The policy appears inclined toward helping save the government airline, Linea Aeropostal Venezolana (LAV), which is suffering losses and cannot get jets until 1961."

It therefore becomes clear that the fundamental issue in the controversy was the adverse effect on the competitive position of LAV. But was the Venezuelan Government justified in basing its restrictions on the "spirit of reciprocity" and on the "fair and equal opportunity" clause of the Annex? What is the meaning of this clause?

One author commenting on this provision of the Bermuda Agreement, said, "...There is no indication of what is meant by fair and equal opportunity. Does it mean an ultimate equality in frequencies and capacities, or are the shares to be related to the planes available to the carriers of one or the other party? When is a carrier unduly affected? Answers to these questions will not be found in the text of the Agreement, which seems to amount to little more than a promise by both parties to eschew the results of unrestricted competition, coupled with the evident intention that the method of avoiding such results is to be subsequent adjustment rather than prior determination of frequencies and capacities." (97)

In their Joint Statement, the UK and US delegates to the Bermuda Conference expressed the view: "...The fair and equal opportunity referred

to above does not imply the allocation of frequencies by agreement but only the right of each nation to offer the services it believes justified under the principles agreed to". (98) After citing the above commentary, Cooper has said, "...each nation has promised that its own carriers do not offer frequencies or capacities or indulge in competitive practices not authorized under the quoted principles". (99)

Cooper in another publication (100) referred to the general debate in the British Parliament on February 28, on the Bermuda Agreement, relating that "...Lord Swinton was asked very pointed questions on how the principles of the Final Act would work in practice, and particularly as to what would happen under the equal opportunity principles when Great Britain was fully prepared to fly. He said: 'The Agreement, as I understand it, that there shall be a fair chance for both, means that each will be able, or ought to be in a position to put on enough planes, on this load factor principle, to carry half the traffic..' ". Lord Swinton was further quoted by Cooper to the effect that this principle involved questions of capacities and frequencies. Wassenbergh also takes the clause as referring to frequencies and capacities. (101)

In addition, one commentator on the Bermuda Agreement, makes the distinction between "opportunity" to operate and the share in the operations, suggesting that it would be a serious mistake to force a rigid division of traffic, regardless of who carried it. Lowering the stronger carrier to the methods or level of the other carrier "would not be in favor of needs of the public nor would it be fair towards the other (more enterprising) carrier..." (102)

Thus, not only the participants in the negotiations which produced the Bermuda principles, of which the clause on "fair and equal opportunity" is a part, but also experts in the field of international air law are unanimous

in interpreting this clause as governing capacity aspects of service and not the competitive factor of type of equipment. Again, the basic differences at Bermuda were not was to what kind of services, but rather, how much service. Not quality but quantity. It must be concluded that the denial of use of jet equipment or restrictions on frequency was incorrectly based on the "reciprocity" and "fair and equal opportunity" provisions. The denial was, in reality, based on the desire to protect the national flag carrier, not from competition in the form of excessive capacity of the jets, but from competition in the form of attractiveness to the traveling public.

The restrictions on Pan American's jet operations could have been better grounded in the clause of the Annex which reads: "In the operations by the airline of either contracting party of the trunk services described in the present Annex the interest of the airlines of the other contracting party shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes". (Sec. IV-c)

Van der Tuuk Adriani suggests that this clause might possibly be considered as the "crucial point and very fundamental idea behind the Bermuda: competition is all right but no cut-throat competition in the sense of striving for a monopoly or the domination by one party over the other". (103)

But even using this more appropriate "not to affect unduly" provision, the Venezuelan Government would have to show that Pan American intended "cut throat competition" or was attempting to establish a monopoly on the routes in question, under the interpretation given by the cited author.

Perhaps a less dramatic description of the results of the proposed services would suffice. But the clause, it must be remembered, is designed to protect airlines of both parties. Thus, would it not be unfair to the United States carrier to prohibit use of jet equipment representing a business risk of hundreds of millions of dollars? Why should Pan American be

penalized for the financial failure of a competitor, when there was no indication of unethical practices on its part? LAV had the same chance to purchase long-range jets as PAA when such aircraft were first being offered to airlines. LAV was not restricted nor would be restricted in using jets on services to the US. Was this not evidence of "reciprocity"?

And most significant, the argument that the United States carrier could be restricted under the "fair and equal opportunity" clause or the "not to affect unduly" clause, presumes that the operation of jets or of more jets than were finally allowed, would seriously jepoardize the financial position of LAV. The implication that the operations of the more efficient company should be reduced to the level of the less efficient carrier is certainly not a sound proposition. Pan American was not responsible for the almost hopeless condition of LAV, and the Venezuelan Government recognized that the critical condition of LAV was not due to any unethical competition by Pan American. In an important policy declaration of the Venezuelan Government, reported in the Caracas newspaper "El Nacional" on September 23, 1960, the observation was made by the Government authorities on the critical situation of LAV that it had one of the lowest load factors of any airline in the world. The declaration added "...Nevertheless, this situation is not the fault of the agreements celebrated nor of the administrative permits conceded to foreign companies. In effect, until the year 1956, LAV carried 55% of the traffic between Maiquetia and New York and Pan American the remaining 45%. Beginning in that year and due to the accidents suffered by the national carrier the load factor of LAV dropped to impressively low figures." (Emphasis supplied)

The following statistics on the number of passengers carried between New York and Caracas by Pan American, LAV and KLM, and a list of LAV accidents, tend to confirm this view.

Number of Passengers Carried Between New York and Caracas by Pan American, LAV and KLM and a List of LAV Accidents

	PAA		LAV		KLM	
	Pass.	% of Total	Pass.	% of Total	Pass.	% of Total
1955	12,900	41	18,400	59		
Jan-June 1956.....	7,300	44	9,300	56		

On June 20, 1956 an LAV L-1049 crashed on a flight from New York to Caracas.

July-Nov 1956.....	8,700	59	6,100	41		

On Nov. 27, 1956 an LAV L-749 Crashed on a flight from New York to Caracas.

Dec. 1956 - June 1957...	13,400	73	4,900	27		

In May 1957 an LAV L-1049 was destroyed on the ground at Maiquetia. In July 1957 LAV reduced its New York service from 6 to 3 non-stop flights per week.

July-October 1957.....	10,200	75	3,400	25		

In Nov. 1957 LAV increased its New York service to 5 weekly non-stop flights. In January 1958 service was increased to 6 non-stop flights per week. KLM inaugurated New York-Curacao service Oct. 1957.

Nov. 1957 - Oct. 1958...	26,100	62	11,900	28	4,100	10

On Oct. 14, 1958 an LAV L-1049 crashed near Maracaibo.

Nov. 1958 - June 1959...	20,300	71	5,200	18	3,300	11
July 1959- Sept. 1959...	11,500	65	4,000	23	2,100	12

(Note: The figures for KLM represent passengers carried between New York and Caracas (both directions) who made direct connections at Curacao. The figures opposite the period Nov. 1957-Oct. 1958 include Jan. through October 1958 only.)

(Source: U.S. Immigration and Naturalization Service Statistics, and Records of Pan American World Airways, Inc.)

Section C - Did Use of the Jets Violate Other Provisions on Regulation of Capacity?

When Pan American notified the Venezuelan authorities on October 26, 1959 that this company would substitute a second piston flight 201/202 with service of Boeing 707 aircraft on the New York-Caracas-Asuncion-Buenos Aires route, the Department of Civil Aeronautics responded with the aforementioned Communication No. 1115, as follows: "Considering that this service has as its principal objective the providing of a capacity adequate for traffic demands for service between the United States of America and the country of ultimate destination of the traffic, in this case the country or countries to the south beyond Venezuela, this Office has no objection to make since this circumstance is provided for in Paragraph (d) of Section IV of the Annex to the Air Transport Agreement between Venezuela and the United States of America. This opinion is not in conflict with that which the Department of Civil Aeronautics expressed in its Communication 1076 of this month."

While the statement was made in this Communication that the views therein were not in conflict with those expressed in Communication No. 1076, yet it should be observed that Pan American's earlier proposal, to which the denial in Communication 1076 referred, included in part a request for exactly the same type of change in operations, substitution of jet for piston equipment on a flight New York-Caracas-Asuncion-Buenos Aires. Such additional flight was not granted by No. 1076, but was permitted by No. 1115.

Also in Communication No. 1115, for the first time the Venezuelan authorities referred to the fifth freedom capacity provision of the Annex - Sec. IV (d). But in making reference to this Section there was an apparent confusion as to its meaning.

The main part of this section provides: "Services provided by a designated airline under the present Agreement and Annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such airline is a national and the country of ultimate destination of the traffic." This clause is the heart of the "Bermuda principles" and is designed to make carriage of third and fourth freedom traffic (traffic between the United States and Venezuela, for example) the main purpose of providing services. This is indicated by the following phrase of that same section: "The right to embark or desembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in the present Annex shall be applied in accordance with..." certain general principles governing carriage of fifth freedom traffic. These general principles include the proviso that fifth freedom capacity should be related to "traffic requirements between the country of origin and the countries of destination". The Joint Statement of the delegations at the Bermuda Conference and the opinions of commentators are unanimous in viewing the mentioned "primary objective" as third and fourth freedom traffic. (104)

But even if the Venezuelan authorities had intended to make reference to the "country of origin and countries of destination" (Sec.IV-d-1), this part of Section IV is pertinent only to regulation of fifth freedom traffic as it relates to third and fourth freedom traffic. Carriage of third and fourth freedom traffic was precisely the purpose of Pan American's proposed substitution of jets for piston equipment on routes between New York and Caracas, which proposal was not granted (Communication 1076).

But no specific reference to type of traffic was made in Communication No. 1115, and thus, the reference to prior Communication 1076 could only refer to the general objections therein presented on the basis of "economic

effects and others of a type not provided for".

There would have been more justification, according to the usual interpretation of the Bermuda principles set out in Sec. IV, for restriction of additional capacity on the New York-Caracas-Asuncion-Buenos Aires route (the one that was granted) than for restrictions on capacity on the New York-Caracas route (the one previously refused). This is owing to the fact that the first mentioned route above includes fifth freedom traffic, while the next mentioned route is third and fourth freedom for United States carriers. It can only be concluded that the approval of one additional jet flight New York-Buenos Aires via Caracas and Asuncion, under Communication No. 1115, was erroneously based on citation of Section IV-d of the Annex.

In February of 1960 Pan American requested approval for seven weekly flights with jet equipment, to become effective May 1st. Communication No. 349 of March 26 refused permission for the proposed changes that would add two flights New York-Caracas, and increase from two to five the New York-Caracas-Asuncion-Buenos Aires flights.

With respect to the New York-Caracas flights the cited Communication stated in part "...there is no reason to authorize this service and we confirm that new authorizations are subject to prior approval in conformity with the interpretation of the Venezuelan Government on the relative clauses of the Annex to the bilateral Air Transport Agreement between Venezuela and the United States, which interpretation became more directly applicable with the introduction into services of jet aircraft and which was communicated to your company by Communications No. 437 of April 28 and No. 1115 of October 28, 1959".

The Communication No. 349 then referred to the three additional "through" flights proposed, and observed, "...while it is true that the company enjoys the concession for exploitation of the services which are required by

traffic between the points of origin and ultimate destination, the ' a posteriori' experience of the two previously authorized flights demonstrates that the purpose for which they were authorized has been altered, in that the major part of the seat capacity is not used for in transit traffic, but is offered with marked preference for passenger traffic Caracas-New York and vice versa. This circumstance automatically includes them in the established framework for 'local' flights between New York and Caracas".

The first portion of this Communication No. 349 repeated the "new situations and problems" and "economic effects" arguments by reference to the two earlier Communications.

The proposed extra "turn around" flights between New York and Caracas, being third and fourth freedom flights, would seem to have had more justification than the through flights (involving fifth freedom traffic). Nevertheless, by reference to Communication No. 1115, the implication of the mentioned portion of Communication No. 349 was that the original through flights were justified and the proposed additional third and fourth freedom flights were not, under the same (mistaken) rationale of Communication No. 1115, treated above.

It will be noted that in the Communication No. 349 there was no specific indication that the capacity then being offered between Caracas and New York was adequate for the traffic demands on this route and that any increase in such capacity would be unwarranted. This viewpoint was only implied and no statistics were adduced in support of the implication.

Once more, when Pan American on June 8, 1960 requested authorization to increase the number of jet flights, with a similar schedule, Communication No. 594 of June 16 again denied such permission. The requirement of prior

authorization in keeping with the interpretation of the Venezuelan Government was repeated, and it was concluded that there was no reason for authorizing the proposed services "...particularly when the capacity which is proposed represents a substantial increase over the present capacity offering for the Venezuelan-United States traffic, and is not in relation to the verified traffic demands".

Although not specifically stated this objection could have been based on Section IV-a of the Annex which stated that "The air transport facilities available hereunder to the traveling public shall bear a close relationship to the requirements of the public for such transport". Actually, however, records of Pan American indicated that for the period January to April 1960 there was an increase of some 18% in traffic over the same period in 1959 on the route Caracas-New York. The proposed substitution of jet equipment for piston planes would amount to an increase from the then authorized 814 seats per week to 847 seats, or an increase in capacity of about 4%.

Thus, there was obvious disagreement as to the traffic demands on the route Caracas-New York, with Pan American attempting to justify its request for substitution of jet equipment on the basis of an increase in demand and the Venezuelan Authorities denying such request on the ground that the proposed substitution would result in an unwarranted increase in capacity.

The following tables, some of which are based on U.S. Immigration and Naturalization Service traffic figures, and some of which are based on Pan American records, give a picture of capacity-in-relation-to-demand on the New York-Caracas route during the time of the controversy. Observations concerning these tables are presented on succeeding pages.

TABLE NO. 1

Growth of Air Passenger Traffic Between the US and Venezuela

1949-1959

Yr. Ended June 30	US-Ven.	Increase over Previous Yr.	N.Y.-Ven.	Increase Over Previous Yr.
1949	36,437	-	14,567	-
1950	37,178	2.0	15,313	5.1
1951	37,673	1.3	16,418	7.2
1952	49,122	30.4	19,407	18.2
1953	51,987	5.8	18,821	(3.0)
1954	52,781	1.5	20,158	7.1
1955	63,044	19.4	27,048	34.2
1956	74,641	18.4	30,702	13.5
1957	82,747	10.9	27,730	(10.7)
1958	101,294	22.4	37,900	36.7
1959	118,968	17.4	46,720	23.3
% Increase 1959 over 1949		227%		221 %
Average Yearly Increase		12.6%		12.4%

Source: United States Immigration and Naturalization Service Statistics. 1958 data include 2,111 passengers carried between New York and Caracas by KLM via direct connections at Curacao during the period Jan. through June 1958. 1959 data include 5,330 passengers carried by KLM during the period July 1958 through June 1959.

TABLE NO. 2

Seat Factors on PAA's Scheduled Combination Non-Stop Flights Between New York and Caracas - Year Ended September 30, 1959

Southbound

Month	No. of Flights	Available Seats	Revenue Seats	Seat Factor
Oct. '58	31	1,757	1,423	81
Nov.	32	1,827	1,353	74
Dec.	34	1,922	1,243	65
Jan. '59	35	1,979	1,505	76
Feb.	30	1,711	1,158	68
March	36	2,035	1,296	64
April	33	1,867	1,083	58
May	36	2,082	1,362	65
June	36	2,056	1,700	83
July	35	2,103	1,648	78
Aug.	36	2,346	1,964	84
Sept.	34	2,122	1,794	85
Total	408	23,807	17,529	73

Northbound

Month	No. of Flights	Available Seats	Revenue Seats	Seat Factor
Oct. '58	30	1,688	1,182	70
Nov.	32	1,810	1,326	73
Dec.	33	1,897	1,240	65
Jan. '59	36	2,054	1,335	65
Feb.	31	1,770	1,010	57
March	35	2,009	1,682	84
April	33	1,887	1,584	84
May	37	2,170	1,778	82
June	36	2,107	1,603	76
July	38	2,329	1,825	78
Aug.	41	2,614	2,263	87
Sept.	39	2,518	2,226	88
Total	421	24,853	19,054	77

Source: Records of Pan American World Airways, Inc.

TABLE NO. 3

A Comparison of Pan American's Jet and Non-Jet Load Factors

on New York-Caracas Non-Stop Flights

July, August and September, 1959

Southbound

	No. of Flights	Available Seats	Revenue Seats	Seat Factor
July 1959				
Non-Jet	33	1,881	1,501	80
Jet	2	222	147	66
Total	35	2,103	1,648	78
Aug. 1959				
Non-Jet	31	1,797	1,483	83
Jet	5	549	481	88
Total	36	2,346	1,964	84
Sept. 1959				
Non-Jet	30	1,686	1,446	86
Jet	4	436	348	80
Total	34	2,122	1,794	85

Northbound

July 1959				
Non-Jet	36	2,108	1,653	78
Jet	2	221	172	78
Total	38	2,329	1,825	78
Aug. 1959				
Non-Jet	37	2,174	1,843	85
Jet	4	440	420	95
Total	41	2,614	2,263	87
Sept. 1959				
Non-Jet	34	1,970	1,698	86
Jet	5	548	528	96
Total	39	2,518	2,226	88

Source: Records of Pan American World Airways, Inc.

TABLE NO. 4

A Survey of the Availability of Seats on Pan American's Flights From New York to Caracas

Weeks of Oct. 4-10, 18-24 Nov. 1-7, 15-21, 1959

Service	Number of Flights: Total	Open to Sale at Dep.	Closed to Sale at Dep.	Flts. Closed Prior to Departure: Days 3	Weeks 1	2	3	4	5	6	7	8 or more
DeLuxe	14	2	12	14	14	11	6	6	6	6	4	4
% of Total	100	14	86	100	100	79	43	43	43	43	29	29
First	26	10	16	17	12	7	5	4	2	1		
% of Total	100	38	62	65	46	27	19	15	8	4		
Tourist	40	12	28	28	23	18	13	12	11	10	8	8
% of Total	100	30	70	70	58	45	33	30	28	25	20	20

Note: This summary covers a total of 40 flights, 14 combination DeLuxe-Tourist Flights and 26 combination First-Class-Tourist.

Source: Records of Pan American World Airways, Inc.

Table No. 1 shows the "Growth of Air Passenger Traffic Between the US and Venezuela" for the period 1949-1959. As can be seen from this table the increase in traffic has been substantial over the years, although not always uniform. But the clear fact is that in a ten year period, the average increase annually has been 12.4% and for the latter two years, the increase was unusually high (36.7% for 1958 and 23.3% for 1959). It should be pointed out that this is a record of passengers between the US and Venezuela, and some adjustment would have to be made for accurate classification of traffic by "freedoms". Nevertheless, in the absence of "true origin and destination" statistics, the figures are indicative of a healthy growth situation on routes between the two countries.

The next Table, No. 2 shows "Seat Factor's on PAA's Scheduled Combination(First and Tourist, Deluxe) Non-Stop Flights Between New York and Caracas for the year ended September 30, 1959". The breakdown by Southbound and Northbound traffic, on a monthly basis, as well as the overall averages show a very favorable capacity utilization. Here again, true origin and destination figures are not available, but with several carriers offering service on a more direct route from Caracas to Europe, the majority of the traffic shown here and in Table No. 1, should be taken as third and fourth freedom traffic. The traffic carried by Pan American from Caracas to Europe via New York is estimated at around 2,000 passengers per year, and thus, even allowing for further adjustments for passengers destined for Canada, the Orient and Africa and the Middle East (much smaller percentages than Caracas-Europe traffic on PAA), the resulting third and fourth freedom traffic, must be recognized as evidence of an excellent and developing market. No airline official would deny that an average load factor of 73 and 77 percent is generally considered a healthy situation and usually represents

a profitable operation with modern aircraft, Clearly, there was no "flooding of the market" with excessive capacity resulting in low utilization.

Covering the three months of operations with jet equipment before the negotiations in Washington in Winter of 1959 over the jet question, Table No. 3 shows the seat factors on Southbound and Northbound flights, jet and non-jet, by Pan American. The load factor of the jets was very good (averaging in the 70's and 80's), but at the same time the non-jet load factors were also very good. Thus, the availability of a weekly jet flight in the months of July, August and September did not affect unduly the piston aircraft operations over the same route during the same period.

Finally, on this question of whether or not the proposed use of jets represented a violation of capacity principles, Table No. 4 shows the "Summary of Seat Availability" during a four week period, 2 weeks in October 1959, and two weeks in November 1959. This chart includes a total of 40 flights (14 jet and 26 piston), with an indication from reservations records on the number of days or weeks prior to departure that flights were closed to sale, that is, fully booked. It will be observed that some flights were booked several weeks before departure, with most flights (86% in Deluxe Class, 62% in First Class and 70% in Tourist Class) fully booked at departure. This chart indicates that for these New York to Caracas flights for the periods indicated, there was a substantial and sustained demand in relation to the capacity offered.

The reasonable conclusion to be drawn from these statistics is that in the specific case of Pan American's route between New York and Caracas, there was adequate compliance with the principles in the Annex regulating

capacity. The transport facilities available to the traveling public did have a close relationship to the requirements of the public for such transport. Also, since it was acknowledged by the Venezuelan authorities that traffic carried on the Caracas-New York sector was greater than that on the Caracas-Asuncion-Buenos Aires sectors, this carriage was in conformity with the proper interpretation of the "primary objective" provision of Section IV-d of the Annex.

Of course, if it had been shown that Pan American offered or intended to offer, let us say, double the existing capacity on either the third and fourth, or the fifth freedom sectors of these routes, then this certainly could have been called excessive and grounds for objections. But in view of the traffic statistics, such was clearly not the case. The approach to statistics urged by the Venezuelan delegation at the consultations in Washington in 1959, that the load factors of all carriers over a particular route should be averaged together, with resulting lowered utilization figures due to inclusion of LAV's extremely low load factors, was not a proper application of the "Bermuda principles" as set out in the Annex. Section IV-d refers to "...services provided by a designated airline", and not "The designated airlines".

Also, it is basic to the interpretation of the "Bermuda principles" that application of the various provisions on capacity was to be founded upon experience after a reasonable period of operations and not be a predetermination of frequency or capacity. (105)

Thus, the above observations on the issue of capacity in relation to the introduction of jet equipment lead to the conclusion that the refusals to allow substitution of jet equipment or limitations on the frequency of jet operations were not properly founded when based on alleged violations

of provisions on regulation of capacity under the US-Venezuela Agreement or Annex. The real basis of the controversy, it is repeated, was the issue of the effect of the jets on competition in general, and in the case under discussion, it was shown that Pan American was not responsible for the ruinous condition of the Venezuelan national carrier, LAV. Pan American should, therefore, not have been so restricted in its attempts to introduce jet equipment on its routes under the bilateral.

Part IV - Summary and General Observations

The economic regulation of international civil aviation implies the balancing of two opposing interests: (1) the need of airline management for sufficient freedom to develop an industry which demands rapid adjustment to dynamic growth; and (2) the need for protection of national aviation enterprises from excessive competition by foreign airlines.

This basic conflict of interests in the question of regulation was present from the beginning of international air transportation, although military and political considerations at first overshadowed commercial aspects. The regulation of world air transport was fixed in a narrow framework upon the adopting of the principle of sovereignty over the airspace, in the Paris Convention of 1919, and the restrictive interpretation of Article 15 on the establishment of international air services. Later conventions and national legislation reflected the concepts of sovereignty and protectionism. Many limitations were imposed by bilateral air transport agreements, air navigation agreements and administrative permits which characterized regulation before World War II.

Joint efforts at the Chicago Conference in 1944 and afterwards at Montreal and Geneva to achieve a multilateral convention on the liberal exchange of commercial operating rights failed. The Chicago Convention reaffirmed the principle of sovereignty and the requiring of special permission for the establishment of scheduled international air services. The system of bilateral agreements, which had its beginning before the Chicago Conference was further extended in the absence of widespread agreement on the multilateral approach to regulation.

However, some degree of uniformity was obtained through use by many countries of the general provisions of the "Chicago Standard Form" as a model for bilateral air transport agreements. But the specific provisions on routes, competition and capacity were left for negotiations in each case, to be formalized in an annex to the basic agreement. The "Bermuda principles" emerged as the most widely accepted compromise scheme, embodying guidelines for the control of competition and capacity.

While every nation has a justifiable interest in developing its air travel potential and in protecting its national flag-carrier from excessive competition by foreign companies, and while, in most cases, the Bermuda principles have proved to be an adequate means of doing so; it can be seen in the Venezuelan jet controversy that even these principles are subject to an overly-restrictive interpretation. The need for reasonableness in their application is apparent. Airline management must be allowed a certain degree of freedom in the decision-making process.

The bilateral system embodying Bermuda-like principles is certainly the best of the alternatives. Such unworkable schemes as quotas or frequency limitations, tariff differentials on fifth freedom traffic, mathematical formulae for determining capacity which have been suggested as methods for controlling competition are manifestly unsatisfactory.

But all schemes depend for their proper application on a factor that has received too little attention - accurate statistics. Adequate figures for types of traffic, "true origin and destination", are not available, and are indispensable for determining relative shares of traffic, and for determining compliance with "primary objective" clauses.

In fact, the first requirement for proper interpretation of bilaterals, which either have specific limitations or general principles of the Bermuda

type, is agreement upon the meaning of freedom classifications. International agreement upon the meaning of third, fourth and fifth freedom traffic should now be feasible. ICAO is the logical organization for establishing a standard of interpretation of these terms and is presently at work on the subject. Once agreement is reached on this matter, the next step would be to require governments to submit periodic reports to ICAO for publication, to be accessible to all interested parties.

If properly based in accurate statistics, the bilateral transport agreements of the Bermuda type are adequate for handling present situations created by the introduction of jets.

However, when a conflict in interpretation arises, which proves irreconcilable, as in the Venezuelan situation, then the only recourse is to a revision of the bilateral to include a provision specifically allowing designated airlines to choose the type of equipment most suited to their commercial needs, while respecting general provisions on capacity and competition.

Today, the most significant trend in international air transport is the attempt to solve problems of regulation on a regional basis and by pooling or other cooperative arrangements among airlines. The commercial turbo-jet aircraft, with its outstanding attractiveness to the traveling public and its radically increased capacity, is changing the patterns of world air transport. The prospect of super-sonic aircraft foreshadows a similar revolutionary effect on operations in the near future.

Indeed, it is this very element of change which makes aviation inherently dynamic. Thus, the problem of regulating commercial aviation between nations is a matter of formulating principles general enough to be applicable in the face of substantial changes, and yet specific enough to have practical

meaning in day to day operations.

Internationalization of ownership and operation of world civil aviation as an alternative to other forms of regulation, has few adherents, and, if desirable, is certainly not feasible at present. Nor are nations willing, as yet, to give a substantial degree of control over commercial matters to an international aeronautical authority, except, perhaps on a regional basis.

As the exigencies, political and economic, of the current world situation are impelling countries with common interests to form trading blocs and to regulate many commercial activities on a regional or continental basis, there is reflected in international civil aviation a similar urgency to form larger units. It may well be that before regulation by an international authority, commercial aviation will pass through a period of bargaining for operating rights and routes - the participants being blocs of nations or their airlines - Europe; Latin America; the United States and Canada; the Middle East; the Far East; Africa; and the Pacific, banding together to regulate competition and capacity.

Footnotes

1) Stoffel, Albert W., "American Bilateral Air Transport Agreements on the Threshold of the Jet Transport Age". Journal of Air Law and Commerce, Vol.26, No. 2 Spring 1959, p. 134.

2) ICAO Doc. 7894-C/907 "The Economic Implications of the Introduction Into Service of Long-Range Jet Aircraft", June, 1958, p. 38; Stoffel, op. cit., pp. 135-135; Doty, L.L., "Bilaterals May Be Redrafted for Jet Era". Aviation Week, November 17, 1958, pp. 38-39; Jones, Harold, "The Equation of Aviation Policy". Journal of Air Law And Commerce, Vol. 27, No. 3, Summer 1960, PP. 239-246; Burkhardt, Robert, "Nine Big Questions on Bilaterals". Airlift, Vol. 24, No. 10, March, 1961, p. 21.

3) ICAO Doc. 7894-C/907, op. cit., p. 38.

4) Stoffel, op. cit., pp. 134-135.

5) Colegrove, Kenneth W., The International Control of Aviation. Boston, World Peace Foundation, 1930, p. 3.

6) Fauchille, Paul, Le Domaine Aerien et le Regime Juridique des Aerostats. Paris, 1901, p. 5.

7) For a description of these early theories see Hazeltine, Harold D., The Law of the Air. London, University of London Press, 1911; English, J.F., "Air Freedom: The Second Battle of the Books". Journal of Air Law and Commerce, Vol. 2, No. 3, Summer 1931, p. 356.

8) English, J.F., op. cit., p. 361.

9) See Colegrove, op. cit., Chapter 3 for summary of international meetings on aeronautics at the turn of the century.

10) Cooper, John C., The Right to Fly. New York, Henry Holt & Co., 1947, pp. 19-20.

11) Goedhuis, Dan, "Civil Aviation After the War". American Journal of International Law, Vol. 36, No. 4 Oct. 1942, p. 596.

12) Cooper, op. cit., p. 20.

13) Ibid., pp. 20-21.

14) Rhyne, Charles S., "Legal Rules for International Aviation". Virginia Law Review, Vol. 31, No. 2, Mar., 1945, p. 269.

15) "Had these British draft provisions been incorporated into the international convention, the whole subsequent history of world air transportation might have been very different. Commercial aircraft would

have flown in the airspace with the same freedom as merchant vessels now navigate the high seas." Cooper, op. cit. , p. 30.

16) See Cooper, John C., "The United States Participation in Drafting Paris Convention 1919". Journal of Air Law and Commerce, Vol. 18, No. 3, Summer 1951, pp. 226-280.

17) Cooper, op. cit., Right to Fly, p. 30. Commenting on the universal acceptance of the doctrine of sovereignty, Albert Roper wrote in 1930: "...its (the Convention's) principles were applied in the whole world by all the States signatory and non-signatory which during that period (following the War) prepared their national laws and regulations relating to air navigation." Roper, Albert, "Recent Developments in International Aeronautical Law". Journal of Air Law and Commerce, Vol. 1, No. 3, Summer 1930, p. 396. But cf. Puente, Julius I., "Survey of Commercial Aerial Navigation Law in Latin America". Journal of Air Law and Commerce, Vol. 1, No. 2, Spring 1930, p. 127, where author cites Panama Administrative Law (Art. 1968, Codigo Administrativo) of 1916: "Aerial navigation is free over the whole territory of the Republic without any other restriction than as provided by law with respect to certain portions of the atmosphere for the proper security of the State". Also, Colegrove, Kenneth W., "A Survey of International Aviation". Journal of Air Law and Commerce, Vol. 2, No. 1, Winter 1931, p. 17, where reference is made to Decree of Nov. 15, 1931 of Peru proclaiming freedom of navigation at an altitude of over 3,000 meters.

18) For an analysis of conventions, see Warner, Edward P., "The International Convention for Air Navigation, and the Pan American Convention for Air Navigation: Comparative and Critical Analysis". Air Law Review, Vol. 3, July, 1932, p. 221; and Rhyne, op. cit., pp. 274-276.

19) Wegerdt, Dr. Alfred, "Germany and the Aerial Navigation Convention at Paris, October 13, 1919". Journal of Air Law and Commerce, Vol. 1, No. 1, Winter 1930, p. 1; Goedhuis, Dan, "The Air Sovereignty Concept and United States Influence on its Future Development". Journal of Air Law and Commerce, Vol. 22, No. 2, Spring 1955, p. 209; Cooper, op. cit., Right to Fly, pp. 132-135; Colegrove, op. cit., Control of Aviation, pp. 76, 85.

20) For examples of restrictive interpretation of "innocent passage" in Art. 2 of the Convention and commentary, see Aspects of United States Participation in International Civil Aviation. (Dept. of State Publication No. 3209. International Organization and Conference Series IV, International Civil Aviation Organization 2, 1948, pp. 10-18); Latchford, Stephen, "The Right of Innocent Passage in International Civil Air Navigation Agreements". Dept. of State Bulletin, July 2, 1944, Vol. XI, No. 262, p. 19.

21) Wegerdt, op. cit., p. 13.

22) Cooper, op. cit., Right to Fly, pp. 143-144; Goedhuis, "Sovereignty Concept", op. cit. p. 212.

23) For comment on earlier discussion on meaning of "airways" in last paragraph of Art. 15 of Paris Convention, see Cooper, op. cit., Right to Fly, pp. 133-135.

24) Goedhuis, op. cit., Sovereignty Concept. In the Havana Convention of 1928, Art. 21 provided for mutual right of contracting states to operate regular international air services without obtaining special permit from other contracting states; but only 9 states ratified this Convention, and in practice this liberal provision was ignored and special permission was required. See Lissitzyn, Oliver J., International Air Transport and National Policy. New York, Council on Foreign Relations, 1942, p. 372; Also, on restrictive practices of this nature see Burden, William A., The Struggle for Airways in Latin America. New York, Council on Foreign Relations, 1943, p. 62 and Rhyne, op. cit., "Legal Rules", p. 275. In 1932 at the Disarmament Conference the French put forward an elaborate plan for the internationalization of world air transport but met with little acceptance. See Lissitzyn, op. cit., pp. 416-417; Also, an "Inter-American Technical Aviation Conference" was convened in Lima in 1937 during which it was resolved to set up a "Permanent American Aeronautical Commission" for the gradual unification and coordination of public and private law and technical developments, taking into consideration the Paris, Ibero-American and Havana Conventions. This Commission never met. See Brown, James L., "Pan American Cooperation in Aeronautics". Journal of Air Law and Commerce, Vol. 9, No. 3, Summer 1938, p. 468.

25) On the development of international air routes generally, see Colegrove, op. cit., Control of Aviation, Chap. 2; Lissitzyn, op. cit., Chap. 1, 12, 13; for Western Hemisphere, see Burden, op. cit., Part I.

26) Burden, op. cit., pp. 48-54.

27) Lissitzyn, op. cit., p. 381. For example, Art. 1, Par. 2 of these agreements specified "special agreement between both States": France-Germany (1926); Poland-Hungary (1931); Hungary-France (1935); Czechoslovakia-Germany (1927). But this was not universal. The agreement between Switzerland-Germany (1920) did not contain any specific mention of the need for special authorization. Meyer, Alex, Compendio de Derecho Aeronautico. Buenos Aires, Editorial Atalaya, 1947, p. 193.

28) See agreements: Germany-Denmark (1922) (Art. 9); Germany-Holland (1922) (Art. 12); Germany-Sweden (1925) (Art. 12); Germany-Austria (1925) (Art. 14). Meyer, op. cit., p. 194.

29) See agreements Germany-Italy (1927); Germany-Norway (1929); Germany-Poland (1929); Germany-Hungary (1933); a similar provision is also found in these treaties: Switzerland-Hungary (1935); Holland-Hungary (1935); Italy-Hungary (1932); Meyer, op. cit., p. 194. For translation of complete text of typical treaty of this period, see Colegrove, op. cit., Control of Aviation. Appendix IV, where Germany-France agreement of 1926 is set out in full.

30) Meyer, op. cit. pp. 195-196.

31) Colegrove, op. cit., Control of Aviation, p. 34.

32) Ryan, Oswald, "Policy Issues in International Air Transportation". George Washington Law Review. Vol. 16, No. 4, June, 1948, p. 448.

33) For text of this treaty see Meyer, op. cit. p. 470; The agreements between Greece and Great Britain (1931) and Greece and Poland (1931) and that between Germany and Czechoslovakia (1931) are examples of treaties which also included provisions on commercial matters in some detail. These agreements are commented on by York, Brower V., in Journal of Air Law and Commerce, Vol. 3, No. 4, Autumn, 1932, pp. 120-121, 291.

34) For text of agreements see Meyer, op. cit., p. 450.

35) Gomez-Tamayo, Eduardo, Conceptos Juridicos-Historicos de la Navegacion Aerea. Madrid, 1955, p. 93. For text of the Argentina-Brazil agreement see Meyer, op. cit., p. 536.

36) "Prior to the War (World War II) negotiations for landing rights in foreign countries were largely conducted by the (United States) carrier concerned with only incidental aid from the Government. These negotiations by the carrier resulted in concessions to the carrier involved from the foreign country concerned. On Oct. 14, 1943, the Board (Civil Aeronautics Board) and the State Dept. issued a joint release, adopting as the joint policy of the two agencies the policy that negotiations for international rights would thence forward be conducted by the Government." Quoted by Calkins, G. Nathan, "Role of the C.A.B. in Grant of Operating Rights in Foreign Air Carriage". Journal of Air Law and Commerce, Vol. 22, No. 3, Summer 1955, pp. 263-264. To same effect see Burden, op. cit., p. 49.

37) State Dept. Press Release, Feb. 23, 1929; Lissitzyn, op. cit., p. 388.

38) The constitutional validity of such executive agreements on air navigation and air transport has been seriously but unsuccessfully challenged on several occasions, and bills have been introduced in the U.S. Senate to require such agreements to be in the form of treaties. See Calkins, op. cit., p. 262; Committee on Interstate and Foreign Commerce. Aviation Study. (83rd Con. 2d Ses. Senate Doc. 163, August 20, 1955.); Committee on Commerce. International Commercial Aviation. (79th Con. 2d Ses. Senate Doc. 173, April 19, 1946) Note 17-1; Lissitzyn, Oliver J., "The Legal Status of Executive Agreements on Air Transportation". Journal of Air Law and Commerce, Vol. 17, No. 4, Autumn 1950 and Vol. 18, No. 1, Winter 1951.

39) Latchford, Stephen, "Air Navigation Arrangement Between the United States and Italy". Journal of Air Law and Commerce. Vol. 3, No. 1, Winter 1932, pp. 75-76, 109.

40) Similar provisions are contained in the air navigation agreements between the U.S.A. and Italy (1931) Art. 7; Great Britain (1931) Par. 3; and Ireland, (1937) Art. 4. For summary of pre World War II US bilaterals on air navigation and air transport services, see Lissitzyn, op. cit., International Air Transport. pp. 373-378 and 388-395.

41) Ibid., p. 388.

42) Ibid., pp. 389-390.

43) For a description of the earlier proposals for the internationalization of civil aviation see Lambie, Margaret, "Aeronautical Use of the Air". Journal of Air Law and Commerce, Vol. 8, No. 1, Winter 1937, pp. 8-10; Also, Lissitzyn, op. cit., International Air Transport, pp. 416-418.

44) Canada. Wartime Information Board. Canada and International Civil Aviation. Ottawa. Mar. 31, 1945, p. 4.

45) The British Govt. in Aug. 1944 requested the U.S.A. to convene a conference and if not convenient for the U.S.A. to do so, the British were willing to call a meeting. The Canadian Govt. presented a similar request. Blueprint for World Civil Aviation. (Dept. of State Publication No. 2348) Conference Series 70, 1945, p. 7.

46) For text of invitation and list of invitees, see United States. Proceedings of the International Civil Aviation Conference. Dept. of State. Publication 2820. International Organization and Conference Series IV. 1948, Vol. I, pp. 11-13.

47) Proceedings, op. cit., Vol. I. p. 12.

48) For exposition of U.S.A. position see Proceedings, op. cit., Vol. I, pp. 55 ff.

49) For exposition of the UK proposal see Proceedings, op. cit., Vol. I, pp. 63 ff.

50) For exposition of the Canadian proposal, see Proceedings, op. cit., Vol. I, pp. 67 ff.

51) Proceedings, op. cit., Vol. I, p.4.

52) Sheffy, Meachem, "The Air Navigation Commission of the International Civil Aviation Organization". Journal of Air Law and Commerce, Vol. 25, No. 3, Summer 1958, pp. 281-328, and Vol. 25, No. 4, Autumn 1958, pp. 428-443.

53) ICAO Doc. 7278 C/841 10/5/52; see also, Wassenbergh, H.A., Post-War International Civil Aviation Policy and the Law of the Air. The Hague, Martinus Nijhoff, 1957, pp.30-40.

54) For text, see Proceedings, op. cit., Vol. I, p. 175.

55) For text, see Proceedings, op. cit., Vol. I, p. 179.

56) In 1954 the United States Air Coordinating Committee expressed the view that the ultimate objective of the U.S.A. "has been and continues to be the achievement of a multilateral air transport agreement". Report of the Air Coordinating Committee on Air Policy, Washington, 1954, p. 35.

57) For text, see Proceedings, op. cit., Vol. I, p. 127.

58) For text of the Agreement and Final Act see Shawcross, Christopher N., and Beaumont, K.M., Air Law. London, Butterworth & Company, 1945, p. 1209-1222.

59) ICAO Doc. ECAC/1 WP/7 6/9/55.

60) Stoffel, op. cit., p. 122.

61) Cribbet, Sir George, "Some International Aspects of Air Transport". London, Royal Aeronautical Society, Sep. 1950, p. 11 (cited by Wassenbergh, op. cit., p. 56).

62) Dept. of State Bulletin. Vol. 14, No. 347, Feb. 24, 1946, p. 303.

63) Wassenbergh, op. cit., pp. 53-61; Cooper, op. cit., Right to Fly, p. 185; Cooper, "The Bermuda Plan: World Pattern for Air Transport". Foreign Affairs, Vol. 25, No. 1, Oct. 1946, pp. 67-68; Report of Air Coordinating Committee on Air Policy, op. cit., p. 36; Van der Tuuk Adriani, P., "The 'Bermuda' Capacity Clauses". Journal of Air Law and Commerce. Vol. 22, No. 4, Autumn 1955, p. 409; Dept. State Bulletin, Vol. 14, No. 347, Feb. 24, 1946, p. 302-305; Jennings, R.Y., "Some Aspects of the International Law of the Air" Recueil des Cours, Vol. 75, No. 2, 1949, pp. 534; Ryan, op. cit., pp. 455-456.

64) Wassenbergh, op. cit., p. 59.

65) Dept. of State Bulletin, op. cit. p. 303; Van der Tuuk Adriani, P., op. cit., p. 408; Wassenbergh, op. cit., p. 54-58.

66) Dept. of State Bulletin, op. cit., pp. 302-305.

67) For text and commentary see PICAO Doc. 2089 EC/57 Oct. 1946.

68) For commentary on draft and positions of governments, see Little, Virginia, "Control of International Air Transport". International Organization. Vol. 3, No. 1, Feb. 1949, p. 35; "International Civil Aviation 1945-1948". Report of the Representative of the U.S.A. to the ICAO. p. 14-18; Dept. of State Publication 3131, 1948; Thomas, A.J., Jr., Economic Regulation of Scheduled Air Transportation. Buffalo, Dennis & Co. Inc. 1951, pp. 198-205; Ryan, op. cit., p. 452, 458.

69) For text and commentary see PICAO Doc. 2866 AT/169 26/2/47.

70) See Little, op. cit., pp. 35-36; Thomas, op. cit., 205-211; Ryan, op. cit., p. 459; Cooper, John C., "The Proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport". Journal of Air Law and Commerce, Vol. 14, No. 2, Spring 1947, pp. 125-149; McClurkin, Robert J.G., "The Geneva Commission on a Multilateral Air Transport Agreement". Journal of Air Law and Commerce, Vol. 15, No. 1, Winter 1948, pp. 39-46.

71) For commentary on various pooling and other interline arrangements during the years before WWII and up to 1951, see Wager, Walter, H. "International Airline Collaboration in Traffic Pools, Rate-Fixing and Joint Management Agreements". Journal of Air Law and Commerce, Vol. 18, No. 2, Spring 1951, pp. 192-199 and Vol. 18, No. 3, Summer 1951, pp. 299-319.

72) For description of these trends and the "Bonnefous Plan" (1949), the Count Sforza Proposal (1951) and the "Van de Kieft Plan" (1952) see Jones, op. cit., pp. 236-238; also, Wassenbergh, op. cit., pp. 79-80.

73) "Standard Clauses for Bilateral Agreements Dealing with Commercial Rights of Scheduled Air Services", (ECAC). Journal of Air Law and Commerce, Vol. 27, No. 3, Summer 1960, pp. 281-289.

74) For a history of the development of civil aviation in Venezuela up to World War II, see Chafardet, Luis M., Trayectoria de la Aviacion en Venezuela. Caracas, Taller Osffet, 1941.

75) Dept. of Commerce, Bureau of Foreign Commerce "Civil Aviation in Venezuela" by N.W. Kendall, May 1957, p. 5.

76) Ibid., p. 5.

77) American Aviation Daily, Vol. 76, No. 30, Oct. 15, 1951.

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80) Jennings, op. cit., p. 534.

81) Caracas, Daily Journal, March 13, 1961, p. 1.

82) Caracas, El Universal, June 23, 1960, p. 20.

83) ICAO Doc. 7894 C/907 June 1958, p. 47 (Table 3).

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97) Jennings, op. cit., p. 534.

98) Dept. State Bulletin, op. cit., p. 303.

99) Cooper, op. cit., Right to Fly, p. 185.

100) Cooper, op. cit., "The Bermuda Plan", p. 68.

101) Wassenbergh, op. cit., pp. 43, 54, 57, 59, 110-111, 129.

102) Van der Tuuk Adriani, op. cit., pp. 409-410.

103) Ibid., p. 410.

104) Dept. of State Bulletin, op. cit., p. 303; Van der Tuuk Adriani, op. cit., pp. 406-407; Wassenbergh, op. cit., pp. 54-55; Ryan, op. cit., pp. 455-456; Stoffel, op. cit., p. 129; Jones, op. cit., p. 231.

105) See Note 20.

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