THE ROAD TOWARDS A EUROPEAN COMMON AIR MARKET

by E.A.G. Verploeg

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Institute of Air and Space Law,
McGill University,
Montreal.

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T A B L E O F C O N T E N T S

O U T L I N E

After a brief discussion of the causes which gave rise to the existing protectionist aviation policies and their consequences in Western-Europe, "the Road towards a European Common Air Market" deals with the development of air law in Europe from the outset of aviation until the present days.

Next there follows an analysis of the problems of civil aviation in Europe, emphasizing the need for closer co-operation between both governments and airlines, and of the various forms of collaboration and co-ordination between airlines. Mention is also made of a number of governmental and private efforts to facilitate civil air transport and to stimulate its development, i.a. of the plans submitted by Bonnefous, Sforza and Van de Kieft to the Council of Europe and the establishment of the European Civil Aviation Conference at Strasbourg in 1955 as a result of these plans.

The thesis concludes with an analysis of the impact of the European Economic Community on civil air transport. In this connection consideration is given to a possible European Aviation Authority modelled on the United States Civil Aeronautics Board and the role of Eurocontrol.

ABBREVIATIONS USED IN THIS THESIS.

Am J Int L	- American Journal for International Law
E S B	- Economisch Statistische Berichten
Int'l Comp L Q	- International and Comparative Law Quarterly
J A L C	- Journal of Air Law and Commerce
N J B	- Nederlands Juristenblad
R C A H	- Recueil des Cours de l'Académie de la Haye
R F D A	- Revue Française du Droit Aérien
R G A	- Revue Général de l'Air
Sw L J	- South Western Law Journal
Z L W (Z L R)	- Zeitschrift für Luftrecht und Weltraum Rechtsfragen (Zeitschrift für Luftrecht)
A B A	- Aktiebolaget Aerotransport
A F L	- Ali Flotte Riunito
A I R	- Air International Register
A R B	- Air Research Bureau
A R I N G	- Aeronautical Radio Incorporated
B E A	- British European Airways
B O A C	- British Overseas Airways Corporation
C A B	- Civil Aeronautics Board
C A I	- Conférence Aérienne Internationale
C A M	- Conférence Aérienne de la Méditerranée
C A T E	- Conference on Co-ordination of Air Transport in Europe
C I D N A	- Compagnie Internationale de Navigation Aérienne
C I N A	- Commission Internationale de Navigation Aérienne
C I T E J A	- Comité International Technique d'Experts Juridiques Aériens
C J I A	- Comité Juridique International de l'Aviation
C O C O L I	- Committee on Co-ordination and Liberalisation
C P A	- Canadian Pacific Airlines
C P A M	- Committee of Purchases of Aviation Materials
C S A	- Czechoslovakian State Airline
D D L	- Det Danske Luftfartsselskab
D N L	- Det Norske Luftfartsselskap

E C A C	- European Civil Aviation Conference
E C M	- European Common Market
E C M T	- European Conference of Transport Ministers
E C S C	- European Community for Coal and Steel
E E C	- European Economic Community
E F T A	- European Free Trade Association
E S A S	- European Scandinavian Airlines System
Euratom	- European Atomic Energy Community
F A A	- Federal Aviation Agency
F A I	- Fédération Aéronautique Internationale
F A L	- Facilitation
F A L A	- Flotto Aerea Latino Americana
Fed Av Act	- Federal Aviation Act
F I R	- Flight Information Region
F I T A P	- International Federation of Private Air Transport
I A T A	- International Air Transport Association
I C A O	- International Civil Aviation Organisation
I C C	- International Chamber of Commerce
I F A L P A	- International Organisation of Air Pilots Associations
I F R	- Instrument Flight Rules
I R L	- International Radio Limited
I T A	- Institut du Transport Aérien
I T U	- International Telecommunications Union
I U A I	- International Union of Aviation Insurers
L C	- Legal Committee (of ICAO)
N A T O	- North Atlantic Treaty Organisation
O E E C	- Organisation for European Economic Co-operation
O S A S	- Overseas Scandinavian Airlines System
P A A	- Pan American Airways
P I C A O	- Provisional International Civil Aviation Organisation
S A F E A	- South American and Far Eastern Airlines
S I L A	- Swedish Intercontinental Airlines
S I T A	- Société Internationale de Télécommunications Aéronautiques
T A P	- Transportes Aéreos Portugueses
T C A	- Trans Canada Airlines
T E A	- Tasman Empire Airways
T E E	- Trans Europe Express
T W A	- Trans World Airlines

U I R	- Upper Information Region
U K	- United Kingdom
U N (O)	- United Nations (Organisation)
V T O L	- Vertical Take Off and Landing
W E A A C	- Western European Airport Authorities Conference

P R E F A C E

Civil aviation was still in its cradle when it was considered as a possible danger to the safety and sovereignty of States. For that reason, it was received in an atmosphere of fear and suspicion which from its very outset has hampered the development of a free and economic air transport system. Only later, much later, was it realised and experienced that the serious restrictions imposed on air transport tend rather to hamper the national and regional economic welfare than to protect it.

"The Road towards a European Common Air Market" describes on the one hand how the restrictive attitude towards civil aviation has arisen in Europe 1). On the other hand, and more particularly it deals with the efforts which in that same region have been made to pave the road to legislation and law providing for a sounder, more liberal situation, and how far that road has been completed and how much of it still has to be constructed.

Air Law, which covers a wider field than Aviation Law, is a "droit de milieu". That means, it does not refer to one special set of laws, but comprises all the rules of public and private law alike, which relate to the air space and aviation 2). Therefore, a work describing the development of air law over a period of about fifty years can hardly be complete. Moreover, in an analysis of such development, its merits and its downfalls, conclusions are bound to be based

on the social and political orientation of the person making the analysis. Therefore, the information given by this thesis, besides being incomplete, also cannot be considered to be fully detached.

Nevertheless I may assume that it contains an overall picture of the road as indicated above, with its twists, turns and obstacles, some of which have been overcome and other which have not.

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1) Where in this thesis the name "Europe" is used it should be understood to indicate "Western-Europe", unless expressly stated otherwise.

2) Cf. D. Goedhuis "Air Law in the Making" (The Hague - 1938), p. 5.

CHAPTER I - I N T R O D U C T I O N

If the English poet W.H. Auden today was asked for his impression of Europe, one probably could expect a milder judgement than

> "In the nightmare of the dark
> All the dogs of Europe bark
> And the living nations wait
> Each sequestered in its hate".

These were the words he used to describe the European situation at the end of the 1930's. 3).

From C.I.N.A. to I.C.A.O.

Since then a war has been fought and - as history has shown before - the experiences of that war which started in and had its centre of gravidity in Europe, have urged the big and small powers of the world to get together and to undertake efforts to come to a better mutual understanding of and a better relationship with each other, in order to prevent another calamity. They founded the United Nations Organisation (U.N.O.).

A similar organisation - of a narrower scope - had been established a mere 25 years before, after another war, and with similar objectives. Even the wording of the U.N. Charter "To promote social progress and higher standards of living in greater freedom" did not sound very strangely to those who still could remember the exalted objectives laid down in the Covenant of the League of Nations 4).

There were however some signs from which the conclusion could be drawn that mankind had become more sober-minded and nothing at all comparable to that wave of emotional

enthusiasm which marked the birth of the League of Nations accompanied the establishment of U.N.O. Also there has been a general absence of claims that the Organisation is the final answer to the problems which afflict mankind in the twentieth century.

But let us turn to aviation. In the field of air transport and the law ruling it, a development has taken place analogous to that of the entire world order. The Commission Internationale de Navigation Aérienne (CINA) 5) controlled by the League of Nations, with its operational, legal, meteorological, etc. sub-committees, the affiliated Comité International Technique d'Experts Juridiques Aériens (CITEJA) and the League's own Air Transport Co-operation Committee, etc. have disappeared and the International Civil Aviation Organisation (ICAO) with its Legal Committee, its Air Transport Committee, etc. has entered the stage.

A salient policy difference between the pre- and post-war institutions is that the former were mainly European institutions, with preponderantely European countries as their members and dominated by the European attitude, whereas the post-war United Nations Organisation turned out and still turns out to be an organisation of world wide scope.

Flight is by its very nature international; especially in Western-Europe, where a flight of two or three hours always involves the crossing of one or two frontiers. For modern jet aircraft domestic routes which could be operated on an "economical" basis are hardly conceivable.

It was this soon recognised international character of aviation which is responsible for the present desire to create an international "air order". International conferences on air law were held before the beginning of the twentieth century and continued to be convened until today. In the early period it was the enthusiasm of the new discovery which brought lawyers and scientists together to pave the road for its development. Very soon,however it became the fear of the possible dangers to the security of their territories which urged the states to regulate the international utilization of aircraft 6) and from the 1930's security reasons gradually were mixed and partly crowded out by motives of an economic nature. Today the desire of protection of the national industry and reasons of competition dominate the field of international air law; they are the same background which dominate international law as a whole.

In Europe the concept of "every state having the complete and exclusive sovereignty of the airspace above its territory" was established during the first decades of the twentieth century. Its official international recognition by the Paris Convention of 1919 7) has since hampered the establishment of an international law of the air comparable to the international law of the sea and has denied air transport a free, economic healthy development.

Of course considerable progress has been made. The fear of the unknown has disappeared and in this respect air transport is obtaining a status equivalent to that of other

means of transport. No longer the entry of a foreign aircraft is considered as a danger and we are far ahead of the days during which in Europe only 5% of all flights were nightflights, because of the mere impossibility of obtaining permission for a border crossing at night in several countries 8).
Several international conventions provide for the identical legal treatment of carriers, passengers and aircraft in the greater part of the world. The necessity of fast world wide communications have prompted even the most reluctant and protectionist states to give in at certain points and it is very unlikely that today any airline could be confronted with such difficulties of protectionism as B.O.A.C.'s predecessor had to cope with in France and Italy in the early 1930's 9) or as K.L.M. met in its desire to establish a third and fourth freedom route from Curaçao to Miami in the second half of that decade 10). Nevertheless even in modern Western Europe with its O.E.E.C., E.C.S.C., E.C.M. and E.F.T.A. 11) taking care of a free exchange of goods and services to the greatest extent and N.A.T.O. 12) providing for a close military alliance, the right to fly is still considered as very precious and difficult to get. "Quid pro quo" is still the leading theme and if there is no other quid to offer pro quo, the results are often agreements which stipulate that the route shall be flown in pool by the "chosen instruments" of the states concerned. Immediate and direct reciprocity is today the narrow basis of air law and also in a uniting Europe air agreements showing a spirit such as that of the Lateran Treaty of 1929 13) cannot be found.

According to Max Hymans, speaking to an Ambassadors Conference in Paris 14), shortly after the war the world could be proud of about 2700 air transport companies, nearly 250 of them operating regular services. This still growing amount of business caused a bitter battle among the airlines. The competition almost bordering on dishonesty by using luxuries as perfume, orchids, nine-course meals, champagne, cocktails etc. as bait to lure passengers away from the competitor, led to a closer co-operation in the new I.A.T.A. 15). Through this body also the regular carriers unitedly carried on their still more bitter fight with the internationally operated non-scheduled carriers. "Competition" and "monopoly" in the world of aviation became words highly charged with emotion. These were the circumstances under which the post-war European network was built. It was built by as many carriers as there are countries and it was built starting from the premise that every country's capital should have its own direct connection with the capitals of each of the other countries. In other words, the very shape of the European network bears the imprint of national privilege 16) and its air transport is organised on an artificial basis.

EUROPE COMPARED TO AMERICA.

This area and these problems are often compared to those of the country with the most developed air transport, the U.S.A. In doing so we discover that the European network is twice as long as that of the U.S. Of a population of 250 million 5.5

million passengers were carried on that network, whereas of the U.S.' 165 million inhabitants 38.9 million were carried by airlines. The number of European kilometre/passengers in 1955 was 15% of the U.S. number. The number of European airline employees was 65% of its U.S. counterpart 17). A European ticket costs approximately 50% more than a corresponding North-American ticket covering the same distance.

Of course, it is possible to shrug one's shoulders and to refer to the enormous wealth of "the new world where everything is possible". Further data from Canada, where in the same period 1.7 million of its then 15.6 million people travelled by air, and from Australia where 2 million air passengers were counted on a population of 9 million, however, demonstrate clearly that European air transport contrasts very unfavourably with the air transport in other highly developed parts of the world.

Many reasons are assigned for this backlog. Some writers blame the situation on the expanded and very well run network of European railways and coachlines. Others attach responsibility to the European standard of living which certainly is lower than in North-America and which results in much higher fares in comparison to the average income. Still other take the view that it is imputable to the absence of an adequate European aircraft industry which could be blamed for the comparatively high costs of maintenance and the multitude of the different types of aircraft in use.

Others point to the disadvantages of shorthaul traffic in which category many of the European routes must be included. It is difficult to deny that short-haul traffic means higher take-off

and landing fees, a greater consumption of fuel, higher establishment expenses, whereas because of the little time which can be gained on these short sections the tariffs cannot be set accordingly and that moreover the carriers are compelled to establish more frequencies to attract any passengers at all. The importance of all these factors and their influence certainly cannot be disclaimed. The deeper and at the same time the immediate root of this evil must however be sought in the air law in Europe which prevents air carriers from showing what they are worth and from taking the measures necessary for the popularization of their means of transport.
More than in any other means of transport there exists an incompatibility between the political situation in Europe and the excessive demands of modern techniques 18).

EFFORTS TO REMEDY

Later on I will come back to each of the above mentioned obstacles. Here I must point to a few of the most salient results, of which first of all must be mentioned the fact that despite an increase in European passenger traffic of 450% during the last 15 years and a world airline passenger traffic increase of 283% of which the European airlines had their share, in the same period 19) not a single European airline managed to carry on without more or less extensive government subsidies.
Despite the creation of a special European governmental organisation for the promotion of co-operation in the field of aviation, E.C.A.C. 20), in 1955, Cartou in a review of the course

of things comes to the conclusion that since 1954, the year in which the decision for the establishment of the said organisation was taken, nothing new has occurred 21). It is true, several recommendations were agreed upon and even a European Convention on non-scheduled traffic was signed. The agreement however is accompanied by so many precautions that it cannot be expected to be of much practical value. In fact it provides the states with power to abandon the two categories of freedom which it is granting 22). In 1960 another form of co-operation was set up, Eurocontrol 23), but it seems to be an agreement that could not be avoided rather than a product of the desire for European co-operation.

Various attempts were also made by the airlines themselves and whereas they did not imply a partial relinquishment of independence, they have not been without succes. Negotiations on the establishment of Air Union 24), a project of close co-operation between the airlines of the European Common Market countries, however have dragged on for years, without concrete results being reached.

"In view of the efforts taken and the results acquired, one must acknowledge that the European idea up till now has not had great influence on the organisation and the performance of air services" Lemoine wrote in 1957 25), and a similar statement can be made in 1963.

WILL HISTORY REPEAT ITSELF?

Nevertheless in Europe many are convinced that history will

repeat itself also in the case of air transport, and that with regard to the public international law of the air economic pressure will supersede the political influences which in the case of each mode of transport have played a more or less important part. No matter what obstacles various countries have at one time or another put in the way of transport communications, the requirements of transport have always led to the discovery of a means of overcoming or circumventing these obstacles. Once it is established that the development of European aviation serves a fundamental social requirement, it will also be understood that the law to be formulated for air transport should promote its development to the greatest possible extent.

In the meantime European airlines maintain their excess capacity to which they are compelled by the impossibility of establishing an economic network of "hubs and spakes" 26) and excess capital, labor and promotional expenses are devoted to their maintenance 27). It is not likely that without the establishment of another air-order and a little of the spirit of Beethoven's nineth symphony, the high costs can be lowered to a level on which European air transport can also reach that large proportion of society which until now is deprived of benefiting from the efforts of the industry but nevertheless pays for it through government taxes.

Presently however in the European airspace the dogs still bark!

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3) Taken over from I. Samkalden - Nederlands Tijdschrift voor Internationaal Recht 1957 - Vol. 4, p. 121: "De Europese integratie als vraagstuk van nationale wetgeving".

4) Cf. art. 22, 23 and 25 of the Covenant of the League.

5) CINA was created by the Treaty of Paris (October 13th, - 1919).

6) Cf. L.C. Tombs "International Organization in European Air Transport" (New York - 1936) p. 192 where he cites one of the delegates to the International Convention to the Regulation of Aerial Navigation in 1919: "The international firm of Mercury, Mars and Co. was a power against which it was difficult to compete. Over and above this there was the fear of novelty".

7) Generally used designation of the Convention mentioned in note 6.

8) At the same time the U.S. carriers performed 40% of their flights during the night.

9) In 1929 Italy refused to allow Imperial Airways (predecessor of BOAC), which company wanted to establish routes to Africa and India, to enter Italy by sea from France, as was permitted to French and Dutch airlines. Owing to this refusal Imperial Airways had to cover the section Basel-Genoa of this route by train. Italy's condition to the wanted permission was that the line after leaving Corfu should touch at Tobruk (then a city in Italian held Cyrenaica) before proceeding to Alexandria and that the section Tobruk-Alexandria should be flown by an Italian airline during the middle of the week whereas the British company would be allowed to fly during the, less favoured, week-end. Later Imperial Airways met similar difficulties in France for the route Paris-Marseille and the result was that until 1935 it had to cover the whole route Paris-Brindisi by train on its East-Asia and Africa routes.
Similar difficulties were met by most of the European companies in India which demanded that routes through Indian airspace should be flown by an Indian company.

10) In the 1930's the Dutch airline K.L.M. several times applied for permission to establish a regular route between Curaçao - then a Dutch colony - and Miami, the nearest city in the U.S. The request was refused for the reason that P.A.A.'s network already provided for a fair connection between Curaçao and the U.S.A. and that therefore a second route did not appear to be necessary.

11) O.E.E.C. - Organisation for European Economic Co-operation, see p.
E.C.S.C. - European Coal and Steel Community, see p.
E.C.M. - European Common Market, see p.
E.F.T.A. - European Free Trade Association, see p.

12) N.A.T.O. - North Atlantic Treaty Organisation.

13) The Lateran Treaty concluded in 1929 between Italy and the Holy See is one of the very few air agreements not based on reciprocity of treatment. It contains on the one hand provisions for a free circulation of Vatican vehicles and aircraft in and over Italy and on the other hand it stipulates that in conformity with the regulations of international law, aircraft of any kind are prohibited from flying over the territory of the Vatican. Cf. supra 6, page 102.

14) See Interavia 1951 No. 6, p. 299 - M. Hymans "A European Air Transport Union?".

15) I.A.T.A. the International Air Traffic Association, established in 1919 at the Hague was reorganised after the war and assumed its current name International Air Transport Association.

16) Cf. Hymans, supra 14.

17) Data concern the year 1955: See Hymans, supra 14; Interavia 1956 No. 9, p. 711 - (Editorial) "Brief analysis of American and European Air Transport"; and R.G.A. (1961) Vol. 24, p. 340 - J. de Villeneuve "Les transports aériens réguliers de l'Europe occidentale".

18) Cf. R.G.A. (1951) No. 14, p. 359 - "l'Organisation Européenne de l'Aviation Civile". (Bonnefous plan)

19) Interavia 1962 No. 4, p. 412 - Douglas of Kirtleside "European Air Transport in the 1960's".

20) European Civil Aviation Conference, see Chapter VII.

21) R.F.D.A. (1958) Vol. 12, p. 101 seq. - L.Cartou "La structure juridique du transport aérien en Europe à la veille du marché commun".

22) Cf. R.F.D.A. (1957) Vol. 11, p. 1 seq. - M. Lemoine "l'Idée Européenne dans l'aviation de transport et l'accord multilatéral sur les droits commerciaux pour les transports aériens non-réguliers en Europe".

23) Project for joint air traffic control in the European airspace; see Chapter X.

24) See Chapter IX.

25) Supra 22.

26) Cf. J.A.C.L. (1959) Vol. 20, p. 209 seq. - L.H. Slotemaker's address to the XVIIth Congress of the International Chamber of Commerce, at Washington, April 1959.

27) Cf. J.A.L.C. (1953) Vol. 20, p. 379 seq. - D.W. Bluestone "The problem of competition among domestic trunk airlines".

CHAPTER II - THE EUROPEAN AIR SPACE IN THE FIRST DECADES OF THE TWENTIETH CENTURY 28).

PRE-WORLD WAR HISTORY.

Little is known of the unfortunate flight of Icarus from the island of Creta. In exploring the roots of civil aviation most writers overlook these mythological efforts. According to current conceptions aviation's cradle was occupied for the first time in 1783 when the French Montgolfier brothers succeeded in effecting the first human ascent in a balloon. Only two years later another Frenchman performed the first international flight by crossing the English Channel in a same vehicle.

From there it took little time to lay the basis for what is considered to be the root of civil aviation's main evil, the protective interference of the states and the resulting clipping of air transport's free wings. Europe, and in the wake of Europe the entire world, was not as prepared for the new invention as it had been for steamcars, electricity and other miracles of the 19th century.

As early as 1899 the first international rules were set for the prevention of aviation's "disastrous contingencies". The Peace Conference at the Hague 29) of that year adopted a declaration by which the contracting states obliged themselves to refrain from dropping explosives or projectiles from balloons or by similar means. In the same year on the other hand the first known aeronautical congress was convened in Paris, with the aim of exploring the possibilities for further development 30).

From this very outset two opposed schools of thoughts in the matter of air law presented themselves. One, led by Fauchille and Nys, pleaded for freedom of the air on the basis that flying over its territory could not do any damage to a state 31). This idea very rapidly became obsolete. Their opponents were chiefly British, who in an effort to gain a substitute for the shattered illusion of the inaccessibility of their islands, advocated the doctrine of state sovereignty in the air space above national territories 32).
However, everybody seemed to be convinced that aviation by its nature was an international affair. In 1909 a group of European lawyers, convened as the Comité Juridique International de l'Aviation, started to work on an international Code de l'Air. Their work unfortunately was broken off by the world war 33). In the meantime efforts for an international convention on air navigation had met with failure.

The great war seemed to prove that those who had feared the development of aviation were right. Whereas up till then the "air force" in several local wars had been proved to be chiefly useful for communication and observation, it now showed its destructive power. Air forces of the belligerents, small and unimportant at the outset of the struggle, grew tremendously keeping pace with the technical development of aircraft, or perhaps the reverse. By the end of the war the air forces had gained their status as one of the components of modern military power, next to the army and navy.
The world however at that time was not yet ready for civil

aviation and this must have been the main cause of the resulting events. The Peace Conference of 1919 seemed to be still deeply impressed by what had happened and not in the least by what had happened to the development of aviation. The more or less dormant fear of the pre-war years had become real and the proceedings of the Conference's Commission de l'Aéronautique showed clearly the desire to create as many precautions as possible. Long respected principles as those of the Barcelona Treaty, the Danube Statutes 34) and similar were not to be applied to aviation. Aviation could not be trusted, and even a man as the French jurist M. de la Pradelle who is today considered as having taken a rather moderate point of view, made the statement: "We have no experience and we do not know what aviation will bring us. Maybe in the future we can allow a more favourable attitude to international air transport, but right now it would be imprudent to commit ourselves". After this, the statement made by the Italian delegate M. Buzatti: "It is a new area, the future is a great mystery", is not surprising 35).

THE PARIS CONVENTION.

The International Convention for the regulation of Aerial Navigation, held at Paris in 1919 and generally referred to as the Paris Convention, was the result of the preliminary work of the Aeronautical Commission of the Peace Conference.It was chiefly a European affair. Nineteen European countries took part. Beside them also four American, one African, four Asian and the New-Zealand and Australian delegations were present.

The Paris Convention dominated the law of the air for more than twenty years and does so to a certain extent still indirectly. If the Aeronautical Commission had shown less fear for contingent future damages and if it had drawn its conclusions from the lessons of the development of shipping, of the railways and of road traffic, today's aviation might have taken a different direction. But it was hard to realise that the war monsters of yesterday were bound to develop into silver birds designed to carry thousands of passengers to all spots of the globe every day, and to provide a fast means of communication without which international relations would become rather impossible.
So the peacemakers were not content with the insertion of restrictive air clauses in the peace treaties with their bellicose defeated enemies, Germany, Austria, Bulgaria, Hungary and Turkey. They wanted also to be safeguarded from possible surprises on the part of their current allies and the official international recognition of the de facto recognised conception of air space sovereignty could serve that desire. They did not even confine themselves to stating "sovereignty", but they thought it useful to add the pleonastic adjectives "complete and exclusive" to it 36). Even then the future of air transport could have been saved from its current evil by including with this recognition a formal declaration by the states, acknowledging the Barcelona and Danube 37) principles as applicable to aviation. Instead of a legal principle inherent to the air regime the right of innocent passage however, became an obligation under an agreement which in fact was rendered almost ineffective by the following

stipulations 38).

In short, the main principles of the convention may be stated as follows: The contracting states recognised the complete and exclusive sovereignty of each state over the airspace above its territory (art. 1). Recognised also in principle was the freedom of innocent passage of aircraft of contracting states over the territory of other contracting states and the right to use the public aerodromes of that state (art. 2). As indicated above, however, this freedom was not considered as a natural right in the sense of the freedom on the high seas, but as a privilage which was granted on a basis of equal treatment by one member state to the other. Moreover this freedom was to a great extent weakened by supplementary stipulations conceding that the right to cross the airspace of the other state was subject to the right of that state to fix the route to be followed (art. 15). It was this provision which gave rise to the unfortunate controversies which developed soon after 1922 (the year in which the convention came into force) when states began to realise the economic value of this right and the sources of revenue which could be derived from it. Economic reasons also seem to have been responsible for the removal of the equality principle implied in the additional stipulation according to which aircraft might be prohibited from flying over certain areas of a state's territory provided that no distinction was made between that state's own aircraft and foreign aircraft (art. 3). This latter clause was removed by protocol in 1929 and by doing so the exclusiveness and com-

pleteness of the state's sovereignty was established to its fullest extent.

The conception of "complete and exclusive" sovereignty, which was renewed at Chicago in 1944 39), has since been used as the international law under which civil aviation's advance could be stopped just before the protected national borders and on the basis of which the operation of competitive trunk routes could be rendered almost impossible. The Commission de l'Aéronautique could not have rendered a greater disservice to the development of the possitive, creative elements in civil aviation than by drawing up this text of art. 1 of the Paris Convention of 1919 40).

On the other hand it would not be right to depict the Paris Convention 1919 merely as the picked apple in air law's Garden of Eden without mentioning its merits. In fact the Paris Convention is also anterior to any national aviation legislation in Europe and all these legislations are based on its principles 41).

It is not an exaggeration to call the convention the basis of European and even world public air law 42). National air codes established in the 1920's and 1930's all bear its imprint. This goes even for such attempts to deal with all aviation problems (air navigation, labor, liability) as the U.S.S.R.'s (a non-member) air code of 1932 and the much criticized Italian Codice Della Navigazione, which deals with either aviation and shipping 43).

C.I.N.A.

At the time of the convention itself however, its most important achievement was considered to be the creation of C.I.N.A., the Commission Internationale de Navigation Aérienne. CINA can in some aspects be compared to the current ICAO. It was a permanent commission placed under the direction of the League of Nations but in practice autonomous. It was endowed with administrative, legislative and judical powers, and was as well an advisory body and a centre of documentation. The original draft of the convention provided the great powers with a preferential vote system, but as six neutral countries 44) jointly declared that they would adhere to the convention only if equal voting rights would be granted to all the states represented, this provision was changed by an amendment coming into force at the end of 1926.

THE LEAGUE OF NATIONS.

Besides the Paris Convention and its CINA there were several other international efforts to influence public air law. First of all there is the League of Nations itself which took an interest in aviation through its own Organisation for Communications and Transit set up by the League in conformity with art. 23 of the Covenant:".....make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all members of the Leaque". Further it could not avoid aviation in the preparation of the drafts for a disarmament convention, where it had to examine

the question of the possible use of civil aviation for military purposes 45).

The main body of the Organisation was the Transit Committee by which most of the work was accomplished. This Committee called in experts, set up any subsidiary committees which its work required and during the years built up a number of new instruments of international co-operation 46). Although the Committee had no permanent - and till 1930 not even a temporary - sub-committee on aviation 47) it nevertheless drew the attention to various matters regarding aviation, such as national restrictions and the unification of private air law, to name but two.

DISARMAMENT CONFERENCES.

The Conference for the Reduction and Limitation of Armament (1932) held under the auspices of the League showed again clearly the conception of aviation as something dangerous to the security of the state. The fact that the civil aviation administrations of most of the European countries (i.a. of the big powers Britain, France, Germany, Italy) were part of their respective Defence Ministries and were headed by men with military ranks, speaks in this respect for itself 48).

It appeared during the negociations that the only efficacious solution possible, was the internationalisation of aviation 49). Several states, headed by Germany, proposed to confine internationalisation to military aviation alone. Other proposals to internationalise civil aviation only, often linked with the

creation of an international air police force 50), constituted a revival of the pre-war peace movements which found strong defenders in several outstanding European jurists such as the Dutch Professor Van Vollenhoven 51). An international body endowed with a strong arm to enable it to enforce the international agreement if necessary, was widely considered to be an important guarantee for a lasting result. As Wehberg 52) put it: "Non-compliance with international award will only occur in exceptional cases. But the temptation to break a law will be the greater, the more the rule of arbitration in international life expands and the more even questions of vital importance are submitted to arbitration. The mere existance of an effective executive will essentially contribute to prevent once and for all the breaking of the law".

Not only jurists took this point of view. The same is expressed in a letter addressed by the president of the Ligue Internationale des Aviateurs (Paris) to the president of the Preparatory Disarmament Commission in London, stressing the desirability of the creation of an international air force to secure peace and as a means of execution against law-breakers 53).

Similar proposals had already been made in the Air Transport Co-operation Committee of the League of Nations 54) two years earlier (1930), where also the establishment of an international company was discussed.

Although the idea of denationalisation of aviation and air transport in that era virtually had no chance of acceptance and has been rejected ever since on the various occasions when a

proposal in this direction has been made 55), it is quite possible that the discussions in the Disarmament Conference of the 1930's will eventually turn out to be the basis of a future solution of the world's main aviation problem.

From the above the conclusion may be drawn that the League of Nations no more than the Paris Convention and CINA succeeded in restraining the steady growth of European economic nationalism which was reflected in aviation. But although the rational appreciation of the value of aviation as an incentive to higher levels of economic activity and to peace became lost 56), on the other hand it was becoming increasingly evident that a certain degree of co-operation was a conditio sine qua non.

As early as 1927 the Committee of Experts on Civil Aviation of the Preparatory Commission for the Disarmament Conferences adopted the following resolution: "At the present time civil aviation in most cases has become national in character. It would seem desirable to encourage the conclusion of economic agreements between civil aviation undertakings in the different countries. Other adopted resolutions dealt with the unification of public international law on air navigation, conditions for the admission of foreign undertakings engaged in regular international air transport, progress of international co-operation in the operation of airlines, and a study of certain legal and administrative questions offering the development of international co-operation in air transport 57).

OTHER EFFORTS, POLICIES.

There were also several other achievements. In 1929

the Conference of the International Labour Organisation invited the Governing Board of the International Labour Office to consider the desirability of a study, notably of the safety, but also of the living, training and working conditions of workers in air transport.

In 1936 an agreement on duty exemptions on fuel and lubricants with a much wider scope than that provided for by the Paris Convention, was opened for signature.

Several bilateral agreements showed a certain measure of liberal policy. In general they were based on the Paris Convention and the greater part of them contained much the same mixture of strength and weakness, from the point of view of international organisation as the multilateral instrument itself 58). The air policy of the concluding states shows little variety. France, Belgium and the Netherlands usually tended to favour freedom, whereas Italy has been protectionist from the very outset of its interests in aviation 59).

Most of the bilaterals held reservations that the frontiers might be crossed only at certain points. Prohibited zones were mentioned in virtually every agreement. Other common clauses dealt with matters such as: the duty to abide by the laws of the country flown over; assistance to the foreign aircraft in maintenance, flight information, distress, etc.; prohibited transport and cabotage; wireless apparatus (in some cases the apparatus had to be licensed by both states); and designated aerodromes.

Disputes mainly were to be settled according to the provisions of the General Act for the Pacific Settlement of International

Disputes, adopted by the League of Nations in 1928 60).

PRIVATE LAW; C.I.T.E.J.A.

Greater achievements can be claimed by those who dealt with private law. Between 1920 and 1939 four conventions on private air law were signed, one of them still accepted throughout the whole world and two others still in force between several states. There was moreover an increasing organisation among the airlines themselves.

The basis of international public law was actually established before the advent of air transport. Unification of private law needed some previous experience.

The credit for the first efforts to unify the private law of the air goes to the Advisory and Technical Committee for Communications and Transit of the League of Nations, which drew attention to the importance of uniformity as early as 1922. Yet it was the French Government which convened the First International Conference on Private Air Law, in October 1925 in Paris. Forty-three countries represented at the conference, adopted a draft convention relating to the liability of the air carrier and in addition laid the basis for the establishment of C.I.T.E.J.A., the Comité International Technique d'Experts Juridiques Aériens, the next year.

Many of the problems CITEJA studied are still being studied today by the Legal Committee of I.C.A.O.: compulsory insurance; seizure; renting of aircraft; collisions; the legal status of the aircraft commander; to name but a few. Other problems:

damage caused by aircraft to goods and persons on the ground; establishment of aeronautical registers; ownership of aircraft; uniform rules for the determination of the nationality of aircraft; the bill of lading; and mortgages and other rights in aircraft, have been solved or have lost their topical interest. CITEJA met for the first time in Paris in May, 1926, and assembled regularly up to the commencement of the second world war.

WARSAW.

Its first and greatest achievement was the Warsaw Convention, the draft of which was submitted to the Second International Conference on Private Air Law in October 1929, at Warsaw, and opened for signature on October 12.
Thirty-three states were represented at the conference and up till today, the Warsaw Convention 61) is the basis 62) of the law regarding the liability of air carriers towards their passengers and consigners, not only in international air transport, but in most of the European countries and in many outside Europe 63), also in domestic transport. Over a hundred states have ratified or adhered to it.

ROME.

An other important and influential convention drafted by CITEJA, was the Rome Convention 1933 64). As a matter of fact there were two draft conventions submitted by CITEJA to the Third International Conference on Private Air Law which was held in Rome in the second half of May 1933. One dealt with the precautionary attachment of aircraft, by which term is understood

any act whereby an aircraft is arrested in pursuit of a private interest by the agency of judical or public authorities on behalf of a creditor or the holder of a lien on the aircraft 65).

This convention was opened for signature at the conclusion of the conference but up till 1961 it obtained no more than 13 ratifications.

The other convention which is generally known as the Rome Convention 1933 found no better acceptance 66). Since 1933 only six states ratified it. The convention seeks to protect the innocent victims of aviation on the surface as well as the operator of the aircraft by which the damage is caused. Although, as has been said, it never received more than six ratifications, its principles have been widely used in the various national legislations 67).

The reasons for its little acceptance are non-agreement with the principle of absolute liability, or with the exact amount of the limitation, or with the compulsory insurance which left little space for other measures to secure the operator's liability 68).

BRUSSELS.

One year before the outbreak of World War II the Fourth International Conference on Private Air Law met in Brussels (September 1938). Again two draft conventions prepared by CITEJA were submitted to the conference, but this time only one of them was adopted. And even this adopted Brussels Conven-

tion 1938, signed by fifteen states, has as yet not been ratified by any of them. The convention sets certain uniform rules for the mutual assistance in the "search and rescue" from aircraft to aircraft and between aircraft and ships at sea. After the war the Legal Committee of ICAO took over the study of this subject and of the second draft convention, which dealt with collision.

Also during the 1938 conference an insurance protocol to the Rome Convention 1933 was adopted, which allowed the insurer to raise certain defences in order to avoid liability under the policy in respect of the convention's liability.

After the war CITEJA's work was taken over by the Legal Committee of ICAO.

VARIOUS OTHER ORGANISATIONS.

The development of international co-operation in aviation has not been limited to the above mentioned. By 1935 the number of international conferences, corporations and societies which dealt with aviation were numerous. Paris alone was the headquarters of more than a dozen of them. To name but a few: C.J.I.A. (Comité Juridique International de l'Aviation), founded in 1909, was a private air law association which was particularly interested in the development of a universal air code; F.A.I. (Fédération Aéronautique Internationale) was chiefly interested in the international regulation of private aviation; a conference of national registration and classification bodies held in 1927 at Paris, founded A.I.R. (Air International Register); the foundation of I.U.A.I.

(International Union of Aviation Insurers), influenced by CITEJA, was an important step to a modern aviation insurance system, which because of its wide extent is able to insure any conceivable risk; the C.A.I. (International Air Conference) which owed its origine to the Anglo-French air conference of 1930 (two years before CINA came into effect) dealt chiefly with technical matters such as wireless communications, meteorology, etc. The Mediterranean region and the Balkan and Baltic region had their regional organisations respectively C.A.M. (Mediterranean Air Conference) and Balkan and Baltic States Air Conference 69). Last but not least must be mentioned IATA, the International Air Traffic Association 70).
IATA was formed rather simultaneously with the establishment of the first domestic and international services, on August 25th, 1919, at the Hague. In its first decade it was merely a European tariffs and conditions trust 71). But after the first coram publico conflict of interests in air navigation concerning the interpretation of art. 15 of the Paris Convention, the organisation showed its intention to deal with a much wider field of aviation matters.
Notwithstanding membership of Brasil, India and some North-African states, its activities were chiefly confined to Europe. By 1939 the number of members had increased to thirty and the co-operation originally scheduled, had assumed a different scope 72).

THE PRACTICE.

The subject of the activities of all these organisations, civil air transport, developed steadily, despite all kinds of hindrances from the first regular airline between London and Paris in 1919 to an all European network by 1939. Very early however it turned out that it could be made no more "civil" in fact as well in name than could be the automobile, the telephone or the birthrate 73). Started originally as private enterprises, by 1939 nearly all of the airlines were owned by the various governments. French aviation already was subsidized by the government in 1919 and the words of Winston Churchill in 1920: "Civil aviation should fly by itself. Governments cannot hold it up in the air", in 1921 were followed by the "temporary" subsidizing of the British airlines, which has lasted ever since. Various attempts to cope with this situation lead to mergers, to international companies and especially to pools.

Under a concession of 1931 the German Lufthansa and the General Directorate of Sovjet Civil Aviation (Aeroflot) established the German-Russian company Deruluft, to fly regular services from Berlin to Moscow. Another instance of an international company was the Franco-Roumanian airline which served the route Paris-Boucharest 74) and a similar Sovjet-Polish venture. There is little available published information on these types of co-operative international airlines 75).

The same goes for the many pre-war pools, the persons responsible for the administration having from the outset shown a

disinclination to furnish any details 76). The list of existing pools published by Tombs 77) shows that (the German) Lufthansa 78) especially must be considered a pioneer in this form of co-operation.

In general the pool agreements contained such matters as: provisions for equal numbers of flights; representation of one company for administrative and technical facilities including loading and unloading, catering, repairs, etc. The setting of equal tariffs of course used to be one of the essentials of the pooling agreement. Postal receipts were usually retained by each company.

CONCLUSION.

The conclusion of this concise outline of the European pre-war aviation history can be short. From the beginning of flight, the legal development necessary to safeguard economic and beneficial utilisation of aviation was not able to keep up with the technical development. Fear of national security, later mixed with economic protectionism, appeared to be an insurmountable obstruction.

At the Paris Convention of 1919 the legal bases were laid for the narrow fences within which aviation had to grow and Europe never succeeded in establishing a regime of the air in which aviation could spread its wings freely. Partly, if not chiefly, owing to these restricted possibilities, aviation always has been connected with the interference and censoriousness of governments which subsidize them. The development of a European

airlines network has not been prevented but in stead of becoming a communications system of a general beneficial character comparable to e.g. rail and sea transport, it turned out to be an expensive instrument of national prestige to which every taxpayer contributed, but from which only a few could benefit. From the very beginning also, there have always been defenders of the principle of coelum librum, among them outstanding practitioners of international law, and also aviators, economists and businessmen. Their efforts however have gained astonishingly little. Astonishingly, especially when one considers that their point of view has been strongly supported by the facts which have proven the operation of air transport in Europe completely impossible without (a certain degree of) international co-operation.

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28) See L.C. Tombs "International Organisation in European Air Transport" (New York - 1936).

29) The First Hague Peace Conference convened at the initiative of Emperor Nicolas II of Russia, for the codification of international law. After 1899 several other Hague conferences were held.

30) Cf. A. Roper "La Convention Internationale du 13 Octobre 1919 (Paris - 1930), p. 21, 22.

31) Cf. W.H. Prinz von Hannover "Luftrecht und Weltraum" (Hanover - 1953), p. 18.

32) Cf. Tombs, supra 28, p. 5.

33) Cf. E. Pépin "Development of the national legislation on aviation since the Chicago Convention" (McGill University, Montreal - 1957).

34) The Peace Treaty of Paris 1856 stipulated for free navigation on the Danube. The definite statute of the Danube was established in 1922. The created Danube Commission had distinct juridical personality independent of the municipal law of the State in which they were situated.
A similar agreement was reached by the Barcelona Conference of 1921 by which freedom of transit for commercial and private vessels was mutually accorded by member-States through navigable waterways situated under their sovereignty.
Since the Barcelona Conference "freedom of transit" became the qualified term for the more general expression of "innocent passage".

35) Cf. Documentation Internationale, LA PAIX DE VERSAILLES- Commission de l'Aéronautique (Paris - 1934), p. 263, 264.

36) Art. 1 (a): Les Hautes Parties Contractantes Reconnaissent que chaque Puissance a la souveraineté complète et exclusive sur l'espace atmosphérique au-dessus de son territoire".

37) Supra 34.

38) Art. 15 (d): "Chaque Etat contractant pourra subordonner à son autorisation préalable l'établissement de voies internationales de navigation aérienne et la création et l'exploitation de lignes internationales régulières de navigation aérienne, avec ou sans escale, sur son territoire".

39) See pp. 58 and 59.

40) Cf. D. Goedhuis "Idea and Interest in International Aviation" (The Hague - 1947) p. 10.

41) Cf. A.D. McNair "The Law of the Air" (London - 1932) p. 1.

42) The Ibero-American Convention concluded between Spain and a number of South-American States, at Madrid in 1926, and the Pan-American Convention concluded between the U.S.A. and South-American States, at Havana in 1928, reproduced a number of the essential provisions of the Paris Convention.

43) Cf. also Roper's point of view, supra 30:
"It (the Paris Convention) offers to the contracting states all the advantages resulting from the unification of public air law, leading to the standardisation of national legislations, without asking for serious sacrifices, without submitting these states to exorbitant obligations and without exposing them to any danger".

44) See Tombs, supra 28, p. 47.

45) There was also the desire of the League of Nations to establish independent and swift communications between Geneva

(the seat of the League) and the capitals of its members, which evoked several aviation problems involving the League.

46) Cf. "Ten years of World Co-operation" issued by the League of Nations (Geneva - 1930) p. 210.

47) According to art. 34 of the Paris Convention CINA was placed under the direction of the League, but worked in fact quite independently.

48) There are still many states where the aviation administrations are part of the military instruments. Of the 400 delegates to the Chicago Conference in 1944, 90 were military officers.

49) How strong and general this idea was, appears from the French law on commercial air transport of 1932 (December) which stipulates: "The state if it considers that it is preferable to have the airline adopted by an international organisation, may repeal the charter according to conditions to be laid down by a special law".

50) See e.g. R.N. Lawson "A plan for the organisation of a European air service" (London - 1935) pp. 16 seq. and 24 seq.

51) Cf. "Het plan van Vollenhoven in openbare bespreking" (Leyden - 1913).

52) Cf. H. Wehberg "Theory and practice of international policing" (London - 1935), p. 66.

53) Cf. Wehberg, supra 52, p. 87.

54) The Air Transport Co-operation Committee was appointed by the chairman of the Transit Committee. It consisted of delegates from the different member countries, who did not commit their governments. It's first session was held in 1930.

55) In 1932 at the Disarmament Conference; in 1933 by CITEJA; in 1944 at the Chicago Convention by the delegates of Australia and New-Zealand. Similar proposals are made for regional internationalisations of which must be named the succesful establishment of the Scandinavian Airtransport System and such efforts to unite the European air transport industry as the Bonnefous Plan, the Sforza Plan, the Van de Kieft Plan (see chapter VI) and the negociations on the Europair and Air Union (see chapter IX) so far without much succes.

56) Cf. JALC (1957) Vol. 24, p. 273 seq. - D. Goedhuis "The role of air Transport in European Integration".

57) Cf. Tombs, supra 28, p. 184.

58) Cf. Tombs, supra 28, p. 100.

59) Cf. Sforza Plan, chapter VI.

60) See Tombs, supra 28, p. 38 seq.

61) Convention for the Unification of Certain Rules Relating to International Carriage by Air.

62) The convention was amended for the first time in 1956 by the so-called Hague Protocol (infra 268) and for the second time in 1961, by the Guadalajara Convention (see p. 113).

63) The growth of international interest is illustrated by the difference in the delegations respectively to the Paris Convention and the Warsaw Convention. The former was chiefly of European concern, whereas at the latter many states from outside Europe were presented.

64) Convention for the Unification of Certain Rules Relating to Damages Caused by Aircraft to Third Parties on the Surface.

65) Cf. P.H. Sand, G.N. Pratt and J.T. Lyon "An Historical Survey of the Law of Flight" (Montreal, McGill University - 1961) p. 18.

66) Cf. M.T. Laurès "La Convention de Rome" (Paris - 1934) i.a. p. 57.

67) Argentine, Belgium, Brazil, Canada, Denmark, Iceland, Sweden have inserted compulsory insurance provisions according to the text of the Convention, whereas several other states created the possibility of the requirement of compulsory insurance in their legislation.

68) The Convention was amended by the Rome Convention 1952, in which alternatives to insurance were provided for.

69) The Baltic and Balkan Conference was of great influence to the connection of the southern and northern European countries. Air transport, chiefly performed by the Polish airline Lot, cut off the long roundabout sea route and provided also for a much better connection than that by the winding and tiresome railroad.

70) See Chapter IV.

71) Cf. Z.L.W. (1960) Band 9 p. 111 seq. - P.H. Sand "Die Airunion und das Wettbewerbrecht des Gemeinsamen Marktes", p. 116.

72) The first General IATA Conditions were based on the conditions of the International Railway Union (Berne Convention

1924). IATA did much for the organisation of combined transport by air and rail in order to enable air passengers to continue their journey by rail in the event of interruption of flight. In 1930 a contract concerning this matter was concluded between the railway administrations and the air transport companies through the co-operation of IATA and I.R.U.

73) Cf. J. Parker van Zandt "Civil Aviation and Peace" (Washington - 1944) p. 1, 2, and 22 seq.

74) C.I.D.N.A. (Compagnie Internationale de Navigation Aérienne) was a French-Bulgarian company which carried out services from Paris to Bucharest via Vienna, Prague and Belgrade. The company was of French nationality. Its succes may have been influenced by common (roman) language ties between France and Roumania (cf. the S.A.S. co-operation between the Scandinavian states).

75) See chapter V.

76) Cf. chapter V.

77) Supra 28, pp. 36 and 37.

78) In 1932 Lufthansa, or better in general the Germans, were the biggest air transporters of the continent. They produced and utilised as many ton-kilometres as the companies of Austria, Belgium, Netherlands, Czechoslovakia, Denmark, Finland, Greece, Hungary, Poland, Roumania, Spain, Sweden, Switzerland and Yugoslavia together.

CHAPTER III - THE PRESENT SITUATION OF EUROPEAN AIR TRANSPORT. FLAGCARRIERS.

At the end of World War II the total disorganisation of all means of transport, on the surface, on the sea and in the air, left for a while more room for private initiative in aviation. But quite soon it appeared that the problems had lost nothing of their actuality and when the Belgian foreign minister Spaak in his Spaak Message 79) called the preparation of a convention on air traffic a whole chapter of Europe's "secteurs urgents", he was not exaggerating.

When one wants to review European air transport by examining both its juridical structure and its other aspects, and if one wants to explore the causes and the ratio behind the present law of the air in Europe one should keep in mind one basic quality in which it differs from American air transport: the main European air lines are not private enterprises. Most of them are government owned 80). Moreover all of them have a more or less officially recognised other quality, that of national flagcarrier. In some countries, such as France, where the notion of "Gloire" seems never to have lost its medieval importance, this quality plays a more important role than e.g. in countries such as Denmark or Italy. But also in other countries one cannot avoid a certain notion of the national air-line being generally considered to belong in the same emotional sphere as the army, the navy and the National Museum. Whereas probably no French wine-dresser of Italian spaghetti merchant would have serious

objections to close co-operation with a colleague in Holland, Britain or Germany if this were profitable to him, the national emotional affection attached to the "flagcarrier", makes international co-operation in air transport a much more difficult affair.

HIGH COSTS.

When one compares the European situation with the American, it is obvious that the difference of background is responsible, or at least partly responsible, for the fact that flying in Europe is considerably more expensive than it is in the U.S.A. or Canada 81). A superficial study of U.S.A. transport might rather give the impression that were it not for the C.A.B.'s (Civil Aviation Board) policy of competition, the entire U.S. aviation industry would gradually merge into one big (monopolistic) company 82).

Of the total transport in Europe, the share of air transport is 15% whereas the comparable share of the U.S. air-lines is much more. In an area comparable to that of the U.S.A. 83) European air transport is 1/5 of the size of domestic U.S. air transport. One of the reasons for the lesser popularity of air transport in Europe are the rather high fares. Although it still has a considerably lower standard of living than the U.S.A. or Canada, Europe produces air transport at generally much higher costs than those countries at the other side of the Atlantic Ocean 84). With average incomes at nearly 1/3 of the Americans ($550,- compared to $1850,- in 1956) Europeans therefore still

do not consider air transport as a normal means of transport. The American airlines have several other advantages, many of which are due to the fact that they can operate in a large air space under a united (federal) technical and economic control. In Europe the airlines face the problem of short stages, which tend to raise operation costs such as: wear of tires, fuel consumption, low utilisation of aircraft and crews, landing taxes, communication costs, greater difficulty in establishing rotations, etc., costs which could be kept down to a great extent were it possible to spread them over a greater number of ton-kilometres. In 1958 the U.S. airlines found themselves confronted with uncompletely financed re-equipment programmes, with traffic growth at a stand still, with declining load factors and rapidly shrinking profits, a similar situation to that which they had had to face in 1948. The remedy was found in a fare increase (of nearly 10%) which was approved by the C.A.B. 85). In Europe the airlines face similar problems but they are not in a position to acquire such a quick remedy. Fares already are at such a high level that the only remedy seems to be an increase in traffic and a tailoring of the product to suit the customers' desires.

Few European airlines have ever made any profit by the flying of their European network alone 86). Nevertheless every country wants to have its own national carrier and competition is ever growing.

Another cost increasing factor is the absence of a competent European aircraft industry. The United Kingdom with its Common-

wealth has an aircraft industry able to produce big transport aircraft comparable to the American products but it only recently seems to be in a situation to offer competitive propositions. Most of the other West-European countries have their own aircraft industries as well, but all of them confine themselves to short and medium range aircraft. The production of the big jets such as the DC8 and the Boeing require considerable more investments of money and skill, than any of the current European industries can afford by itself 87).

Then there are also the other means of transport, railways, road transport and water transport, of which especially the railways are important to air transport. Luxurious TEE (Trans-Europe-Express) trains connect over 80 European cities as a result of the common efforts of the closely co-operating European railways. Apart from them there are other special luxurious expresses and local trains all operating according to a frequent schedule and at high speed in order to provide the customer with choice of several connections a day between the important European centres and - taking into account the inevitable delays at the airports - at a speed competitive to air travel speed and this mostly at much lower fares 88).

Furthermore there is again the handicap of the frontiers and the fact that air transport in Europe by its very nature is an export product. This is particularly a problem of the small countries most of which have no domestic network of any importance at all. Whereas inter-European trade relations are to a great extent liberalised, air transport

still is submitted to quota and restrictions. In other words, with regard to air transport there has been little changed since the pre-war days.

These legal restrictions have considerable economic consequences. As it is easier to obtain 3rd and 4th freedoms, a radiation network is being built up which leads to the constant overlapping of services. This general lack of (the possibility of) co-ordination affects costs unfavourably. European services run from every capital to every other capital but connections outside this system are few. A study of I.T.A. (Institut du Traffic Aërien) in 1955, showed that only 26 of 195 European routes touched more than two countries and these 26 routes carried only 10% of the total traffic. A fraction of this 10% was 5th freedom traffic, which nevertheless seemed to be sufficient for everlasting disputes 89).

It goes without saying that such a radiation network can hardly be economic and tends to increase fares. It finds its main "raison d'être" in its function as a feeder service to the intercontinental services. Passengers with an intercontinental destination are lured onto the airline's non-profit making European routes, in order to sell to him a seat on one of the more profitable intercontinental routes. Meyer is doubtless right when he takes the view (in 1944) that the European network of the airlines in Europe is only part of their intercontinental network. It is difficult to agree with him however, when he claims that the fifth freedom should be of less importance in Europe because of the short distances (seldom more

than 800 miles) and because most of the routes are just point to point routes 90). Nor does it seem possible to agree with a statement of the Schweizerische Bundesrat, cited by Meyer, according to which the so called pick-up traffic would grow less important to aviation enterprises. In my opinion it is the difficulty met with in obtaining 5th freedom rights which is responsible for the situation as it is: terminal traffic and the use of aircraft suitable for this special purpose.

By summarizing the above - high costs, short stages, railway competition, terminal to terminal traffic - one arrives at a vicious circle which can only be broken by legal measures tending to liberalise air transport. Undoubtedly the popularity of air transport in America is due to the fact that the airlines offer considerable time savings at prices on the same or at a slightly higher level than those of surface transport. It seems probable that air transport in Europe will gain a comparable popularity only if it will be able to reduce its fares to a comparable level, especially when one considers that it is much more difficult to offer a time advantage.

FREE COMPETITION AND NATIONALISM.

Under the present circumstances European air transport is not competitive. Cost prices are high which means low rotation and thus high deprecation of aircraft resulting in non-satisfactory schedules.

It seems that the European network has developed without taking into account the general need of the European community. One

could say: "Europe is rather used than served by air transport". In domestic traffic the nature of the public service of air transport and the economic demands have generally resulted in a state imposed co-ordination. But such co-ordination in international traffic is still unsatisfactory even concerning such matters as landing formalities. Very long customs and immigration checks are becoming rare, but the period which the air traveller is obliged to spend at a European airport is still far in excess of the average ten minutes in the U.S.A. 91). Even in inter-European traffic, ICAO Annex 9 92) is not yet generally implemented 93).

A great deal of the difficulties are caused by the fact that air transport is an export product of which every country wants his own share, which means that every country wants to export the same product to every other country. The fairness of each airline's share in this remarkable "export interbreeding" is measured according to different standards by each interested party. Switzerland which attracts thousands of tourists every year, thinks it only fair that a large number of these tourists should be brought in and out of the country by Swiss transport. A country such as the U.S.A. whose air minded population forms the greater part of intercontinental traffic, takes the view that Americans should fly American; France fervently doing its best to recover something of its pre-war status of the cultural as well as aeronautical centre of the world, considers the role of French air transport in Europe a leading role. The Netherlands, whose K.L.M. is one of the oldest and most well-known air-

lines of the world, regards a free competition of skill in a free air as the solution to the problems. And in practice every State uses its power to promote its own ideas.
The difference of living standards intra-Europe constitutes one factor. More important is the difference in the geographical and economic position of the countries. Some countries have a typical terminal position, others are merely transit countries. Some attract a great quantity of tourists during the whole year or during only a part of the year, others have cities which are important business centres and still others have neither business nor tourism. The result can be a disparity between the general economic activity and the commercial aviation aims of a country, a disparity which does not count in shipping, but which raises great difficulties if one wants to export a product which is exported also by others who have a much better bargaining position.

POOLS.

The current rights to fly are established by bilaterals whereas a number of other agreements between the airlines themselves (pools) 94) and between governments and airlines provide for further freedoms and concessions. A recent review by Coulet 95) gives information about the existing pools. The conclusion to be drawn from it is that the European airlines generally fly a smaller part of their total traffic under pooling arrangements than they did before the war 96). In making this statement, one should take into account the considerable increase

in the number of routes flown in scheduled service compared to the pre-war situation and by studying Coulet's table of the pools of Air France, BEA, KLM and Swissair 97) it becomes clear that the poolroutes are the most important routes. From this it may reasonably be deduced that as routes gain importance the establishment of a pool with other airlines which fly them, becomes more desirable. For as soon as an air route becomes an economic proposition (or one of special prestige) the other airline(s) which are in a position to claim that route, will be inclined to competition with the consequent desirability of regulating each share. This will occur unless the traffic on that particular route is so heavy that several airlines are able to fly it on a frequent schedule and with high loadfactors. The route London - Paris, Europe's heaviest flown route seems an example of the latter category.

Compared to the number of pool systems in other parts of the world the amount of traffic flown in pools in Europe is greater than anywhere else. The reason for this must not only be sought in the political and legal conditions but also in the desire to force down expenses and to offer such flight schedules as are fit to compete with the strong competition of the other means of transport 98). It is only by pooling services that airlines on a particular route can be prevented from offering their services only at hours the most travellers can be expected. By doing so the proverb "too many cooks spoil the broth" becomes relevant and services at other times are not available which in turn has an unfavourable influence on the popularity

of air transport.

POLICIES.

The European bilaterals reflect the air policies of the countries concerned. For the better understanding of the ideas fostered by the States involved in the European situation a general outline of these policies follows here 99):

Britain and France are unquestionably the States with the best bargaining positions and they therefore play dominant roles in European air legislation, at least as far as public law is concerned.

The first striking feature of Britain's policy on the regulation of the air space is that it appears to be not always the same. Britain is known for its "Real Politik" and this applied also to its aviation policy. Nevertheless an important guide to the U.K.'s ideas can be found in the negotiations on the Bermuda Agreement 100), where the British advocated the predetermination philosophy, the same as they had done at Chicago. Several of the air agreements between the U.K. and other European countries have been concluded on the basis of this theory although in some cases the restrictions of the agreement have not been put into operation (i.a. in the U.K. - Netherlands agreement). In others however (with France, Portugal) the conditions of pre-determination are strictly insisted on by the other party and this may be the cause of Britain's more liberal attitude at the European Civil Aviation Conference in Strasbourg (ECAC) 101), where its delegates showed a preference

for the granting of liberal traffic rights in Europe.

France believes strongly in the "quid pro quo" theory and advocates the doctrine that every State should have the amount of traffic that it generates itself 102). Its agreements with the U.K. and Italy provide for the creation of a Standing Joint Committee for a regular review of the implementation of the equal division of capacity provisions. France also makes its exceptions: its aviation relations with the Netherlands and Belgium are not regulated by any respective bilaterals at all, the Dutch and the Belgians just have freedom to fly to France's international airports and the French enjoy the same freedom in Belgium and the Netherlands. The French policy at Strasbourg however, was much more restrictive than that of the British and Dutch and went not much further than to favour the idea of interchange of aircraft. In fact it was the French delegation which may be held responsible for the eclative failure of the conference.

The Netherlands which has the third biggest European airline, have never departed from the ideas of its great son Grotius and have always favoured the coelum librum. At various opportunities, at Chicago as well as on later occasions, the Netherlands advocated a multilateral agreement containing provisions for fifth freedom rights and safeguards against discriminations. At Strasbourg the Dutch did not propose such a multilateral agreement; this was not because of a change in standpoint but simply for reasons of realism. Instead they submitted a proposal for the exchange of routes. With comparatively little

traffic originating in Holland and its big airline KLM, the Netherlands suffers considerably from other countries' protectionism in air transport 103).

Belgium's air policy is chiefly founded on its important Africa (Congo) routes and tends to be pre-determinative and restricted. Since the Congo failure the Belgian position is still more vulnerable than it was before. It seeks to solve its problems by a close co-operation with other airlines (in the first place with the Dutch and the Swiss) and favours the regulation of air transport by bilateral agreements instead of by a multilateral solution. The Benelux association provides for freedom of air transport for the three states. Belgium is a partner to the so-called Beneswiss arrangements - mainly providing for an interchange of spare parts - which may be the cause of the absence of an air transport agreement with Switzerland as well.

The Swiss policy is clear from the statement of the Schweizerische Bundesrat of 1953 104): "The basis of our air transport policy could neither be unrestrictive freedom nor exaggerated protectionism. The forefighters of the extreme liberal thesis forget that elsewhere - in sea transport - the experience with this freedom has been a bad one. Its consequence would be an unrestricted competition, absence of co-operation also where this is obviously useful, and the unproductive, undercapacity operation which can only be maintained by subsidies". Switzerland, although a small country, generates a considerable amount of tourist (and convention) traffic which gives it a strong bargaining position in Europe. Switzerland requires all

foreign airlines to submit schedules to its civil aviation administration thus giving this body an extra regulating power.

Sweden, Norway and Denmark have a fairly uniform air policy. Their main airlines are united in the Scandinavian Airlines System (SAS) 105). The three countries were supporters of the Services Transit Agreement of Chicago 106) and have since followed the line of freedom of the air 107). Because of their geographical position as an airline terminal rather than as a transit country, their generally modest standard of living 108), and the consequent lack of traffic originating in Scandinavia, this freedom of the airspace is for Scandinavia as important as it is for the Netherlands. In most of the countries' agreements a SAS clause is inserted which designates SAS as the "chosen instrument" of each of the three countries, in order to be allowed to operate the agreed routes with aircraft registered in any of the three registration offices.

Italy's aviation ideas are more or less reflected by the Sforza plan 109). Because of its position as a defeated country after the war it was and still is behind in the development of its airlines 110). At the time of its admission to ICAO, Italy seemed to have radically changed its pre-war attitude of protectionism 111), but since that time it has shown a tendency to adopt a similar restrictive policy 112). The Sforza plan wants to divide air transport according to standards chiefly connected with population and surface area. Bermuda type agreements are interpreted in the sense of utmost restriction and on various occasions the Italian view has been expressed

that fifth freedom rights should only be granted to foreign airlines where no Italian airlines operate along the same route.

A similar development is shown in the common policy of Spain and Portugal. At present these countries reserve all traffic between their cities for their own airlines, after having taken a fairly liberal position at Chicago.
The Portugal-Spain combination shows a favour for strict determination of capacities and the French view of property over air traffic originating in Spain and Portugal. This view is pursued to such an extent, that in cases where a foreign airline has carried more traffic than the national airline, requests for compensation have been made.

Ireland, for a long time a necessary last landing place before crossing the Atlantic, has also adopted a very restrictive policy.

Greece with its major airline partly British owned initially favoured liberal views. Apart from its British interests, most of its agreements with other European countries are of the Bermuda pattern 113). To non-European airlines Greece tends to be more restrictive.

Turkey is one of the rare countries which has no airline of its own operating on foreign routes and has therefore little reason for protectionism.

A condition by which West-Germany could recover its own say in matters of civil aviation was a guarantee that it would pursue a liberal policy, without discrimination. It had moreover to respect existing rights (American, British and

French) except where domestic traffic was concerned. The rights on the routes to Berlin, however, are still regulated by the U.S.A., the U.K. and France and only airlines of these countries are permitted to fly them. Germany favours a system of co-operation with other European airlines, especially by pooling agreements. The importance of its major airline Lufthansa is continuously increasing and although the air policy of Bonn up till now shows little retreat from the Paris Agreements of 1954 114), it is likely to turn more restrictive in the future if no European multilateral or other respective agreements are concluded.

PROGRESS TO LIBERALISATION.

Comparing the present European situation of air transport to that of ten years ago, certain tentative steps towards closer co-operation and organisation can be discerned. They all bear the stamp of incompleteness; they are fragmentary and deal with a very narrow field (pools, representatives, interline agreements, etc.). Some improvements in efficiency have been established. It is, however, certainly not yet possible to speak of a recognition of a European interest to which national interests are subordinated. Such a recognition would be necessary if European operations are to be conducted on a permanent multilateral basis. However, the voices which either favour the joint operation under a European authority, or the necessary degree of freedom to operate on an economic basis, are gradually gaining strength.

In the meantime the faster jet aircraft has made its entrance, not only on the intercontinental stretches but also in the European region. The result is a tendency towards fewer landings on longer routes. This might lead to a decreasing competition between the longer routes (which need the fifth freedoms) and the shorter routes and a decrease in the importance of European fifth freedoms; but this will occur only if these new traffic opportunities create a consequent increase in traffic and if the so-called pick-up traffic grows less important to profitable operation.

It is hard to forecast anything for the time when super sonic aircraft will be used in civil aviation. It seems however clear that operations with that type of aircraft will be too expensive for one single European company and that common exploitation will become a necessity if European airlines want to use it 115).

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79) Cf. Report Spaak (Brussels, April 21, 1956) - Report of the Chiefs of the Delegations to the Foreign Ministers, Intergovernmental Committee established by the Messina Conference. The Messina Conference, June 1, 1955, was charged with the task of preparing treaties that would accomplish the next stage (after the E.C.S.C.) in the process of European integration. Cf. A.H. Robertson "European Institutions" (New York - 1959), pp. 27, 121, 193.

80) Air France is 100% government owned; B.E.A. and B.O.A.C. are both 100% government owned; K.L.M. is legally a private company with limited liability and its shares are held by

the Dutch government; Sabena is 50% government owned and the other half is in private hands; S.A.S. is in the same position as Sabena; Swissair is mostly privately owned, the Swiss government holds 30% of its shares; Alitalia was 60% government owned, 40% of its capital was chiefly in British (B.E.A. and B.O.A.C.) hands. In June 1961 British interests in Alitalia were taken over by the Italian State; Lufthansa is a company owned by the West-German state. The above according to W. Deswarte, managing director of Sabena, in Interavia 1955 No. 10, p. 756 - "Co-operation" and some scattered other sources.

81) Canada's biggest airline T.C.A. is state owned but competes on an equal basis with the other major Canadian airline C.P.A. and in the domestic field also with minor airlines.

82) Cf. Time 1962, June 8.

83) The greater part of European air transport is performed in a quadrangle between Scotland (Glasgow)-Spain (Madrid) - Italy(Rome) - Sweden (Stockholm). Europe's population in 1956 was roughly 320 million in an area of 1350 square miles with an air route mileage of 186.400 miles compared to the U.S.A. with 160 million, 3020 square miles but a mileage of 93.200.

84) According to M. Hymans (in Interavia 1957 No. 3, p. 219 - "European Air Transport is indivisible") this difference in cost factors is not due to an inferior administration of the European airlines. The average ton/kilometres in the U.S. cost (1957) 19 cent and in Europe 30.5 cents. The price of fuel in Europe however was 29.5 cents compared to the U.S. price of 17.5 cents.

85) Cf. JALC (1959) Vol. 26, p. 101 seq. - L.J. Hector in an Address to the N.Y. Society of Security Analysts on problems of economic regulation (November 1958).

86) B.E.A., Aer Lingus and Finnair made a small profit on their entirely European network in the years before the jet made its entrance.

87) See R.G.A. (1951) Vol. 14, p. 359 - CHRONIQUE INTERNATIONALE "L-organisation Européenne de l'aviation civile".

88) A comparison of air and surface fares on a number of European routes has been published in 1956 by Wheatcroft. Of the routes published, at 70 it is 4% to 315% more expensive to travel by air, whereas at 17 the possibility existed to travel 25% to 3% cheaper by air than by train (and boat). For 5 the difference was 1% or none. The cheaper fares exist mainly in the South-England - Benelux, France and Switzerland area where exellent railway services offer the greatest competition.

89) Cf. Interavia 1955 Vol. 10, p. 753 - L.H. Slotemaker "Thoughts on Strasbourg".

90) Cf. Z.L.R. (1954) Band 3, p. 223 - A.Meyer "Der internationale Luftlinienverkehr und der internationale entgeltliche Gelegenheitsverkehr nach geltendem Recht und de lege ferenda unter besonderer Berücksichtigung einer Koordinierung des europäischen Luftverkehrs".

91) In the U.S.A. great efforts are made to avoid delay in handling as much as possible. The establishment of a U.S.-immigration office at the Montreal airport to serve U.S. bound passengers is one of the examples of that effort. Others are the application of the so-called finger system at the major American airports and the establishment of "shuttle services" on the route Boston-New York-Washington by Eastern Airlines (on these services the passenger buys his ticket in the airplane and thus saves the time usually spent at booking offices).

92) Annex 9 to the Convention of Chicago - FACILITATION.

93) In 1953 the European conference at Cannes, which can be considered as the predecessor of ECAC, dealt chiefly with the subject of Facilitation. Agreement was reached upon a simplification of sanitary measures, passengers manifests, disembarkation and embarkation cards, visas, load manifests and custom handling of non-scheduled traffic.

94) See Chapter V.

95) See W. Coulet "L-organisation Européenne des Transports Aériens" (Toulouse - 1958), Chapitre III.

96) Cf. Coulet, supra 95, p. 42.

97) Coulet, supra 95, p. 49.

98) Cf. Hymans, supra 84.

99) Cf. S. Wheatcroft "The Economics of European Air Transport" (Manchester - 1956), p. 235 seq.

100) Cf. Meyer, supra 90.

101) The European Civil Aviation Conference is held regularly with the object of co-operating in the research and development of air transport and aircraft, to prevent expensive multiplications and to establish a counterweight to the resources of the U.S.A. and the U.S.S.R. Virtually all European countries except Russia and its satellite states

send delegates to its meetings. Its first meeting was held at Strasbourg in 1955 (Nov./Dec.). From the very outset and already at the preceding Conference of Cannes it was clear that the chance of reaching a multilateral agreement on the establishment of fifth freedom rights in Europe, was very small. From its first session ECAC could only state the impossibility of formulating an acceptable proposition (see ICAO doc. 7676 ECAC 1). Most delegates took the view that it was too early for such an agreement (Cf. ECAC/1 WP/3). ECAC was no more able to reconcile the doctrines of nationalistic protectionism and liberalisation of trade than ICAO. See further Chapter VII.

102) Cf. M. Lemoine in Interavia 1957 No. 10, p. 1058 "European Common Market and Air Transport".

103) K.L.M. suffered comparatively greater losses from the switchover to jet aircraft than several better with landing rights provided airlines. Cf. Time, July 13, 1962.

104) See Wheatcroft, supra 99, p. 208.

105) See infra Chapter VIII.

106) Norway and Denmark never ratified the agreement however; Sweden is still a member.

107) An early example of the Scandinavian policy may be found in the air agreements between the U.S.A. and Scandinavia of 1933/1934. These agreements stipulated that consent to the passage of civil aircraft of one party over the territory of the other "may not be refused on unreasonable or arbitrary grounds".

108) Chiefly as a result of its neutrality during the war, Sweden has a much higher living standard than its S.A.S. partners.

109) See Chapter VI.

110) In 1958 the then existing major Italian airlines Alitalia and Ali Flotte Riunite merged. The merger resulted in a considerable advance in the position of the Italian air transport.

111) Cf. supra 9 .

112) Italy makes to a considerable extent use of art. 9 of the Chicago Convention to restrict and prohibit the aircraft of other states from flying over certain areas of its territory.

113) Greece is a member of the International Air Transport Agreement with the exception of the fifth freedom. Other European members are the Netherlands, Sweden and Turkey.

114) See Wheatcroft, supra 99, p. 246.

115) It is fairly certain that the airlines will eventually be tempted to bring supersonic equipment into service on long-haul routes. As far as can be foreseen however, the character of these aircraft will rule them out on European routes. It is unlikely that they will have any advantages on routes of less than 1000 miles.

CHAPTER IV - POST-WAR ORGANISATION. THE CHICAGO CONVENTION; I.C.A.O. 116).

The increasingly important role played by aviation during the war inspired statesmen and aviation experts to envisage the desirability of a design for its future international pattern 117). Particularly in the U.S.A. and in Britain the post-war status of aviation became one of the popular topics of consideration in government agencies and by politicians 118). The experiences of warfare tended to change the ideas concerning the traditional concepts of State sovereignty and it became clear that the conception "freedom of the air" would lose most of its security aspects and that the post-war air transportation problems would be of a primarily economic nature.

The invasion of the German held territory of Western Europe was only a few weeks old when the Government of the U.S.A. announced that it had invited more than fifty allied and neutral countries to take part in an international aviation conference to be held at Chicago in September 1944.

All of the invited States accepted the invitation, except Russia 119) and Saudi Arabia.

The expectations of this conference, whose objectives were the establishment of a new multilateral aviation convention and a new permanent aeronautical body (to replace the 1919 Convention and its International Commission for Air Navigation 120)) and also the establishment of world air route agreements, were high and there was a general feeling that international understanding this time might be able to find the solution which

pre-war Europe had failed to establish. Shortly after the opening of the Conference, however, it became clear that the variety of the positions of the different States and the uncertainty regarding the future character of the development of general international relations would impede very seriously the forming of a common opinion 121).

At the Conference different points of view were expressed the most important of which were the American, the British and the Australian-New Zealand points of view. The Chief of the American delegation, who was also President of the Conference, explained his government's policy as aiming at a general system of rights for airplanes to travel and to carry international commerce and at arrangements similar to what had become the settled law of the sea in order to establish the custom of free commerce by air 122). This system should be supervised by an international body with executive functions in the technical field and advisory capacity in matters of an economic nature. This view, which was directly opposed to the U.S.A. pre-war policy 123), could only partly be shared by the British delegation which also favoured an international aeronautical body but wanted to endow it with the additional power of fixing routes, frequencies and rates 124). The Australian-New Zealand proposal was much more progressive. It envisaged an internationalisation of all international air services which would be operated by one internationally owned entity. This proposal however was rejected at an early stage of the discussions.

The final act of the Conference shows a compromise between the

American and British points of view.

The results of the Conference were of dominant importance for post-war aviation. An interim agreement provided for the Provisional International Civil Aviation Organisation (PICAO) and established certain rules for an interim period necessary for the definitive international organisation and agreement to be effected. The interim agreement became effective six months after the Conference and lasted until 1947.

The substantial result of the Conference is the Convention on International Civil Aviation, divided into two parts. The first part provides for a certain uniformity of the aviation standards, procedures and regulations of the contracting States and an international law of the air over the high seas. These standards, procedures and regulations are elaborated in a number of technical annexes which are kept up to date by the International Civil Aviation Organisation (ICAO) which is created by the second part of the Convention. The Convention bears 32 original signatures, but is today accepted on a world-wide basis 125).

Other results of the Conference are two international agreements dealing with the admittance of aircraft in the airspace over and on the airports in the territory of contracting States. Both later turned out to be of minor importance. The International Air Services Transit Agreement provides for the right of innocent passage for scheduled flights, granting passage without landing and passage with landing for non-commercial purposes (1st and 2nd freedoms agreement). The most significant aspect of this

agreement is perhaps the fact that a great number of the ICAO States refused to adopt it, thus indicating their unwillingness to recognise the right of innocent passage for aircraft.
The International Air Transport Agreement provides for rights of a much wider scope. In fact it provides the contracting States with the full five freedoms for air transport from and to each other's territories 126). As long as the U.S.A. was a member of this agreement it had a very valuable importance. After its denunciation by this country 127) in 1946, the agreement became a dead letter.

THE ORGANISATION.

The role of ICAO as the international body of civil aviation has a much wider scope than ever achieved by any of the pre-war bodies of similar nature. ICAO regional offices are spread over the world and almost any event in civil aviation can be related in some way to the organisation.
The organ endowed with decisive power is the Assembly, in which every member State has one vote. Assembly meetings are held every three years, whereas every year limited meetings are convened. The executive body is the Council consisting of 27 member States 128) elected by the Assembly for a period of three years. The Council's president is an official paid by the organisation 129). He does not represent any particular State. More or less following the pattern of ICAN, the Council has established several special Committees, one of which is the Legal Committee which took over the work of the former CITEJA 130).

ICAO's activities are carried out by the Secretariat, headed by a Secretary General.

ICAO headquarters are established at Montreal under the regulations pertaining to Specialized Agencies of the U.N. 131).

ICAO's functions are executive, regulatory and judicial.

I.C.A.O.'s ACTIVITIES.

After 1944 various other attempts were made to reach a multilateral agreement on commercial rights in international civil air transport. At the first and second sessions of ICAO (Montreal 1947 and Geneva 1948) the matter was discussed again but the majority of the States took the view that the freedom of the air should be obtained through bilaterals 132). The increasing support for this point of view was stimulated by the bilateral agreement concluded between the U.S.A. and Britain at Bermuda in 1946 133).

The Bermuda Agreement must be considered as a compromise between the U.S. and the British policies. It contains rules for the operation of air services on determined routes, but contains no express provisions regarding the permission itself for those routes. Each nation granted to the other the two first freedoms 134) and also the three "commercial" freedoms limited by conditions such as government approval of rates, adequate capacities, and "ex post facto" reviews of the carrier's operations and their compliance with these conditions, and only between agreed airports and along agreed routes.

This agreement was widely considered as an important step in the

direction of a certain liberalisation and even the "liberty loving countries" seemed for a while inclined to ask themselves whether this Bermuda system perhaps might provide an other method of approach to their aims 135).

In the technical field ICAO has proved itself indispensable to air transport; in the economic field it has been a great stimulant. The Annexes to the Convention provide for an ever more accepted uniformity of the rules of flight 136).

Navigation aids established in areas important to aviation (e.g. Iceland, Faroe Islands) and meteorological aids (on the Atlantic) provide for the maximum of safety for aircraft passing through these areas 137). All kinds of information collected by ICAO 138), studies performed and draft and recommendations 139) produced by ICAO, serve the member States with valuable material with regard to their activities both in domestic and international aviation 140).

Regional offices are established for a better world wide active service of which e.g. the Paris office goes so far as to provide skill and knowledge to a regional European organisation not based on ICAO membership 141).

ICAO's efforts for the unification of air law resulted in four important international conventions: The Convention on the International Recognition of Rights in Aircraft (Geneva 1948), the Rome Convention of 1952 142), the Hague Protocol (1955) 143) and the Guadalajara Convention (1961) 144). Other projects undertaken by the organisation deal with the Liability of Air Traffic Control Agencies 145), the Legal Status of the Aircraft Comman-

der 146), the Legal Status of Aircraft 147), the Carriage of Nuclear Material 148) and Aerial Collisions 149).

THE CONVENTION AND INTEGRATION.

It seems useful to review some of the articles of the Chicago Convention which appear to be of particular importance to the European problems.

Article 3 of the Convention states that the convention shall not be applicable to State aircraft. It also stipulates that aircraft used in military, customs and police services shall be deemed to be State aircraft but gives no further indication of what State aircraft are. Keeping in mind that nearly all European airlines are owned by the States, this provision might seem ambiguous if projected against, what Hyde calls, the classical rule according to which it must be born in mind that a State never acts in a private capacity, even when the activity in which it participates is one which is commonly confided to and carried out by the private individual 150). According to Hyde, this is true whether its commercial ventures are designed to produce profit, or simply mark the acquisition of derived articles such as for example stationery, locomotives or aircraft equipment for the use of particular government departments. Hence there must be difficulty in concluding that a state when embarking upon any of these transactions is not acting in an essentially governmental capacity 151). In practice however this article did not give rise to any practical difficulty in civil air transport performed by any State owned airline, al-

though some examples showed that it leaves ample opportunity for disagreement on interpretation.

Article 4 is also interesting: "Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aimes of the Convention". If it may be assumed that the aims of the Convention are entailed in its preamble ".... in order that international civil aviation may be developed -..... and that international air transport services may be established on the basis of equality of opportunity ....." the question may arise as to whether the statement by Keeton and Schwarzenberger "that most States at most times keep their international obligations" 152) would also apply to the Chicago Convention. Furthermore this article may be of importance with respect to such ideas as are entailed in the Sforza plan and the establishing of a "cabotage générale" 153) in a common European airspace.

Article 5 which deals with the right of non-scheduled aircraft proved to be of particular importance for Europe as will be pointed out later when dealing with the achievement of the European Civil Air Conference (ECAC). Obviously the makers of art. 5 intended to establish a principle freedom for non-scheduled traffic between member States.

The pertinent language of the last part of this article viz "to impose such regulations or limitations as it may consider desirable" has proved a source of trouble from the very outset 154).

Its first paragraph deals with two types of entry into and flight over the territory of a State: ..... without a stop; and

.... with a stop for non-traffic purposes 155). So far as traffic other than traffic "engaged in the carriage of passengers, cargo or mail for remuneration or hire or in scheduled international air services" is concerned, the States seem to reserve their sovereign rights only with regard to flights over parts of their territory which are inaccessable or without adequate air navigation facilities. If the non-scheduled flight however is made for remuneration or hire, States in many cases tend to utilise their rights given by the second paragraph to nullify some of the rights apparently conferred by the foregoing part of the article, notably that of making the flight "without the necessity of obtaining prior permission 156), which often results in a refusal of the admittance of the flight concerned to their territory. This despite an official ICAO analysis of this article saying "the right of States to impose'such regulations, conditions or limitations as it may consider desirable' is unqualified, but it should not be understood that the right could be exercised in such a way as to render the operation of this important form of air transport impossible or non-effective 157).

Article 7 stipulates - superfluously 158) - the right of States to refuse to allow aircraft of other contracting States to engage in traffic which can be considered as their own cabotage traffic 159). This article has also proved to be ambiguous as the different States give their own different interpretation to it. Generally traffic is considered to be cabotage traffic not only when it carries passengers or goods from one point to an-

other within the boundaries of the same State, but also traffic between a State and its extra-metropolitan possessions (grand - cabotage). Neither the terminology of the Convention nor the definitions of the five freedoms in the International Air Transport Agreement gives any useful indication as to the interpretation of such terms as "taken on", "coming down", "embarkation", "disembarkation", "discharge", etc. as used in the article 160). At Chicago however, the authors of art. 7 had ordinary cabotage in mind and did not wish to regulate "grand cabotage".
Whereas the application of art. 7 to "grand cabotage" is more or less generally agreed upon, some States go to absurdities by e.g. even considering as cabotage traffic not only the conveyance of a passenger flying from a certain overseas possession to an ultimate destination in their metropolitan territory, but also to an airport between these points in a foreign country where he wants to stay for a while before finishing his trip, 161). Although difficulties of this nature are not likely to presént themselves in Europe, the second part of art. 7 containing the prohibition of granting cabotage privileges to or to accept such privileges from (airlines of) other States on an exclusive basis could offer some legal objections to efforts of close co-operation as have been and still are under consideration in Europe 162). As an example may be mentioned the co-operation of the Scandinavian States in the Scandinavian Airlines System (SAS) where Swedish aircraft are involved in Norwegian or Danish cabotage traffic and vice versa.
As a matter of fact the application of the conception of cabo-

tage 163) went far beyond the boundaries of art. 7. In the gradual evolution of air law the conception of "international cabotage" was also admitted (especially in regional traffic) and incorporated in various bilateral agreements between neighbour states 164).

International cabotage means the reservation by two or more contracting States of the right to serve the route between their respective territories for their own nationals. These States claim to have an inherent right to dispose of the traffic which moves between a point in its own territory to another point in that of its neighbour State as they consider that in such traffic vital interests of two neighbour States are concerned 165).

It goes without saying that this practice, which is defended on the basis of art. 7 166), can constitute a great impediment to international air transport 167), especially if it is in force between countries which are (both) typical transit countries 168).

Similar non-discrimination clause difficulties as those of art. 7 are contained by art. 8 which stipulates the right of establishing prohibited areas over the territory of a State.

Chapter III of the Convention deals with the nationality and registration of aircraft. It does not seem to have taken into greater account the possible forms of international co-operation which happen to be of actual interest for Europe.

On this point a solution might be provided by art. 77 which stipulates that the Council of ICAO shall determine in what manner the provisions relating to the nationality of aircraft shall apply to aircraft operated by international operating agencies.

It seems clear however that the authors by drafting this escape clause have not thought of a form of co-operation between two or more individual States but rather of international entities as U.N.O. or similar 169).

Article 77 which also expressis verbis states the right of contracting States to constitute joint air transport organisations does not provide for other means to facilitate such joint organisations, e.g. by allowing them contingent necessary dispensations from imperative rules of the Convention.

CONCLUSION.

Making up the balance of the Chicago Convention the conclusion must be that it has provided for a solution, although it is not the badly needed economic slution. Moreover its text, drafted chiefly by experts in other than the legal field, often gives rise to ambiguities and therefore to well-founded criticism.

There are some cases of settlement of disputes according to the rules of art. 84 170) but several others still exist. It is evident that as long as air transport is under the impact of art. 1 of the Chicago Convention it is difficult to devise a suitable scheme to alleviate the effects of "exclusiveness" and "completeness" of air space control. Moreover the evolution of the general ideas rather tends to more restrictive policies than to a liberalisation, thus making it not very probable that one of the solutions mentioned by Oppenheim 171) could be used in order to solve the difficulties of different interpretations

and the consequent variety of national legislations based on the Convention. In fact one can notice a certain tendency to leave the Convention for what it is and to solve relevant problems by arrangements between the States directly concerned.

I.A.T.A.

Although the Chicago Convention laid down a much more complete set of regulations and principles than the Paris Conference had done, it left several matters to be settled by the airlines - at least in the first instance.
Many of these matters are dealt with by IATA 172), which must be considered the second most important organisation in the field of aviation. The post-war organisation is, in a sense, a sub-contractor to governments, working out accommodations between the views and interests of individual airlines which would be impossible for governments to produce efficiently and economically 173).
The purposes of IATA as stated in its Act of Incorporation 174), are:

a. to promote safe, regular and economic air transport for the benefits of the people of the world, to foster air commerce, and to study the problems connected therewith;
b. to provide means for collaboration among the air transport enterprises 175) engaged directly of indirectly in international air transport services;
c. to co-operate with the International Civil Aviation Organisation and other international organisations 176).

Some of the matters the Chicago Convention did not succeed in reaching agreement on were rates, schedules and routes 177). Whereas the last two of these are generally dealt with by bilaterals, rates are the most important part of IATA's activities.

The new IATA 178) was established in April 1945 at a meeting of airline representatives from 31 countries at Havana.

The ultimate authority of the organisation is vested in its General Meeting, in which every member has a vote. The General Meeting convenes at least once a year. It approves budgets and accounts, considers reports from its committees and officers and elects the members of an Executive Committee consisting of 18 men.

The Executive Committee establishes policy and manages the affairs, funds and assets of the Association generally 179).

IATA TRAFFIC CONFERENCES; INTERLINE AGREEMENTS.

The most spectacular and to a certain extent the most important of the IATA activities is its Traffic Conference whose legal basis is provided for by Art. 5 (par. 5) of its Articles of Association: "The Association ..... may organize such member traffic and rates conferences as may be required .....".

These Traffic Conferences are three, one for the Western Hemisphere in New York; one for Europe, Middle East and Africa in Paris; and one for Asia and Australia in Singapore. The Traffic Conferences constitute an important effort to reconcile the different views, customs and needs of more than a hundred air-

lines from all pdrts of the world. They set international fares and rates which prevents expensive and uneconomic chaos. The Traffic Conferences voting system is governed by the requirement of unanimity, that is to say that every member has a virtual veto which it can use to prevent a proposed resolution from coming into force 180). The principal arguments for this rule, which often has been disputed, are that the rights of the individual carriers, particularly of the economically and politically smaller ones, are better preserved and that the danger of establishing or emphasizing blocs 181) amongst members is minimized 182). In an industry where fares and rates are marginal and apparently small items such as flowers, meals, drinks, airport-city transport, etc. 183) are weighty, such preservance of each airline's rights seems considerably important.

A very important basic facet of IATA achievements which must be mentioned is the widespread system of interline agreements covering all forms of traffic and embracing non-member carriers as well 184). These agreements are to be credited for today's possibility to buy a ticket from almost any point in the world to any other point and to send air freight from any point to any other point.

Three of these Agreements are very important: the Interline Traffic Agreement, the Interline Baggage Agreement, and the Interline Cargo Handling Agreement. The first is the basis for both the others. It contains provisions relating to the mutual acceptance of tickets, notification of tariffs and schedule information, payment of airway bills and exchange orders,

commissions, transfer of unaccompanied baggage and cargo, interline settlement of accounts etc. Disputes concerning the scope of this agreement are solved by arbitration 185).

IATA CLEARING HOUSE; AGENTS.

The execution of these agreements is greatly facilitated by the IATA London Clearing House. This institution handles an annual volume of business to a value of several billions of dollars 186) in interline transactions. The average offset in the Clearing House is approximately 85 to 90% which indicates the extent of the saving each carrier enjoys. The London Clearing House may also be considered partly responsible for the fact that it is possible to buy an airline ticket everywhere in the local currency, no matter what the destination.
A service of a similar nature is the IATA administration of agencies. In order to prevent travel agencies from selling air tickets at discount prices those which want to sell airline tickets have to apply for IATA approval and an IATA standard form contract. After an appropriate investigation, if they are granted their certificate of appointment, they are subjected to IATA control under the terms of such a contract.

IATA AND EUROPEAN CO-OPERATION.

From the foregoing it appears clear that the post-war IATA has entirely lost its typical European character. This, however, does not mean that IATA would not play a significant role in European co-operation. Its standardising activities have

provided for a common commercial practice from which the travelling public benefits at least as much as the airlines themselves. The Paris Traffic Conference offers the airlines the means to regulate their competitive practices to a considerable extent and prevents dumping and other practices which would jeopardize the gradual development of the European air transport system. Although it appears from the Conferences, that members use to hold strongly to their views, the discussions at the meetings distinguish themselves by the good spirit and sensibleness, in which they are conducted. They are essentially the place where the airline have the opportunity to learn each other's points of view and difficulties and in this way they provide for valuable documentation for discussions on co-operation at other levels.

IATA co-operates regularly with the States and with ICAO in regional plans for airline routes, landing-aids and airports and navigation aids (radar, radio, etc) 187). In co-operation with ICAO and ECAC, IATA's staff works on solutions of the many legal and economic problems of European civil aviation of which should be mentioned IATA's efforts to solve the problems regarding "banalisation" 188) in conformity with the recommendations of the Strasbourg Conference. IATA urged the States to facilitate and to approve "banalisation" agreements and to adopt international legislation respecting them 189). The organisation also plays a stimulating role in the establishment of schedule arrangements in intra-European traffic.

Although IATA in general must be considered as a very desirable

and even an indispensable institution in civil air transport, it should be understood that it is in the first place an organisation for the benefit of air transport enterprises and only in the second place for the benefit of the public. IATA may be no cartel 190), it nevertheless aims at the fixing of uniform fares and the minimizing of the remaining factors of competition 191) and thus protects to a certain degree the maintenance of uneconomic enterprises 192).
As such IATA might appear to be an institution which could oppose a development of air transport along the lines of the envisaged European integration 193). This question, however, will be examined later 194).

OTHER CO-OPERATION THROUGH GOVERNMENTAL AND PRIVATE ORGANISATION.

Besides ICAO and IATA there are several other organisations through which governments and private companies or persons co-operate. Co-operation on the government level takes place either through various organisations specifically created for the purpose of facilitating aviation or through organisations for economic or political co-operation which are only incidentally concerned with aviation. Examples of the former category are next to ICAO the exclusively European organisations ECAC 195) and Eurocontrol 196), both of them of sufficient importance to be dealt with in a separate chapter.
Organisations of the latter category are OEEC, NATO, Benelux, the Council of Europe and EEC, to mention a few.
The Organisation for European Economic Co-operation, to which

17 States are members 197), was originally set up as the European counterpart to the U.S. Economic Co-operation Administration 198). Since then it has served as a meeting place where European economic experts meet to discuss common problems. The OEEC deals with aviation through its administrative secretariat to the European Conference of Transport Ministers, a descendant of the former Organisation for Communications and Transit of the League of Nations. The Conference (ECMT) was set up in 1953 following a protocol adopted by the OEEC Conference of that year 199). ECMT's functions are to take whatever measures may be necessary to achieve at a general or regional level the maximum use and most rational development of European inland transport of international importance, and in general to co-ordinate and promote activities on an international level concerned with intra-European transport. ECMT works through three organs: a Council of Ministers of Transport, a Committee of Deputies of the Ministers, and an Administrative Secretariat. OEEC's activities are mainly concerned with surface transport. Facilitating and liberalising such transport however includes several aspects which are important in the field of air transport. OEEC's activities in the field of air transport at present are for the greater part undertaken by the European Facilitation Committee, created by ECAC.

The North Atlantic Treaty Organisation 200) is principally a military organisation. Technical development however compels increasing co-operation between military and civil aviation 201). In this connection NATO established a Committee for the Co-ordin-

ation of European Air Traffic, which deals chiefly with the harmonisation of ground aids for military and civil air traffic in the European member countries 202).

The Benelux Treaty between the Netherlands, Belgium and Luxembourg provides for the liberalisation of trade and economic activities in the territories of the three countries. Its importance to air law is that it provides for an example of the establishment of the principle of freedom of transport services throughout the area of the combined territories of the contracting States 203).

The roles of these organisations in civil aviation may be considered to be important. Much more important for European air law, however, are the activities of the Council of Europe and its Assembly and the creation of the Common Market. Owing to its close connections with the Bonnefous, Sforza and Van de Kieft plans and the work of ECAC, the work of the Council of Europe will be reviewed with a discussion of these topics in a separate chapter 204).

The influence of the European Common Market or European Economic Comminity on civil aviation will also be dealt with later 205).

Besides co-operation on a governmental level the airlines themselves set up various bodies to facilitate their traffic and to study its development and future possibilities.

Next to IATA must be mentioned:

SITA (Société Internationale de Télécommunications Aéronautiques).

Technical progress in the construction of aircraft rendered

the operation of an airline impossible without appropriate and reliable telecommunications. First the airlines made use of the official Post Office services for their operations. However, as the role of communications increased, these services became insufficient. They could not provide for the priority which the airlines wanted under all circumstances, as they were designed first for inter-State communications and secondly to serve the public and the airlines in principle were considered as part of the public. The result was the setting up of individual networks by every airline. The growing cost of these individual networks led to the idea of a co-operative airlines communications network.

This idea was realised at a meeting of the International Telecommunications Union at Paris in 1949. Seven airlines 206) founded SITA as a non-profit making company under Belgian law, at Brussels. In order to prevent the domination and control of the organisation by one of the partners, it has been agreed that no member can hold more than 20% of the company's capital (190.000 Belgian francs divided into 950 shares).

Companies belonging to the same financial bloc can have no more than 20% together. On the other hand every party to the agreement has to hold at least one share 207).

The aim of the organisation as stated in the agreement is: the study, the acquisition, the utilisation and the operation of means of telecommunications with a view to the assurance of the transmission of all kinds of messages for the operation of air transport companies, members of the organisation.

SITA's membership grew from 7 in 1949 208) to over 80 in 1960 209). It developed from a European organisation into a world organisation and plays an ever growing role in international civil air transport.

Before the establishment of SITA two other similar organisations existed in the same field: IRL International Radio Limited and ARING (Aeronautical Radio Incorporated). IRL is a British "domestic" organisation, founded in 1947, serving the U.K. and the Commonwealth countries. However, most of the European world-wide carriers co-operate with this organisation with regard to their flights to Commonwealth countries 210).

ARING was founded in the U.S.A. in 1929 as an agency of the federal administration. It deals chiefly with communications from airport to aircraft, used in landing and preparation for landing. Some of the European transatlantic carriers participate also in ARING 211).

As the three organisations together represent nearly all the civil airline companies which are members of ICAO and IATA, it has been proposed that they should unite into one single organisation under the auspices of the latter.

CPAM (Committee of Purchases of Aviation Materials) is a committee formed by a number of European airlines to handle the purchase of equipment and spare parts in the U.S.A. 212). There is little documentation on this committee and its underlying agreement. The idea behind the foundation of the committee was that a common action would strengthen the financial position of the European airlines in the American purchasing market and would lead to a stronger bargaining position. On the other hand,

it would enable the American producers to plan their production schedules according to the demand. Two factors however, prevented the committee from reaching its aims. The first was the failure to reach sufficient agreement on a certain standardisation of equipment between the airlines. Their different preferences regarding types of aircraft often stimulated individual negotations outside the committee. Secondly, the American defence program demanded priority and rendered the aircraft market in the years following the end of the war into a producers market. As a result of this, the committee's activities became gradually confined to the purchase of ground equipment and spare parts. Its importance as the tenant of a European common stock of spare parts is still considerable.

ITA and ARB are two European organisations founded by airlines whose activites are aimed at the problems of the development of air transport.

ITA (Institut du Transport Aérien) situated in Paris, was originally created as a study centre for the development of air transport on behalf of French interests only 213). Since the end of the nineteen fifties however, it serves as a European study centre, especially aimed at the examination of the economic political and technical difficulties met by the airlines. Although the institute has no official authority whatsoever, it has proved itself very useful and its work has gained wide recognition. With its knowledge and documentation it has assisted at several international conferences.

The second organisation, ARB (Air Research Bureau), was founded

in 1952 by six European airlines 214). Is has its domicile in Brussels.

The aim of the ARB is the development of the co-operation and co-ordination in European civil air transport. In the first instance the founding airlines created the Bureau in order to perform commonly the following triple research task 215):

a. to provide for a complete and systematic informative documentation on the nature, repartition and volume of European traffic;
b. to make an analysis of the operation of the European network, the methods used in it, the results achieved by it, its efficiency, and its weak points, followed by a practical suggestion for an improvement of the actual situation, this from a European point of view and not from the point of view of an individual carrier's interest;
c. to give a reasonable estimation of the increase in future traffic, especially in so far as the period 1955 - 1960 was concerned.

The Bureau's report appeared in 1953. It dealt with the above mentioned items regarding the entire area of western Europe and part of North Africa and the Middle East 216).

Since 1954 the Bureau has been constituted as a permanent study centre of the six original airlines and the many other airlines which joined them later.

IFALPA (International Organisation of Air Pilot Associations) is of European origin but grew into a world organisation. The organisation serves in the first place the personal

interests of its members. It deals not only with labour questions but extends its activities also to safety and other social matters. As the representative of the persons who have to abide by the rules drafted by the legal and technical experts, IFALPA is represented at most international conferences on aviation matters 217).

FITAP (International Federation of Private Air Transport) can be considered as a trade association of air carriers 218). The main European carriers are all members.

FAI (International Aeronautic Federation) carries the same programme as it did before World War II 219).

The same goes for IUAI (International Union of Aviation Insurances).

Entirely new is WEAAC (Western European Airport Authorities Conference) which was founded in 1950. WEAAC convenes regularly to deal with all kinds of problems related to the establishment and maintenance of airports and to the vicinity of airports 220).

In the field of common financing a French proposal at the Messina Conference 221) suggested the creation of a sort of financing trust as a counterpart of the existing European railways financing organisation Eurofima. Eurofima is an organisation similar to the American railways equipment trusts, founded by the national railways of fourteen European countries in 1956 under the auspices of the Council of Europe. It provides the European railways with greater credit possibilities for the

purchase of railway equipment and it also stimulates the standardisation of such equipment. The establishment of a Eurofimair would provide for a co-ordination of the purchase-plans of the European airlines with the consequent results of standardisation and the stimulation of co-operative maintenance.

An other French proposal put forward in 1955 at the meeting of the Sub-committee on Air Transport created by the Messina Conference, envisaged the creation of a common European aircraft manufacturing society. This company would be charged with the planning of the common production programme according to European needs and to make a choice from the projects presented to it by the European aircraft manufacturers.

A rather active role in air transport and the development of its law is played by a private international organisation which does not specialise in aviation: the International Chamber of Commerce (ICC).
The ICC pursues a policy aimed at a general liberalisation of trade and it considers air transport an important medium in stimulating world trade and communications. Its special Air Transport Committee continuously stresses the importance of air transport and tries to increase the public's interest in it 222). The ICC confines its activities not to Europe but because of its special interest in European affairs its activities certainly must be mentioned.
After studying the reports of the Commission of Economic Questions of the Council of Europe at its Paris meeting in 1951

223), ICC came to a resolution in which the non-economic competition between the European carriers was criticized as causing inconvenience both to the carrier and the traveller. According to the resolution the creation of a single European company is neither desirable nor practical. It is not practical because the European carriers carry out a great part of their operations outside Europe on transatlantic and other intercontinental routes. It is not desirable because it would not leave any competition. (The resolution did not indicate what should be understood by "not practical", whether it must be understood to mean "impossible" or "difficult" or whether a combination of the European airlines would not work out well in practice.)

According to the ICC European air transport should develop along Chicago Convention lines, which should be understood as harmoniously and without government protection. Technical progress should not be restricted by political measures. The ICC resolution proposed the creation of a Permanent European Council representing the carriers (scheduled and non-scheduled carriers). This Council should examine the possibility of suppressing government measures and restrictions which hamper the development of air traffic. It further recommended the study of a solution to the European aviation problems from an entirely European view and to enter into arrangements inspired by the examples of ICAO and IATA 224).

Although in my opinion a total discontinuance of government interference in the current period would be - to understate it - not "practical", and although most of the ICC recommendations

are a mere repetition of the numerous vague phrases stated so often on this subject, the desire of the influential ICC to contribute something to the necessary closer co-operation of European airlines is evident.

Through the years ICC has continuously stressed its point of view. At Lisbon in 1953 it declared itself in favour of an unrestricted freedom of the air 225). A few years before, it had defended the establishment of a free regime for non-scheduled transport (at Quebec in 1949). After the conclusion of the European Multilateral Agreement on the Commercial Rights in Non-Scheduled Traffic, it urged the States to ratify that agreement 226). In a recent resolution, ICC stressed the desirability that the development of European air policy should follow the same course to liberalisation as the European trade and shipping policies - that is the OEEC 227) course 228).

Its attempts to impose its views on the attention of the authorities and executives concerned, are not confined to resolutions at its own meetings only. ICC's keen interest in air transport obtained official recognition and as a result the organisation is represented at many international conferences which deal with aviation policy matters.

CONCLUSION.

This review of organisation of European civil aviation in its different forms and the particular problems connected shows that international activities prompting co-operation between European airlines are many. It shows also that a certain

degree of co-operation is an essential condition for the mere existence of an European air transport.

The current degree of co-ordination, however, can not yet deprive the European network of its imprint of national privileges 229).

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116) a.The most important post-war aviation organisations are ICAO and IATA. Both of them are extensively reviewed in various publications. Therefore in the scope of this thesis they are only very concisely dealt with.

b.For more detailed information of ICAO see: Proceedings of the International Civil Aviation Conference (International Organisation and Conference Series published by the Department of State, no. 2820; Washington - 1948); Bin Cheng - 1962), pp. 18 - 201; R.G.A. (1949) Vol. 12, p. 179 seq. Y. Bédin "l'Organisation de l'Aviation Civile Internationale"; R.G.A. (1946) Vol. 9, p. 600 seq. M. Le Goff "L'Organisation Provisoire de Chicago sur l'Aviation Civile"; H.A.Wassenbergh "Post-War International Civil Aviation Policy and the Law of the Air" (The Haque - 1957); Blueprint for World Civil Aviation (U.N. Information Organisation - London, 1945); R.G.A. (1956) Vol. 19, p.146 seq. M. Le Goff "Les Annexes Techniques à la Convention de Chicago"; P.H.Sand, G.N.Pratt and J.T. Lyon "An Historical Survey of the Law of Flight" (Montreal, McGill University - 1961).

117) Transportation of passengers and goods was mainly performed by the Allied Air Transport Command, created in 1941, which in 1944 flew as many as 600 million miles in different parts of the world. By that time it had a fleet of more than 3000 airplanes.

118) See speech by Clare Booth on February 9th, 1943, before the U.S. Congress; also the "British Economist of March 6th, 1943.

119) The official reason for the Russian refusal to take part in the Conference was the U.S.S.R.'s unwillingness to deal with such neutral States as Switzerland and Spain. Unofficially however, it is assumed that the U.S.S.R. was not prepared to engage in any agreement by which it could be obliged to denounce any aspect of its sovereignty in its airspace.

120) ICAN.

121) Cf. R.F.D.A. (1957) Vol. 11, p. 1 seq. - M.Lemoine "L'Idée Européenne dans l'aviation de transport et l'accord multilatéral sur les droits commerciaux pour les transports aériens non-réguliers en Europe".

122) See Blueprint for World Civil Aviation (International Organisation and Conference Series published by the Department of State no. 2348; Washington - 1945) W.A.M. Burden "Opening of the Sky".

123) Whereas the U.S.A. had taken the position of an advocate of the freedom of the air at the end of World War I, it had turned to a restrictive policy during the years of the great world crisis.

124) The British rightly feared the overwhelming American competition, owing to the fact that the U.S.A. had the disposal of a large stock of transport aircraft and Boeing bombers which could be transferred to transport aircraft. The British and other European countries at that time had a great lack of transport aircraft; moreover the British made Lancaster bombers could not be made suitable for transport.

125) The U.S.S.R., Red China and most other iron and bamboo curtain countries are not members of the Convention.

126) The agreement provides for fifth freedoms only on direct routes, thus e.g. not on a route New York-Mexico-Oslo-Paris-Athens. Of the European States only the Netherlands, Sweden, Turkey and Greece (the latter with an exception as to the fifth freedom) ratified the agreement.

127) Cf. O. Riese "Luftrecht" (Stuttgart - 1949), p. 144.

128) At the General Meeting of ICAO at Rome in 1961 the number of Council members, which was originally 21, has been augmented to 27.

129) The president is chosen by the Council itself. The State whose representative is appointed president had to provide for another delegate.

130) See Chapter II.

131) See U.N. Treaty Series Vol. 33, No. 52, 261 seq.

132) It seems questionable that one can speak of freedoms granted by bilaterals. Even a granted fifth freedom is in fact not a freedom at all but only a precarious privilege accorded between States in exceptional cases.

R.M. Cleveland and L.E. Neville in their book "The Coming Air Age" (New York, London - 1944), p. 65, propose to divide the freedoms of the air as follows:
1st freedom: the freedom to pass over all the oceans of the globe;
2nd freedom: the freedom to pass over all the land bodies;
3rd freedom: the freedom to land one's aircraft at any established airport in any country at any time;
4th freedom: the freedom to use one's aircraft as an instrument of international trade.

133) See C.H. Shawcross and K.M. Beaumont "Shawcross and Beaumont on Air Law" 2nd. ed. (London - 1951), no.'s 301, 303, and 8001. (No. 8001 contains the text of the Bermuda Agreement).

134) The so-called technical freedoms.

135) Cf. D. Goedhuis "Idea and Interest in International Aviation" (The Hague - 1947), p. 23, 24, 25.

136) Cf. R.F.D.A. (1954) Vol. 8, p. 352 - D. Haguenau "Les formes de la collaboration internationale dans le transport aérien".

137) See Shawcross and Beaumont, supra 133, no. 226.

138) See Shawcross and Beaumont, supra 133, no. 227.

139) One of ICAO's recommendations deals with bilaterals and suggests that in order to avoid later difficulties the granted rights should be described thoroughly and that common terms such as e.g. "fifth freedom" should be fully explained.

140) In this respect ICAO Circular 28 - At/4 "Existing forms of commercial and technical co-operation between European Airlines in Regional Airservices" should be mentioned. ICAO has also undertaken an analysis of the common provisions of the European air agreements (bilaterals) for the preparation of a European multilateral agreement. A draft for such a agreement has also been published. It provides for the applicability of the rules of the Chicago Convention to the following: Freedom of aerodrome fees, tax freedom for fuel, spare parts, equipment and stocks, recognition of personal licenses and airworthiness certificates. The national laws should be applied for the incoming and outgoing aircraft without discrimination as to nationality, for entry and exit procedures for passengers, crew and freight. It further contains provisions for the solution of disagreements, for amendments and the enforcement of the agreement.

141) ECAC is meant; see Chapter VII.

142) In fact a renovation of the Rome Convention 1933. See ICAO doc. 7379-LC/34 Conference on Private International Air Law at Rome.

143) An additional protocol to and revision of the Warsaw Convention.

144) A convention additional to the Warsaw Convention mainly containing the appropriate rules for the application of the latter on international flights with chartered, hired or other aircraft used by persons other than the owner/ operator.

145) See ICAO doc. 8101 LC/145 (Sept. 1960).

146) See ICAO doc. C-WP/899; C-WP/980 and AN-WP/1375 (attachment).

147) See ICAO doc. LC/SC "Legal Status 1962" No.'s 1-5.

148) ICAO followed closely the work of the International Atomic Energy Commission and that of the O.E.E.C. in this field.

149) See ICAO doc. 8101 LC/145 (Sept. 1960) apendix 1.

150) See C.C. Hyde "International Law chiefly as interpreted and applied by the U,S. (Boston-1945 - 2nd.ed.) Vol. 2, p. 844.

151) Cf. Annual Digest 1923-4 Case 69, Advokaat v. Schuddink and the Belgium State. The Municipal Court ofmDordrecht (Netherlands) ruled that it was incompetent in a suit by the owner of a vessel damaged by a tug owned by the Belgian State, the tug's acts being in the public services. The court held that it had jurisdiction over the master of the vessel.

152) See G.W. Keeton and G. Schwarzenberger "Making International Law Work" (London - 1946), p. 105 seq.

153) G. Scelle in an introduction to W. Wagner's "Les libertés de l'air" (Paris - 1948) distinguishes "Cabotage générale" (the general fifth freedom granted by a State to another State) from the normal concept of cabotage.

154) Cf. Riese, supra 153, p. 317: "Nobody will want to claim that the formulation of art. 5 of the Chicago Convention is a masterpiece of legislation"; cf. also J.A.L.C. (1956) Vol. 23, p. 180 - E.M. Weld "Some notes on the Multilateral Agreement on Commercial Rights on Non-scheduled Air Services in Europe".

155) Art. 96 of the Convention defines "stop for non-traffic purposes" as meaning "a landing for any purpose other than taking on or discharging passengers, cargo or mail".

156) According to the text of art. 5 no prior permission for the traffic mentioned in its first paragraph is required, not even if automatically forthcoming upon the application. An advanced notice of intended arrival however could be required (for traffic control, public health and similar purposes).

157) Cf. ICAO doc. 7278 C/841 and also ICAO doc. 7676 ECAC/1 p. 136.

158) This right could also be derived from the foregoing articles.

159) The conception of cabotage is old. The first cabotage rule was established in England as early as 1562. The German professor of air law, A. Meyer, suggested cabotage for the first time in the history of air law; see A.Meyer "Die Erschliessung des Luftraumes und ihre rechtlichen Folgen (Frankfurt am Main - 1908).

160) Cf. Wassenbergh, supra 116, p. 69.

161) Cf. Wassenbergh, supra 116, pp. 73, 74.

162) Cf. e.g. articles 84 and 85 of the Treaty establishing the European Economic Community (Rome - 1957) with articles 77, 78 and 79 of the Convention.

163) Cf. ICAO doc. 5230 A2 EC/10 Vol. II part. 1, p. 26.

164) Argentine is one of the countries which used to incorporate the doctrine of international cabotage in most of its bilateral agreements with "neighbour states" (U.S.A. as well as U.K., France, Holland, Italy and other European countries).

165) Canada was one of the countries which advocated the international cabotage doctrine at the Geneva Conference of 1947.

166) Cf. ICAO doc. 2089 EC/57 (Oct. 1946) pp. 29, 34, 38, 134, 155.

167) Cf. ICAO doc. 4510 AL EC/72 Vol. I, pp. 27, 62, 65 from which I cite a statement of the U.S. delegate at the ICAO meeting concerning the development of a multilateral agreement on commercial rights: "I do not know a greater decisive influence to the freedom of world air transport and to the building of long route transport, than the idea of international cabotage. The right of international cabotage would balkanize - from an air transport standpoint - the entire world.

168) International cabotage between two or more typical "terminal" countries such as e.g. New Zealand and Australia, constitutes less impediment to international transport.

169) The framers might have kept in mind the experience of the Danube Commissions (see supra 34) whose international bodies used to have their own vehicles under a special registration.

170) Art. 84 deals with the settlement of disputes between member States, which, if they cannot be solved by negotiations, may be referred to the Council of ICAO for decision. States may appeal from the decision of the Council to an ad hoc tribunal agreed to by the other parties in the dispute, or to the Permanent Court of International Justice.

171) See L. Oppenheim - H. Lauterpacht "International Law" 7th ed. Vol. I - Peace (London - 1948) pp. 857/858.

172) See supra 116.

173) Remarks by J. Brancker (IATA) at a meeting with the U.S. Civil Aeronautics Board, Washington D.C., 22nd March, 1954.

174) A (Canadian) Act to incorporate the International Air Transport Association - assented to December 18th, 1945.

175) In the Act of Incorporation "air transport services" include those persons, corporate bodies, companies, firms, partnerships, societies and associations, now or hereafter ((see previous footnote))operating a scheduled air service for public hire, under proper authority, in the transport of passengers, mail or cargo under the flag of a State eligible to membership in the International Civil Aviation Organisation (Art.1).

176) Cf. Preamble of the Chicago Convention: "..... among the peoples of the world, ...", and "..... in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated safely and soundly".

177) Cf. J.C. Cooper "The Right to Fly" (New York - 1947), p. 173.

178) The name of the pre-war association was International Air Traffic Association. The change of name reflects in a sense the change of aviation's importance from the security aspect to the economic aspects, as the change of its headquarters from the Hague to Montreal reflects the movement of the centre of gravity of world aviation to America.

179) See Art. 9 of the Articles of Association of IATA.

180) Rates upon which no unanimous agreement can be reached, are called "open rates".

181) Cf. infra Chapter V on the subject of participations.

182) Cf. Sw. L.J. (1953) Vol. VII, p. 143 - W.M. Sheehan "The IATA Traffic Conferences".

183) Cf. Interavia 1951 No. 6, p. 299 - M. Hymans (Air France) A speech on an Ambassadors Conference at Paris.

184) On the other hand IATA carriers make individual arrangements with non-IATA members. An example is the 1962 arrangement between KLM and the Chinese State airline to accept each other's tickets and other traffic documents.

185) IATA resolutions 850, 850a and 850b.

186) See Brancker, supra 173.

187) Cf. R.F.D.A. (1954) Vol. 8, p. 354 - D. Haguenau - "Les Formes de la Collaboration Internationale dans le Transport Aérien".

188) French name for certain type of interchange; see Chapter V..

189) Cf. R.F.D.A. (1958) Vol. 12, p. 119 - L. Cartou "La Structure Juridique du Transport Aérien en Europe à la Veille du Marché Commun".

190) According to Sir William Hildred (IATA) in a lecture at the Institute of Air and Space Law, McGill University Montreal, on January 16th, 1962.

191) It should be noted that such advocates of competition as Goedhuis (cf. D.Goedhuis "Handboek voor het Luchtrecht" (The Hague - 1943) p. 14) and J.A.C.L. (1957) Vol. 24, p. 273 seq.) and Meyer (cf. R.G.A. (1952) Vol. 15 p. 107 seq. seem not to have objections against this competition suppressing factor.

192) In the current era the national prestige of a country seems to demand that it has its own national airline, no matter whether there is any need or useful purpose for such an airline or not. The result is that the establishment of national airlines in the new African and Asian independent States nearly keeps an even pace with their becoming independent. In most cases it is possible only with foreign aid. In my opinion the IATA protection is a facilitating factor for such establishments.

193) Cf. art. 85 of the Treaty establishing the European Economic Community (Rome 1957).

194) See Chapter XI.

195) See Chapter VII.

196) See Chapter X.

197) France, Greece, Italy, Norway, Portugal, U.K., Sweden, Switzerland, Netherlands, Belgium, Luxembourg, Trieste, Turkey.

198) ECA, organisation created by the Economic Co-operation Act of 1948, for the allocation of Marshall Aid.

199) See M.M. Ball "NATO and the European Union Movement", p. 230 seq.

200) NATO was founded in 1949. Members are: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, U.K., U.S.A., (Original members) and Greece, Turkey, West-Germany (which joined later). The NATO Council is subdivided in divisions, one of them being the Board for European Inland Transport.

201) Cf. Eurocontrol; Chapter X.

202) See Interavia 1957 no. 3, p. 219 - M.Hymans "European Air Transport is indivisible".

203) See Ball, supra 199, p. 276.

204) See Chapters VI and VII.

205) See Chapter XI.

206) Air France, KLM, Sabena, BEA, BOAC, SAS and the American TWA.

207) See Art. 12 of the SITA Agreement.

208) See ICAO circ. 28 AT/4, supra 140, p. 60.

209) Cf. Interavia 1960 no. 4, p. 425 - L.M. Chassin - A Good Servant to Air Transport.

210) See Haguenau, supra 136.

211) See Haguenau, supra 136.

212) See Deswarte, supra 285 and ICAO circ. 28 AT/4, supra 140 - p. 72 seq.

213) Its name before the reorganisation was Institut du Transport Aérien Français.

214) Air France, KLM, SAS, Sabena, BEA, Swissair.

215) See R.G.A. (1954) Vol. 17, p. 266 - Chronique Economique - Les transports internationaux aériens à l'intérieur de l'Europe.

216) Between Helsinki, Oslo, Glasgow, Dublin, Bordeaux, Lisbon, Madrid, Rome, Cairo, Beyrouth, Athens, Prague, Hannover.

217) See Haguenau, supra 136.

218) See Haguenau, supra 136.

219) See supra p. 29 .

220) See Z.L.W. (1961) Band 10, p. 304 - "Western European Airport Authorities Conference".

221) See Report Spaak. Report of the Heads of the Delegations to the Foreign Ministers, Intergovernmental Committee established by the Conference of Messina. Brussels, April 26th, 1956. Part III, Chapter 2.
See also infra

222) See Interavia 1957 no. 3, p. 232 - Caron Giuseppe "The Road to Integration".

223) See Chapter VI.

224) See R.G.A. (1951) Vol. 14, p. 502 - "C.C.I. - Co-ordination des transports aériens en Europe".

225) See Z.L.R. (1954) Band 3, p. 223 seq. - A.Meyer "Der Internationale Luftlinienverkehr und der international entgeltliche Gelegenheitsverkehr nach geltendem Recht und de lege ferenda under besonderer Berücksichtigung einer Koordinierung der europäischen Luftverkehrs".

226) See Z.L.R. (1959) Band 8, p. 127 seq. - O.Riese "Das mehrseitige Abkommen über gewerbliche Rechte im nichtplanmässigen Luftverkehr in Europa".

227) Cf. Chapter IV.

228) See Z.L.W. (1961) Band 10, p. 299 - ICC Doc. no. 310/147 (1960) "Liberalisierung des europäischen Luftverkehrs".

229) Cf. Hymans, supra 202.

CHAPTER V - FORMS OF CO-OPERATION BETWEEN AIRLINES.

CO-OPERATION CONDITIO SINE QUA NON.

On the one hand civil aviation is considered as an element of the defence potential, on the other hand it serves to establish connections which are considered political desirabilities. Besides, the airline companies as well as the States, foster the idea of civil air transport as a profit making, or at least a paying, service to the public. For the sake of international standing States are prepared to pay high subsidies but, on the other hand, they try to limit the price to be paid by restricting the competition of foreign airlines by refusing them the necessary rights to fly. If other means fail, a solution is sought in co-operation 230).

Obstacles to such co-operation are not only the prestige of the States, but also the attitude of the companies who are inclined to think themselves more capable than the others. They are moved to that attitude partly by the fact that aviation in its rapid technical development never has lost the pioneering spirit. They still think that it is possible to dominate the market by means of their unique service to the travelling public. if only the interference of the States could be stopped 231). As a result, forms of co-operation which avoid the semblance that the partners do not want to commit themselves too much, are scarce. Most forms of collaboration are fragmentary and of a narrow scope. They show a certain search for unity of doctrine relating to installations and organisation of services

and also for a certain harmonisation of programs and co-ordination of exploitation. There is, however, only one European example of a full scale common effort: the Scandinavian Airlines System (SAS) 232).

Next to co-operation on the government level through such organisations as ICAO and ECAC 233), the forms of co-operation between the airlines themselves 234) must be mentioned. Best known are (a) common representation, (b) co-ordination of schedules, (c) hire, (d) charter, (e) interchange of aircraft, (f) interchange of routes, (g) pools, (h) consortium and (i) international company. From a legal point of view the last mentioned types of co-operation are perhaps the most interesting.

(a) REPRESENTATION AND MAINTENANCE.

A brief look inthe streets of a major European city or in cities on other continents, will make it clear that the establishment and maintenance of (luxurious) sales offices constitute an important part of the expenses of an airline.

If an airline can reach an agreement with another airline according to which the latter will act as its agent in a certain city, it could save itself considerable expenses. The same goes for catering and administrative functions at airports. If an airline has to maintain its own staff for such activities at an airport where it makes only a few landings, the costs of such a staff might render its operations to that airport uneconomic.

Agreements on representation are mostly concluded between a foreign, interested, airline and the national airline of the country where the particular city and airport are situated. The

idea of maintaining good relations with that national airline and through it with the national aviation authorities undoubtedly plays a role in this choice.

The agreement in its most extensive form contains an undertaking by the representing company, the (general) agent, to perform all the commercial activities in its area necessary to achieve the greatest possible sale of passenger and freight kilometres on behalf of the represented company. These activities may include the sale of tickets, reservations, advertising, administrative services, bookkeeping, fueling and cleaning of aircraft, catering and all other airport services, airport - city transport, appointment of sub-agents, contact with the authorities, in short everything except the performance of the flights themselves. In exchange for these services the agent is entitled to a certain consideration, often on the basis of a commission with regard to the actual sales and on a basis of declaration of certain agreed amounts for the other services 235).

It goes without saying that such a general representation in cases wherein the represented airline performs the only communication by air between the city concerned and the other points served on its route, creates advantages for both parties concerned. If, on the other hand, the parties are competitors on the same route, or if the representing company is also the agent of other airlines which are competitors of the former, such representations are likely to cause trouble unless the agreement could exactly point out the duties of both parties. E.g. Air France flies a route from Paris to Dahomey and is represented in the

latter country by the national airline whose services do not extend over its own borders or those of their nearest neighbours, the representation would likely work out advantageously for both parties. If on the other hand Air France nominated Al Italia as its agent in Rome, it should not be surprised to find that this agent allocates most of the traffic between Rome and Paris to its own flights rather than to those of Air France.
It would also be quite natural if Al Italia at Rome airport gave preference to the handling of its own aircraft in cases where these happen to arrive or take off at the same time as Air France aircraft.
However, even in the case of the Air France - Al Italia example, representation appears to be possible and advantageous 236).

Besides general representation several other possibilities are conceivable and practised. To give an example, it would be quite possible for an European airline which performs short-as well as long-haul traffic, to be represented by a company which has the same interests in the European area but which does not perform any services beyond that area. The representation in this case should be confined to long-haul traffic, whereas an other agent could be appointed for the other routes 237). Whereas such an allocation can work out reasonably well with respect to the commercial side of the representation, it tends to give rise to complications if it is also applied with respect to the other mentioned services.

As a matter of fact there exists a sort of representation agreement between all IATA members. IATA members recog-

nize passenger tickets and freight documents issued by other members. Most airlines provide for air tickets and freight carriage from each place of the world to each other place, by virtue of this co-operation 238).

For reasons given above, it is not surprising that the agreement on representation seldom stands on its own. In most cases it is combined with another type of co-operation.

Of special importance are the agreements which include or are specially concluded for the maintenance of aircraft. Several airlines prefer to have their own commercial staff and handling personnel at foreign airports but prefer to avoid the considerable investment involved in the establishment of workshops for the technical maintenance of aircraft. Most of the European carriers fly different types of aircraft and the purchase and the installation of the equipment necessary for repair and maintenance of all the types used, demand huge sums of money. Considerations of this nature have led to the conclusion of several maintenance agreements which enable the airlines to specialize in the maintenance and repair of one or two types of aircraft only and to have the necessary maintenance work to other aircraft in their service carried out by another company which specializes in those types.

Well known are the so-called Shannon agreements concluded at the time when all transatlantic flights made intermediate landings at Shannon (Ireland) or the Azores, and at Gander (Newfoundland). Shannon was a typical example of an airport where the maintenance of staff did not make much sense, as it originated little

traffic. On the other hand it was a necessary technical stop before the "hop" over the ocean. Most of the airlines using the airport had concluded agreements with the Irish company for the handling of their passengers, the preparation of traffic documents, customs formalities, loading and unloading aircraft, catering, fueling of aircraft and several other airport activities 239). Aer Lingus did not provide for technical maintenance and the Shannon agreements therefore distinguish themselves from the usual pattern of representation agreements.

An example of a typical maintenance agreement was the so-called Beneswiss agreement concluded between KLM, Sabena and Swissair 240). The agreement covered the common maintenance of the most current types of aircraft used by the contracting parties at the time: DC 3, DC 4, Convair 240 and later DC 6. The agreement provided for a common maintenance service, mechanics, workshops and stocks of spare parts for these types.
The partners agreed that the costs for the various airports could be paid on a basis of subscription or if so preferred on the basis of payment for each individual service. This allocation made it possible for the companies to take part on the first mentioned basis in regard to their most frequented airports and to pay (less) on a basis of individual calls for maintenance and service on airports to which they performed less frequent services. The allocation of the costs of this service illustrates the different operation-methods of the companies caused by divergent interests. The Beneswiss agreement later was joined by SAS and Air France.241).

Following the entrance of the jet in Europe, a similar agreement was concluded between SAS and Swissair in 1958. Its aim was to achieve a standardization between the companies on three types of aircraft and a common maintenance of these types. Two other companies, KLM and TAP (Transportes Aéreos Portugueses) showed also their interest in this agreement. The standardization envisaged could however not be achieved and this agreement has only been affected in part.

The advantages of these agreements are evident. On the other hand airlines show a favour for their own independent maintenance services wherever their operations are big enough for the economic exploitation of such 242). There is always the fear that other companies will favour their own aircraft where both their own aircraft and those of the partner need servicing at the same time. Moreover each company has its own standards of maintenance and likes to be sure that these standards are complied with. In general however, the cost reducing aspect predominates and this may be the reason for increasing co-operation of this kind.

(b) CO-ORDINATION OF SCHEDULES 243).

As will be pointed out later, European air transport in its competition with the well equipped railways operating on frequent schedules is obliged to offer also a choice of departures and arrivals.

As well as in railway transport and other surface transport, the travelling public shows a certain preference with respect to the times of departure. A preference which gives rise to the

existence of "rush-hours" and not very busy hours. It goes without saying that an airline operating, let us say, a daily service between Amsterdam and London, will choose to depart during the busiest periods of the day. If the route Amsterdam-London was serviced by e.g. four airlines the situation would be very likely that four flights were leaving Amsterdam at the same time or within short intervals, and no connection during the rest of the day. The excessive capacity offered by the four airplanes would for each of them result in low load factors, whereas passengers with a preference for travelling at another hour of the day would be obliged to take the boat and thus would be lost to air transport operators.

The solution to situations of this kind is sought in a co-ordination of schedules between the interested airlines, so as to offer the public a choice of as many times of departure as possible and on the other hand to divide the traffic between the companies as reasonably as possible 244). A solution to rush-hour travel may be found in an agreement providing for one airline to fly the service at that hour during one week and the other airline the next week 245). In practice co-ordination of this nature is often a part of a more elaborated co-operation between the airlines concerned. In particular agreements constituting pools often include time table provisions.

(c), (d), (e) HIRE, CHARTER, AND INTERCHANGE.

The above mentioned types of co-operation do not raise any problems relating particularly to aviation law but may be considered as creating the kind of obligations common in the

field of (international) business law in general. The hire and charter of aircraft however directly affect several international aviation conventions, at least in so far as the parties are companies of different nationality.

It is difficult to distinguish exactly between the conception "hire" and "charter". For example the English word "charter" has many meanings and it is therefore necessary to make clear which kind of charter is meant, before proceeding.

French writers discern between "location" and "affrêtement" to indicate two conceptions of which the former relates to a contract in which the aircraft and the control over it, on certain conditions (remuneration), during a certain period or for certain flights, is put into the hands of the person (company) who utilises it. "Affrêtement" indicates a contract in which the control over the aircraft remains in the hands of its owner, who untertakes to perform one or more flights on behalf of the charterer, on agreed conditions and on the latter's account.

Further, in the case of "affrêtement" it seems obvious that the owner provides for the crew of the aircraft, but this aspect is not necessarily a part of the agreement.

In the following text the word "hire" is used in the sense of the French "location" and "charter" should be understood to mean "affrêtement" whereby it is presumed that "charter" includes the provision for a crew by the owner and that "hire" relates to the hiring of aircraft without crew 246).

As a matter of fact there exists a third conception in this field, the "interchange of aircraft", or in French "banalisation"

247). At the Strasbourg Conference of 1954 248) "banalisation" was defined as the utilisation by an air transport company of an aircraft belonging to a foreign company and registered in a foreign State on an international service, duly authorised by the authorities concerned, with or without its own crew. 249).

As a matter of fact this definition applies to hire and to charter as well. Dutoit 250) therefore takes the view that this term in fact is more a technical term than a juridical term, which comprises both the former conceptions and in general refers to the simple use of an aircraft on a certain route without consideration of the control over the aircraft. The criterion between interchange on the one hand and hire or charter on the other hand according to his point of view must be sought in the period of time during which the aircraft is put at the disposition of the hirer/charterer: one or two days in the former case and for a longer period in the latter. Dutoit criticizes the introduction of this new conception, as according to his point of view the actual juridical relation can be no other than either one of hire or one of charter and the term interchange therefore does not indicate a definite contract, but rather leads to a further blurring of a terminology which already gives rise to confusion. He admits that the hire or charter of an aircraft for a very short period as mentioned, gives rise to certain difficulties in regard to the Chicago Convention, notably with respect to the registration of the aircraft, but these difficulties are not so important as to justify the introduction of a new term.

Within the scope of this thesis hire and charter agreements other than those between airlines of different nationality are of little importance; therefore there is no need to indulge in a lengthy discussion disputing Dutoit's point of view. As a matter of fact, however, I agree with Coulet 251) who points out that Dutoit has ignored one important passage of the Strasbourg definition, namely the words "the utilisation by an air transport company" and " belonging to a foreign company and registered in a foreign country" by which really a substantial discrimination between interchange and hire or charter is created. The term interchange as defined applies only to international hire / by and charter/ companies from companies 252).
In my opinion therefore the term "banalisation or "interchange of aircraft" constitutes a collective noun for the agreements of hire and charter for international flights between companies of different nationality. It thus indicates exactly the form of co-operation I want to discuss, which must be divided between "interchange by means of hire" 253) and "interchange by means of charter".

THE CHICAGO CONVENTION AND INTERCHANGE.

The convention most affected by interchange of aircraft is the Chicago Convention. It seems clear that the framers of Chapter III (Nationality of Aircraft) and articles 30, 31, 32 and 33 (concerning respectively aircraft radio equipment, certificates of airworthiness, licences of personnel, and the recognition of these certificates and licences) did not take into consideration that there might originate the desirability of

easy terms for the hire of aircraft of a company by another company not domiciled in the same State. As a consequence such hire meets with serious difficulties or at least with difficulties which could be made serious.

First, the question of nationality 254). If an aircraft registered in one State is utilised by a company of another State it keeps the nationality of the former State 255). If the said company wants to use it in international traffic, there exists the possibility that overflown States, or more likely States where commercial landings are made, will object 256). Or even if it is used in traffic between points in the territories of the States concerned (theoretical) difficulties could arise if the aircraft served more than one point in the territory of the State of the hiring company. For art. 7 of the Convention stipulates the right of every State to refuse its cabotage traffic to the aircraft of other contracting States but contains also the obligation of non-discrimination in this matter. In practice, however, it is not very likely that this provision will be used to dispute the competence of a State to grant permission to its airline for using foreign aircraft on domestic stretches while refusing the same route to other foreign companies.

More practical problems arise from matters such as licences, certificates and periodical inspections of the aircraft. According to article 30, aircraft of each contracting State may, while on an international flight, carry radio transmitting apparatus only if the apparatus and operator are duly licensed by the oppropriate authorities of the State of regis-

tration. This means that according to art. 30, a hired aircraft (nota bene "hired" in the said sense without crew) is not allowed to carry its own built in radio equipment licensed by the State of registration, and even if that equipment was also licensed by the authorities of the hirer's State, its crew would not be permitted to use it.

Articles 31 and 32 respectively dealing with airworthiness certificates and crew members licenses raise similar difficulties. Airworthiness certificates must be issued or rendered valid by the State of registration. In most cases this condition will be easily fulfilled. In cases of hire for a longer period by a carrier situated in a country far from that of the owner, it might require such expensive operations as to fly the aircraft back to its home country in order to be inspected by its own authorities every time the period of validity of the certificate expires. This supposition however is not of practical importance within the scope of intra-European co-operation.

Licenses of personnel must comply with the same demands. The obvious solution is the granting of proper licenses by the State of registration to the hirer's crew, or the validating of the crew's national licenses by the said State.

In practice, problems also tend to rise from the use of validated certificates and licenses. In general, States granting traffic rights to other States do so duly taking into account the practical possibilities of such grants. In order to avoid surprises many States insist on inserting in their bilaterals with other States the condition that only the national companies of their contract-partner will be admitted to the performance

of the routes for which the rights are granted and some States even want to mention the "chosen instrument" in the text or in an appendix of the bilateral agreement concerned. If after the conclusion of an agreement the contracting partner allows its "chosen instrument" to hire aircraft from foreign companies in order to enlarge its own fleet and so to exercise the rights concerned with means not anticipated by the State granting them, that State might desire to take countermeasures. It might find a juridical basis for such measures in art. 33 which stipulates that certificates and licenses issued or rendered valid by the State of registry shall be recognised by other contracting States, provided that the requirements under which such documents were issued or rendered valid are equal to or above the minimum standards established by ICAO. As there are few States which strictly stick to these standards 257) and moreover the decision whether they do so or not is in principle at the discretion of the States whose recognition is sought, this article might put obstacles in the way 258).

Less probable is the case where the State of the hiring company would refuse its approval. In that case it could make use of the provision of art. 32 (b) which gives it the right to refuse recognition of licenses granted to any of its nationals by another State.

Problems can also arise as to which nationality marks an aircraft should carry, (those of the registrating State or (also) those of the operator's State) and from the provisions of article 26 stipulating that in the case of an accident "the state in which

the aircraft is registered shall be given the opportunity to appoint observers to be present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to that State". This could have the consequence that in a case of an accident occuring to a hired aircraft the State whose nationals are involved would not be enabled to take any part in the investigations but would be obliged to leave these to the State whose nationality marks are painted on the aircraft. As a matter of fact the solution to all these, no very substantial, problems could be quite simple. Nothing in the Chicago Convention prevents the interested States from making arrangements to make good the imperfections of the Convention 259). It seems, however, that the influence of protectionism has prevented the States from taking the necessary steps. A Belgian draft for an agreement submitted at Strasbourg in 1955 260) providing for a multilateral recognition of validations of personnel licenses and renewals of airworthiness certificates with regard to interchanged aircraft, was rejected as the States deemed it necessary that a prior study should be made of the requirements and standards of every State concerned, before they could agree to accept those.

Another effort to reach a solution was made by the British delegate Kean who submitted a report to ICAO 261) the next year. Kean proposes the adoption of double registrations on behalf of the interchange of aircraft. His plan envisages that an interchanged aircraft should be registered by the State of the hiring company for the period of the interchange. This tem-

porary second registration would not affect the rights of property but would be aimed to serve the purpose of the interchange so as to conform with the (other) 262) formalities imposed by the regulations of the Chicago Convention. As an attendant advantage of such a double registration Kean foresaw a facilitation of aircraft financing as the double registration could also serve as a system of fiduciary ownership of aircraft to be exercised by foreign banks or finance companies.

To cope with the problems caused by interchange for short periods of one or two days or even for a single journey, Kean wanted to discern between short term and long term hire agreements, in order to allocate the responsibility for the aircraft to the State of registration (short term contracts) or the State of the hiring company (long term contracts). Kean's proposal emanates from the idea that the State of registry has no power to have its regulations enforced by the State of the hirer and that the law of the State of the hirer is only applicable to aircraft registered in its own registers.

With Dutoit 263) I have the impression that Kean's starting point is that the nationality of aircraft should be analogous to the nationality of ships and that thus the aircraft should have a quasi personality. It appears that such a conception could be derived from certain articles of the Chicago Convention, but nevertheless as this conception is not affirmed by other maritime analogies I tend to the view that the question of the law applicable to the physical persons aboard the aircraft (the crew) should predominate.

According to a report of the Legal Committee of ICAO neither the double registration of Kean, nor an amendment (regional or international) of the Chicago Convention is necessary. Validation conforming to the provisions of the article 31 and 32 could provide for a sufficient solution 264). The Legal Committee evades the central problem of the nationality and its legal consequences. It also does not deal with the radio equipment certificates and licenses with regard to which no validation is foreseen. For an answer to this question it points to the Regulations of the Atlantic City International Telecommunications Convention of 1947, to which Convention all interested States are signatories. The Atlantic City Convention is more flexible than the Chicago Convention in that it states that the operator of a radio set must have a license of the State concerned or recognized by that State. Although in my opnion the 1947 rule does not automatically overrule the regulation of 1944, States in practice tend to recognize operator licenses issued in accordance with the regulations of Atlantic City in the present cases. Such a licence to install and operate the radio set can be issued by the State of the hirer as well as by the State to which the owner is a national.

In the foregoing no special mention has been made of charter contracts. It goes without saying that the interchange by means of charter also meets with difficulties imposed by the Chicago Convention. Problems caused by the different nationality of the aircraft and its crew however do not arise in this case. The most important question in the case of charter is whether the

States overflown and the States where landings are made will allow aircraft belonging to a State with which it did not conclude a bilateral agreement or to an airline which has no right to fly the route concerned on its behalf, to perform services on behalf of another airline to which the relating rights have been granted 265).

As the Chicago Convention does not give such an answer, it mainly depends on the provisions of the bilateral agreement of the States concerned.

THE WARSAW CONVENTION AND INTERCHANGE.

Interchange is also affected by the Warsaw Convention and the main question with respect to interchange posed by this convention is: "Who is the carrier?" Chapter III of the Convention (articles 17 - 30) deals with the liability of the carrier of persons, luggage and goods in international traffic which includes carriage for reward and gratuitous carriage performed by an air transport undertaking 266). The carrier is not defined by the Convention and as far as the carriage by chartered and hired aircraft is concerned, the question arises as to whether the chartering or hiring company or the owning company must be considered to be the carrier in the sense of the Convention. Article 30 par. 3 stipulates that with respect to damage to goods or luggage performed by various successive carriers the first carrier, the last carrier and the carrier who caused the damage are jointly and severally liable to the passenger or to the consignee or consignor. The passenger or the consignee or consignor

has a right of action under the provisions of the Convention against all three. In the case of damage by injury or delay to passengers the passenger can only take action against the carrier who performed the carriage during which the accident or the delay occurred, unless the first carrier had assumed liability for the whole journey (art. 30 par. 2) 267).

This question has given rise to several legal disputes which as a matter of fact have never led to an established jurisprudence. Chiefly at the instance of ECAC the Legal Committee of ICAO has studied the question. As the result of its activities in 1961 a new Convention supplementary to the Warsaw Convention was signed at Guadalajara 268).

The Guadalajara Convention distinguishes between the actual carrier (that is a carrier other than the contracting carrier who by virtue or authority from the latter performs the whole or part of the carriage governed by the Warsaw Convention, but is not with respect to such part a successive carrier within the meaning of that Convention) and the contracting carrier (that is the person who as principal makes an agreement for carriage governed by the Warsaw Convention). If an actual carrier performs the whole or part of the agreed carriage governed by the Warsaw Convention, both the contracting carrier and the actual carrier are subject to the rules of that convention 269), the former for the whole carriage contemplated in the agreement, the latter solely for the carriage which he performs 270). The Convention deals further with the question of the liability of servants and agents the application of the Warsaw Convention to whom was also

doubtful 271).

Its provisions are important not only with respect to the carrier's liability for damages but also with respect to all other relations between the carrier and his passengers, consignors and consignees 272).

The Warsaw Convention in fact does not affect the hire of aircraft as it is clear that the hirer who provides his own crew and who exercises full control over the carriage can only be considered as the carrier.

THE ROME CONVENTION AND INTERCHANGE.

The Rome Convention also poses the question "Who is the carrier" or better "Who is the operator?" Art. 4 of the Rome Convention 1933 defines the operator as the one who can dispose of the aircraft and who utilises it on his own account. The Rome Convention 1952 substituted for this ambiguous definition the following: "The person who was making use of the aircraft at the time the damage was caused, provided that if the control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly of indirectly, that person shall be deemed the operator". "Make use" is further defined as personal use or use by servants or agents in the course of their employment whether or not within the scope of their authority.

In case of doubt, the Convention points to the registered owner of the aircraft who will be presumed to be the operator unless in the proceedings for the determination of his liability he proves that some other person was the operator and takes the

appropriate measures to make that other person a party to the proceedings 273).

This last provision is obviously an effort to make sure that the claimant will not become the victim of any ambiguity relating to the identity of the operator. The consequence of it may be that in cases of damages to third parties on the surface caused by a hired aircraft the registered owner of the aircraft will be held liable in the first place. However, he will not have much difficulty in showing that his company was not the operator. This, unless art. 3 is applicable which deals with the person who has the right to use an aircraft less than fourteen days. Art. 3 states: "If the person who was the operator at the time the damage was caused had not the exclusive right to use the aircraft for a period of more than fourteen days, dating from the moment the right to use commenced, the person from whom such right was derived shall be liable jointly and severally with the operator".

From the above it may appear that the position of the hiring out company is not completely certain. Although it can hardly be claimed that the Rome Convention as amended in 1952 put any obstacles in the way of interchange as may be claimed with regard to the ChicagoConvention and to a certain degree with regard to the Warsaw Convention, it compels interested companies to define their position precisely in case an accident governed by the Convention accurs. Such a defining of the parties' position might be also of great importance in connection with possible compulsory security. States are entitled to demand the operator

such security to set up with respect to his liability under the provisions of the Convention in their territory 274).

This uncertain position does not apply to the parties of a charter agreement 275). As the charterer has no navigational control over the aircraft he can not be considered as the operator. In this case it seems clear that the owner company is liable for damages governed by the Convention 276).

(f) INTERCHANGE OF ROUTES.

The term interchange is of North-American origin and it is used there to indicate the use of each other's aircraft by two or more companies, thus emphasizing interchange in both ways. Interchange was introduced in order to serve the purpose of establishing long haul routes by combining the services of two or more regional carriers. E.g. shortly after World War II Delta Airlines and American Airlines respectively servicing the South-East coast and the West coast of the U.S.A. and using the airport of Dallas as the most Western respectively the most Eastern terminal in their networks, decided to establish a coast to coast route by means of interchange. Delta Airlines' aircraft flying along their normal route from Miami to Dallas would be taken over there by an American Airlines crew in order to be flown along the network of the latter to San Francisco. This arrangement provided the travelling public with a faster and more comfortable communication (the former necessity for changing planes had been removed) from the West to the South East coasts and the companies with a more attractive and therefore more profitable service. An attendant advantage was the more economic

utilisation of their aircraft. The agreement concerned provided for a mutual hire of each other's aircraft to be used in the through service. In fact both airlines stuck to their own networks but flew (part of) it with hired aircraft. This type of agreement therefore is legally a sort of interchange as defined in the last section, the only difference being that both companies mentioned are of the same nationality and the flights concerned are also domestic. If however, some airlines decided to apply this system in Europe by turning some of the existing short-haul routes into long-haul routes for the benefit of both public and airlines, the arrangement would constitute a case of interchange according to the definition given by ECAC and would meet with all the difficulties as dealt with above.

Another way to lengthen existing routes, is by the application of an interchange of routes. An interchange of routes occurs when two airlines agree to admit each other to their own routes 277). To give an example: If KLM flies the route Amsterdam - Edinburgh and Amsterdam - Rome, and Alitalia flies the route Rome - Amsterdam and Rome - Athens, passengers wanting to travel from Edinburgh to Athens would be obliged to change airoplanes at Amsterdam and Rome.

Through-flights from Edinburgh to Rome or from Athens to Amsterdam would simplify the journey and would moreover provide for a better use of equipment and the best service could be offered if Alitalia continued its Athens - Amsterdam flight to Edinburgh or if KLM flew from Edinburgh via Amsterdam and Rome to Athens. Besides by an interchange of aircraft, the airlines concerned

could arrange this by interchanging the routes Amsterdam - Edinburgh for Rome - Athens 278). The advantage of interchanging routes over interchanging aircraft is the avoidance of the problems raised by the Chicago, Warsaw and Rome Conventions and moreover of the more or less complicated administration entailed by the hire of the aircraft and the clearance of the fares received from through-passengers.

However, the avoidance of these problems does not mean that there are no other problems involved which are even harder to surmount. To stick to the above example, the fact is that the rights of KLM on the route Edinburgh - Amsterdam and those of Alitalia on the route Rome - Athens granted respectively by the British and the Greek governments are not interchangeable. They are granted to KLM and Alitalia, respectively, most likely on certain conditions as to capacity and frequency and the governments concerned certainly would not allow the said companies to transfer them, or part of them, to other companies. If therefore the companies wanted to conclude an agreement of this nature they could not do this without going through the process of bilateral negotiations between their governments and the British and Greek governments which, in all probability, would not grant permission without being satisfied that the agreement would not effect any British or Greek interests respecting the route Edinburgh - Athens.

At the Strasbourg Conference of 1954 a proposal for a multilateral agreement on the right to interchange routes was submitted by the Netherlands delegation 279) as a first step to a

European liberalisation of civil aviation. As could have been expected, the proposal was given little consideration, let alone accepted.
As far as I could ascertain, no interchange of routes is practiced yet in Europe.

(g) POOL AGREEMENTS.

Several bilateral agreements on civil aviation contain "pool" clauses 280) thus obliging the "chosen intruments" of the contracting States to co-ordinate their services and to share the revenues from the routes concerned between them. This sharing of revenues may be on a fifty-fifty basis or by another agreed ratio.

The costs of the services are born by each company itself. This distinguishes the pool system from the consortium system one of whose characteristics is the allocation of both expenses and revenues to the participating companies.
A pool can be defined as: "An agreement between two or more airlines relating to the services on one or more routes containing provisions for a co-ordination of these services and a division of the revenues therefrom, but not necessarily provisions for the allocation of expenses."
The pooling of services can serve two different purposes. It might be inspired by a State wanting to protect its own weaker airline against the fatal competition of a stronger airline of the other contracting State and it might also be inspired by fact that competition has only a "raison d'être" on routes where the volume of traffic is sufficient to prevent it from

resulting in an increase in exploitation costs 281).
In the first case the State of the weaker airline will be inclined to introduce the pool system for all routes flown, or under the protection of a pool system could be flown by its own airline. The bilateral agreement may provide for an arrangement of routes to be flown by both airlines as well as for an arrangement that the airlines will fly different routes of which the points of departure and destination are situated in the same region, but that nevertheless the revenues of both routes will be shared.
The sharing of revenues leads to the establishment of the most favourable schedules, frequencies and capacities. On common flown routes peak hours and peak seasons will be proportionately served by both of the airlines in such a way as to provide for sufficient services, to boost the revenues as high as possible and to avoid over-capacity.

Pools entail several advantages. The most obvious and in an indirect way the most important for the travelling public are the following: The co-ordination of schedules and sales services and attendant circumstances will tend to render the attractiveness of the offered services as great as possible, this with consequent benefits for the carriers. Contrary to what one would expect, however, pool agreements in practice do not seem to lead to a reduction in fares. The reason for this might be sought in the price setting of the IATA Conferences 282) and also in the fact that, notwithstanding the fixing of capacities on pool routes, the pay load factors on these routes

generally seem to be lower than on the free competition routes. Because of this it should be kept in mind that pool systems generally are established only on routes where the competition tends to be too heavy to carry on without the system. A table given by Coulet 283) seems to support this reasoning.
Further advantages are the possibility of an exact determination of the capacity offered. The parties to the pool agreement will make a common estimation of the traffic to be carried and will determine together the capacity to be offered for this traffic. Because of the fixed allocation of revenues there is no sense in increasing the capacity in order to lure passengers from one airline to the other.
The consequent result of a better utilisation of equipment and the reduction of operating costs seems evident 284).
For weaker airlines the pooling of their services is moreover a way to establish a share in the international traffic backed up by co-operation with another bigger airline. For the latter the agreement might be the way to establish its interests in an area to which it would not be admitted without such an agreement.

The greatest problem of a pool agreement is obviously the partition of the common revenues. If it concerns a pool of two airlines operating the same route according to a schedule in which each of them performs the same number of flights with the same type of aircraft, the problems seem to be quite surmountable. But even in such a clear case, there is a possibility of difficulties with respect to the division of the

revenues. If for instance one of the old established airlines with a good safety record enters into a pool agreement with a new and inexperienced company, the public might quite well favour the former with the result that this airline carries most of the passengers along the common route and the latter flies it with nearly empty aircraft. In such a case, the established airline will hardly be inclined to share the revenues on a fifty-fifty basis.

The situation is much more difficult when more than two airlines enter into a pool agreement providing for schedules of which each of them performs its own particular share along (slightly) deviating routes and all of them or some of them fly with different types of aircraft and different capacity. Supposing that moreover some political factors affecting the division of the revenues play a certain role, the result is a complicated problem which would at first sight render the pool completely impossible.

Nevertheless pools of such a nature exist and the solution has been sought in the use of different formulas to assess the distribution of the common revenues.

These formulas mostly start from the total capacity offered on a certain route and each partner is assessed a portion therein. The preferences of the public and the difference of capacity may be negotiated on by the establishment of certain ceilings. E.g. if three companies operate the same routes with aircraft seating respectively 60, 50 and 46 passengers, there may be established a ceiling of 46. If the three carriers over a certain

period carry respectively an average of 45, 48 and 40 passengers, the revenues of carriage up to the number of 46 are put into a common fund i.e. the second carrier is not obliged to share the revenues from the passengers he carried over that number. He retains the revenues from the carriage of two passengers for himself.

Several other formulas of distribution are possible. They vary according to the conditions in the pool agreements which can relate to all traffic on a route or to a part of it only (e.g. generally cabotage traffic is retained by the national company).

The unfavourable aspects of pooling agreements mainly originate from their limited scope. They tend to stimulate the formation of a trust 285) and may serve more as a juridical frame of co-operation in order to conceal the competition and /or to get influence where it could not be obtained before 286) without direct government interference 287).

A trust is formed when two or more companies enter into a pooling agreement with the aim of common competition against another company. The latter may in its turn seek co-operation with others and begin a competition more uneconomic and fatal than existed before. Apart from this the situation of the European network as a feeder network for the Atlantic and other long-haul routes should be taken into account 288). It seems that European airlines rather than forming pools on these long-haul routes are inclined to strengthen their European feeder network 289), in a way which is not necessarily aimed at benefiting European

communications, but is chiefly aimed at the extension of their sales on the overseas routes.

On the whole, however, the establishment of pools, especially in combination with such other forms of co-operation as mentioned above (except interchange) constitutes an important step to the most desirable solution of forming an efficient and economic transport system adapted to the needs of the multiple services of the various national aviation systems of Europe 290). In Europe several pool agreements have been concluded. Their "popularity" is growing, especially since in the years after the post-war boom aviation met with increasing difficulties 291). According to Weld 292) in 1953 pool traffic constituted 20% of the entire European traffic compared with 60% in 1935. Since then several other agreements have made this percentage go up. However, chiefly in the interest of their transatlantic traffic, some carriers would be prepared to give in with respect to regional interests 293).

(h) CONSORTIUM.

A following step to closer co-operation is the consortium. It is difficult to give an exact definition of the term consortium, since the name "consortium" could be given to several types of co-operation without anyone being able to dispute its use. The term originates in fact from marriage law and indicates the relationship and the duties and rights between husband and wife. In air law the term is used to indicate a certain relationship between airlines, a sort of half-way house between the

pooling arrangements and an international company. There are very few examples of such consortia 294) which moreover show different basic principles.

In Europe there is only one consortium, the Scandinavian Airlines System (SAS) which is of great importance as an example of a possible solution to the civil aviation problems of Europe as a whole. SAS will be dealt with in a separate chapter in which the legal aspects of the (European) consortium will be further examined 295).

(i) THE INTERNATIONAL COMPANY.

One of the main features of what is called in aviation law an international company, is that it is in fact not an international company, but a national company financed by stockholders of different nationalities. As far as could be ascertained there exists not a single civil air transport company with a supra-national status and article 17 of the Chicago Convention, stating that aircraft have the nationality of the State in which they are registered, applies also the airlines in practice. A company may be international from an economic point of view, although from a legal point of view it can have only one nationality, which is defined by its place of domicile. The fact that most of its share holders may reside outside the State of domicile does not effect its legal status 296). It would nevertheless be quite possible to create a company with a supra-national status 297) but this would demand not only the necessary agreements between the States directly concerned,

but in order to achieve international recognition for such a company the co-operation of States not directly concerned would also be necessary. Moreover, under the provisions of the Chicago Convention, 298) the Council of ICAO would have to determine in what manner the provisions of the Convention could apply to the operations of such a company. It is difficult to agree with the objections to such a supra-national entity put forward by Coulet 299), especially not when he compares such a creation with a nation without persons. There are several examples of such creations in the field of public law and it is hard to see why they would be impossible in private law. I agree however with him that many problems would have to be overcome and that only a large scale international co-operation could achieve such an aim.

The existing international companies on a national basis can be divided into two categories: (a) the hidden international company and (b) the open international company. As hidden international companies I would consider those national companies which are presented to the public as the national (or one of the national) company (ies) of a certain State but which in fact are mostly owned by a foreign State or a foreign company. I would not go so far as to consider an airline a hidden international airline just because it offers its shares for sale on the public stock market to purchasers of other nationalities 300). But, if a foreign company or State participates in the capital of an airline to such an extent, that it can exercise a certain degree of control over that airline, I take the view that such a participation must be considered to make that company

a hidden international airline.

A European example of such an airline, was Alitalia. Alitalia is generally considered as the Italian State airline but 40% of its capital was owned by the British B.E.A. (British European Airways) and through that company indirectly by the British State. A B.E.A. director situated in Rome followed the daily activities of Alitalia 301). An examination of the bilateral agreement between the United Kingdom and Italy shows that it reflects this relation. A similar relationship exists between B.E.A. and the Greek Olympic Airways and between B.E.A. and the Irish Aer Lingus, in both cases with favourable consequences for British aviation rights in the countries concerned.

Several other examples of financial participation exist in Africa South-America and Asia. The British and the Americans in particular practice this system of participation as a form of "foreign-aid" to less developed or financially weak States with consequent benefits to the networks of their national companies 302). Generally the financial agreement also provides for technical assistance and the pooling of certain services. In the current situation where every small country considers the establishment of an airline under its own flag as an important factor of national prestige, this practice - often denounced as neo-colonialism or imperialism - serves the mutual benefit of both parties. It is obvious that many such participations must also be projected against the political struggle between West and East, a factor which often dominates the strict commercial interests of the financers. Little published documentation exists on this form of co-operation 303).

An (open) international company is created when two airlines of different nationality or two States participate in the establishment of a common airline and introduce that airline as an instrument of international co-operation. Its juridical form is not important. In most cases it will be a limited company of which both or, in the case of more than two partners, all hold some of the shares and have a say in the nomination of the members of the board and the directors.

In practice such a company works along the same lines as the consortium, but is has juridical personality and it has therefore a domicile and a consequent nationality. The choice of the domicile defines the national law to which it will be submitted.

The above states what is generally considered as an international company. As de la Pradelle 304) however points out, the conception of "international company" is a very narrow one. In my opinion forms of international co-operation such as "hidden international company" and also the consortium deserve this name as well. The main criterion is the international participation in the establishment of a commonly owned air transport company and neither the juridical form nor the presence of a juridical personality can affect this generally accepted conception and where hereafter an international company is spoken of it should be understood as a company established by the joint effort of two or more different States or airlines of different States, with a juridical personality and presented to the public as an international company.

The history of the creation of SAS shows clearly the problems

involved in the establishment of an international company. In connection with the importance of aviation and aircraft with respect to the national security of a State, such a company is only possible if the States concerned maintain extremely close relations. More than in any other form of co-operation the States concerned place themselves in a position of mutual control and of dependency on the goodwill of the other. This applies particularly to the State which agrees on the establishment of the domicile of the company in the country of its partner. In the SAS consortium, the Scandinavian States found a way to allocate the commonly owned aircraft to the participating companies (States) in the ratio of their contributions to the consortium and to register them accordingly without many consequent problems. In the case of an international company, however, the participants could not do so without the consequent problems of hire and charter as indicated above. If the international company wanted to fly with aircraft registered in a State other than that if its domicile, it would have to hire or charter such aircraft (or borrow them which would not make much difference). Various international agreements with other States would be necessary if the company wanted to fly these planes on a network extending beyond the direct communications between the partner States. Moreover, internationalization presupposes not only the substitution of two or more competing national airlines on a route by an international one, but also the substitution of nationally owned property, equipment, personnel, etc. by internationally owned property, etc. 305). Moreover in Europe,

where most States have only one major airline, the participation of that airline could not be confined to a part of its network, at least not to an important part. It might be possible to create an international company for the operation of one or two routes but as soon as the operations of the international airline directly or indirectly affected the operations of the national airlines themselves, it would constitute a new competitor and would put the airlines into the position of having to merge completely or to dissolve the international company. The example of ESAS and OSAS in this respect is instructive 306). Meyer 307) and Goedhuis 308) base their objections to the creation of an international company on the consequent absence of any competition. Such objections apply with equal force to consortia, pools and similar forms of co-operation, whose first aim it is to cope with the uneconomic (cut-throat) competition. Such objections also would leave little room for co-operation at all, unless it is sought exclusively in the technical field.

After CIDNA and DERULUFT 309) both of which were dissolved before the beginning of the second World War, no other open international companies have been established in Europe. Dutoit mentions Aer Lingus, in which B.E.A. and the Irish Aer Rianta participate by 40% and 60% respectively. Aer Lingus was the result of an agreement between the British and Irish governments of 1946 310). As Dutoit himself more or less admits, however, Aer Lingus must be considered as an Irish company, a daughter company of Aer Rianta Teoranta which has since ceased its active operations. Aer Lingus could not be considered as

an international company in the narrow sense of the term as defined above, but it shows the characteristics of a hidden international company. B.E.A. and Aer Lingus divided revenues of the traffic between Ireland and the U.K. equally between them and the revenues of other European traffic according to the ratio of their contributions. Losses were allocated equally to both partners.

Outside Western-Europe several international companies exist. Although they are not of much direct importance to the scope of this work their example confirme the statement that international companies can be succesful only if the States involved maintain close political relations.

There was the Sino-Sovietique company which maintained communications between Moscow and Peking and was dissolved at the time of the deterioration of the U.S.S.R. - Chinese relations in 1953 311); Laier (the Chinese) Civil Air Transport was established, partly American, partly (Taiwan) Chinese owned; further Qantas Imperial Airways representing British (B.O.A.C.) and Australian Airways of which the British interest were sold in 1947 to the Australian government; Tasman Empire Airways domiciled in New-Zealand and originally 38% owned by B.O.A.C., 20% by the Government of New-Zealand, 19% by the New-Zealand Union Airways and 23% by Qantas but in which after 1948 the New-Zealand Government obtained an interest of 50% and B.O.A.C. and Qantas respectively 20% and 30%; and British Commonwealth and Pacific Airlines in which Australian, New-Zealand and British interests are respectively 50%, 30% and 20%. Both Qantas and T.E.A. following their

reorganisation must be considered as hidden international companies.

An examination of these examples leads to the conclusion that international companies as a rule do not exist very long. Their success is entirely dependent of the spirit of the participating States, rather than of their national airlines who are the official participants. If the States begin to feel themselves bound by their obligations arising from these participations and desire to be boss in their own house, or better of their own airline, the merger becomes impossible. In the case of such narrowly related States as those of the British Commonwealth, a compromise might be found in the change of the international company into a hidden international company which leaves the State of domicile its international prestige and its own instrument in international aviation. Lacking such close relations, however, the only solution is to dissolve the company.

This is why the establishment of an international airline as e.g. proposed by Bonnefous and Sforza 312) in my opinion cannot be considered as a workable solution for the European situation.

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230) Co-operation serves in general one or more of the following purposes:
a. A better use of material; b. A more economic route system; c. A stronger international position.

231) Cf. R.F.D.A. (1954) Vol. 8, p. 348 - D.Haguenau "Les formes de la collaboration internationale dans le transport aérien".

232) See Chapter VIII.

233) See Chapter VII.

234) IATA must be considered as the most important form of collaboration between airlines; See Chapter IV.

235) According to W.Coulet in his thesis "L'Organisation Européenne des Transport Aériens" (Toulouse University - 1958), these commissions mount up to 7.5% for the sales of passengers tickets and to 5.5% for the freight bookings, whereas the fee for other services is generally 2.5% of the amount involved.

236) See ICAO Circ. 28 AT/4 of 1952 . p. 29 seq. "Actual forms of commercial and technical co-operation between European companies in regional air services" and the Report of A.R.B. no. 104 of 1955 "Review of existing agreements regarding commercial and technical co-operation between European airlines".

237) Cf. R.G.A. (1951) Vol. 14, p. 31 seq. - W.H. Wager "Coöpération Internationale et Scandinavian Airlines System". Wager points out that several airlines have also established multilateral representation agreements through IATA.

238) See Sw.L.J. (1953) Vol. 7, p. 141 - W.M. Sheehan "The IATA Traffic Conferences".

239) Among others Air France, BOAC, KLM, Panam, Sabena, TWA.

240) See Interavia 1960, no. 1, p. 33 - D.D. Dempster "Civil Aviation in the West".

241) See Interavia 1955, no. 10, p. 756 - W.Deswarte "Co-operation".

242) See ICAO circ. 28 AT/4, supra 236.

243) The co-ordination of schedules is also strongly advocated by IATA.

244) A better co-ordination of schedules is among others advoc-

ated by M.J. van de Kieft in his "Van de Kieft plan" (see Chapter VI.)) as one of the means for a better utilisation of European air transport.

245) The ARB report no. 104, supra 236, provides for an elaborate documentation on this subject.

246) Hire of aircraft without crew is seldom found between European airlines but several of these airlines concluded contracts of hire with airlines from other continents. E.g. Ethiopian Airlines used to fly hired Swissair aircraft, South African Airways utilises BOAC aircraft without crew, whereas KLM used to let some of its aircraft to an Australian company during the European winter which coincides with the Australian summer. See ICAO doc. LC/SC/AFF DT no. 41 (February 1957), p. 27.

247) The term "banalisation" originates from railway practice. It was and still is, used to indicate the interchange of locomotives on the European railways network.

248) See Chapter VII.

249) See the report of the British delegate Kean, ICAO doc. LC/SC/AFF DT no. 14 (April 1956), p. 1 - Cited from Dutoit, infra 250.

250) See B. Dutoit "La Collaboration Entre Compagnies Aériennes - Ses Formes Juridiques" (Lausanne - 1957), p. 23.

251) See Coulet, supra 235, pp. 110/111.

252) This in contrast to the use of the term in the U.S.A. where by the interchange of aircraft is meant the utilisation of aircraft belonging to one American company on routes of another in order to provide the passengers with long-haul services along their combined networks without the necessity for changing aircraft. This U.S. conception is nearer to what is called "interchange of routes".

253) Cf. Dutoit, supra 250, p. 112 and Coulet, supra 251.

254) Cf. J.P.Honig "The Legal Status of Aircraft" (The Hague - 1956) p. 108 seq.; J. Cooper "A study of the Legal Status of Aircraft" (Prepared for the Air Law Committee of the International Law Association - 1949), p. 23 seq.; and O. Riese "Luftrecht" (Stuttgart - 1949), p. 201 seq.

255) Cf. Art. 17 of the Chicago Convention: "Aircraft have the nationality of the State in which they are registered".

256) Many bilateral agreements contain clauses stipulating that the rights as agreed upon in the bilateral shall be exercised only by companies or aircraft belonging to nationals of the contracting parties and registered in the contracting States, or similar provisions.

257) Cf. Article 38 of the Convention by which States are allowed to depart from the standards and procedures set forth by the Convention upon certain conditions.

258) See Chapter VII. A proposal for a mutual recognition of such documents, submitted to ECAC, was opposed to as the (opposing) States wanted to find out first which standards in the various States were applied.

259) See art. 83.

260) See ICAO doc. ECAC/I WP/19 (November 1955).

261) Report Kean, supra 249).

262) Cf. Art. 18: "An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another".

263) Supra 250, p. 87 - 89.

264) See ICAO working paper LC/534 (July 1956).

265) A recent example of such a problem are the difficulties met by P.A.L. (Philippine Airlines) to which commercial rights are granted by the British Administration in Hong Kong on its route Bangkok - Hong kong - Manilla. Inorder to cope with the competition on this route PAL wanted to fly it with jet aircraft chartered from KLM. The Hong kong authorities objected to this as "such an exercise of its rights by PAL would provide KLM with landing rights in Hong Kong which it did not have of itself". The reaction of the Philippine authorities was to suspend the landing rights of BOAC in Manilla (July/August 1962).

266) Art. 1 of the Convention.

267) Cf. Rediger v. T.W.A. 6 Avi. 17.315. (Sabena sold a ticket one leg of which was from Paris to New York on TWA. The injury was caused while the passenger was travelling on TWA. The court ruled that, unless there is an agreement to the contrary, the carrier which caused the injury or delay is liable under the Warsaw Convention (art. 30.2). The case against Sabena was dismissed)

268) Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961.

The Hague Protocol of 1956 also is of importance in this respect.

269) See art. 1 and 2.

270) There are a few minor exceptions, cf. art. 3 part. 2 and art. 4.

271) Art. 3 and 5.

272) E.g. those stipulated in articles 5,6,12 and 13 of the Warsaw Convention.

273) Art. 2 R.Conv. 1952.

274) Articles 15 - 18 R.Conv. 1952.

275) Cf. M. de Juglart "La Convention de Rome du 7 Octobre 1952" (Paris - 1955), pp. 38/39.

276) As a matter of fact interchange, as defined, is not found frequently in intra-European practice.

277) See ICAO Bulletin of 1954, No. 4 p. 4. Interchange of routes indicates that each participating company extends its services along the routes of the other(s).

278) Cf. J.A.L.C. (1958) Vol. 25 - p. 55 seq. - R.J. Keefer "Airline Interchange Agreements".

279) See infra Chapter VII.

280) Examples are the French - U.K. bilateral of 1948, the French - Italian bilateral of 1949. Most of the bilaterals of which France is one of the parties contain such pool clauses, included those under which the U.S. carriers operate their routes to and via France. Switzerland and Italy show also a strong preference for pool clauses in their bilaterals.

281) Cf. Statement of the U.S. CAB in 1943 cited by Wheatcroft. M. Wheatcroft "The Economics of European Air Transport (Manchester - 1956) p. 209.

282) See ChapterIV.

283) Coulet's, supra 235, p. 51, table shows that the load factors on routes flown in pool by two or more airlines are generally lower than on those flown in free competition if it concerns routes which are flown frequently. Fewer frequencies on a route (that means less competition and thus a less attractive route) show the reverse, that is to say, better payloads where flown in pool.

284) Cf. Annual report to the shareholders of KLM 1949.

285) Cf. ZLW (1960) Band 9, p. 116 - P.H. Sand "Die Airunion und das Wettbewerbsrecht des Gemeinsamen Marktes".

286) According to Dutoit, supra 250, p. 18.

287) Cf. ICAO corc. 28 AT/4, supra 236, p. 190.

288) Cf. KLM report, supra 284.

289) This situation may be the reason for Petzel's statement: "Clauses in bilaterals to preserve the national share are perfectly well justified between Mexico and U.K. or Canada and Italy, but in Europe where each country has a relatively small area and population such a practice tends to inhibit the development of air traffic". Interavia 1959 no. 12, p. 1538 - F.W. Petzel "What's wrong with European Air Transport?".

290) Cf. Interavia 1957 no. 10, p. 1059 - M.Lemoine "Marché Commun Européen et Transport Aérien".

291) Especially SAS and BEA, both with an exclusive European network, during the first six or seven years after the war, were reluctant to pools.

292) JALC (1953) Vol. 20, p. 454 - E.M. Weld "ICAO and the major problems of international air transport".

293) Cf. Coulet, supra 235, - pp. 47/48. Coulet points to the pools of KLM, Sabena, Air France and Swissair with the Czechoslovakian airline C.S.A. CSA which like its partners is interested in transatlantic or other long haul traffic could gain various advantages by concluding these pools at the cost or its partners. Those however were prepared to give up some of their European position in order to attract traffic from behind the Iron curtain with transatlantic destinations through CSA.

294) To my knowledge: SAS, United Arab Airlines and Air Afrique. The creation of a South American consortium, FALA - Flotta Aerea Latino Americana, with all the Latin-American States as participant is considered but seems to meet with extremely great difficulties.

295) See infra Chapter VIII.

296) See Am. Journal of Int. Law (1960) Vol. 54, p. 884 which reviews a decision of the International Court of Justice on the election of the members of the Maritime Safety Commission of the IMCO (Intergovernmental Maritime Consultative Organisation).

297) Cf. R.G.A. (1948) Vol. 11, p. 130 seq. - W.Wagner "Vers L'Internationalisation de la Navigation Aérienne".

298) See art. 77 of the Convention.

299) Coulet, supra 235, p. 148.

300) Such as e.g. KLM in Europe and most American airlines. All of them however take care that a substantial part of the stock remains in the hands of Dutch respectively U.S. nationals.

301) See R.G.A. (1951) Vol. 14, p. 31 seq. - W.H.Wager "Coopération Internationale et Scandinavian Airlines System".

302) Examples are: the T.W.A. participation in Saudi Arabian Airlines; Aerovias Venezuela Europa which is 45% American owned; and Peruvian International Airways which was 40% Canadian owned and 27% American owned until 1946. Because of C.A.B. conditions (including the condition that the company should at least be 51% Peruvian) concerning the granting of landing rights in the U.S.A., these participations were later reduced to 49%.

303) Cf. ICAO circ. 28 AT/4, supra 280.

304) R.G.A. (1948) Vol. 11, p. 121 seq. - P. de la Pradelle "L'Internationalisation des Lignes Aériennes Long-Courrier".

305) Cf. de la Pradelle, supra 304.

306) See Chapter VIII.

307) R.G.A. (1952) Vol. 15, p. 107 seq. - A. Meyer "Union ou Coopération".

308) J.A.C.L. (1957) Vol. 24, p. 273 seq. - D.Goedhuis "The Role of Air Transport in European Integration".

309) See Chapter II.

310) Recently the British participation in Aer Lingus has been reduced to 3%.

311) See J.A.L.C. (1953) Vol. 20, p. 133 - J.W. Rizika "Commercial Air Transport in the Union of Soviet Socialist Republics" which also gives some other examples of international companies of Eastern Europe; and Interavia 1956, no. 1, p. 46 - Pien Jen Keng "Air Transport in the Chinese Peoples Republic".

312) See Chapter VI.

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CHAPTER VI - THE PLANS OF SFORZA, BONNEFOUS AND VAN DE KIEFT.

In the history of European aviation, the year 1951 is notable for three efforts to find a solution to its main problems. Within a short period of time the French Mr. Bonnefous, the Dutch Mr. Van de Kieft and the Italian Foreign Minister Count Sforza submitted their plans for co-ordination of and co-operation between the European airlines to the Council of Europe; the first two through the Special Transport Commission of the Council and the latter through the Commission on Economic Affairs of that Council. All three argued that the only solution to the current difficulties was a close co-operation between the airlines to stimulate government regulations. Their ideas were not entirely original. Several writers before them had advocated similar propositions 313). The importance of their plans, however, was that they were brought to the official European forum and that they have resulted although not in what they were aimed at, nevertheless in a substantial step forward on the road towards a European common air market 314).
In the Council itself the necessity of some stimulus to co-operation in the field of aviation was not an original notion either. Also the ideas of a S.A.S. modelled consortium and a High Authority over the Airspace had already been discussed in the Council 315).

PLAN BONNEFOUS.

In its preamble the Bonnefous plan mentions both the

troubles of European aviation and the solution which should be applied, in accordance with the principles by which the work of the Council itself is ruled. Bonnefous estimates that the degree of unification realized in the domain of European Transport must be considered to be the real criterion of accomplished progress in the objectives of the Council of Europe.

Bonnefous proposes the creation of a European Transport Authority, modelled after the Authority of the Schuman plan 316). This body would be charged with the encouragement of an efficient economic and appropriate exploitation of transport and to help the national development of transport. The plan was intended to last for a period of 25 years.

The Transport Authority would comprise:

- a. An executive Committee consisting of six to nine members (dependent on the number of contracting States), chosen by the Assembly, no by virtue of their quality as a body of representatives of States but for reasons of personal experience and skill, on the recommendations of the Council of Ministers. It would take its decisions by simple majority or qualified majority vote, this depending on the importance of the decision concerned.
- b. An Assembly of representatives consisting of members of the Assembly of the Council of Europe, chosen by that Assembly. The executive Committee should be responsible to the Council. The Assembly should have the power to dismiss the Committee by a two/thirds majority vote.
- c. A Council of Ministers, consisting of the Foreign Ministers

or Ministers of Transport of the Member States, with the power to decide the augmentation of the quota which each of the States would have to contribute to the funds of the Authority and also empowered to temporarily suspend the decisions of the Committee.

- d. A Court of Justice which would have competence in every case against the Committee based on the violation of the Treaty by which the Authority would be established.

The Authority would be related to the Council of Europe by its Secretariat which would be included in the Secretariat of the Council. The Executive Committee would moreover submit yearly reports to the Assembly and the Ministers' Committee of the Council of Europe.

The Authority would have decisive power over questions relating to transport of interest to two or more of the contracting Parties and would have the right of recommandation in national transport related to international intra-European transport.

The Bonnefous plan aimed in fact at the co-ordination of route, rail and water transport, but attached to it is a special memorandum dealing with air transport. In this memorandum the plan is elaborated and mention is made of a choice between two possible extensions of the plan by which its execution could be facilitated: the establishment of an international affreightment association or the creation of a European Airlines Consortium modelled on the example of S.A.S. 317). Long-haul traffic (overseas cabotage included) and atlantic traffic were excluded from

the Bonnefous proposal.

PLAN VAN DE KIEFT.

The Van de Kieft plan was aimed at the creation of a single European company, either a company of affreightment or a consortium of the existing airlines. It refers to art. 77 of the Chicago Convention under whose stipulations both forms of co-operation are legally recognised.

The role of such an affreightment company would be to remunerate the services of the different national airlines on a basis of kilometres flown. A European consortium - as Van de Kieft saw it - could be modelled on the S.A.S. principles as an entity without legal personality charged with the division of routes, schedules and frequencies between the companies and the distribution of the investments and profits. Van de Kieft took the view that as a first step on the way to the integration proposed by him the establishment of regional agreements such as the S.A.S. agreement should be encouraged. Van de Kieft recommended that at least at the outset the cabotage routes relating the States with their overseas associated territories and the trans-atlantic routes should be excluded from his co-operative system. He claimed that the Europe - Mediterranean area is an area on its own, distinguished from the world wide network, and with its own technical, legal and political problems. He illustrated this point of view with a reference to the specific European network airline B.E.A. and the European divisions of S.A.S. and Air France.

Van de Kieft emphasized that the preparation of a solution as

foreseen by him could not be left to the interested companies. It has to be undertaken by the governments, especially taking into consideration the close relations between the governments and the airlines as they consist in Europe. He recommended the convocation of a conference of government and airline representatives for a further elaboration of his plan 318).
Van de Kieft motivated his plan by pointing out that aviation competes very little with the other means of transport 319) whereas in air transport every carrier is the competitor of the other in a degree many times heavier than is the case in surface transport. The air transport industry is relatively young and has to force its way to the market by rendering services which are substitutes for the already existing services of railways and other surface means, at (heavy) expense to the public. It is therefore a matter of public responsibility to take the appropriate measures to ensure its most economic operation.

PLAN SFORZA.

The plan of Count Sforza seems more or less a combination of the foregoing proposals. It provides for an agreement for a period of 50 years during which the air spaces belonging to the territories of the contracting State 320) would be combined into one common European air space within which the contracting States - on certain conditions - would have full freedom of civil air transport. Sforza recommended that this air space should not be confined to the metropolitan areas, but that the overseas territories should be included where possible.

With the air space the "infrastructure" 321) should also be the subject of gradual co-ordination. Rights of third parties should be respected.

The establishment and control of this common airspace would be conferred on a common authority which, taking into account the rules set forth by ICAO would have the following duties:

a. to ensure the freedom of traffic in the common airspace;

b. to set forth the rules applicable to this air space which would be enforced by the governments;

c. to authorize permissions to airlines to take part in the common air traffic after having examined technical, financial and legal conditions and having found them satisfactory;

d. to regulate the organisation of civil airports;

e. to stimulate and supervise the unification of the "infrastructures";

f. to set up a sole research and study centre.

The authority would be elected by the contracting States 322). Its voting system would be regulated from the very outset on the basis of certain principles. These principles would at least take into account the number of the population, the area of the surface and the geographical position of each of the contracting States.

The authority would function within the framework of the existing European international organisations and periodically report to the Assembly of the Council of Europe and the Council of the O.E.E.C.

An international Court of Justice would be created with decisive

power in all matters concerning disputes which would arise with regard to the functioning of the authority and the utilisation of the common airspace in general.

At the same time a European Air Consortium would be established comprising the airlines of the contracting States which could benefit from the technical and economic improvements resulting from such a concentration. That is to say airlines which are controlled by the State would be obliged to enter the consortium (after having been concentrated into a national consortium) whereas private companies would be free to do so or not at their discretion.

The aims of the European Consortium would be chiefly:

a. to practice a common commercial policy;

b. to co-ordinate and unify the sources of exploitation and rationalize the routes, schedules, etc.;

c. to organize a joint operation with a conveniently decentralized technical management;

d. to standardize gradually the type of aircraft, engines and "infrastructures";

e. to unify the existing technical and scientific research centres;

f. to avoid duplication in operations, installations, etc.

The joint operation would cover the international intra-European services only. Domestic services would be excluded and long haul services would only gradually be inserted after respective agreements with the interested non-member States.

Allocation of revenues and losses would take place according to

a commonly agreed basis which would reflect e.g. the assets brought in by national consortia and the flown ton/kilometres. The Authority would also have a decisive say in matters of national subsidies, their increase as well as their reduction 323).

PRACTICAL MERITS.

All of the three plans have in common the principal demand for close co-operation as the only solution for a sound and economic European air transport. An unrestricted freedom of the air or the classic doctrine of unrestrictive competition is not advocated in one of them. By discarding this doctrine they reflect the changes in general thinking since the Chicago Convention. They lack, however, a sufficiently clear lay-out, and a distinction between security aspects and the economic needs of the airlines 324) restricted as they are to general principles without regard to the problems of applying them in practice 325). It was still too early to expect an acceptance of one of these plans, but they served as an incentive for further steps which eventually led to the creation of a European civil aviation organisation: the European Civil Aviation Conference (ECAC) 326).

The objections of the Council of Europe against the submitted proposals have not been published but they are easily conceivable. First of all there are the political difficulties. The acceptance of the Bonnefous or Sforza plans would consequently mean an abandoning to the Common Authority of part of the sovereignty which every State exercises in its airspace. It would

also mean a restriction of bargaining power in negotiating with non-members, as it is hardly conceivable that the contracting States under the plan would retain their freedom to negotiate air transport bilaterals with non-member States without the consent of their partners. Moreover if the Authority had power in matters of domestic transport too, it would mean a restriction of freedom in entirely domestic matters.
Economic problems will arise from the establishing of the schedules, the standardization of equipment and the operational assets brought in. Standardization would mean a trade policy imposed from outside in matters of aviation which may have its impact on trade balance and other exports. As many of the European services of today have their main importance as feeder services for the long-haul routes their co-ordination and reorganisation may influence the schedules of the transatlantic, African and Far East routes. The contribution of assets to the super-organisation may lead to an initial increase of costs 327).

Against these objections is set the conviction of Bonnefous that the exclusion of domestic traffic (metropolitan and overseas) is possible. Bonnefous confines himself however to this statement and does not elaborate on the matter. In my opinion, strengthened by the S.A.S. experience 328), especially on this point, the practical possibility of the Bonnefous plan seems doubtful.

A similar weakness is contained in the Van de Kieft plan. It is true that some of the European airlines have their separate European divisions. Others, however, do not have these,

as the operation of European services for them is mainly a question of feeder services, or may be for other reasons. For those it will be unattractive to change their organisation, especially at this current time of heavy losses. Moreover, one of the greatest advantages of European co-operation could be the creation of a common airspace and the unified negotiation on rights in that airspace with third parties. A consortium without any more would leave the possibility of competing airlines next to the consortium and although there seems to be no objection to competition 329), the possibility of unregulated competition would render the co-operation a disillusion. Moreover, if Western Europe desires to provide its air transport with a position in economical respect comparable with that of U.S. or U.S.S.R. transport, it is necessary to render the different national airspaces into one large object of negotiation. And, if it wants to become competitive with the American airlines, it should not forget to take the appropriate measures also on the routes which are in fact the fountain of life for all major European airlines, viz the transatlantic routes.

The Sforza plan therefore seems prima facie to be the most realistic; prima facie because although the reservation of the European airspace for a European air transport syndicate seems to be the only solution for keeping up with the more and more protective attidtude of the world towards civil aviation and although it leaves the possibility for a certain form of competition 330), Sforza makes it clear that he is not prepared to

abandon the attitude of protectionism. In elaborating his proposed Common Authority and its voting system, he proposes that the role of each contracting State shall be determined by its population, its surface and its geographical situation. It is evident that such reasoning renders the entire plan unacceptable. It would mean that the contracting partners would have to consider the matter apart from their economic strength, their achieved share in air transport, their experience and skill, their international relations, their ability, tradition, existing network, etc. 331), and that several of them rather would prefer to continue the cut-throat competition situation as it exists.
Thus each of the plans contains its own problems and it is evident that the Council of Europe was unable to design appropriate methods to implement any of them 332).

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313) See Interavia 1951 Vol. 1, p. 11 - "Hundred and fifty million air passengers going begging".
Interavia 1951 Vol. 6, p. 299 - M.Hymans in a speech to an Ambassadors Conference at Paris.
R.G.A. (1951) Vol. 14, p. 209 seq. - H.Mourer "Pour un 'pool' européen des transports aériens".
R.F.D.A. (1948) Vol. 2, pp. 121 seq. - M.Lemoine "Essai sur les perspectives d'avenir du droit aérien".

314) Namely the creation of the European Civil Aviation Conference (ECAC).

315) On August 25th, 1950 a respective recommendation had been accepted. See also Council of Europe doc. AS/ST (2)3 Annex B, Jan. 31th, 1951.

316) The European Coal and Steel Community.

317) See R.G.A. (1951) Vol. 14, pp. 359 - 365.

318) See R.G.A. (1951) Vol. 14, pp. 366 - 370.

319) Van de Kieft pointed out that in 1948 only 10% of the passenger traffic between London and Paris (Europe's most densely flown air route) had been carried by air.

320) It was Sforza's intention that his plan should be accepted by all States of the O.E.E.C. (Organisation for European Economic Co-operation).

321) The French word "infrastructure" as used in this context, covers the whole field of administrative and technical facilities necessary for the operation of civil air transportation.

322) D. Haguenau in R.F.D.A. (1954) Vol. 8, p. 364, points to the similarity to the methods followed by the European Coal and Steel Community.

323) See R.G.A. (1951) Vol. 14, pp. 370 - 372.

324) Cf. S. Wheatcroft "The economics of European air transport" (Manchester - 1956) p. 204.

325) Cf. Interavia 1957 Vol. 10, p. 1058 - M. Lemoine "European Common Market and Air Transport".

326) See Chapter VII.

327) As has been the case in the co-operation of the Scandinavian airlines in S.A.S. (see Chapter VIII).

328) Cf. R.G.A. (1951) Vol. 14, pp. 109, 110 - W.H. Wager "Coopération internationale etScandinavian Airlines System".

329) Mourer, supra 313, points out that even in the event of the absence of all competition in European air transport there is no fear of a leisurely attitude because the vitality and skill of all participating nations would be invdved.

330) Cf. Mourer, supra 313.

331) Cf. JALC (1957) Vol. 24, p. 273 seq. - D.Goedhuis "The role of air transport in European integration".

332) The problems indicated above are not the only ones to be solved. Cf. Chapter VII where these and connecting problems will be considered more comprehensively.

CHAPTER VII - EUROPEAN CIVIL AVIATION CONFERENCE (ECAC).

A EUROPEAN ORGANISATION.

In order to stimulate and to favour the co-ordination of European air transport and to examine the various problems concerned, current and future 333), the European States have established the European Civil Aviation Conference. ECAC met for the first time in November 1955, at Strasbourg.
The establishment of ECAC was the result of various efforts made in the European Assembly 334).

After Bonnefous, Sforza and Van de Kieft plans had proven to be in advance of general thinking 335), the Consultative Assembly 336) recommended that:

- a conference of governmental experts and representatives of the airlines be held to examine the possibility of an association of airline companies to take charge of the air communications between the member countries, or
- other possible methods of achieving closer co-operation for more efficient operations be studied 337).

In March 1953 the Committee of Ministers of the Council of Europe 338) requested ICAO to convene a conference mainly to examine the following subjects:

- a. The methods of improving commercial and technical co-operation between the airlines of the States participating in the conference;

- b. The possibility of securing a closer co-operation by the exchange of commercial rights between the European States.

Invitations to the conference should include the European States which were not members of ICAO, and consumers' organisations such as the International Chamber of Commerce, and the Council of Europe itself.

ICAO accepted the invitation and appointed a preparatory committee to study and recommend general subjects suitable for discussion 339).

As a result the Conference on Co-ordination of Air Transport in Europe (C.A.T.E.) met in Strasbourg in April 1954. Nineteen members of ICAO, one non-member 340), and thirteen international organisations were represented.

The Conference did not have the result which had been expected. Its merit, however, was that it gave official expression to the general feeling that something ought to be done. Most representatives felt that it was still impossible to reach a multilateral agreement on scheduled air transport, but in so far as the interest of scheduled services would not be affected, something could be done on non-scheduled transport. As a principle for an agreement on non-scheduled services it was accepted that further provisions should be added to art. 5 of the Chicago Convention, such as to establish that for non-scheduled flights of aircraft registered in member States no prior permission would be demanded, if these flights were performed as taxi flights or as flights for humanitarian reasons or in such other way as to not affect scheduled services. For all other classes of

operations prior permission might be required. ICAO was requested to prepare an appropriate draft agreement of a very much narrower scope than originally aimed at 341).

Several other, minor, recommendations 342) were submitted to the conference. As the adoption of many of them would require follow-up action by some duly authorised and competent body operating in close relation with ICAO, the meeting proposed the establishment of a permanent European organisation of high-level aviation authorities to implement its recommendations and to carry out the work it had initiated. It was agreed that the secretariat of that organisation, at least at the outset, would be serviced by ICAO 343).

ECAC's objectives should be:

- (a) to continue the work of this Conference, as set forth in its agenda and the records of its proceedings;
- (b) generally to review the development of intra-European air transport with the object of promoting the co-operation, the better utilisation, and the orderly development of such air transport;
- (c) to consider any special problem that may arise in this field.

This recommendation defining the proposed organisation was ultimately adopted as its constitution 344). With the exception of the Scandinavian States which feared that the organisation might become "too large" and for this reason abstained, there was a general acceptance of the proposals. The airlines were not included in the organisation. They were encouraged to undertake co-operative studies on the same or similar subjects themselves

and in this respect a special reference was made to the Air Research Bureau (ARB) 345). Action on a request by ARB to be given a more official status for co-operation with the organisation was deferred. The organisation was called: the European Civil Aviation Conference.

ECAC is a regional organisation but not one fitting in the international picture of Chapter XVI 346) of the Chicago Convention 347). It is in no respect subordinate to ICAO, but wants to maintain a close co-operation with this world organisation. Part of its expenses are covered by ICAO 348).

LEGAL STATUS.

At ECAC's first session the delegates started to occupy themselves with the constitution and status of the Conference. The adoption of a statute and internal regulations met with little difficulty 349). It is, however, difficult to define the international status of ECAC 350).

Art. 77 of the Chicago Convention provides for the establishment of operating organisations on a regional or international basis, but although there are no provisions in the Convention which prevent States from establishing organisations which are more or less duplicating its aim on a regional basis, it is clear from the text of the Convention that such organisations are certainly not foreseen. It is conceivable that one would be inclined to call the European problems disputes and by doing so the establishment of a regional organisation could be regarded as an implementation of articles 84 and 85 of the Convention.

In my opinion one could do so with regard to special questions, e.g. with regard to the interpretation of art. 5. This point of view could hardly be maintained, however, with regard to other questions, such as e.g. the implementation of Annex 9 351).
I therefore take the view that ECAC is a civil aviation organisation established not in compliance with the international rules set forth at Chicago but rather as a result of the failure of the Chicago Conference to establish world order in aviation.
ECAC may be compared with an institution like the OEEC. Legally OEEC is not a regional agency or entity of the U.N.O. Its main role, (which has varied according to different political factors and circumstances) has been to provide for a meeting place for delegates of the European States where they could discuss their economic problems with a view to facilitating agreements between the States.
ECAC's position is very similar. Although its origins and functions are due to an understanding of two international organisations (ICAO and the Council of Europe) to neither of which it has strictly defined relations, it does not constitute an organisation according to the general definitions of international law itself. ICAO has accepted the invitation of the Council of Europe 352) to patronize an intergovernmental conference of the European States and to provide for its secretariat. That conference has obtained a permanent character by creating ECAC. This organism could have been set up as a dependant organisation of ICAO in accordance with the provisions of the constitution of

the latter (art. 55 of the Chicago Convention). It is, however, not such an organisation, since some European States are not members of it, although there is a certain affiliation defined by the simultaneous adoption of certain resolutions by ICAO and ECAC 353).

The legal status of ECAC therefore has to be defined separately from ICAO and to be determined by the generally accepted rules of international organisations set up by the legal instrument of a treaty or convention. ECAC's constitution, set up by its first resolution 354) does not provide for characteristics from which its independent legal personality under international law could be deduced nor does it give any indication of the diplomatic status of the delegates to its meetings.

Besides a relationship with ICAO the organisation also maintains close relations with the Council of Europe to which it sends regular reports.

AGREEMENT ON NON-SCHEDULED TRAFFIC.

Next to the agreement concerning the organisation's constitution and its working methods the Conference at its first session adopted a draft for a multilateral agreement on non-scheduled traffic submitted to it according to the resolution adopted at the CATE meeting of the year before 355).

The conference had little difficulty in establishing the underlying principle that scheduled and non-scheduled operations have independent but complementary fields of activity. The criterion to be applied in removing the words "to impose such regulations,

conditions or limitations as it (the State) may consider desirable" from the text of art. 5 of the Chicago Convention, might be properly the extent to which the non-scheduled flight harms in any way the operations of the scheduled services performed by the national carrier(s) 356).

The draft discerned three categories of non-scheduled flights:

-(a) flights which by their nature do not harm scheduled transport, such as humanitarian flights; emergency flights; isolated flights, by which is meant flights which may take place with a certain regularity but not more often than once per month; taxi-flights, provided that they are performed with aircraft which have a capacity for less than six passengers; and charter flights on which the entire capacity is let to one charterer without resale of space;

-(b) Flights which do not harm scheduled operations although they could do so, such as all-freight operations and passenger operations between areas which have no reasonably direct connections by scheduled services;

-(c) other flights which are not performed according to a schedule.

The agreement provides for freedom of operation for the first category of flights, which means that those are allowed in the airspace of the contracting States without prior permission. For the second category the same applies in so far as all-freight operations or the transport of passengers between regions which have no reasonably direct scheduled air connections are concerned. The State concerned, however, is free to abandon these

activities if it deems that the respective flight(s) do(es) any harm to its scheduled services. With respect to the third category the Member States undertake no obligations respecting the granting of permission.

The agreement 357) is certainly not a sensational one. It is very limited in scope, as it provides for little more than a confirmation of the existing practices. It provides for the systematic grant of transit and commercial rights for certain categories of flights operated at low frequencies. The other categories covered, namely pure freight operations and the transport of passengers between regions not at present adequately served, might be of greater interest. On these points however, the agreement is hedged around with such precautions that the rights derived from them are in fact rather ambiguous 358). For the first category of flights prior permission is no longer required. Flights of category (b), however, may be prohibited if a State in its own discretion finds that they could harm the scheduled operations of its national airlines. There is no discussion possible on the question of whether there is any real harm involved and whether an area is really adequately served or not. The choice of the word "area" instead of "city" or "country" or a closer definition mentioning a radius of a certain number of miles, leaves the decision still more to the entire discretion of the authorities concerned. The only possibility of appeal against misinterpretation is laid down in art. 4 of the agreement which provides for the settlement of disputes between the contracting States.

Category (c) is of course remembered throughout the prima facie right to operate under art. 5 of the Chicago Convention. The main problem left respecting this category appeared to be the limitation of the information required in applications for prior permission for the performance of any commercial flight not falling under categories (a) and (b). The agreement provides that in cases where States require compliance with regulations, conditions or limitations for non-scheduled flights referred to in the second paragraph of art. 5 of the Chicago Convention, the terms of these regulations, conditions and limitations shall be prescribed by public regulation which should not require more than certain specified information. It further provides that such applications may be made directly to the aviation authorities, thus with avoidance of diplomatic channels 359).
By stipulating so the agreement also establishes that for certain categories of non-scheduled flights there is no freedom, despite art. 5 of the Chicago Convention 360).

As said before, the agreement is not an epoch making step forward to a coelum librum or to a European unity in aviation matters. It is however of great importance if one considers that rights in the field of non-scheduled traffic have gradually decreased since 1944 (Chicago) 361). Moreover this was the first time after Chicago that States sat down together and worked out any grant whatsoever of commercial rights.
From the text of the agreement the conclusion also may be drawn that there will be no such discrimination as to the nationality of the non-scheduled carriers.
This brings us to the difficulty of defining the notion "non-

scheduled traffic 362). Most writers take the view that it is impossible to define "non-scheduled" traffic properly 363). The Council of ICAO has adopted a definition of "scheduled traffic" and has presented that to ICAO members in 1952 364). This definition however has never been accepted and the Conference therefore was not willing to apply it 365). Moreover its acceptance would have meant the drafting of an Agreement on a basis of what was not covered by a quoted definition instead of on what was covered by it. On the other hand it appears from the text of the agreement that a positive point of departure was impossible too 366).

Maybe it would have been possible to use the notion which has become customary in the U.S.A. and according to which the criterion is the frequency of the flights. Following this criterion the C.A.B. 367) has ruled that an air transport service of more than ten flights a month could not be regarded as non-scheduled. Instead, the agreement tries to define each category of its flights "on other than scheduled international air services" by distinguishing them in what Meyer 368) calls Occasional Traffic (Gelegenheitsverkehr), Taxi-traffic (Taxiverkehr) and Tramp Traffic (Trampverkehr). The last description applies to all-freight traffic and the two others to the carriage of persons and goods.

The Conference has wanted to distinguish between several types of non-scheduled traffic without creating any prejudice with respect to scheduled traffic. It has tried to achieve this aim by mentioning various types of flights belonging to the category

of non-scheduled flights according to general understanding. It could however not succeed in covering them all and therefore the agreement contains its third category of non described flights, with respect to which art. 3 prescribes the old treatment, with the understanding that the "conditions, regulations or limitations" will be laid down in published regulations.
The draft convention was opened for signature on April 1956. Fifteen States have signed it 369) of which not all have ratified it.

RECOMMENDATIONS: MULTILATERAL AGREEMENT, FREIGHT FACILITATION.

The Multilateral Agreement on Commercial Rights of Non-scheduled Air Services in Europe has been the main achievement of ECAC sofar. This, however, does not mean that ECAC's work has been finished by that agreement. Also at its first session several other topics already suggested at the CATE Conference of the previous year were discussed. One of these was the proposal for a multilateral agreement on freedom for scheduled services put forward by the S.A.S. States which advocated complete freedom in the European region for a period of five years. This proposal - as has been said before - was rejected mainly on the grounds that adequate economic safeguards were not provided for. It appeared to be clear that such a step should be preceded by various other forms of gradually closer co-operation, if it wishes to have a chance of acceptation 370). The same goes for the United Kingdom proposal based both on multilateralism and bi-

lateralism which favoured the maintenance of the bilateral system of granting air routes but the multilateral abolition of the distinction between the various freedoms in the European bilaterals 371). This doctrine also was rejected but was later discussed again and partly adopted with respect to freight traffic 372). A proposal containing a legal provision for a form of close co-operation between the airlines by permitting them to grant each other the facility to utilise their mutual rights on certain routes: the exchange of routes 373), was put forward by the Netherlands. Such interchange would save material, provide for longer routes and through-services for passengers 374). It was strongly supported by I.T.A. 375). The States however showed no inclination to adopt this proposition based on United States' practice 376).

The Secretariat of ICAO had prepared a noteworthy working paper attempting to solve the European difficulties by advocating the release of European scheduled air transport from the complete restriction imposed by art. 6 of the Chicago Convention and the establishment of the regime that applies to the performance of non-scheduled services according to art. 5. According to this proposal each member State would be given full legal operation rights in the area of the other member States under certain conditions. One of these conditions was that they should recognize the right of the States concerned to impose the "conditions, regulations and limitations" of art. 5. An other condition was the recognition of the right of every State to re-

fuse the unrestricted grant of the fifth freedom so far as passenger traffic was concerned, whereas the routes were to be determined by negotiations between the aviation authorities. These conditions however would not be prohibitive since they were accompanied by provisions for non-discrimination between airlines, IATA fixed fares, and Bermuda capacity provisions. As the most important difficulties were dealt with in this proposal and as an attempt was made to put them in their right perspectives, this paper seemed to be a realistic basis for further discussion. It has, however, not been used.

Various other proposals for a multilateral solution foundered on statements criticising the usefulness of a multilateral and the danger involved of less liberalisation than exists under the bilateral system. References were made to the International Air Transport Agreement 377) and the fact that it became a dead letter, and to the negotiations at the Chicago Conference in general.

An other CATE recommendation favoured the liberalisation of freight traffic. It advocated the abolition of freedom distinctions in European freight transport and the favourable consideration of applications for indirect freight routes. The majority of the representatives present at Strasbourg in 1954 were in favour of freight freedoms for a trial period of five years, according to a system whereby permission, if granted, would be granted unconditionally.

In the field of freight carriage a great expansion is still possible 378) and to impose restrictions in this field would be prudence carried too far 379). Even to-day freight transport by air is increasing and companies which suffered considerable over-all losses reported advances in the carriage of freight 380). The potentials of air freight never have been fully exploited and one of the reasons has been that its regime, although more liberally applied, was in fact the same as that concerning the transport of passengers.

Freight traffic is to be divided into two categories, (a) all freight services and (b) freight carriage on passenger services. The latter which accounts for three quarters of the total freight carried in Europe is definitely the most important category 381). The CATE recommendation, which dealt with all-freight transport only met with several objections. It nevertheless was carried by the votes of the majority of delegates 382).

At the 1955 ECAC session the working paper on this subject which was discussed, went further than the CATE recommendation by covering mixed freight traffic as well as all-freight traffic. It also dealt with the question of freight picked up at a point outside Europe with a European destination and vice versa and pointed out the desirability of including this transport in the liberal policy. With the French and Portuguese representatives as chief protagonists, there was a great deal of opposition to the proposal. Nevertheless it appeared that in 1957 thirteen states had notified their intention to implement the recommendation. Four had not yet decided upon it and two notified their inability to comply. The recommendation for the grant of permits

for indirect routes had at that time definitely been accepted by nine States 383).

Discussions on multilateral agreements for both scheduled and non-scheduled traffic formed the staple diet of the first ECAC session. ECAC's second session was held in Madrid, two years later. Much of the reasoning of the first session was repeated with respect to freight and scheduled traffic. The main topic however of this session was facilitation. A result of it was the creation of a European FAL-committee 384), charged with the adaptation of immigration, customs, sanitation, health, and money exchange rules. Other topics were standardisation of aircraft and recognition of certificates of airworthiness and flight appliances. The meeting also adopted a recommendation that States should adopt a liberal attitude towards intra-European air traffic, i.e. without stops outside the European area, and that they should facilitate the establishment and operation of other intra-European air services unless it is considered that they unduly affect the national carriers or do not serve the interests of the users. The last sentence especially is of importance, in my opinion, as usually the emphasis seemed to be laid on the interests of the airlines rather than on the people whom they are expected to serve. Besides a little ideological value this recommendation however has little importance and certainly has no legal importance 385).

COCOLI.

In its 1959 session at Strasbourg the main topics of

1954 and 1955 were entrusted to a newly created permanent body: COCOLI (Committee on Co-ordination and Liberalisation). COCOLI was formed in order to perform the work which the Conference itself apparently was not able to: the free and frank examination by the Governments of the practical problems of co-operation and liberalisation on a continuing and formal basis. COCOLI met for the first time in November 1959 and discussed recommendations on hire, charter, exchange of aircraft, tariffs, freight liberalisation, traffic rights, the integration of aircraft manufacturing, airport improvements, jet aircraft and tourist traffic improvements (with respect to the growing popularity of the introduced all-in tours).

At the 1955 Conference the general opinion had been expressed that air mail should be carried by the most rapid services, regardless of traffic rights. A consequent relevant Dutch proposal for a recommendation at the 1957 Conference was accepted 386). The Netherlands delegate based his proposal on the difference between mail and other freight. Whereas with respect to the latter the consignor can choose himself the company he wants to carry his goods, the sender of a letter does not have any control over its manner of transport. An other difference, in my opinion, is the character of postal services as a public service which in most countries is a non-profit organisation partly paid or subsidised by public funds. It would constitute a taking with one hand what had been given by the other, if States for reasons of protectionism subjected air mail to considerable delay.

At first the Netherlands proposal met with strong objections, especially from the French delegate who foresaw the possibility

of unhealthy competition from airlines which had no rights at all. The Portuguese representative took a similar point of view 387). Two years later however it was disclosed that out of the thirteen states which reported on the recommendation only one was unable to implement it.

The Committee's discussions on the liberalisation topic were based on a British suggestion to approach the problem by practical co-operation and by organizing the market. As was pointed out this could lead to greater efficiency as well as better services to the public. All kinds of arrangements from the co-operation meant by art. 77 of the Chicago Convention 388) to much simpler forms could be applied to achieve such an organisation. After ample discussion, however, the subject was postponed sine die.

Several other proposals on this subject were submitted to the meeting by the president of ECAC. Noteworthy is his proposal for an adoption of the form of the "Code of liberalisation and Exchange" of the OEEC for air transport 389).

A draft was prepared by ICAO's secretariat and presented to the 1960 meeting. It provided consequently for a progressive liberalisation on the basis of a co-operative operation.

OTHER ECAC ACTIVITIES.

Noteworthy also are ECAC's discussions on the subject of "Interchangeability of aircraft", a problem of actual interest also taken up and defined by the CATE Conference 390). In-

terchange of aircraft meets with some difficulties arising from the Chicago Convention. Especially from art. 12 dealing with nationality and registration of aircraft and from art. 33 dealing with the recognition of crew members licenses and certificates of airworthiness. Furthermore the Warsaw and Rome (1933 and 1952) Conventions raise questions relating to the damage caused to passengers and goods carried in and damage caused to third persons by such aircraft 391). The consideration that a development of interchange agreements could be facilitated by a study of the legal problems associated with this type of co-operation, resulted in a recommendation to the Council of ICAO to do so 392). On its first session however, ECAC examined the question only from the point of view of public law, i.e. the questions of recognition of certificates, licenses and registrations, and the question of the admittance of the aircraft concerned to the respective territories.

It was generally agreed that interchange agreements could only be concluded with the express approval of the States concerned. The opinion that the approval of the agreement by a State which was merely overflown, or whose airports were only used for non-traffic stops, should not be required, was not generally accepted. Respecting the matter of the transfer of the functions of the State of registry 393) it was decided that such functions indeed may be transferred, but that such a transfer would not be binding on third States. However, it was agreed that member States should facilitate interchange agreements 394) and that ICAO should study the legal questions arising from the transfer of

functions. As far as the validation of crew members' licenses was concerned, it was felt that it would be difficult to achieve a multilateral agreement at that time as this would need a previous unification of licensing standards. The meeting further considered that the recognition of radio licenses would create minor problems as all States were members of the Atlantic City Telecommunication Convention 395) and licenses issued by that organisation would be valid in all countries.

It was decided that a draft would be prepared by the Secretariat for a multilateral agreement on the technical aspects of interchange taking into account the many recommendations. At its third session however, the delegates to ECAC, after having examined this draft and one for a standard form for a multilateral agreement on interchange prepared by the S.A.S. countries, decided that the conclusion of such an agreement was not justified. In the meantime it appeared that most of the States had implemented ECAC's recommendations 396).

The CATE conference of 1954 had also dealt with helicopter services which at that time had been recently started by one European airline (Sabena) as a supplement of its normal services. Although there was not yet a possibility of a general European helicopter network, CATE took the view that a consideration and regulation of this type of service might be valuable with regard to the future. It was suggested that the CATE members and ECAC should examine the means to facilitate further development.

Besides the technical side of this type of transport and air-

craft, ECAC considered the necessity of standardizing helicopter and heliport regulations within the framework of the Chicago Convention.

The Conference was inclined to treat helicopter services in exactly the same way as services with other aircraft, deeming it merely one of a variety of types of aircraft engaged in general air transport. However, it was generally agreed that something should be done in the field of facilitation since helicopter services which are performed over short stages only, are comparatively more vulnerable to airport delays than the normal type of air transport. A proposal of the secretariat to grant full traffic rights to aircraft with a speed limit of less than 150 miles and a range of less than 300 miles resulted in a mere statement that it might be possible for States to exercise a liberal policy and to introduce a certain amount of elasticity into the operating rights accorded to helicopter services.

Today SABENA is still the only European airline operating an international scheduled helicopter network. Probably a second airline (B.E.A.) will establish European international routes in the near future.

As soon as a type of helicopter with a capacity of 60 to 70 seats and a reasonably economic operating possibility is available on the market, however, this type of aircraft may have great possibilities for the European network with its large amount of short-haul traffic 397).

CONCLUSION.

Reviewing ECAC and its results it may be stated that its creation has established a useful meeting place for the European governments to discuss their aviation interests.
One formal agreement has been reached, the Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe.
It further should be credited with stimulating the general understanding for the necessity of a more liberal policy and a greater degree of co-operation in order to provide for more economic load factors, greater density of the European network, and a less ruinous operation.
It also must be stated that after the first session at Strasbourg, the principal questions regarded as secondary at Strasbourg, were moved to first place at the Madrid Conference.
Most of ECAC's achievements have been in the field of technical co-operation and little preparedness has been shown to give in on the economic side of aviation 398).
It seems clear that ECAC cannot by its own efforts change the rules of the game, especially not if one keeps in mind the difficulty of the close relations between European traffic and the intercontinental services originating in Europe. It can do much in such matters as facilitation and in stimulating co-operation but the attitudes of governments are most important.

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333) One of the problems of the near future was the rehabilitation of Germany, whose potential aviation resources were generally considered as a serious matter in European competition.

334) Two commissions of the Assembly had discussed the aviation problems of Europe: the Commission Spéciale des Transports to which the Bonnefous plan had been submitted and the Commission des Questions Economiques, where the Van de Kieft plan was developed. (For Bonnefous, Van de Kieft and Sforza plans, see Chapter VI)

335) Each of the projects was restricted to general principles, without regard to the problems of applying them in practice, which well may have contributed to the attitude of reservation of most delegates.

336) The Council of Europe was established on May 5th, 1949, by ten European States: United Kingdom, France, Belgium, Netherlands, Luxembourg, Italy, Ireland, Norway, Sweden, and Denmark. Later also Germany, Greece, Turkey, Iceland and Austria became members. The organisation's main bodies are the Ministers' Committee and the Consultative Assembly which is formed by members of the national parliaments who by their parliaments are chosen to take part in the European Assembly. The Assembly has no decisive power, Its discussions and recommendations have an indirect influence on the national policies however.

337) See JALC (1961/1962) Vol. 28, p. 71 - "ECAC standard clauses for bilateral agreements dealing with commercial rights of Scheduled services".

338) See supra 336.

339) ICAO doc. 7447 C/868 (Resolution of the Council of ICAO, Dec. 16th, 1953).

340) Members are: Austria, Belgium, Denmark, Finland, France, Germany (West), Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom. The non-member present was Yugoslavia.

341) Cf. Interavia 1957 No. 10, p. 1058 - M.C. Lemoine "European Common Market and Air Transport".

342) Other Strasbourg CATE recommendations concerned: mutual assistance, co-operation between air and ground services (facilitation), harmonisation of schedules, co-operation to resolve the problems of weak density routes, formation of pools, mutual representation, handling, interline agreements, and agreements conforming to arts. 77, 78, 79 of the Chicago Convention.

343) Cf. supra 337.

344) See ICAO doc. 7575 CATE/1 p. 36.

345) See supra p. 81 .

346) Chapter XVI deals with Joint Operation Organisations and Pooled Services.

347) Reuter likens ECAC to the European Transport Commission (Brussels 1953) which according to him is an institute of a similar nature. P. Reuter "Cours d'organisations européennes" (Paris - 1959/60).

348) The advocate of a coelum librum and the possibility of free competition in world air transport D. Goedhuis comments on this ICAO - ECAC co-operation: "Rightly ICAO was chosen! Regionalism should never lead to the formation of blocks of closed sky".

ICAO's Assembly (at its meeting in Caracas) agreed to provide secretarial services to the new organisation, including such facilities as maintenance of records and services for meetings, studies, etc. Its financial contribution to ECAC consists of payments of the salaries of the staff members required for the above mentioned work in its regional Paris office and payment of stationery and further items necessary for documentation etc.

349) ECAC's executive body is a steering organ, "the Bureau", made up of the president and 5 vice-presidents.

350) In the inaugural session at Strasbourg 1955 three alternatives were discussed: a. a completely independent agency; b. a body subordinated to ICAO as anticipated in art. 55(a) of the Chicago Convention; or c. a body of intermediate status as contemplated in the CATE recommendation (no. 28). The majority of the delegates favoured a status as mentioned under c.

351) Annex 9 to the Chicago Convention deals with the facilitation of air transport by establishing favourable regulations as to customs, immigration, health, and hygienic practices; changeability of money, designation of airports, and in general any kind of regulation by which the delay at airports can be minimized.

352) See supra p. 139 .

353) Cf. Reuter supra 347.

354) See ICAO doc. 7676 ECAC/1.

355) The British delegate at the conference stressed the danger-

ous consequences which refusals of permission for non-scheduled flights would have on the position of air transport in its competition with surface transport (CATE - WP/60).

356) Cf. JALC (1956) Vol. 23, p. 185 - E.M. Weld "Some notes on the Multilateral Agreement on Commercial Rights on Non-Scheduled Air Services in Europe".

357) See ICAO doc. 7695.

358) Cf. Lemoine, supra 341.

359) Art. 3 (b) of the Agreement. Meyer seems quite satisfied by this solution when he writes "It seems the duty ... of aviation authorities to see that non-scheduled carriers do not take away the traffic from the scheduled carriers, but that otherwise there should be as much freedom as possible". (Z.L.W. (1954) Band 3, p. 223 seq. - A.Meyer "Der internationale Luftlinienverkehr und der internationale entgeltliche Gelegenheitsverkehr nach geltendem Recht und de lege ferenda under besonderer Berücksichtigung einer Koördinierung des Europäischen Luftverkehrs".) The term "as much freedom as possible", however, seems to me as ambiguous as the text of the agreement itself.

360) Cf. Z.L.R. (1959) Band 8, p. 127 seq. - O.Riese "Das mehrseitige Abkommen über gewerbliche Rechte im nichtplanmässigen Luftverkehr in Europa". Riese apparently also takes the view that ECAC is not to be regarded as an agency of ICAO since he gives the opinion that the German language in a European Convention like this one, should have the same rights as English, French and Spanish.

361) Cf. R.F.D.A. (1954) Vol. 8, p. 345 seq. - D. Haguenau "Les formes de la collaboration internationale dans le transport aérien".

362) Riese - supra 360 - seems to take the view that every State has the freedom to decide what flights are non-scheduled.

363) Cf. O. Riese "Luftrecht" (Stuttgart - 1949) pp. 164 and 167; and R.F.D.A. (1948) Vol. 2, pp. 11 and 19 - "Une note de travail de l'Institut Français du Transport Aérien - Le problème de l'organisation nationale du transport à la demande".

364) See ICAO doc. 7278 C/841.

365) An attitude which was strongly objected to by the British delegate.

366) See art. 1 of the Agreement.

367) The United States' C(ivil) A(eronautics) B(oard).

368) See Meyer supra 359.

369) Autria, Belgium, Netherlands, Luxembourg, Denmark, France, Iceland, Ireland, Italy, Norway, Spain, Sweden, Switzerland, Turkey, (West) Germany.

370) Cf. Haguenau, supra 361.

371) H. Bouché "Comment peut-on se proposer d'agir sur l'efficacité du transport aérien en Europe" - Studi in onore di Antonio Ambrosini (Harvard Law Library - 1957).

372) See infra pp. 163/164 .

373) "L'échange de routes c'est l'exploitation pour coopération de compagnies de nationalités différentes, d'un service aller et retour ou circulaire, sur une route ou un ensemble des routes intéressante des territoires d'au moins trois Etats, chacun des compagnies étant autorisée par les autorités officielles compétentes à exercer les droits commerciaux afférents à la route ou à l'ensemble des routes" (ICAO doc. 7575 CATE/1 p. 5.);
or
"Un effort de mise en commun d'un réseau des routes pour l'exploitation coordonnée des services internationaux selon toutes les combinaisons justifiées par les besoins de traffic, d'amélioration du service public et des exigences économiques des exploitations particulières des états participients volontairement au système sur le réseau considéré" (I.T.A. Note de travail no. 257).

374) Cf. ICAO Bulletin 1954 April, p. 4.

375) See I.T.A. Note de Travail no. 257.

376) It was felt that acceptance of such a proposal would endanger the rights of the States to design their "Chosen instruments".

377) One of the two agreements concluded at the time of the Chicago Convention in 1944. Besides a few European States (of which the Netherlands and Sweden were the most important for aviation) and other States with minor aviation interests, the U.S.A. was originally a member of this agreement. Its withdrawal in 1946 was in fact the end of the agreement.

378) Interavia 1959 No. 2, p. 150 - "European air freight without illusions", gives the following data for the A.R.B. airlines (Aer Lingus, Air France, KLM, Alitalia, Lufthansa, Finnair, BEA, Iberia, Icelandair, Sabena, SAS, Swissair).

The average increase of freight transport from 1947 - 1957 was 21%; the increase of freight transport from 1937 - 1947 was 34%, from 1947 - 1953 25% and from 1953 - 1957 13%. (Mail is excluded.)

379) Cf. Interavia 1955 No. 10, p. 753 - L.H. Slotemaker "Thoughts on Strasbourg".

380) In the period March 1961 - March 1962 the increase of freight ton/km of KLM was 50%, mainly due to the carriage of insecticides in long-haul traffic - According to N.R.C. (Nieuwe Rotterdamsche Courant) Overzeese Weekeditie May 29th, 1962.

381) See ICAO doc. 7799 ECAC/2 - 2 WP/45 and ICAO doc 7977 ECAC/3 - 2 WP/42,46,49.

382) France, Italy and Norway abstained from voting.

383) In 1961 ECAC adopted a recommendation to extend the five year period (finished in 1959) for another five years. See ICAO doc. 8185 ECAC/4 -2.

384) Facilitation Committee. ICAO Annex 9 recommends the creation of FAL Committees in every State.

385) Cf. JALC (1957) Vol. 24, p. 273 - D.Goedhuis "The role of air transport in European integration".

386) The Netherlands together with the Scandinavian countries had submitted a similar proposal to the U.P.U. (Universal Postal Union) at Ottawa in 1957, where this was considered a matter for ICAO and therefore had been withdrawn.

387) See ICAO doc. 7799 ECAC 2 WP.

388) Art. 77 deals with organisations for joint operations, which are permitted under the convention.

389) Organisation for European Economic Co-operation.

390) "Interchangeability of aircraft refers to the ability of an airline operating internationally, under government agreement and authorisation, to use an aircraft belonging to a foreign airline and registered in a foreign State, with or without the aircraft's crew.

391) See Chapter V.

392) The first problem found since regulation by the Hague Protocol to the Warsaw Convention (1956) and the Guadalajara Convention (Mexico 1961). The amended Rome Convention (1952)

defines more clearly than the Rome Convention of 1933 the person liable for damage to third parties on the ground. It has not been considered necessary to draft a more specific regulation.

393) Such as issue of airworthiness certificates, renewal of licenses, regular inspections, etc.

394) Cf. ICAO doc. 7676 ECAC/1.

395) The Atlantic City Telecommunication Convention is worldwide adhered to. It regulates international telecommunication matters, such as frequencies, transmitting licensing, etc.

396) See ICAO doc. 7676 ECAC/1.

397) Cf. Interavia 1962 No. 4, p. 412 - Lord Douglas of Kirtleside "European Air Transport in the 1960's".

398) Cf. Haguenau supra 361.

CHAPTER VIII - SCANDINAVIAN AIRLINES SYSTEM - S.A.S.

Much has been written about the most progressive and audacious form of international co-operation in air transport by the Scandinavian countries Sweden, Norway and Denmark which created a common "chosen instrument", SAS 399). SAS was born out of the idea expressed by Per Kampmann, one of its creators: "One small country is nothing in the air. Three small countries together have some significance 400).

CONCEPTION CONSORTIUM.

SAS is a consortium of three airlines, the Swedish SILA (Swedish Intercontinental Airlines), the Danish DDL (Det Danske Luftfartsselskab) and the Norwegian DNL (Det Norske Luftfartsselskap).
According to Earl Jowitt's Dictionary of English Law, a'consortium' is "the right of one spouse to the company, assistance, affection and fellowship of the other". Stroud 401) defines "consort' as suggesting "a more or less close personal relationship, at least some degree of familiarity with persons or attraction from or enjoyment of some feature in common that results in a tendency towards companionship". Quemner's French legal dictionary 402) calls it "mariage légitime et devoir d'aide réciproque qui en découle". In French law the term seems also to be used to mean a consortium of bankers or banks 403), and in the Netherlands several investment consortia exist.
In fact the SAS agreement has little to do with a contract of

marriage nor does it have any resemblance to an association of bankers. The SAS consortium therefore may be considered as an agreement sui generis, not elaborated in a code of law or in jurisprudence 404). It may be likened to the French "société simple", the German "offene Gesellschaft" or the Dutch "maatschap" or "vennootschap onder firma". Three partners have put something in common and present themselves to the public under a common name whereas they divide their liability, revenues and losses between themselves according to a fixed allocation. The consortium has no legal personality of its own 405).

OSAS, ESAS.

The first negotiations on Scandinavian co-operation of which the consortium was the result, were held as early as 1938. At that time they were aimed at the joint operation of a transatlantic route to be operated under terms of co-operation with PAA. The negotiations were delayed (not ended) by the war and in 1943 representatives of the three national companies signed a contract with the Douglas Aircraft industry for the supply and delivery of a number of DC4 aircraft to be used on the route from Scandinavia to the U.S.A. This occurred despite the war 406) and despite the fact that the final agreement on atlantic traffic between the companies themselves had not yet been signed. As a matter of fact that agreement was only reached in 1946, due to difficulties caused by the economic situation in Denmark and especially Norway after the war which appeared to be much worse than the contracting parties had expected 407).

The first joint operated services took off for New York in September 1946 under the name of OSAS (Overseas Scandinavian Airlines System) in which SILA (3/7) and DDL and DNL (each 2/7) all participated 408).

In 1948 another agreement was signed, this time on common European operations, under the name ESAS (European Scandinavian Airlines System) between DDL, DNL and the Swedish European airline ABA (Aktiebolaget Aerotransport).

The OSAS operations worked out reasonably well. Those of ESAS were less satisfactory, however. The ESAS agreement provided for a pooling of all income on the basis of the ton/kilometre performance of each carrier regardless of the number of passengers carried, whereas all OSAS activity was carried out under a joint account. The ESAS agreement further provided for a division of the maintenance work between the three countries, in which the maintenance of the common DC3 aircraft was allocated to Norway taking into account the fact that this country could not dispose of sufficient equipment to deal with the more complicated DC4 and DC6 aircraft. This part of the agreement especially worked out badly as the Swedish, not content with the Norwegian standards 409), kept their aircraft in their own maintenance shops and the Danish too did not send them to Norway as agreed. Moreover the Norwegians were not in a position to keep up with their partners who because of their better equipment (Norway's fleet at that time consisted mainly of DC3 aircraft) were able to service longer routes and at higher frequencies while the losses suffered on these routes were nevertheless on the common

account. In addition there were difficulties with flights to Greenland and the Faroe islands which were considered by Denmark and Norway as domestic.
In short, the short-coming of ESAS was that it went beyond simple pooling, as often practiced by the European airlines, yet attempted to preserve the operating entities of the parties 410). Its experience indicated that this set-up tends to be unworkable. As a result the agreement was denounced by the Norwegians little more than a year after its entry into force. By that time negotiations on a better and financially sounder organisation were already under way.

THE CURRENT AGREEMENT.

By that time also, the part played by the respective governments had increased since the co-operation which had begun as a primarily private venture 411), had gradually become a matter of financial interest to the States. The new project which provided for a coverage of all ESAS and OSAS activities, involved inter alia the expenditure of a considerable amount of money which mostly had to be supplied by the States. For this reason the matter became a concern of the parliaments.
The new agreement was concluded early in 1951, but with retroactive effect from the date of effectiveness of the denunciation of the ESAS agreement. It was originally fixed to last for 25 years and later extended to 35 years, that is until ultimo September 1985 412). To avoid difficulties of interpretation in the three different languages, it was decided that the English

text would be decisive. Parties were ABA, DDL, and DNL 413). which again participated in the ratio of 3 : 2 : 2 414).
A clause in the agreement (art. 1 part. 3) forbids the parties to carry or take interest in any activity of the kind carried on by the consortium or to support such activities, directly or indirectly.
That means that all traffic, even domestic and cabotage traffic is involved. The problems of maintenance are dealt with in the provision that business activities shall be allocated reasonably between the three countries (art. 3).
Against third parties the companies are jointly and severally liable 415). This facilitates possible claims from such parties and solves the problem of liability under the Warsaw and Rome Conventions.
All assets, except real property shall be deemed the common property of the parties (articles 4 and 5). This includes physical property as well as rights. Real property shall be retained by the company concerned, but shall be placed at the disposal of the consortium and be considered as leased to the consortium.
This provision of property contribution raised difficulties with respect to the aircraft. Mainly for reasons of security each of the States wanted to have part of the aircraft registered in their own registry offices and therefore a solution had to be found in order to cope with this desire. As moreover only Sweden allowed registration of foreign owned aircraft in its registers 416), the property of the aircraft had to be allocated to the contracting companies in order to register part of them in each

of the States concerned. A solution could have been found also by amending the respective laws of Denmark and Norway, but the Norwegians particularly, still slightly suspicious, were not inclined to do so.

The agreement therefore contains what Dutoit calls the bizarre stpulation 417) (art. 4) ".... notwithstanding the above mentioned provision regarding the common property, the ownership of each aircraft is retained by the party registered and recorded as owner thereof in accordance with the provisions of articles 4(3) and 6, but all aircraft shall internally be regarded as owned by the Consortium, which shall with regard to third parties, exercise any and all powers appertaining to ownership of aircraft .....". This is a sort of unknown three-dimensional relationship States - Consortium - Third Parties, which nevertheless does not appear to raise practical difficulties. Thus the aircraft are registered in ABA's name in Sweden, in DDL's name in Denmark and in DNL's name in Norway 418), special care being taken that each of the countries' registers exactly contains the number and value of aircraft according to the quota to which its airline is entitled in the consortium (3:2:2) 419).

The consortium is directed by a Board of 18 Directors, appointed by governments and airlines, six appointees from each party 420). The offices of president and first and second vice-presidents alternate between the parties. The president and vice-president from the Executive Committee, together with three other members of the Board. The president's vote prevails when there is an equal number of votes.

Using the power, given to it by the agreement (art.4) to choose the location of the executive headquarters, the Board has established the consortium's headoffice in Stockholm. There are besides regional offices in Oslo and Copenhagen, but those seem to confine their main activities to such matters as building, real estate and national routes 421).

Whereas the Board decides on all matters of policy and financial affaire, the direct management of the consortium's operations is in the hands of a general manager who is not a member of the Board. The other personnel, mainly Scandinavians, are recruited in such a manner as to achieve a reasonable proportion between the three countries, and, especially so far as flight personnel are concerned, the 3:2:2 rule is applied as strictly as possible. A similar solution has been sought for the other employment creating activities resulting in separate maintenance bases in Stockholm (DC8), Oslo (Convair) and Copenhagen (Caravelle).

SAS AND PUBLIC AIR LAW.

This solution of the registration problem likewise solved the problem put forward by art. 20 of the Chicago Convention according to which every aircraft engaged in international navigation has to bear its appropriate nationality and registration marks 422). In addition to the national marks SAS aircraft carry the SAS emblem.

The stipulations of articles 30, 31 and 32 of the Chicago Convention were also conformed to in this way. They deal with radio and

airworthiness certificates and personnel licenses.
As a rule the airworthiness certificates of SAS aircraft are issued by the competent au-thority of the State of registry, in full compliance, with the rules set forth by these articles. In a 1951 agreement, however, the three Governments provided for a legal basis for the issuance of inspection certificates by the authorities of the States in whose territories the maintenance shops for each type of aircraft are established. Thus Danish DC8 aircraft are inspected by Swedish civil aviation inspectors and Norwegian Caravelles by Danish inspectors etc. 423).
The licenses of flight personnel are issued by the competent authorities of the States of which they are nationals. The three countries, however, recognize each others' licenses and in order to comply with the stipulation of art. 32 (a) of the Chicago Convention 424), certificates of SAS flight personnel are validated for use in aircraft belonging to another (SAS) State by a so-called insertion card declaring the license to which it has been attached to be of equal validity in all three States 425).

Another legal obstacle to be overcome was the fact that the national laws stipulated that air transport concessions for cabotage transport could only be granted to national air transport companies. Because SAS could not be regarded as a national company, amendments in the laws of the three countries had to be made, providing for stipulations according to which the national airline to which a concession had been granted would have the freedom to delegate the exercise of its acquired rights and

the fulfilment of its duties to SAS 426). On the other hand each of the States has the right to require that the national company shall fly the domestic routes as deemed necessary by the State concerned. The SAS agreement fits in with this situation by providing that each of the three companies on a request by the government concerned can demand that the consortium shall perform such flights as may be required, under certain conditions, e.g. appropriate remuneration by the State concerned.

Although SAS may be classified as a joint operation organisation within the meaning of art. 77 of the Chicago Convention 427) and thus "subject to all the provisions of the Convention", this does not mean that traffic rights granted to one of the SAS companies automatically could be exercised by the consortium. A bilateral agreement concluded by one of the three States with a third State will in principle contain the same provisions concerning "chosen instruments" which only can be companies owned by nationals of the choosing State, as are usual in most of the post-1950 bilaterals. In order to acquire operating rights for SAS it should therefore be necessary for each of the three States to negotiate an identical bilateral agreement with the third State concerned. In order to avoid such a complex and cumbersome method, a simplified practice has been established by the use of the so-called "SAS clause". One of the three States negotiates a bilateral agreement with the third State whose third, fourth or fifth freedoms are sought, and in the agreement a clause is inserted naming the national company of

the contracting (Scandinavian) State as the chosen instrument of that State but holding the rights concerned in this capacity as a constituent of, and agent of the consortium.
Other States have no obligation whatsoever, to accept such a clause, however 428). In cases of non-acceptance, three separate agreements have to be concluded. Another possibility which pre - sented itself in the SAS practice, is that a third party is prepared to negotiate on an agreement with one of the three, but is not prepared to grant the traffic rights concerned to both, or one of the other two. In these cases, which are very few, SAS can only service the route concerned by flying it with the aircraft and crew of the nationality of the contracting Scandi- navian State. It goes without saying that if many third States were to show such an unwillingness to contract with the SAS States, either by application of the SAS clause or by the nego- tiation of agreement with each of the three States, SAS co-oper- ation in its current form would be rather difficult.

However, the statement of Per Kampmann 429) has been proved correct. The fact that the three governments are acting jointly in these matters has increased their bargaining position in the world of aviation. Negotiation with a background of the three most important northern European traffic centers located in an area with a population of fourteen to fifteen million provides for more opportunities than the possibility of having only one major traffic centre and three and a half to at most seven million people to offer 430).

THE ROLE OF THE GOVERNMENTS.

A succesful consortium of this nature demanded close co-operation notonly between the airlines, but also between the three governments concerned. In the first place these governments are financially involved and thus next to their co-operation of a private and public legal nature 431) a certain unification in the field of legislation appeared to be necessary. It is hardly conceivable for instance, how the consortium could operate "smoothly" in the Scandinavian domestic area if one or two of the countries only had adopted the Warsaw Convention or an other major international law of the air and the other(s) would not. SAS passengers or shippers of goods from Stockholm to Oslo or Copenhagen would be deprived of the certainty as to which law applied to their particular flight, this being conditional upon the question whether their aircraft happened to belong to ABA, DDL or DNL. A similar embarrasment would arise with respect to the legal status of the aircraft and the legal status of the aircraft commander. SAS crews would be required to know their position under Swedish, Danish and Norwegian law and would have to make sure of the nationality of their aircraft and their consequent status every time they entered a SAS aircraft. There would also be the rather complicated problem of drafting uniform conditions of carriage for SAS operations 432).

In this respect, however, the Scandinavian countries already possessed experience. For a long time the Scandinavian countries have fostered close relationships in the field of economics 433). Co-operation in legislation dates from 1876 434) and its result

has been i.a. a uniform Sale of Goods Act. Various other matters have been regulated in a way which is uniform in essence, although not always uniform in design 435). The fact that SAS co-operation requested uniform air legislation therefore did not present any problem which had not been faced before.

Already before the conclusion of the 1951 SAS agreement, committees in the Swedish, Danish and Norwegian Ministries of Communications co-operated in drafting their own regulations for the application of the post-Chicago Convention aviation acts which were to replace their obsolete air legislation passed in the early twenties 436). During these negotiations it was decided that the reasons in favour of regulating the basic stipulations in the field of public air law by an act should predominate and that such a basic legislation should give the administrative authorities the power to regulate the technical details (Frame work legislation) 437).

There have also been talks on establishing a joint Civil Aviation Authority of the three SAS countries but nothing has come of that yet. Other provisions had to be made with respect to customs and taxation in order to prevent SAS property from being subjected to three duties when entering the different countries of the SAS region. A solution has been found by establishing a regime according to which SAS aircraft, parts and other assets are subject to duty only in the first country entered, the revenues being divided between the three.

THE BALANCE OF ADVANTAGES AND DISADVANTAGES.

The SAS system has disadvantages too, although several of the original disadvantages have been coped with. Before the new SAS agreement of 1951 the System in practice consisted of six companies (ESAS, OSAS, ABA, SILA, DDL and DNL) each with their own organisations, administrations and overhead expenses. Much of the work was duplicated and the accountancy system was extremely costly. The pre- 1951 ton/km revenue assessment urged each company to perform as many ton/km as possible whereas on the other hand low costs were to every company's individual advantage.

Currently there are still four companies and although the ton/km assessment has been substituted by an assessment according to which the entire revenue and losses are divided 3:2:2, which leaves less opportunity for practices which are uneconomic, to SAS as a whole, SAS is still paying for national considerations which require the maintenance of regional organisations in each country in case of emergency. Facts that it also has to deal with every task accepted by any of the companies, that the contract had been signed for 35 years, and that the consortium has to co-operate with three Civil Aviation Authorities, tend to render the organisation very heavy 438).

Another difficulty is that the system leaves in fact no place for any real competition. It may not be very likely that any serious competitors will arive on the market in the near future but the experience with the former Norwegian competitor SAFEA 439) which operated international long-haul routes to Africa and

South East Asia should be kept in mind. SAFEA operated a route from Norway through different European and Asian countries to Hong Kong, a route in which SAS originally had not shown interest 440). Due to various circumstances SAFEA was not able to operate more than one service a fortnight which rendered almost negligible its competition with other airlines on the same route. When SAS belatedly showed interest in the route it met with a British refusal on the ground that SAFEA was already the "Chosen instrument". The result was a pressure from the part of the Swedish and Danish SAS partners and their governments on the Norwegian government. The latter was put in a rather uneasy position by this pressure, as the matter also caused internal controversies in Norway itself 441).

On the whole, however, SAS co-operation may be regarded as succesful. The balance of advantages and disadvantages is clearly in favour of the former 442). Its main achievements are:

a. a better use of material 443);

b. an economic route system;

c. a stronger international position.

One of the objections to the SAS system which is often heard, is the importance of the role played by the governments in the system. This objection, however, can be answered by pointing to the 43 years old experience of aviation which has made clear, certainly with respect to Europe, that no commercial air transport is possible without government assistance. This fact has made civil aviation a problem of public interest and as such it has to be treated as a public utility with consequent protection.

The question to be solved is: to what extent such protection should be given 444).

With respect to SAS, there was especially in Norway a contrary objection, namely the fear that the system might become autonomous and unresponsive to government controls. This objection seems to have been solved in practice too. The governments play more or less the role of underwriters; they have their appointees on the Board of Directors, but nevertheless the interest of the company comes first 445).

The example of SAS has often raised the question why a similar system of co-operation should not be applied to solve the economic and political problems of most European airlines. Why should they not instead of using restrictive policies against each other co-operate to mutual advantage in order to achieve a whole greater than the sum of the parts as has been done by the Scandinavians? The answer to the question can hardly do other than stimulate such an effort.

With regard to a practical application, however, it should be borne in mind that there were more circumstances favouring the Scandinavian Project than exist in most other parts of Europe. A similarity of governmental systems, of political regimes, of language, of legislation and geographical situation such as exist between the Scandinavian countries cannot be found in the rest of Europe. Another circumstance favouring the creation of SAS was Scandinavian familiarity with the consortium co-operation system which already existed in maritime commerce 446).

The absence of all these circumstances is definitely a serious

obstacle to the achievement of similar co-operation in Europe as a whole 447).

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399) For more detailed information see: B. Dutoit "La collaboration entre compagnies aériennes" (Lausanne 1957), p. 146 seq.; S.A.S.,The Story of SAS (Stockholm); R.F.D.A. (1954) Vol. 8, p. 345 seq.; - D.Haguenau "Les formes de la collaboration internationale dans le transport aérien"; H. Bahr "The Scandinavian Airlines System" (Montreal -McGill University - 1959); R.G.A. (1951) Vol.14, p. 31 seq. and p. 99 seq. - W.H. Wager "Coopération internationale et Scandinavian Airlines System"; R.G.A. (1956) Vol. 19, p. 126 seq. - P. Burguet "Les relations entre les Etats Scandinaves et le Scandinavian Airlines System"; J.A.L.C. (1953) Vol. 20, p. 178 seq. - R.A. Nelson "S.A.S. - Co-operation in the air"; ICAO Circular 30-AT/5, 1953 - "Report on the Scandinavian Airlines System (SAS)"; I.T.A. Note documentaire 588 - 1953 - "L'organisation de l'aviation civile dans les pays scandinaves".

400) Transmondia (1955) Vol. 5, p. 7 - S. Savreux - "S.A.S. - De la fusion Scandinave à la conquête du Pôle Nord".

401) Stroud's Juridical Dictionary (London - 1952, 2nd ed.).

402) T.A. Quemner "Dictionnaire Juridique" (Paris - 1953).

403) Cf. Bahr, supra 399.

404) As far as could be ascertained, no cases involving the question of the legal status of the consortium have been decided by any court as yet.

405) According to Dutoit, supra 399, the absence of a legal personality is one of the features of SAS which in particular complicates its operation.

406) The negotiations took place in Sweden. They were kept secret in order to hide them from the Germans then occupying Norway and Denmark.

407) It appeared that Norway had been affected most severely by the German occupation. However, it had, as it appeared at that time, one main advantage over the other parties, namely the presence of the only airport in Scandinavia (Sola airport at Stavenger) which could accommodate the Boeing Stratocruisers aircraft which OSAS intended to utilise on its transatlantic routes. (Later it turned out that the Swedish airport (Bromma) could also accommodate this new, heavy type of aircraft.).
Denmark's most valuable asset was its Copenhagen airport (Kastrup) which is the natural air traffic gateway to Scandinavia. Moreover both countries, struck by the war, had currency difficulties. On the other hand they both refused to put up with a lower share than that eventually established (the 2:2:3 ratio). It was therefore extremely difficult to acquire the desired balance.

408) With regard to this division and the greater share of Sweden, the greater economic welfare of Sweden, the fact that Sweden just after the war was the only country of the three with a sound currency and able to afford the expensive enterprise and also its greater population (Sw. 7 million, Dm. 4 million Nw. 3.5 million) have played a role. Cf. with regard to these aspects the plan of the Italian Foreign Minister Sforza, who may have been influenced by this example (Chapter VI).

409) In fact Norway did not have the necessary facilities at the moment of the conclusion of the agreement and it took longer than expected to obtain them. Cf. Nelson, supra 399.

410) Cf. Nelson, supra 399.

411) Before co-operation in SAS the Norwegian and Danish companies were respectively 80% and 82% privately owned, whereas the Swedish government already had an interest of 50% in its airlines.

412) In 1959 the period of the agreement was extended by ten years as a result of an American loan of $ 49 million for the purchase of new jet aircraft, under a contract providing for payment over a longer period than that ending 25 years after the establishment of SAS.

413) SILA merged with ABA.

414) The capital of the consortium is according to art. 4 of the SAS agreement 75.5 million Swedish Kroner (approx. U.S. $30.3 million), whereas the registered capital of the contracting parties is respectively: ABA - U.S.$13 million, DDL - U.S. $5.3 million and DNL - U.S.$4.2 million).

415) It should be noted that the participating companies are all limited companies, see supra 414.

416) Cf. J.A.L.C. (1958) Vol. 25, p. 1 seq. (P.2, note 10) - J.G. Gazdik "Nationality of aircraft and nationality of airlines as means of control in international air transportation".

417) See Dutoit, supra 399, pp. 154 and 155.

418) Art. 6(a): Aircraft contributed by the parties to the Consortium as capital, in connection with its formation, as well as aircraft later acquired by the Consortium, shall be registered, within each type of aircraft, by approximately 3/7 of each type of aircraft in ABA's name in Sweden, by approximately 2/7 in DDL's name in Denmark and by approximately 2/7 in DNL's name in Norway, without this having any other effects on rights and liabilities under this Agreement.

419) An agreement between the governments of 1951 provides moreover that "in the event of war or the proclamation of a state of emergency the contracting parties shall make joint efforts to allow the co-operation practiced by SAS to continue each contracting party. If however, for reasons of national safety one contracting party considers it necessary to withdraw its personnel, aircraft and equipment from the consortium, the other contracting parties shall facilitate the withdrawal and any transportation connected therewith not necessarily to a point in the withdrawing country". Cited from Bahr, supra 399.

420) The directors are partly airlines appointees and partly government appointees.

421) Cf. Bahr, supra 399.

422) Cf. Gazdik, supra 416.

423) Cf. Annex 8, II, 5.2 to the Chicago Convention.

424) Text of art. 32(a): The pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competency and licenses issued or rendered valid by the State in which the aircraft is registered.

425) Cf. Art. 77 of the Chicago Convention (Joint operations) stipulating that the Council of ICAO shall determine in what manner the provisions of the convention relating to nationality of aircraft shall apply to aircraft operated by international agencies. Asked for such determination the Council did not in fact give any decision in this matter (See ICAO doc. C.WP/3186 and Minutes 8th Council Meeting, December 1960).

426) See Burguet, supra 399, p. 128.

427) Supra 425.

428) In practice SAS aircraft in many cases operate routes achieved by one of the parties not covered by the SAS clause or separate agreements.

429) See supra page 178 .

430) Cf. Nelson, supra 399, "The terms of air agreements between large and small powers tend to reflect the relative aviation strength and need of the parties".

431) See W. Coulet "L'organisation européenne des transports aériens" (Toulouse - 1958) p. 136. Coulet sets out three matters in which the Scandinavian governments cannot help but co-operate: Concessions, international negotiations on routes, and decisions with regard to the course of things of the consortium itself.

432) Another question is raised by the difference in status of a managing director of a company in Sweden and the two other countries. In Sweden the managing director of a limited company has a stronger position in relation to the Board of Directors than in the two other countries, (According to Nelson, supra 399). Although the consortium is not a limited company, this difference must have played a role in the administration of SAS.

433) In this general co-operation the two other Scandinavian countries, which did not join the SAS co-operation, are also involved.

434) Cf. J.A.L.C. (1957) Vol. 24, p. 36 seq. - T. Nylen "Scandinavian co-operation in the field of air legislation".

435) According to Nylen, supra 434, punishable offences e.g. in Norway are elaborately stated in the act whereas Denmark, Sweden and Finland applied an opposite system.

436) There are however differences. E.g. whereas Sweden signed both the Air Transport and Air Transit Agreements with the Chicago Convention, Denmark recognising the strong position, provided by Copenhagen Airport (Kastrup) deemed it more profitable to follow a more restrictive policy.

437) Cf. Nylen, supra 434.

438) Cf. Wager, supra 399, pp. 99 - 120.

439) SAFEA stands for South American and Far Eastern Airlines. SAFEA was privately owned by the Norwegian manufacturer and shipowner Braathens. Apparently quite succesful in the first years of its existence, the company could not stand the heavy competition starting in the mid nineteen-fifties and was dissolved. At present most of its former routes, inclu-

ding the Hong Kong route, are operated by SAS.

440) See Burguet, supra 399, p. 138.

441) In Norway the presence of another, privately owned, company gave rise to the question whether the SAS concession should give the consortium a monopoly on international Norwegian traffic. The minister of Justice who was asked to solve this problem, held that SAS had a right of first choice, but not a monopoly on domestic Norwegian traffic. That is to say that routes which are attractive to SAS on the conditions set forth for them by the government, will be granted to SAS. Only if SAS does not want to operate them on the said conditions, do other airlines come into the picture. In considering this statement it should be understood that the Norwegian government is a socialist government, which one might expect to favour the partly State operated SAS.

442) If the war concept of the full fifth freedoms had prevailed as an international agreement SAS would have held an enviable competitive position.
In this respect SAS'negative attitude to the "pooling" of its resources with other airlines may be pointed to. As most of the other European airlines soon after the war began to enter into such arrangements, SAS was reluctant to follow them. The entrance of the jet-period however, has brought losses to the consortium, not less severe than those of the other European airlines.

443) The greatest economic advantage of SAS is the division of its maintenance work to three workshops each of them specialising in one type. Of course a centralised maintenance in one country would perhaps have been still more advantageous, but for obvious reasons this was impossible.

444) Cf. Wager, supra 399.

445) A similar situation as that of the Canadian airline T.C.A. (Trans Canada Airlines) K.L.M., Alitalia and various others.

446) A Norwegian maritime consortium which served as freight forwarder and regulator of Norwegian shipping companies involved in transport to America, existed already before the war.

447) Cf. Coulet, supra 431, p. 144, who takes the view that other European consortia of the SAS pattern, are hardly feasible if feasible at all.

CHAPTER IX - AIRUNION.

EARLY THOUGHTS.

Efforts to solve the problems of protectionism and the consequent exorbitant level of costs by the creation of international companies have been many. Mentioned before are the proposals at the pre-war Disarmament Conference 448), the work of CITEJA, the Australian and New-Zealand project submitted to the Chicago Conference and the various examples of European "international" companies in the 1930's 449).

Similar aims were pursued by the British Labor Party's pamphlet "Wings of Peace" just after the end of the war. The planning of "Airopia", an international European company with a monopoly on the European routes, is another example. History has shown that such international companies are quite feasible and that several of them could achieve the aims for which they had been established. In this respect I must disagree with the view which has been expressed by Coulet 450) who claims the opposite on the basis of the fact that the pre-war international companies after a certain period of time have ceased to exist. This, however, was in nearly every case due to the same political factors, which led to World War II. It goes without saying that a situation of war, cold or otherwise, between countries, means the end of any close co-operation between companies of such countries, particularly if they deal with business so much attached to the military as aviation.

Therefore, one can indeed come to a conclusion like Coulet's, by

reviewing enterprises such as DERULUFT and CIDNA 451), but it appears to me that it is only fair to look also at the more succesful enterprises, of which I would mention Qantas Empire Airways, Tasman Empire Airways, British Commonwealth Pacific Airways, (the Chinese) Civil Air Transport, the Scandinavian Airlines System, Air Afrique, United Arab Airlines, which show that the creation and operation of international companies can be really succesful 452).

The creation of a West-European company, however, involving such leaders of European air transport as Air France, K.L.M., Sabena, Alitalia and Lufthansa 453) inevitably produces greater difficulties. It would mean a merger of the main instruments of aviation policies of the countries concerned, and for every state it would mean giving up part of its independence in this field. This may well be the main reason for the fact that most writers on this idea take the view that a Europair or Airunion is not possible without the simultaneous creation of a European Air Transport Authority constituted by the States concerned, whose members are both airlines and Government representatives. Hymans 454) proposed that such an Authority should be appointed by the Council of European Ministers and be endowed with the power to distribute operating rights and to prepare air policy matters. Sand 455) points to the example of the U.S. Federal Aviation Act which gives power to the authorities to regulate competition. Similar ideas are expressed in the Sforza, Bonnefous and Van de Kieft plans 456).

The basis for Airunion was laid far before the actual negotiations

started. Wagner published a scheme for the establishment of an international company - not necessarily confined to Europe - as early as 1948 457). His project means the establishment of an international company in the exact sense of the word. He saw it as a product of a multilateral convention which creates an international legal personality, submitted to international regulations and controlled by international bodies. He emphasizes the importance of precautions to prevent its activities from becoming prejudicial to other persons of international law and his project provides for a special tribunal of arbitration, the International Aeronautic Tribunal.

He further proposes that every merger of air transport companies from different States should be given the status of an international company, regulated by internationally composed law. These companies should present their statutes to ICAO with a request for registration. The ICAO Council should have the right to refuse the registration in case the statutes of the company are in any way opposed to the dispositions of existing multilateral agreements. A refusal of registration would leave the right of appeal to the arbitration of the International Aeronautic Tribunal. The acquisition of an international juridical personality would entitle the company to the same rights as a national company in every country which contributed to its creation.

The thus created international company could choose its place of domicile in any of the co-operating countries or, if it would prefer so, with ICAO. According to Wagner the solution of the liability problem for such a company could be a "responsabilité soli-

daire" of every contributing company (or State) without any limitation.

De la Pradelle, in the same year 458), suggested two other possibilities. The first was the formation of an Aeronautic Union, concluded by an International convention and the creation of an International Bureau of Aerial Navigation which would be the owner of an international airline with exclusive rights in the territory of the Union. The airline would take over all the assets of the existing "private" companies, which would be expropriated to this end.

This proposal sets up a framework for a much more enlarged internationalisation but unlike Wagner's proposal it excludes the possibility of some competition. Thinking of a union de la Pradelle points to the example of the agreement between the U.S.A. and the U.N.O. permitting U.N.O. to establish and perform autonomously services in the territory of the U.S.A.

The proposal further provides for a special Union registration office quite independent of the national registers, with the Union. The question of nationality and flag could be solved according to the principles of the Danube Commissions whose vehicles carried special registration marks.

De la Pradelle's other solution is a union of the existing companies into one International Company, a solution which resembles the S.A.S. agreements. It would not avoid the inconvenience of negotiations of quotas etc. Another inconvenience would be raised by the necessity of an agreement on the place of incorporation (siège national) of the company and the choice of a national legislation, as such a company would not have the real interna-

tional status of the former.
De la Pradelle's proposals did not deal with the question of liability.

His solution to the problem of what could be done with such an international company in the case of an outbreak of war is interesting. According to his view the entire fleet and other assets of the company could be put at the disposal of the International Red Cross or of U.N.O. The practical merits of these solutions, however, are very doubtful quite apart from the fact that in the event of war States would most likely forget this part of the agreement.

THE ACTUAL NEGOTIATIONS.

The actual negotiations on Airunion started in 1957 and until today no practical solution has been reached. The idea was born of the pressing concern to mitigate the losses arising from unrestricted competition, to lower the costs of operating large jet fleets, to eliminate multiplication of sales efforts and above all to leave politics out of transportation policies 459).
The name Airunion dates from late 1959 when K.L.M. left the conference table because it was clear that the proposed Europair, the original name for the project, would not provide this company with the share of traffic to which, in its opinion, it was entitled.
It was intended that the new company Europair should take over the operation of all intra European routes as well as the long

range routes of the participating companies: Air France, Alitalia, K.L.M., Lufthansa and Sabena. The total traffic was to be shared out to the participating companies on the basis of their current shares and future possibilities. The emphasis was put on the latter which made it hard to accept to the old established companies, since K.L.M. and Sabena carried an actual share far bigger than their proposed Europair share. It seemed indeed very favourable to the relatively new 460) companies, Lufthansa and Alitalia whose actual share of the market at that time was far below that of the other companies, but who could expect a much greater expension in the coming years. Air France was considered to still have an opportunity for expansion and its share was fixed at a percentage rather similar to its actual current share 461).
It is thought that the rapidity of development of Lufthansa and Alitalia will gradually slow down to the same tempo as the others by 1972. From that year the partners will progress evenly on the condition, however, that the traffic volumes of none of them diminish, unless there is a general decrease in traffic.
The quota system was not the only difficulty which needed solution. The difference between the partners regarding operations, policy, types of aircraft, organisation, etc. proved to be obstacles equally as formidable. The juridical representatives of the companies finished the draft Statutes of Airunion holding the basis of the collaboration as early as 1959. The economic side of the matter, however, seems not to be fully agreed upon even now 462).

The pool agreements to which the companies are partners

must be adapted to the new structure, that is to say, pool agreements with non-participating airlines are to be retained. The association would also be open to any other airline.
The project thus provides for an organisation of an international character but the divergencies in the national legislations are so wide that the companies will have to feel their way foreward step by step. No provisions were adopted for a common flag. The companies would preserve their independence and fly in their own colors with the Europair (Airunion) shield.
As said, K.L.M. left the conference table in 1959. Sabena who was in a similar 463) position to K.L.M. decided not to quit and since the negotiations on Airunion have still been carried on. They resulted, in 1961, in a draft agreement which has been submitted to the Governments concerned for approval 464).
An exact form of co-operation has not yet been fixed. Initial emphasis has been placed on the co-ordination of the commercial side, to be followed by a rationalisation of equipment and engineering. The companies hope to reach their aim by harmonizing their exploitation programs, by repartitioning their capacities, quotas, divisions of income and by rationalising their sales systems. As far as known, the prospective expansion of air traffic is still the "leitmotiv" and although each company's commercially acquired position is to be taken into account, the latest published quotas show little difference from those which were originally established 465). Domestic routes are excluded, which was particularly important to France with its African network 466). No new company as such will be created but a close union of the existing companies will be accomplished.

Airunion is not a closed European unit. It is open for other companies to join 467). Its official language is French.

Originally the date of the agreement's entry into force was set for autumn 1960, but at that time many legal, financial and technical problems still had to be solved. A later set target date in 1961 had to be postponed again and in the meantime K.L.M. which after 1959 was reported to have had exploratory talks with a possible view to joining the Swissair-SAS group 468), seems to have changed its mind with the result that at present no official target date exists.

Although the efforts to come to an agreement on Airunion according to the German Minister of Traffic cannot be considered to be a direct result of the establishment of the E.C.M. 469), during the course of the negotiations the Traffic Ministers of the E.C.M. countries have interfered. Today it seems clear that no definitive results will be achieved without further action from the six (five) traffic departments.

NATIONALISTIC INFLUENCES.

Airunion does not have to fight with internal difficulties alone. The project itself appeared to be a controversial one in the eyes of outsiders. According to Goedhuis 470) a single European company is undesirable because it would curb the initiative, would leave insufficient scope for creative impulses and would lead to an increase in the already too powerful influence of political considerations in aviation. Hymans also expressed his doubts (in 1957) 471) as to the idea of a single company,

which in practice would not provide for the theoretical advantages.

Lemoine points out that some countries have an aviation power far greater in strength than their importance in the general international sphere would indicate, and he nevertheless takes the view that this factor should not necessarily enable them to take part in Airunion as equals 472). The Italian senator, Caron, emphasizes that the Italian position in the agreement must be in proportion to "our position as a nation, in full equality with our partners" and that "justice must be done to all legitimate interests". Obviously these "legitimate interests" according to his submission, are not considered the same in other countries. Berchtold, Managing Director of Swissair 473) in a speech to the Swissair general meeting of 1960, acknowledged that if Airunion is not directed against anybody and has no agressive objectives apart from normal commercial competition, there should be no reason for the absence of co-operation between Swissair and SAS on the one hand and Airunion on the other. In his opinion, Airunion's objective is to concentrate the entire transport potential of the European carriers under a single unified control. "Although only the Common Market carriers have joined Airunion as yet, it still aims at control of the development of all European air traffic since the development of member companies can no longer be influenced by the succesful management of each individual company but is determined by a quota of the planned total traffic. This concept of controlled economy is so far opposed to the Swiss views of quality being the prerequisite of

succes and succes being the stimulant of improved quality and hence to the development of a company, that Swissair is obliged to dismiss the idea of co-operation with "Airunion". Airunion could lead to a new type of transport imperialism in Europe!
One could take this lofty reasoning seriously maybe, if it came from a country which is known for its liberal standpoint on air transport, but coming as it does from a protectionist country such as Switzerland always has been, it sounds questionable. Questionable also, are the objections to a merger which are based on involved contingent dangers for the public and the absence of competition. I do not believe in such objections, as in Europe itself the railways will sufficiently provide for creative impulses and competition and on the intercontinental routes the American and British carriers will take care of this problem. Moreover, the creation of Airunion does not mean the establishment of one single European air monopoly. Beside the five big carriers there are several others 474), many of them not as Airunion bound by IATA rules and tariffs, which will be able either by their unscheduled services or by their relatively cheap scheduled operations (without the burden of expensive overhead expenses) to provide for the desirable alertness on service.

In reviewing all these objections to Airunion, one is inclined to believe that most of them are inspired by no other than protective commercial considerations. It is true that the danger of a still more powerful influence in aviation as mentioned by Goedhuis, is not theoretical. On the other hand, however, it is hardly conceivable how the European airlines in their present

distress could ever get rid of their government guardianship. In the current political world situation a trend towards a general acceptance of the idea of coelum librum seems very unlikely.

AIRUNION AND E.E.C.

A more serious legal question is put by the Treaty of Rome. Airunion is not a company in itself, it is a co-operative effort to cope with (unhealthy cut-throat) competition. It is in fact a sort of rationalisation trust. European protectionism, however, cannot be reconciled with the principles of E.E.C. If Airunion really did aim at the monopolistic transport imperialism of which Berchtold accuses it, or even if it was destined to be the chosen instrument of the joint E.E.C. countries, this would constitute a break of articles 85 and 7 of the Rome Treaty. These articles forbid the limitation or control of production and the market sharing of sources and supply as well as discrimination between companies. Although the treaty also provides for the possibility of exemptions to these regulations when such exemptions are in the public interest 475), such an exemption surely could not be made if all the major companies of the six were not involved. This is not the case at the present time with both K.L.M. and Luxair 476) remaining outside the scheme.

Provided that Airunion is confined to member companies from the six ECM countries, it seems quite probable that it will profit by the economic unity between the six. The free movement of persons, services and capital as provided for by the third Title

(Part II) of the treaty will facilitate the co-operation as foreseen enormously. It is most likely that there will be a certain equality in personnel recruitment from every member company, but there will be no difficulty as to the status of personnel in the other members' countries nor will there be a necessity for measures to ensure a certain degree of recognised protection. The European Investment Bank could handle a great deal of the common financing requirements and the free movements of goods as provided for by Title 1 of Part II would facilitate the interchange of parts and aircraft and technical co-operation in general. On the whole, the Common Market would provide for an ideal climate for an air union, if only its basis, controlled market sharing, could be reconciled with the treaty.
It is probable that the solution to this and related problems must be sought in the application of art. 84 which stipulates that air transport is not covered by the provisions for transport (Title 3 of Part II) but that the Council (of E.E.C.) can decide whether and how appropriate provisions may be adopted for air transport 477).

AIRUNION EXAMPLE.

In the meantime, however, as said, Airunion has not yet been established and it seems that the legal EEC provisions will play a greater role in the definitive outcome than had been originally foreseen. At present the companies concerned co-operate to a certain extent through existing pool agreements 478) and individual agreements of presentation, hire of aircraft, catering,

maintenance: the classic patron of co-operation without giving up anything of one's independence.

To other companies of the bigger air powers, however, the idea and example of Airunion has brought a kind of respectability to collaboration and the result has been the development of similar agreements in the Middle East (United Arab Airlines), Africa (Air Afrique) and Asia, in several of which British interests play an important role.

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448) See Chapter II; the Disarmament Conference proposal contained the establishment of an Aéronautique Civile Internationale de Transport.

449) See Chapter V.

450) W.Coulet "L'Organisation Européenne des Transports Aériens" (Toulouse 1958 - Thesis University of Toulouse), p. 156 seq.

451) See Chapters II and V.

452) Another post-war example is the Sino-American CNAC (China National Aviation Corporation) established in 1939, 45% owned by Pan American Airways and 55% owned by the Chinese Transport Ministry. After the communist took over in China in 1950, the Chinese Civil Aviation Administration with the help of the U.S.S.R. transformed the company into a joint Soviet-Sino airline company which served the route Moscow-Peking and several domestic Chinese routes. After 1954 this co-operation ended because of political difficulties between the two countries and the operations from then on were carried out by the Chinese themselves (See Interavia 1956 Vol. 1, p. 46 - Pien Jeng Keng "Air Transport in the Chinese People's Republic").
In South America at the present time plans exist for the union of all the major South-American airlines into one company: F.A.L.A. (Flotto Aerea Latino Americana).

453) The airlines mentioned are the companies negotiating on Airunion. The British airlines have sought their refuge mainly in co-operation with airlines outside Europe, in the British

Commonwealth but also in the young countries of Africa and Asia. The Scandinavian countries established SAS in 1951 and lately have established a form of co-operation with Swissair (see p. 100). In the scope of this work companies like the Spanish "Iberia" and "Austrian Airlines" which signed a co-operation agreement in 1961, have been neglected.

454) Cf. Interavia 1957 No. 3, p. 219 - M.Hymans "European Air Transport is Indivisible". Mr. Hymans is Director-General of Air France.

455) Cf. Z.L.W. (1960) Band 9, p. 111 seq. - P.H. Sand "Die Airunion und das Wettbewerbsrecht des Gemeinsamen Marktes".

456) See Chapter VI.

457) See R.G.A. (1948) Vol. 11, p. 130 seq. - W. Wagner "Vers l'internationalisation de la navigation aérienne".

458) See R.G.A. (1948) Vol. 11, p. 120 seq. - P. de la Pradelle "L'Internationalisation des lignes aériennes long courrier".

459) Interavia 1962 No. 7, p. 833 - (Editorial) "Air Union or Internationalisation of Losses".

460) After the war both Germany and Italy were forbidden to deal with air transport. Some years later, however, this ban was partly lifted and since then Lufthansa and Alitalia, the latter with British help, are on their way to developing European and world wide services to an extent comparable with their pre-war shares in air transport, but they have not yet caught up with the European airlines which had the opportunity of starting right after the end of hostilities.

461) According to Interavia 1959 Vol. 5, p. 524 "The aims of Europair", at a meeting at Rome in 1959, the quota were set as follows:

For Air France	27.7%	with the pos-	27 - 31%	Actual	30%
Alitalia	20%	sibility of	15 - 21%	share	10%
K.L.M.	20%	a later set-	19 - 24%	in	35%
Lufthansa	24.4%	lement	23 - 25%	1959:	15%
Sabena	8.4%	between:	9 - 14%		10%

462) Cf. Europäische Wirtschaft (1959) 2 Jahrgang, No. 18, p. 456 - J.B. Hallmann "Airunion - Europäisch oder Weltweit?".

463) Sabena's network is much smaller than K.L.M.'s but in 1959 it still had the profitable Congo routes and intended to keep these.

464) Cf. ICAO Bulletin (1962) Vol. XVII, no. 5, p. 79.

465) Air France 34%, Lufthansa 30%, Alitalia 26% and Sabena 10%.

466) The same went for Belgium.

467) In this connection the talks with Japan Airlines which seeks entrance into Airunion should be mentioned.

468) See p. 100.

469) According to H. Seebohm "Der Luftverkehr in Europäischer Sicht" - Braunschweigisches Industrie und Handelsblatt 1959 No. 142, p. 349.

470) Cf. J.A.L.C. (1957) Vol. 24, p. 273 seq. - D. Goedhuis "The role of air transport in European integration".

471) Cf. supra 454.

472) See Interavia 1957 Vol. 10,p. 1058 - M.Lemoine "European Common Market and Air Transport".

473) See Interavia 1960 Vol. 5, p. 536 - Dr. Berchtold on Protectionism in Air Transport.

474) Cf. Interavia 1962 Vol. 1, p. 96 "What's in the Air?": - The British Air Transport Licensing Board made 22 European and domestic awards to three independent British carriers which will come into effect on April 1, 1963.
In France in addition to the "flagcarrier" Air France there are three other, private, companies: T.A.I., U.A.T. and C.G.T.A.

475) See art. 85 par. 3 and art. 90 part. 2 of the Treaty.

476) Lux(embourg) Air(lines) is a minor company, not comparable with the five "leaders" in the E.E.G.

477) See Art. 84 of the Treaty.

478) Cf. R.G.A. (1951) Vol. 14, p. 309 seq. - H.Mourer "Pour un 'pool' européen des transports aériens".

CHAPTER X - EUROCONTROL.

JET AGE FORCES CO-OPERATION.

Earlier in this work the statement was made that the technical development of aviation has always been far ahead of the development of its commercial, economic and political aspects. Eurocontrol is an example of how this technical development can coerce States into a co-operation which covers political and economic features as well. The speed of jet aircraft and the diminution of distances which they entail have gradually compelled the small national groups constituting Europe, to coalesce and to form an integrated unit.

Eurocontrol envisages the unification of the air traffic control services of a number of Western European States, which up till now maintain their own Air Traffic Control centres in order to direct and regulate the air traffic over their respective territories 479).

As long as civil air transport was performed by comparatively low speed piston engined aircraft this system served its purpose fairly well. The existing air traffic aids and control facilities have an effectual upper limit of 6000 metres (20.000 feet) which made them sufficient to handle almost the entire traffic which was operating within this limit. Until recently skies above this altitude were only utilised by military aircraft and the co-operation within NATO could deal with the safety and regulation problems involved whenever the air forces operated outside their respective national borders. The arrival of commercial jet services

in the European network, however, made it necessary to provide for air traffic control to altitudes of 12.000 metres (40.000 feet). Moreover they operate with a speed which made the fourteen F.I.R.'s (Flight Information Regions) in Europe uneconomic and even impossible 480). Flight safety demands that the transfer of an aircraft from one control centre to another should be reduced to a minimum which makes it undesirable to employ the same boundaries for the speedy jet aircraft as exist for the relatively slower type 481).

The separation of military and civil aircraft became impossible as it proved to be prejudicial to the interests of both. It became necessary to formulate a common air traffic control system for the upper airspace, which within a few years will be as crowded as the space below the 6000 m. altitude is today 482). At the beginning of 1958 therefore the Common Market members Belgium, Germany, Luxembourg and the Netherlands 483) envisaged the unification of the control over their upper air space. France, Italy and England later joined their planning.

UPPER F.I.R.'s.

Eurocontrol initially was less an institution than an effort to resolve an essential security problem through a common agreement 484).

It is inspired on the following principles:

- The States shall co-operate in the establishing of a common control of the upper airspace in order to secure the safety of flight in that space;

- On the military level every State shall take back its independence in case the circumstances may require so;
- The creation of new international administrative or technical institutions and offices shall be avoided as much as possible;
- Supplementary expenses shall be avoided;
- The new system will gradually replace the existing systems.

An appointed study group suggested the division of Europe into two main UIR's (Upper Information Regions). A Southern UIR with its centre in Rome would cover the entire upper air space of Italy and a Northern UIR with a centre in Luxembourg would cover the Benelux countries, France and Germany. In order to comply with military requirements in the latter region, the Northern UIR would be subdivided into a Central UIR and a North-Western UIR, covering respectively the territories of France and those of Belgium, Germany, Luxembourg and the Netherlands; both with centres in Luxembourg. A third UIR with a centre in London would cover the Southern part of England.485).

The organisation of these upper regions will be such that the aircraft described as general traffic, that is to say aircraft subject to the rules of ICAO 486), will travel on predetermined routes or on a limited number of airways which will be as direct as possible. These routes or airways will be controlled and aircraft utilising them will be obliged to fly IFR (that is: under Instrument Flight Rules) 487). Aircraft belonging to other categories than those to which the Chicago Convention applies, will obey their own (military) special regulations.

It was envisaged that the organisation would have the status of a

financially autonomous international public service with the object of establishing an operation to accomplish the prevention of aircraft collisions 488), a rapid and ordered flow of air traffic, the supply of the necessary safety and economy information to aircraft, and the alerting of search and rescue services.

PROCEEDINGS.

In 1960 (September/October) a conference was held in Paris in order to prepare a draft agreement 489) and a draft protocol, containing the measures necessary to cover the period until the rationalisation of the agreement and also to provide for immediate preparatory studies on the subject and related problems. Its direct result was the creation of a Planning Directory which was charged with the technical preparations.

The draft agreement envisages the establishment of a Permanent Committee for the safety of air traffic and an Agency charged with the direct activities involved in the maintenance of the Air Traffic Control Services. The Agency will have its place of business in Brussels. Its Director is appointed for five years. Constitutionally the Agency represents Eurocontrol.

The Permanent Committee consists of the Ministers of the contracting States charged with aviation matters or their representatives. The Committee shall give directions to the Agency with regard to the performance of its work.

A third body, whose members will be representatives of the national aviation authorities, is envisaged to supervise matters of a domestic character. It serves also as a liaison organ

between the Permanent Committee and the Agency.
The contracting States have decided to put the single Agency into force in three stages.
The first stage will cover the establishment of the necessary technical relations. In the second stage a programme office will be created to study all the technical and financial aspects of the Agency. This office has to work in close co-operation with the national organisations and with such interested international organisations as ICAO, NATO and IATA. In fact the work of the first and second stage has been started already.
The agreement as it has been concluded, covers exclusively the control of air traffic at altitudes over 6000 metres. One of its clauses, however, provides for the possibility that a State can also hand over the control of its airspace under the 6000 m. level to Eurocontrol. The Permanent Committee must agree to such a delegation, which in fact has been foreseen as the third stage to accomplish 490).
The agreement provides further for an official international status of Eurocontrol, diplomatic immunities for its personnel, etc. Disagreements between the States concerning its operations are to be settled by arbitration or, if one of the parties prefers, so by a decision of the International Court of Justice 491).

SOVEREIGNTY, LIABILITY.

Eurocontrol provides for a close co-operation between a number of European States of a merely technical nature. On the legal side the most important aspect of the agreement is, that

it constitutes a first example of European co-operation whereby the States abandon part of their sovereignty in their national airspaces to a common authority endowed with full legal powers. Air control of Germany may be exercised by Belgian officials and over Belgium by Dutch officials etc. As such, its succesful operation may inspire confidence with respect to other proposed European Aviation Authorities and pave the way towards further integration.

An interesting problem is raised by the question of governmental liability for the regulation of air traffic.492).

The agreement itself does not indicate where contingent claims should be submitted. The parties to the agreement contribute to its operation costs according to their national gross revenue but there is no answer to the question whether aircraft operators will have to submit their claims to Luxembourg, Rome or London or to the national Aviation Authorities of the country where contingent damage occurred.

In this respect it should be considered that although the organisation legally is an entity of private law, it is in fact made up of persons acting in their official capacity of representatives of the competent aviation authorities of the States concerned. It therefore seems to be rather a public international organisation than a private international company or organisation 493). Thus the situation could be greatly influenced by the principle of "state immunity". This antiquated doctrine may have been modified considerably in many States, and especially in the Western European countries actions against the State not longer meet with

the difficulties of the past. It, however, still plays a role 494) which could grow more important if the non-contracting States which in the last two years have shown interest in the organisation, would join the agreement.

In my opinion, a claimant should start by submitting his claim to Eurocontrol and he might do so as well against the particular control officer in charge at the moment the damage incurred. In both cases the claim should be submitted in accordance with the principles of the lex loci. More complicated questions could arise in a case where the damage occurs during the short period of time during which the control of the aircraft concerned is transferred from the national Area Control Centre controlling the area of the airport from which the aircraft takes off, to the international entity, or when the damage occurs because of a lack of necessary co-operation between the control services of the national Lower F.I.R. and the international Upper F.I.R. 495). Considering these problems, it is not exaggerating to state that Eurocontrol is not only interesting because of its technical and political aspects only, but it certainly also gives rise to considerations of a legal nature.

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479) The creation of a common European air traffic control area was proposed as early as 1952 by C. Pirath and C.E. Gerlach in their book "Der Europäischer Luftverkehr in Planung und Gestaltung" (Berlin, Heidelberg, Göttingen - 1952).

480) Lower Flight Information Regions existing in Italy (3), France (3), Germany (3), Southern England (2), Belgium (1) and the Netherlands (1) will not be affected by Eurocontrol.

481) The operations of civil jet aircraft in the higher air regions are at the moment performed under VFR (Visual Flight Rules) rules with compulsary submittance of flight plans.

482) Cf. R.G.A. (1959) Vol. 22, p. 187 - (Editorial) "Chronique Economique".

483) The plan was mentioned for the first time at the Geneva Conference of the ICAO Regional Air Navigation Committee in 1958.

484) Cf. R.G.A. (Editorial), supra 482.

485) See Interavia 1960 No. 4, p. 445/446 - (Editorial) "The Rationalisation of Air Traffic Control in Europe".

486) See art. 3 of the Chicago Convention.

487) See Annexes 2 and 11 to the Chicago Convention.

488) The danger of aircraft collisions has become a problem of ever growing importance. Cf. ICAO Circulars Aircraft Accident Digest and also TIME, August 24, 1962.

489) The International Convention on Co-operation for the Safety of Air Navigation (Eurocontrol) was signed at Brussels - December 13th, 1960 - by Belgium, France, Germany, Great Britain, Luxembourg and the Netherlands. Italy took part in the preparations, but did not sign it.

490) Interavia, supra 485), deems such a further integration to a European unit rather probable. See also R.G.A. (1960) Vol. 23, p. 331 seq. - "Eurocontrol".

491) See Z.L.W. (1961) Band 10, p. 45 seq. - G.W. Rehm "Eurocontrol".

492) Cf. ICAO Doc. 8101 LC/145 (September 26, 1960).

493) Cf. Quaderni Aeronautico dei Centro per lo Sviluppo dei Transporti Aerei, March 19, 1961 - P.J.M. Nottet "Considérations sur Eurocontrol; Ses perspectives d'Avenir".

494) Cf. H.Street "Government Liability" (London - 1959), pp. 5, 6, and 471 seq.; W.Wade "AdministrativeLaw" (Oxford - 1961), p. 213 seq.; C. Guerreri "Governmental Liability in the Operation of Airport Control Towers in the United States" (Montreal, McGill University - 1960); J.A.L.C. (1950) Vol. 17, p. 170 seq. - S.E. Eastman "Liability of the Ground Control Operator for Negligence".

495) Cf. ICAO Doc. 8137 LC/147 -1.

CHAPTER XI - AVIATION AND THE EUROPEAN ECONOMIC COMMUNITY.

The conception of regionalism after World War II has received general recognition among statesmen, politicians, economists and lawyers as a standard formula or device for solving particular problems, whether they relate to security, economics, or other questions 496). Thinking in terms of regionalism has become an established habit, the legal basis for which is provided for by the United Nations Charter 497).

In post-war Europe the idea of regionalism started with the establishment of O.E.E.C. as a European counterpart to the U.S. Economic Co-operation Administration. The O.E.E.C. policy was to encourage States to eliminate all forms of direct and indirect subsidy to their exporters.

Co-operation through O.E.E.C., however, proved to be unsatisfactory as it did not provide for the degree of liberalisation and integration desired by some of its members. The West-European States decided to establish a closer union and made a proposal for a customs union in the first half of the 1950's. In 1956 the Council of O.E.E.C. decided to establish a Working Party to study possible forms and methods of a multilateral association between the proposed customs union (the E.E.C.) and the other European countries. This effort did not succeed and in the last half of the 1950's two trade zones were established in Europe: The European Economic Community (EEC) and the European Free Trade Association (EFTA) 498).

THE EEC, ITS AIMS AND ORGANISATION.

Of these two trade zones the European Economic Community also called the European Common Market (or "inner six", in contrast to the "outer seven" of EFTA), has proved to be of much more influence and importance than the European Free Trade Association. Although it is always difficult to predict political developments, the present outlook seems to be that most of EFTA's members will eventually seek admittance to EEC.

The EEC was created by the Rome Treaty, or in full the "Treaty establishing the European Economic Community", signed by the plenipotentiaries of Belgium, France, Germany, Italy, Luxembourg and the Netherlands, on March 25th, 1957, at Rome. It was ratified by December of the same year.

According to the preamble of the Treaty it serves the desire of its members to establish the foundations of an ever closer union among the European peoples and to eliminate the barriers which divide Europe. Its essential purpose is the constant improvement of the living and working conditions of the peoples of the Member States. The members are desirous of contributing by means of a common commercial policy to the progressive abolition of restrictions on international trade. They call upon the other peoples of Europe who share their ideal and who want to joint in their effort to strengthen the safeguards of peace and liberty by establishing such a combination of resources, to do so. Thus is the preamble.

The principle aims of the Treaty are specified in greater detail, by the first articles stipulating inter alia that it shall be

the aim of the Community to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, by establishing a Common Market and unifying the economic policies of the Member States 499). To achieve these purposes, the activities of the Community shall include, under the conditions and with the timing provided for in the Treaty, a common commercial policy towards third countries and the inauguration of a common transport policy. Also included is the approximation of the respective municipal laws, to the extent necessary for the functioning of the Common Market. The associatio of overseas countries and territories with a view to increasing trade and to pursuing jointly the effort towards economic and social development is another point on the Community's programme 500).

The Community is administered by four major institutions: the Council, the Commission, the Assembly, and the Court of Justice.

The Council 501) is composed of six delegates, one from every Member State. These delegates are usually the Foreign or Economic Ministers of the countries. Meetings of the Council are convened by the President, acting on his own initiative or at the request of a member or of the Commission.Except as otherwise provided for in the particular articles of the Treaty, the Council's decisions are established by a majority vote.
The Council must be considered as the most powerful institution of the Community, because it is charged with the ensurement of

the co-ordination of the general economic policies of the Member States and because it has power to make decisions on matters relating to the fulfilment of the objectives laid down in the Treaty, under the conditions provided for therein.

The COMMISSION 502) is composed of nine members, nationals of the Member States, chosen for their general competence and indisputable independence. The members of the Commission shall not seek or accept instructions from any Government or other body; they shall perform their duties in the general interest of the Community, with complete independence. The members of the Commission are appointed by the Governments of the Member States acting in common agreement, for a period of four years.
The task of the Commission is
- to ensure the application of the Treaty and of the provisions enacted by the institutions of the Community in pursuance thereof;
- formulate recommendations or opinions in matters which are the subject of the Treaty;
- under the conditions laid down in the Treaty, to dispose of a power of decision of its own and participate in the preparations acts of the Council and of the Assembly;
- to exercise the competence conferred upon it by the Council for the implementation of the rules laid down by the latter.
In short, the Commission must be considered as the executive body of the Community, acting under supervision of the Council.

The ASSEMBLY 503) is composed of delegates appointed by the Parliaments of the States united in the Community from among their members. They are considered as representatives of their peoples.
The Assembly exercises the powers of deliberation and of control which are conferred upon it by the stipulations of the Treaty. In particular it discusses in public meeting the annual general report, submitted to it by the Commission.
The Assembly's power is chiefly one of control in retrospect.

The COURT OF JUSTICE 504) is composed of seven judges and two assisting advocates-general appointed for a term of six years by the Governments, acting in common agreement, from among persons of indisputable independence who fulfill the conditions required for the holding of the highest judicial office in their countries or who are jurists of a recognised competence. The Court shall ensure observance of law and justice in the interpretation and application of the Treaty. Any Member State which considers that another Member State has failed to fulfill any of its obligations under the Treaty may refer the matter to the Court, after having referred the matter to the Commission which gives its preliminary advice 505). States are required to implement the judgments of the Court.
The Treaty is self-executory.

The Treaty contains several provisions ensuring the co-operation of the Community with other international bodies, such as OEEC, UNO and other regional organisations between the

same States, in particular with the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom). As a matter of fact the Assembly and the Court of Justice of EEC are common to EEC, ECSC and Euratom.

The idea behind the Common Market and EFTA is that the liberalisation of trade, including the free movement of labour, capital and services, will create a spiral of free competition - lower prices - international specialisation - greater welfare 506). It is believed - and has been proven already - that the market will create new trade and new transport and that - especially if more European countries will join the six - it will decentralize industry in the square Glasgow-Milan-Stockholm and Barcelona over a larger surface of Europe.

The liberalisation foreseen by EEC, is aimed to be achieved in a period of twelve years in gradual stages. Since 1958 the Community has been able to reach the stages according to its scheme, in several cases even within the fixed limits.

EFTA.

The European Free Trade Association - established on January 4th, 1960, at Stockholm, by 7 States 507) is not of the same universal nature as the Common Market. Although EFTA's aims are very similar to those of EEC and although its creators were also convinced that an elimination of the European frontier barriers would be necessary for the economic and social progress of their countries, EFTA is of a more restrictive, or maybe of

rather a more cautious scope. For various reasons its members feel that they cannot comply with the ambitious programme set forth by EEC, be it because of their relations with other countries 508) or because of internal economic structures or political positions 509).

A good example of the difference between the two systems is given by the way they look upon competition, trust forming and other restrictive trade practices. The EFTA provisions dealing with this subject 510) stipulate that if an agreement or practice is likely to affect trade between the Member States, it is sufficient to establish incompatibility prima facie. This incompatibility, however, has to be proved. On the other hand the Treaty of Rome 511) expressly prohibits the improper exploitation of a dominant market position. Any discriminatory practice would be prima facie null and void under the Rome regulations, the mere likelihood of affecting trade between member States is sufficient.

THE APPLICATION OF THE EEC RULES TO AIR TRANSPORT.

The question whether the EEC rules apply to air transport has given cause for a controversy among European jurists. This controversy is relatively new. Although the report of the Belgian Foreign Minister Spaak 512), which must be considered as an important basic document of the EEC, proceeds on the proposition that the establishment of the common market will carry with it a gradual liberalisation of air traffic, the framers of the actual Treaty did not catch up with this statement. During the preparations of the Treaty the subject was brought up several

times. However, as the delegates agreed upon the fact that civil air transport constituted a very difficult problem, affiliated and dominated as it is with the extra-European trade and politics of the memberStates, they confined themselves with respect to this subject to the text of the second paragraph of art. 84 stipulating that: "The Council, acting by means of a unanimous vote, may decide whether, to what extent and by what procedure appropriate provisions might be adopted for sea and air transport". Art. 84 is the final part of a title containing special provisions for transport in the Community 513).

The years around 1957 were marked by certain progress and prosperity for civil air transport. The jets had not yet spoiled the sport and the introduction of tourists and economy fares seemed promising. This may have been the reason why opinions such as those of Lemoine 514) and Cartou 515) according to whom the application of the Treaty to air transport should be denied, in the first instance stayed uncontradicted 516). A few years later, however, coinciding with a change for the worse in the air transport situation, voices were raised to defend an opposite interpretation. One of the first of them was the voice of one of the Commission members, Schaus, of Luxembourg 517).

Other defenders of the application of the Treaty to air transport are i.a. the Dutch economist Spiegelenberg 518), the German scholar Sand 519) and last but not least the Transport Committee of the European Parliament 520).

The conclusion to be drawn from the existence of this controversy must be that the Treaty itself is ambiguous on this point.

The Treaty elaborates its principles as stated above in four parts containing more than 230 articles. The second Part "Bases of the Community" especially is important in the scope of the question. Title One of Part II deals with the free movement of goods. It stipulates that products brought in for consumption in a Member State shall be deemed to be imported subject to the necessary import facilities and shall be treated as goods produced in that State. It establishes the customs union between the Member States, with the consequent elimination of customs duties, quantitative restrictions and a common customs tariff. It is not questionable that the stipulations of this Title have some effect on air transport. Briefly, they constitute an implementation of some parts of Annex 9 to the Chicago Convention 521), in so far as these facilitation standards and recommendations with respect to the free mevement of aircraft and parts not yet had been implemented by the Six.

Title II provides for a special treatment of agriculture.

Title III dealing with the free movement of persons, services and capital is of more direct importance. It ensures the free movement of workers within the community, involving the abolition of any discrimination based on nationality between workers of the Member States and including the right to accept offers of employment on the same basis as nationals of that State. An exemption is made for employment in public administration. It ensures further a freedom of establishment not only for individuals, but also a freedom for the setting up of agencies, branches or subsidiaries by individuals and companies under civil or

commercial law and other legal persons of any Member State. The Council and the Commission are charged with the abolition of any such administrative procedures and practices resulting from municipal law or from agreements previously concluded between Member States as could be an obstacle to this freedom of establishment.

This freedom of establishment includes the right of engaging in and carrying on non-wage-earning activities, and also of setting up and managing enterprises and, in particular, companies under the conditions laid down by the law of the countries concerned for its own nationals.

If this was the end of Part II, a common air transport market and the abolition of the restrictive and protectionist policies would gradually become a fact 522). Airlines of the Six could freely set up branches and subsidiaries in each country of the Six and could claim the right to be treated in the same manner as the national companies. It is questionable whether this would mean that an airline of one of the States could be a "chosen instrument" of another State, as the Treaty also stipulates that the rights and obligations resulting from conventions concluded prior to the Treaty between one or more Member States, one the one hand, and one or more third countries, on the other hand, shall not be affected by its provisions 523). The problems of interchangeability, nationality of aircraft and other obstacles to such integration, set up by the Convention of Chicago and bilaterals would not be overruled by the provisions of the Treaty. But, as far as the European network of the Six is concerned, the States would be obliged to do their utmost to cope with

these obstacles 524), and as we have seen above 525), this would lead to a rather complete liberalisation within this network 526). Moreover the Treaty stipulates that in so far as the above mentioned conventions are not compatible with its provisions, the Member States concerned shall take all appropriate steps to eliminate any incompatibility found to exist. If necessary the other Member States shall render assistance in order to achieve this purpose 527) and if any action by the Community appears necessary to achieve one of the aims of the Common Market in cases where the Treaty has not provided for the requisite powers of action, these will be provided for 528).

However, Part II carries on with stipulations relating to services in general, and transport services in particular. The special provisions relating to services stipulate mainly the tempo of the liberalisation of services. Transport is a service within the meaning of the Treaty, - it being a service normally supplied for remuneration - to the extent that it is not governed by the provisions relating to the free movement of goods, capital and persons 529). However, the general regime to be applied to services is not applicable to transport, as art. 61 stipulates: "The free movement of services in respect of transport shall be governed by the provisions of the Title relating to transport".

The indicated title is the last of Part II. It provides for a common transport policy of the Member States relating to intra-Community international transport and other international transport from or to one of the six countries, in which the objectives of the Treaty shall be pursued 530). Of immediate valid-

ity is the stipulation that Member States are forbidden to apply their various provisions governing transport at the date of the entry into force of the Treaty, less favourable to carriers of other Member States by comparison with the national carriers 531). In other words, any further protection or restriction is forbidden, and from this status quo a common liberalising policy is to be established.

However, the last article of this title is the above cited art. 84 stating that the provisions of this title shall apply only to transport by rail, road and inland waterway and leaving the adoption of appropriate provisions for sea and air transport to the decision of the Council 532).

Another article of importance in examining the question of the application of the Treaty to air transport is art. 197. Art. 197 appears in the third chapter of the first title of Part V of the Treaty which prescribes the creation of an Economic and Social Committee with consultative status, composed of representatives of the various categories of economic and social life. The article stipulates that this Committee shall include specialised sections for the main fields covered by the Treaty, in particular "a section for agriculture and a section for transport, which subjects are regulated by the special provisions included in the Titles relating to agriculture and Transport" 533).

Summarized the provisions of the Treaty relating to the question are as follows:

Art. 3 (e) stipulates that the activities of the Community in pursuance of its aims shall include the inauguration of a common transport policy.

Articles 60 and 61 define transport as a service within the meaning of the Treaty, but stipulate that the free movement of services in respect of transport shall be governed by Title IV of Part II.

Title IV of Part II (art. 84) declares itself not applicable to air transport.

Art. 197 stipulates that transport is subject to the special provisions included in the Title (IV of Part II) relating to transport.

The history of the Treaty seems to indicate the intention of the framers to leave air transport out.

C a r t o u in his above cited article 534) denies the application of the Treaty to air transport, but nevertheless takes the view that the establishment of the Community cannot but influence the organisation and economy of air transport.

S c h a u s 535) points to the provision of art. 3. According to his view the contracting States have decided to leave the elaboration of a common transport policy to the future thus deliberately taking for granted an incomplete regulation of the transport. The provisions of the Treaty, however, leave the clear duty to conduct further negotiations in order to achieve such a common policy. Taking into account the particular aspects of the transport question the bodies of the Community must make the

appropriate rules relating to transport.
In the meantime the special provisions of Title IV of Part II do not exclude the application of the general rules of the Treaty to sea and air transport, not even those relating to such specially regulated subjects as the free movement of persons and capital which are dealt with by other chapters of Part II of the Treaty.

In a speech to the European Parliament, in December 1961 536), Schaus speaking on behalf of the Commission, stated that the situation on the transport market ressembles more and more the situation on the other markets of services and goods. He emphasized that the economic policy of the Community must form an entire body and he took the view that the disappearance of discriminations and distortions of competition in the transport sector is of substantial importance. Although the Council reserved for the time being its decision concerning the adoption of sea and air transport in the programme, the Commission - according to Schaus - considers the solution of the relevant questions as very important. A common transport policy which does not comprise sea and air transport in the long term, cannot be realistic or in accordance with the Treaty.

S p i e g e l e n b e r g 537) argues that the free movement of goods finds its logical complement in the liberalisation of the movement of services. This principle has been expressively stated in the Treaty 538). Although transport is dealt with by special regulations and not by the general rules concerning services, art. 61 section 1 makes it clear that in the transport

sector also the policy must be aimed at the liberalisation. On this basis it could be demanded from the Six that they aim at the liberalisation of European air transport which should lead to the result of a multilateral treaty containing the mutual grant of third, fourth and fifth freedom rights.

S a n d 539) takes the view that Title IV is not applicable to air transport but that the rest of the Treaty should be fully applicable. He points to the Spaak and Kapteyn reports 540) which both include air transport. According to him one should not delve into the history of the Treaty, as the contracting parties decided not to publicise motives and protocols with the very intention of avoiding future discussions on the historic background.

Most interesting is his reference to art. 42 which stipulates a conditional application of the provisions relating to the rules of competition 541) to the production of and trade in agricultural products. From the non-existence of a similar provision relating to transport in general or air transport in particular, he concludes that - doubtless - the rules of competition are applicable to air transport.

Sand claims the arguments for keeping air transport out of the Common Market have lost their importance. The establishment of the Common Market itself led to a decrease in the importance of the political argument. The military argument did the same thanks to NATO and the imperial argument lost its sense after most of the Asian and African countries became independent and established their own airlines. The opinion that each government in the

EEC stays free to choose its own politics in the trade of air transport as it did before the Common Market had been created, is highly contestable in Sand's view.

C o r n i g l i o n M o l i n i e r bases his opinion that the Treaty applies to air transport as well as to other forms of transport mainly on article 3. The meaning of the word "transport" in its common parlance includes all forms of transport, thus also air transport. The Treaty prescribes a common policy in the field of transport within the scope of the activities of the Community. As the Treaty applies to the entire economic life, there is no reason to suppose that the principles as stated in art. 2 542) would not apply to air transport. The words of article 3 "under the conditions and with the timing provided for in this Treaty" can only be interpreted as "all general rules of the Treaty, all regulations of an institutional nature or relating to procedure, and all periods stated in the Treaty, are applicable to the common transport policy". Notwithstanding the text of art. 84, section 1, "The provisions of this Title shall apply to transport by rail, road and inland waterway", this common policy must apply also to air transport. The second part of art. 84 indicates according to which procedure appropriate measures relating to air transport can be taken in the scope of a common transport policy. Whereas the Council "with a view to implementing art. 74 and taking due account of the special aspects of (rail, road and inland waterway) transport, acting on a proposal of the Commisssion and after the Economic and Social Committee and the Assembly have been consulted, shall, until the end of the second stage by

means of unanimous vote and subsequently by means of a qualified majority, lay down: "common rules applicable to international transport ..... etc." 543), the question to what extent and by what procedure appropriate provisions should be adopted for air transport, shall be decided upon by unanimous vote of the Council.

Corniglion Molinier further states that it is not surprising that the Treaty demands a unanimous vote in this matter. The reason for this Corniglion Molinier sees in the fact that the regulations relating to the forms of transport dealt with in Title IV have also been laid down by unanimous vote. Furthermore this procedure seems necessary as art. 84, section 2, likewise offers the possibility of suspending the application of the Treaty to air transport, as other articles 544) have suspended the application of general rules of the Treaty on rail,road and inland waterway traffic.

The consequence of this point of view would be that the general rules of the Treaty, dealing with the free movement of persons, capital, the right of establishment, the competition rules, the rules concerning the approximation of laws, the social provisions, the regulations relating to the European Investment Bank, etc. are applicable indeed to air transport.

If this view would be right and the general rules of the Treaty apply to air transport including even the more special rules of the Third Title of Part II, relating to the free movement of persons and capital, the logical question arises: What about the chapter concerning services of the same title. The answer to this question, according to Corniglion Molinier, is given in a

1961 report of the Commission on a General Program for the Abolition of Restrictions to the Free Movement of Services 545).
In this report attention is drawn to Annex III of the Treaty: "List of invisible transactions", referred to by art. 106. This list mentions both maritime freights and air transport and elaborates on the financial transactions resulting from air transport. Art. 106, according to the report, forms the connection between the movement of services and the movement of capital. It indicates that a foreign company may not be excluded from a national market, either as a result from a direct prohibition or by refusing to allow the nationals of the country concerned to take up foreign exchange necessary to become a client of the foreign company.
There is no doubt as to the competence of the EEC Commission to deal with remittances of money in connection with air transport. This seems moreover to be clear from the words of article 106 "The progressive abolition of existing restrictions shall be effected in accordance with the provisions of Articles 63 to 65 inclusive ..... etc.".

The report Corniglion Molinier also gives attention to several arguments against the application of the Treaty to air transport. It mentions the opinion according to which article 84 expressly excludes air transport from the Treaty and turns down that opinion by pointing to the fact that art. 84 only refers to "the provisions of this Title", not to "the provisions of this Treaty".
The incongruity that rail, road and waterway transport are subject

to special precautions and that the liberal general rules apply to the complicated and difficult situation of European air transport with its indissoluble coherence to extra-European activities, is refuted by the conclusion that the Council as soon as possible should take the question of air transport into consideration and should take the appropriate measures laid down in art. 84, section 2.

The reasoning on the basis of the history of the Treaty is also rejected by Corniglion Molinier. The fact that air transport has been mentioned in the Treaty seems paramount to him.

The fact that no representatives of the air transport industry are included in the Economic and Social Committee does not mean that their trade would not fall under the provisions of the Treaty. It would be impossible to include a representative from all branches of economic life in the Committee.

Neither are the discussions in the Parliamentary Transport Commission of substantial importance to the question. They are not binding on the members of that Commission, nor on the Parliament.

The submission that the strategic aspect of air transport should forbid its integration can be easily rebutted by mentioning the existence of NATO which all Member States have joined.

The argument that the European air transport question should be regulated by the European Civil Aviation Conference, although very attractive, is under the present circumstances not fully persuasive 546).

ECAC was established prior to EEC and thus a convention with respect to which the Member States of EEC are obliged to take all appropriate steps to eliminate any incompatibilities found to exist 547). In this respect art. 116 stipulating that the Member States "shall in respect of all matters of particular interest in regard to the Common Market, within the frame work of any international organisations of an economic character, only proceed by way of common action ...." seems applicable.

The arguments in favour of the applicability of the general provisions of the Treaty to air transport seem quite strong, particularly as strong and documented opposing opinions are lacking. As will be pointed out hereafter, the EEC Commission has expressed its official point of view in favour of these arguments and is examining whether special provisions relating to competition are necessary with respect to both sea and air transport.

From a legal point of view, however, it still seems interesting to apply to the provisions of the Treaty the r u l e s o f i n t e r p r e t a t i o n of treaties, such as set forth by O p p e n h e i m 548) and other outstanding international jurists 549).

As the provisions of the Treaty are apparently ambiguous with regard to the question of its applicability to air transport the following interpretation rules seem of importance:

"It is taken for granted that the contracting parties intend something reasonable, something adequate to the purpose of the

treaty. If therefore the meaning of a stipulation is ambiguous, the reasonable meaning is to be referred to the unreasonable, the more reasonable to the less reasonable, the adequate meaning to the meaning not adequate for the purpose of the treaty; not only the wording, but also the purpose, the motives which led to its conclusion, the whole of the treaty must be taken into consideration;

if the meaning of a stipulation is ambiguous, that meaning is to be preferred which is less onerous for the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves fewer general restrictions upon the parties;

if two meanings of a stipulation are admissible according to the text of a treaty, the meaning to prevail is that which the party proposing the stipulation knew at the time to be the meaning preferred by the party accepting it;

it is to be taken for granted that the parties intend the stipulations of the treaty to have a certain effect, and not to be meaningless. Therefore, an interpretation which would make a stipulation meaningless or ineffective is not admissible;

all treaties must be interpreted so as to exclude fraud, and so as to make their operation consistent with good faith;

all treaties must be interpreted according to their reasonable, in contra-distinction to their literal sense".

Oppenheim further points to the well-established rule in the practice of international tribunals that so-called preparatory works, i.e. the record of the negotiations preceding the conclusion of

a treaty, the minutes of meetings and committees on the Conference which adopted a convention, etc., may be resorted to for the purpose of interpreting controversial provisions of a treaty.

On the basis of these interpretation rules one could venture to disagree with part of the reasoning of the report Corniglion Molinier and to a certain degree also with the views taken by Schaus, Spiegelenberg and Sand. Such a disagreement would, again to a certain degree, be supported by the actual situation which is still based upon the sovereignty principle of the Chicago Convention. None of the Six States until now has referred the matter to the Court of Justice as they are entitled to do. Especially for the smaller States among the Six, the question is of considerable importance and particularly for such airlines as KLM and Sabena, a decision of the Court rendering the provisions of Chapter 3 of Title III of Part II applicable to air transport would increase considerably their opportunities to compete.
Sand claims that the records of the preparatory work to the Treaty have not been publicized with a view to the avoidance of future historical reasoning. I wonder in how far this would affect an attitude such as that of the Permanent Court of International Justice mentioned by Oppenheim, or also the Court of Justice of the Community.
Oppenheim takes the view that the finding as to whether a treaty is clear or not, is not the starting-point but the result of the process of interpretation and that the Court itself has to resort to the preparatory work even when in its view the Treaty

was clear. It seems apparent that from the historic side the Treaty does not embrace air transport. The contracting States were obviously reluctant to commit themselves with respect to such a delicate matter.

From t h e t e x t o f t h e T r e a t y it seems clear that transport in general shall be subject to a common policy (art.3). Moreover all articles mentioning transport refer to Title IV for the rules governing transport as a special topic 550). Title IV prescribes the procedure to be adopted with regard to that common policy, but stipulates that this procedure does not apply to air transport. The latter is not regulated, but it is stated that the Council may decide to do so.

If air transport comes within the meaning of the Treaty, it must be regulated by the rules set forth for one of the economic activities to which the Treaty applies. These activities are indicated in Part II of the Treaty. Part II establishes two regimes, one for the free movement of persons, services and capital, and a special regulation on transport.

Article 84(2) makes it clear that air transport is exempted from that special regulation. Air transport therefore, if subject to the Treaty, would be subject to the rules relating to services. There is no other choice.

However, if air transport must be considered to come within the meaning of the chapter relating to services 551) this would constitute a situation that the contracting parties surely did not intend to create. The claim that the said chapter applies to air transport, therefore must be rejected.

Air transport thus does not come within the meaning of the economic activities dealt with by Part II; in other words, it cannot be considered to belong to the bases covered by the Community. Therefore I see no reason why the common rules as contained in Title I of Part III should apply to air transport. These rules are common to the activities coming within the meaning of the Common Market to which air transport does not belong. The same goes for the rest of Part III dealing with economic and social policies, as could also be concluded by applying the above interpretation rules to these matters.

The fact that air transport can not (yet) be considered to be covered by the Treaty does not mean that the Common Market will not affect air transport at all. As Corniglion Molinier pointed out, several aspects of the air transport industry benefit from the existence of the Community. The rules relating to the free movement of goods, persons and capital and to a certain extent the right of establishment, do not discriminate and the policy of the community entails also these rights if exercised within the scope of civil aviation. But as far as the special international aspects of air transport are concerned, viz the right to fly and connected problems, the text of the Treaty does not provide anything else but ".... the activities of the Community shall include .... the inauguration of a common transport policy;" moderated and further elaborated by the provision "The Council .... may decide w h e t h e r, t o w h a t e x t e n t and b y w h a t p r o c e d u r e appropriate provisions m i g h t b e adopted for air transport".

POSSIBILITY AND DESIRABILITY OF KEEPING AIR TRANSPORT OUTSIDE THE TREATY.

Although the text of art. 84 sect. 2 itself seems not to constitute an obligation to take any measures in order to bring air transport within the scope of the Treaty, its very existence cannot but mean that its framers did consider this form of transport an economic activity to which the principles of the Community certainly c o u l d apply. The aim of EEC is to unify the entire economic policy of the Community. It is conceivable that transport could be used to weaken or to evade the indispensable measures for the creation of the Common Market. The disappearance of the discrimination within the scope of transportation and the free operation of services connected with a policy of free establishment relating to transportation in the countries of the Six, is therefore essential to avoid distortion of competition.

It is difficult to deny the fact that "trade" or "commerce" comprises transportation. This is fully acknowledged inter alia in the U.S. Federal Aviation Act which defines "air commerce" as "interstate, overseas, or foreign air commerce, or the transportation of mail by aircraft, or any operation or navigation of aircraft which directly affects, or which may endanger safety, in interstate, overseas, or foreign air commerce" 552).
Von der Groeben, speaking to the European Parliament 553) on the application of the competition rules of the Treaty, stated it thus: "There is no doubt - and the drafters of the Treaty have clearly realized this - that there is no sense in abolishing the

restrictions in trade between the Member States if the governments or private enterprises keep disposing of the possibilities of cancelling the opening of the markets aimed at and of hampering or considerably slowing down the necessary adaptation to the Common Market through economic or fiscal measures, or measures of support, or of restriction of the competition by means of trust forming". And further, "The experience of the last hundred years has proven the existence of strong powers in the economy of our countries whose aim it is to restrict competition. If these powers are left free, the danger is imminent that the competition, which should be the regulating factor of our Community, becomes ineffective and must be changed eventually by a government controlled policy. This would not be in accordance with the federal structure of our Community".

There is no doubt that air transport is one of the economic activities which is hampered by restrictive policies. The trouble, however, is that these policies are imposed chiefly by the governments themselves. Nevertheless they constitute a danger to the aims of the Community and a means to evade the regime sought after.

THE UNIVERSALITY OF THE TREATY.

Considerations of this nature which are also found with Schaus 554), the Transport Commission of the European Parliament 555) and Sand 556), presumably stimulated by the rather unfavourable situation of the air transport market, have led to a gradually increasing stress on the Universality Principle of the Treaty. This Principle of Universality, according to its

defenders, entails the principle application of the Treaty to all lines of industry, trade and services of the six countries. The justification for this point of view concentrates mainly on articles 229 - 234 inclusive. Art. 234 stipulates that the rights and obligations resulting from conventions concluded prior to the entry into force of the Treaty between Member States and non-member States, shall not be affected by its provisions. In so far as they are not compatible all appropriate steps shall be taken to eliminate any incompatibility found to exist. Such a provision does not exist with regard to conventions concluded between Member States, except with regard to the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community 557). An other exemption is made with respect to the system existing in the States in respect to property 558). It is concluded from these provisions that atomic energy, coal and steel and - to a certain extent - property, should be the only items not to be affected by the Treaty's aims.

Also in those cases in which special regulations of the Treaty from their very nature are only applicable to a particular branch of industry or trade, but with the intention that they are not (yet) to be applied to that branch, the exemptions are expressively stipulated in the Treaty. Only the principle of a free movement of services in the field of transport is not to be exercised in accordance with the general provisions relating to the abolition of the restrictions concerned. The bodies of the Community are bound to direct themselves to the special transport regulations.

In other fields, however, particularly in the field of the competition, rules establishing similar precautions have not been made for transport. This is contrary to the special rules relating to agriculture and trade in agricultural products,"as shall be determined by the Council"559).

Although the definition of transport within the meaning of the Treaty on the basis of its history and the articles 3(e), 61 (1), 84 and 197 examined in the light of interpretation rules, seems to indicate an exclusion of air transport for the time being, on the one hand, on the other hand the purpose of the Treaty, the motives which led to its conclusion and the conditions prevailing in art. 84 (2), must lead to the conclusion that the Council is bound to decide whether, to what extent and by what procedure appropriate provisions are to be adopted for air transport 560).

COUNCIL VERSUS COMMISSION.

This conclusion however, seems not to be in accordance with the views of the Council itself. On October 25th, the Council adopted a general programme for the abolition of restrictions on the right of establishment. This programme applies also to transport enterprises and auxiliary enterprises in the field of transport. According to it, the discriminations and other restrictions on the basis of the nationality of the persons and companies operating transport business, must be abolished before 1968. With respect to auxiliary enterprises this situation must be achieved before 1964. At the same time the Council adopted a general programme for the abolition of restrictions concerning

the free movement of services, which (according to art. 61) does not apply to transport.

In the meantime, however, the Commission started its preparations for the realisation of the free movement of transport services, taking into account the special aspects of this branch of industry 561).

Owing to the juridical dispute concerning the application of the Treaty to air and sea transport, the insertion of the latter forms of transport into the programme of the Council was deferred in the first instance.

In its programme submitted to the Council in 1962, however, the Commission states clearly its view that the provisions of the Treaty apply to both air and sea transport 562). Paragraphs 236 and 237 of the programme state: "According to the text of art. 84 of the Treaty, the provisions of articles 74 - 83 inclusive apply to transport by road, by rail and on the inland waterways. They do not apply to sea transport and air transport. Article 84 endows the Council with the power to decide whether, to what extent and by what procedure appropriate measures might be adopted for both these branches of transport.

The Commission, however, takes the view, that the other provisions of the Treaty apply to shipping and aviation, in so far as the Treaty does not contain a particular exemption or an authorization 563).

Taking into account the particular circumstances relating to shipping and aviation and particularly in view of their position in world traffic, the Commission is now examining whether it is

necessary to create special regulations in respect to competition for these two branches of transport" 564).

This programme of the Commission and the Commission's attitude towards the application of the Treaty to aviation goes farther than the Memorandum of April 10th, 1961, upon it has been founded 565). In 1961 the Commission took the view that besides articles 74 - 83 inclusive, articles 59 - 66 did not apply to aviation. The memorandum states: "However as pointed out above (section 35), the rules of the Treaty are applicable to all economic sectors, unless exemptions are expressly provided for. Hence rules of the Treaty apply in principle to shipping and aviation, except where they are expressly exempted. The only exemption directly following from the Treaty, is that of art. 61 sect. 1, according to which the provisions of articles 59 - 66 relating to the free movement of services are not applicable to transport. On the other hand the provisions relating to the abolition of the restrictions on the right of establishment are indeed applicable to aviation and shipping. In accordance with this view the Commission has embodied these provisions in the general programme for the execution of art. 54, sect. 1 of the Treaty, which it submitted on March 22nd, 1960.

It is, however, clear that shipping and aviation have their own special characteristics and that these branches of transport are to a much greater extent interwoven with, and more dependent upon, world economy than the intra-European means of transportation. It is in the Community's own interest to take into account this situation and not to jeopardize the competitive power of shipping

and aviation outside the area to which the Treaty of Rome is applicable.

As mentioned above certain articles of the Treaty provide for the possibility of adjusting the general rules to the economic demands. Moreover art. 84 sect. 2 endows the Council with the right to decide whether, to what extent and by what procedure appropriate provisions may be adopted for sea and air transport. Therefore it is necessary to subject all problems evoked by sea and air transport in the field to which the Treaty is applicable, to a common investigation, in order to be able to take measures on the basis of art. 84, sect. 2 necessary to take into account the particular position of these types of transportation. It might even appear desirable to suspend the application of certain general rules of the Treaty to sea and air transport for a period to be fixed, until appropriate measures relating to these branches of transport can be taken" 566).

These statements seem to indicate a difference of opinion between the"general competent and indisputably independent"567) Commission and the politically bound 568) Council. As stated above, it is difficult to agree fully with the views of the Commission because it can hardly be assumed that the rigorous consequences of such an application of the Treaty can be in accordance with the intentions of the contracting parties. On the other hand the interpretation of the Commission cannot but accelerate the achievement of highly desirable measures with respect to the coordination and regulation of European air transport.

THE CONSEQUENCES OF THE APPLICATION OF THE TREATY TO AIR TRANSPORT.

Of "the other provisions" as referred to by the Commission, the provisions of Chapters 1, 2 and 3 of Title III of Part II, Chapters 1 and 3 of Title I, and Chapter 3 of Title II of Part III appear to be the most important, as they would directly affect the particular international aspects of civil aviation. Chapter 2 of Title III of the Second Part of the Treaty - dealing with W o r k e r s; R i g h t o f e s t a b l i s h m e n t; S e r v i c e s - stipulates that the f r e e m o v e m e n t of w o r k e r s shall be ensured within the Community. For the airlines this would mean a free movement of their personnel in the countries of the Six 569). Free movement includes the adoption of measures such as the introduction of a system which permits an assurance to be given to migrant workers and their beneficiaries for social security and pension benefits 570), the abolition of administrative procedures hampering their eligibility for available employment 571), etc. Regulations establishing a preference for national employees and compelling foreign employers to take certain percentages of nationals of the State in which they operate their business into their services will disappear. Airlines therefore will be able to train their personnel in one place and send them to any other place in the Community where they do business, regardless of their nationality.

Closely related to the free movement of workers is the r i g h t of e s t a b l i s h m e n t dealt with in the following chapter of the same Title. Airlines will have the right to set up their branches and subsidiaries in all countries

of the Six 572). They can open their sales offices and also can claim to be treated equally with the national airlines both with respect to international traffic within the Community and to cabotage traffic within the countries. It goes without saying that such an unlimited 573) granting of cabotage, third, fourth and fifth freedom rights would have a favourable influence on the European network. Its pattern of a spike wheel would probably change into a pattern of individual services not only connecting the national capitals with several other European cities, but of long-haul routes connecting a number of cities in series and providing air services between every major city without a necessary detour via the national capital of the airline performing the service. In fact States would not even be allowed to discriminate with respect to their international traffic outside the Community and they would not be able to avoid designating the foreign airline offering the best conditions for a certain route as their "chosen instrument".

The idea of a freedom as described above might be tantalizing to some of the strong "freedom riders" in the field of aviation. It seems clear however, that the period left for the full establishment of the Treaty will hardly be sufficient to achieve such a situation. Moreover there are s e v e r a l obs t a c l e s which are likely to necessitate the establishment of the appropriate measures of art. 84, before any liberalisation of a substantial nature can be established in practice 574). These obstacles are not only concerned with competition as referred to by the Commission, but also with the impact of such liber-

alisation on international air traffic.

In the first place there is the Convention of Chicago to which all six countries are members. The granting of cabotage rights to each other's airlines would meet with difficulties arising out of art. 7 of the Chicago Convention which forbids States to enter into any agreements granting such privileges on an exclusive basis or to obtain such privileges. A similar difficulty could arise from art. 9(b) of the Convention in case of restrictions or prohibitions of flight over a part of the territory of one of the States. The latter question, however, could be dealt with on the basis of art. 223 of the Treaty 575). The former has been solved also by the Scandinavian countries which faced similar problems in respect to their S.A.S.

The application of the principles of the Treaty would moreover necessitate the establishment of a rather extensive complex of rules adapting the national legislations and administrative procedures of the various States to a common aviation policy 576). It is e.g. obvious that all obstacles to hire, charter and interchange of routes would have to be removed 577). Furthermore, the right of free movement of workers would be a farce if it was confined to unskilled labor only, in other words if the free movement of qualified workers was frustrated by the different legal and administrative requirements in the field of diplomes, certificates and other qualifications 578). Disparities existing in the legislative and administrative provisions concerning aviation which in any way could distort the conditions between the airlines would have to be eliminated 579). In short, the air laws of the Commun-

ity would have to be unified, especially in the field of public law, but also a great deal in the field of private law.
As far as the private law is concerned, the interference is that the rules of the Warsaw, Rome, Guadalajara, Geneva and Brussels Conventions, etc. would be translated into a domestic Community air legislation, but a common aviation market would - as the Common Market in general - also demand equal provisions in the field of commercial legislation, sale of goods and transport acts, etc. 580).
With respect to public law matters such as the registration of aircraft, the issuance of licenses, and airworthiness certificates, the requirements of documents to be carried, cargo restrictions, regulations relating to the carriage and utilisation of phographic apparatus, investigations of accidents, airport charges, etc. may be mentioned.

According to the spirit of the Treaty every State should allow the registration of aircraft owned by nationals of another State of the Community in its territory 581). Licenses should be mutually recognized with regard to their utilisation in aircraft of the nationalities of all the six States. The same would apply to airworthiness certificates issued by one of the Six. The requirements with respect to documents to be carried in aircraft would not differ such as to put a heavier burden on the airline of one State than other airlines in the area of the Community would be subjected to. The imposition of cargo restrictions as referred to in article 35 of the Chicago Convention would not be allowed with regard to an airline of one of the Six in discrimin-

ation to another 582). A similar attitude would have to be adopted with regard to the prohibition of regulation of the use of photographic apparatus as dealt with in article 36 of the said Convention 583). The investigation of accidents 584) would have to be regulated in such a way as not to concede facilities to one airline rather than to another. Airport charges would have to be levied on an equal basis so as to remove favourable treatment of the national airlines 585).
All this would occur only in so far as these objectives have not yet been achieved by other conventions and arrangements between the Six.

In the light of this complicated set of measures necessitated by the insertion of air transport into the scope of the Treaty, it is not surprising to learn that during the negotiations on the extension of the economic unification of Europe outside the scope of the European Coal and Steel Community, air transport from the outset supplied an important place. It is also not surprising that several delegates to the preparatory meetings took the view that the conclusion of a convention on civil air transport next to the ECSC, should be given preference to further steps to be taken.

No doubt such a convention would not have avoided the matter which has been dealt with in Chapter 3, Title II of the Third Part of the Treaty: the C o m m o n C o m m e r c i a l P o l i c y. Chapter 3 stipulates that by establishing a customs

union the Six intend to contribute, in conformity with the common interest, the harmonious development of world trade and the progressive abolition of restrictions on international exchanges 586). They will co-ordinate their commercial relations with third countries in such a way as to bring about the conditions necessary for the implementation of a common policy in the matter of external trade 587). Without prejudice to obligations undertaken by Member States within the framework of other international organisations, their measures to aid exports to third countries shall be progressively harmonised to the extent necessary to ensure that competition between enterprises within the Community shall not be distorted 588).

Air transport appears to be the branch of transport which first of all encounters the obstacles of national frontiers and whose scope surpasses the continental framework. By the development of its nature from a matter subject to protection of security interests to a matter particularly governed by economic factors, civil air transport has become a matter so closely intertwined with foreign trade, that aviation policy no longer can be detached from trade policy. This fact provides another argument for the inclusion of air transport in the sphere of action of the Treaty (This for those who do not agree with the view of the Commission).

These provisions are bound to bring about a considerable fortification of the position of European airlines on the intercontinental and other extra-Community routes 589). The application would not only serve integration within the framework of the Six, but would constitute also a forceful stimulation to the liberali-

sation of air transport on a much wider scope. The formation of an air transport bloc consisting of six countries would make it difficult for other countries to stick to their restrictive policies against a front of liberal mutually solidary European countries. This applies in the first place to the other European countries, those of EFTA and in the second place to all members of ECAC. Eventually it would also apply to the U.S.A. and Canada to which countries all major European airlines maintain services which because of the restrictive policies governing the granting of the rights concerned, mostly have to be confined to one particular city 590). The combined area of the countries of the Community would provide the countries concerned with a much better bargaining position, at least comparable with the position which the U.S.A. has acquired on the European continent 591).

As is the case with respect to the other activities of the Community such a bloc formation cannot be reproached with being protective and opposed to the principles of world order as laid down in the Charter of the United Nations. For such a bloc would not be aimed at protectionism, but on the contrary, it would represent a striving after more freedom, after a break-through of the existing protectionism 592).

The C o m p e t i t i o n R u l e s of Chapter 1 of the First Title of Part III provide for the anti-trust legislation of the Community. Before the establishment of the Community anti-trust rules existed only in France, Germany and the Netherlands,

but since Belgium, Luxembourg and Italy have also adopted the appropriate rules 593). The principles of the Community entail the freeest possible competition aimed at a greater productivity for the benefit of the consumer who should get his share of that greater productivity in the form of lower prices. But the consumer does not stand to benefit alone, for firms, governments and workers alike need the quarantees of a clear-cut and uniform policy 594).

The rules governing competition in the Treaty are divided among three sections of which the first two might be considered as the "private" counterpart of the "public" rules relating to the free movement of goods, persons, services and capital of Part II. They set forth rules for enterprises; the third section applies to aid granted by States. Incompatible with the Common Market and prohibited are any agreement between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade in the Community and which have as their object or result the prevention, restriction or distortion of competition within the Common Market. Particularly mentioned as such a practice is among others, the direct or indirect fixing of purchase or selling prices or of any other trading conditions 595).

To the extent to which trade between any of the Member States may be affected thereby, the action by one or by more enterprises to take improper advantage of a dominant position within the Common Market or within a substantial part of it will also be incompatible. Among others, the limitation of production, markets

or technical development to the prejudice of consumers, is mentioned in particular 596).

These rules also apply to enterprises charged with the management of services of general economic interest, this to the extent that the application of such rules do not obstruct the de jure or de facto fulfilment of the specific task entrusted to such enterprise. The development of trade may not be affected to such a degree as would be contrary to the interests of the Community 597). In respect to public enterprises and enterprises to which governments grant special or exclusive rights, no measures may be enacted or maintained which are contrary to the rules of the Treaty, in particular the competition rules and the rules prohibiting any discrimination on the grounds of nationality 598). Any government aid, in any manner whatsoever, which distorts or threatens to distort competition by favouring certain enterprises or certain productions shall, to the extent to which it adversely affects trade between Member States, also be deemed to be incompatible with the Common Market, this except in a few exceptional cases mentioned in the Treaty 599).

See here the most important rules relating to competition which would apply to the air transport in the Community. The last mentioned would be of direct application to the subsidizing practices without which the major airlines of five of the six countries 600) in the current situation in fact could not continue their services and certainly could not maintain their acquired position. The measures to improve their situation as sug-

gested earlier in this work, would likely be also incompatible with the provisions of the Treaty. Particularly when such forms of close co-operation such as the establishment of a consortium would be chosen, as such a consortium would inevitably carry with it a certain degree of monopoly with the consequent limitation of production and of technical development.

In this case, however, one of the exemptions provided for in the Treaty, might be invoked, namely the provision stating that aids intended to promote the execution of an important project of common European interest may be deemed compatible with the Common Market 601). It would also be possible that aid to air transport would be designated by decision of the Council, acting by means of a qualified majority vote on a proposal of the Commission, as a category deemed to be compatible with the Common Market 602). In the former case it would have to be proved that the consortium or other form of collaboration, is of common European interest. It is doubtful whether an institution such as the projected Air-union consisting of the airlines of only part of the Community's countries would conform with this criterion. In case of the entry of Britain or other countries to the Community it would be even more difficult to invoke this exemption.

The latter solution would seem preferable - if strictly necessary - but the danger would most likely be involved that other distressed branches of transport would claim a similar governmental support.

The current practices relating to air transport also would be in conflict with the rule regarding enterprises to which

States grant special or exclusive rights. The current measures in force are contrary to the rules of the Treaty. Although airlines must be considered as enterprises charged with the management of services of general economic interest, it seems doubtful whether the application of the EEC rules would "obstruct the de jure or de facto fulfilment of the specific tasks entrusted" to them 603).

Last but not least there is the prohibition of agreements or dicisions with the object of preventing, restricting or distorting competition, and when the Treaty particularly mentions the fixing of prices and conditions, one cannot but think of IATA. As has been pointed out before, IATA may be considered as a sort of rationalisation trust. Rationalisation in itself seems not to be prohibited by the Treaty, but the activities of IATA's Traffic Conference for Europe and Africa in which the major airlines of the Community take part, must be deemed incompatible with the provisions governing the Common Market. Membership of a IATA Conference, however, could probably be maintained if in accordance with the exemption rule of art. 85 sect. 3 the said provisions might be declared inapplicable on the basis that the co-operation of airlines in IATA must be deemed "to contribute to the improvement of the production or distribution of goods or the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom and which neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives, nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned" 604).

In my opinion, it must be admitted that IATA collaboration contributes to the promotion of the technical or economic progress of air transport. Maybe it even contributes to the production and distribution. It would however be difficult to claim that all the regulations of IATA resolutions - let us think e.g. of the well-known matter of the ham sandwich on the Atlantic routes - concern only restrictions which are indispensable to the attainment of the said progress. Moreover, it must be conceded that the fixing of rates eliminates a substantial part of the competition. Concluding that membership of IATA tends to be incompatible with the Common Market, it is surprising to find that the report Corniglion Moulinier 605) and also the draft resolution of the Assembly resulting therefrom 606) favour IATA co-operation. Both take the view that it would not be prudent to apply the competition rules to air transport without appropriate precautions and that it would be preferable to draft the appropriate measures of art. 84 sect. 2 in accordance with the system of competition such as adopted by IATA. The Programme of Activities submitted by the Commission to the Council stresses the necessity for special competition rules too 607). Some of the writers mentioned above do the same.

Before concluding this short review of the problems raised by the Treaty's competition rules, when considered with respect to air transport, it seems noteworthy to point to a characteristic difference between the EEC rules and those set forth

for the ECSC. Whereas the latter forbid in principle all concentrations (comparable to the U.S. anti-trust provisions), 608), the EEC rules only forbid concentration taking improper advantage of the resulting dominant position 609). The European regulations thus provide the airlines with more possibilities than their U.S. counterparts have in this respect. The latter are prevented from merging without the special permission of the Civil Aeronautics Board 610). European airlines would also be fully free to enter into agreements concerning intercontinental traffic if the intra-Community competition would not be affected thereby 611). The U.S. airlines performing international services however, do not have such freedom 612).

The application of the competition rules is supervised by the Commission. The Commission, however, does not have the power of a European Aviation Authority as proposed by the Bonnefous and Sforza Plans or comparable with the U.S. Civil Aeronautic Board. Its task is to investigate infringements of the rules, to propose appropriate means for bringing them to an end or, if an infringement continues, confirm its existence by means of a reasoned decision (which may be published) and authorise the Member States to take the necessary measures to remedy the situation, particulars of which measures shall be determined also by the Commission 613).

However, the Council, not the Commission, is endowed with the right to adopt provisions to ensure observance of the rules by the institution of fines and penalties. The role of the Commission and the Assembly in establishing such rules are respectively proposing and consultative 614).

From the foregoing it appears that the power of the Council to issue directives for the approximation of laws and other legislative and administrative provisions of the Member States as provided for in Chapter 3 of Title I of Part III, is of substantial importance with respect to air transport. The necessity for the utilisation of this power has been dealt with. Therefore it seems sufficient to mention that the Council shall act in this matter on a proposal of the Commission, after having consulted the Assembly and the Economic and Consultative Committee 615). In addition, laws may also be approximated by international convention: Article 220 lists several subjects as matters of priority.

EEC RULES TO APPLY TO AIR TRANSPORT.

I have taken the view that the rules of the Common Market do not apply to air transport. In addition I have given a review of the situation as it would develop if the rules did apply. This review shows both the impossibility of applying them without the utilisation of the provision of art. 84 sect. 2 and the desirability of making use of that provision as soon as possible.

There is no doubt that the Common Market rules will bring considerable obligations to air transport, but these obligations are likely to be largely counteracted by the advantages which air transport will gain from the ever increasing volume of traffic and better adapted services resulting from a change to a common economic policy.

As for aviation policy and aviation law, the greatest importance of size to the Community is that as its political unification grows, it becomes more and more difficult for any of its members to get out of hand and to embark on some new nationalism. Reasons of defence and security have lost their meaning. After having committed themselves to each other by means of co-operation in NATO, the EEC States also set up common nuclear research facilities whose Euratom centre in the Netherlands seems also of considerable military importance. In June 1962 moreover ten European countries signed a treaty establishing a European Organisation for Space Research whose programme is aimed at an output comparable to the Russian and American achievements in space 616).
And, as corniglion Moulinier observes in his report, "Are wheat and potatoes not also of paramount importance in warfare?"
One can differ as to the details of the common air transport policy to be inaugurated 617) by the appropriate provisions 618) to be adopted. In any event, however, it is necessary that regulations should be prepared which are to the greatest possible extent identical and which take effect at the same time for all Member countries. Every country should also accept as a consequence of the increasing traffic of persons and goods the duty to watch over the interest of the other Member-countries.

It is also questionable whether the regulation of the European interests by European rules directly binding the nationals of the Community's countries is preferable to national rules. Equal opportunities, however, can only be guaranteed by identical laws 619). Equal opportunities entail the equal enforcement of

the laws, both civil, administrative and criminal. This would point in the direction of a common authority to administer such laws, as the interpretation by national judges will no doubt lead to divergencies. With respect to such a controversial matter as air transport it seems important that such divergencies should be avoided as much as possible 620).

A COMMON AVIATION POLICY.

In suggesting a few features with regard to a common air transport policy it seems logical to start from the guidance given by the Treaty for a common policy relating to other forms of transport (rail, road and inland waterway) 621) and the elaboration of the provisions concerned by the Commission.
In its Programme of activities in the field of a common transport policy the Commission states that such a policy must reflect the following aims:

- the abolition of restrictions in the field of transport which are likely to hamper the realisation of the general common market,
- the integration of transport within the Community,
- the regulation in a general sense of the structure of transport activities within the Community.

The measures to be taken in order to achieve these aims must be founded upon the following paramount principles:

- equal treatment,
- financial independency of the enterprises,
- freedom of action of the enterprises,
- free choice of the users,
- co-ordination of investments.

From an examination of the said provisions of the Treaty it seems equally logical that at least one of them should immediately be applied to air transport viz the stipulation that no Member State shall apply the various current national and international provisions governing the subject of aviation, in such a way as to make them less favourable, in their direct or indirect effect, to carriers of other Member States when compared with its own national carriers 622).

There also seems no reason not to apply to air transport the stipulation that any measure in the sphere of transport rates and conditions, adopted within the framework of the Treaty, shall take due account of the economic situation of carriers 623). As a matter of fact it would not be possible to avoid that stipulation.

As has been indicated before, the most controversial rules of the Treaty with regard to air transport are those relating to the

- free movement of persons and services,
- competition,
- and commercial policy.

The other rules do not seem likely to do any great harm to the interests concerned. On the contrary, their application to air transport could only be of advantage, to both air transport enterprises and the public. This seems particularly true in respect to such provisions as those relating to the European Investment Bank and to the approximation of laws other than those included in the above mentioned topics.

FREE MOVEMENT OF PERSONS AND SERVICES.

The application of the rules relating to the free movement of workers will necessitate a co-ordination of the national rules relating to the requirements and standards for qualified personnel, such as pilots, radio operators, mechanics, etc. In this respect the fact that all the six countries are parties to the Chicago Convention and members of the International Telecommunications Union 624), is of great importance. All of them follow to a greater or lesser extent the rules regarding standards of personnel laid down in Annex 1 of the Chicago Convention 625) and there should not be great difficulty in agreeing to common standards in this field 626).

The co-operation of the States in ECAC could facilitate such an agreement.

Besides matters of recognition of licenses there are other matters to be regulated. To mention a few: the questions of salaries, social security, employment, working conditions, occupational training, protection against occupational accidents and diseases, laws as to trade unions and collective bargaining between employers and workers. They are dealt with in article 117 and seq. of the Treaty. These matters are not mentioned in the First Part of the Treaty, but constituting a logical consequence of the stipulations relating to the free movement of labour, they cannot be detached from it. Unification of the respective regulations in force in the various countries will not meet with many difficulties either.

As stated before 627), the fact that an enterprise can move its own officials from one branch to the other without being hampered by protectionist national employment policies is certainly of importance and increases the possibilities of economic operation. Airlines as suppliers of services, however, will particularly profit from such rights of free establishment if they are not only allowed to establish but also to operate their business in the foreign country, which is the main objective of such an establishment.

The Common Market provides aviation with the possibility of interchange of maintenance and overhaul of aircraft. This follows from the abolition of customs barriers 628). It should also offer a solution for liberalisation and co-ordination. That is to say that matters such as interchange of aircraft and interchange of routes, both matters which cannot but serve the principles as laid down in article 1 of the Treaty in a direct way should be freed from any restriction 629). A common air transport policy achieving the objectives of the Treaty could not surpass liberalisation.

LIBERALISATION ULTIMATE AIM.

An immediate admission of the air transport enterprises of the Community to all routes within the Community would no doubt lead to greater economic distress than exists today. In order to offer services at least equal to those of their competitors, most of the airlines would extend their networks to an extent

which would almost certainly cause an economic calamity. Load factors would likely decrease and government subsidies would hardly be able to keep pace with the losses.

Competition between unscheduled and scheduled services would cause a distortion of competition incapable of avoidance by the formation of cartels. It is therefore clear that substantial regulation is inevitable. However, the difficulty lies in the question what that regulation must consist of.

The principle of free competition leading to international specialisation, greater productivity and the benefits therefrom to be derived for both the consumer and the producer, will - if restrictions are necessary anywhere - not deny to a country, which has shown a special capacity for a given activity the allotment of a share in the European economy proportionate to that capacity 630). In other words, the principles of the Treaty are opposed to a solution such as proposed in the Sforza and Bonnefous plans.

A common policy as indicated by the Treaty, must be deemed to consist of the totality of measures, aimed at the realisation of the principles of the Treaty in the field of air transport. All measures taken by the governments and the institutions of the Community must fit into this policy 631). One of the most important of these principles is that of equal opportunity for enterprises within the Community. Not an equal opportunity such as that of the Chicago Convention 632) securely framed in the principle of national sovereignty, but an equal opportunity in a free market with a sufficient number of precautions to prevent any distortion of competition. Therefore, although the rules relating to

the liberalisation of services cannot be applied immediately, their full application to air transport must be ultimate aim. Such a degree of full liberalisation could be reached through different stages in a similar way as has been planned with regard to the other branches of transport. Such stages could entail the gradual abolition of restrictions. Quite clearly, it is impossible to suggest a complete liberalisation programme from behind a writing table in a study room. The establishment of such a programme will be a task of the EEC Commission with, as it seems to me, the indispensable assistance of representatives of the airlines, governments and perhaps also of ECAC or ICAO.

After the example of the proposed measures for road traffic however, 633) it would be conceivable that such a programme could contain the following stages:

a. liberalisation of freight traffic, both for all-freight flights and for freight carried on scheduled passenger flights, passing through countries of the Community;

b. consolidation of the current situation with respect to international traffic rights within the Community and the granting of further traffic rights within the Community according to a system similar to that applied by the U.S. Civil Aeronautics Board, that is to say, traffic rights within the Community are granted to the airline of the Community which requests them and can prove that the service concerned is both an economic and sound 634) project and in the interest of the public;

c. abolition of all capacity clauses governing intra-Community services;

d. permission to the airlines having third or fourth freedom rights

on certain routes to carry fifth freedom traffic on these routes;

e. permission to the airlines having rights on a certain route covering a substantial part of the territory of another State of the Community, to engage in cabotage traffic within that State along the route concerned;

f. consolidation of the situation with respect to national traffic rights within the Community and the granting of further domestic traffic rights to the airlines established or having a subsidiary in the country concerned - but without any discrimination on the grounds of nationality - which applies for that route and can prove that the service concerned is economically sound and in the interest of the public.

It goes without saying that between these stages several other (sub)stages would be possible.

Complementary measures would be necessary for non-scheduled traffic. This traffic also will have to be allowed to take part in a Common Market system but is must be prevented from distorting the competition with the scheduled traffic.

COMPETITION AND SUBSIDIES.

In its Memorandum regarding the direction to be given to the common transport policy the Commission states:"The activities of the Community in the field of transport must enable the transport to fulfil in a sufficient manner its role in the construction and functioning of the EEC. These activities must be aimed

at the creation of the conditions necessary for the development of an effective transport system, which is able - at the lowest possible cost to the Community, taking into account the financial equilibrium and on the best conditions - to conform to the requirements which will be created by the economic expansion in the Member States and the establishment of the Common Market 635). The aim at lower cost and prices is also mirrored in other statements made by institutions of the Community and government officials.

As has been pointed out, the present competition which excludes the fares and some other IATA fixed features, does not contribute to the achievement of lower prices, but rather has the opposite effect 636).

At first sight then, it appears surprising to learn that the Transport Commission of the European Parliament recommends the IATA competition system as a guidance for the establishment of rules on the basis of art. 84, section 2 637). On the other hand, as has been stated, free competition between airlines in a free European market is likely to lead to a Wild-West. The "appropriate provisions" will certainly have to deal with a modification of article 85 for air transport. Minimum fares, traffic pooling, agreements and cancellation of competitive certificates seem inevitable proposals, at least for the transitional period 638). On the other hand the airlines should be prevented from entering into a sort of regulated cartel with fixed prices and quotas 639).

The abolition of subsidizing practices seems a necessary step in the framework of a common policy in conformity with the principles of the Treaty. Where still inevitable, such subsidies logically may be subject to appropriate directives or decisions of the Commission. The maintenance of the current practices for an unlimited period, however, cannot be in conformity with the Treaty. Therefore other solutions must be found.

It is obvious that there are too many airlines in the Community. One solution therefore could be the merger, - under supervision of the Community - of the airlines into two or more concentrations of comparative economic strength. These concentrations could both be granted the rights to the air services within the Community and to be the "chosen instrument(s)" of the Member States for extra-Community traffic. A concentration of this nature could e.g. be Airunion. As long as KLM abstains from joining Airunion , this company could be Airunion's competitor within the Common Market. When in the future other States join the Community or become associated Countries or Territories, such States will be obliged to have their air transport companies examined by the Community with a view of providing them with an appropriate place in the Community's air transport system.

After an initial period of appropriate support such concentrations could be admitted to the Common Market under a competitive system and without government subsidy. The abolition of the existing restrictions should keep pace with the increase in traffic. This would mean that the development of profits would have to be held more or less at the same level until a degree of liberalisation had been reached from which the airlines could carry on in free

competition.

It is hardly conceivable that in the near future a full liberalisation for air transport could be achieved. The same applies to most other forms of transport. From its very nature (air) transport is an industry serving an essential public interest, often with obligatory as well as strict economic services, and therefore subject to concessions. Some regulation both in the field of establishment and the performance of services and with regard to competition seems bound to be maintained. This, however, does affect the principle of equal opportunities.

COMMON COMMERCIAL POLICY.

As pointed out before, the main problems of European air transport are not caused by the intra-European traffic but by the intercontinental transport. The close relationship between air transport and export trade needs no further explanation 640). From the foregoing it may be clear that the stipulation of the Treaty "After the transitional period, the common commercial policy shall be based on uniform principles, particularly in regard to ..... the conclusion of trade agreements, the alignment of measures of liberalisation, export policy and protective commercial measures ....." 641) must also apply to the common air transport policy. Negotiations on agreements are to be dealt with by the Commission 642) and agreements are to be concluded by the Council 643).

Of equal importance is the provision for common action, in respect to all matters of particular interest to the Common

Market, within the framework of any international organisation of an economic character. It is questionable whether an organisation such as ICAO has an economic character. As far as ECAC is concerned, especially when it discussed the liberalisation of traffic rights, I would be inclined to acknowledge that it has at least an economic character in part.

Common action and common policy can be carried out in two ways. It could be interpreted to mean that the Member States have to be consulted when one Member State conducts negotiations with a non-Member State. It can also be interpreted that the negotiations are conducted by a supranational authority and that is the way stipulated by article 113 of the Treaty.

The intra-European liberalisation of traffic and the measures to be taken in order to achieve such liberalisation have already been dealt with. In the current situation, however, it is impossible to influence and direct the intra-European transport system without at the same time influencing transport between the Community and third countries. A common air transport policy cannot be confined to the domestic problems of the Community. It implicates the Member States both in regard to their mutual relations and in regard to their relations with third countries, and requires them to abandon the principle of sovereignty in their airspace 644). The maintenance of sovereignty by each State could lead to considerable distortion of the competition. If e.g. Belgium concluded a bilateral with the U.S. providing for unlimited frequencies from all parts of the Western Hemisphere to Belgium and full fifth freedom rights in Belgium, this bilateral could not but affect the transport of the other

countries. Also for that reason the common area of the Member States therefore must necessarily have the complement of a common air space above it. Bilaterals with third countries will have to be a Community matter; in most cases they should contain an EEC clause 645). The same principles which necessitate the liberalisation of and the establishment of equal opportunity in air transport in regard to intra-Community traffic, must also apply to extra-Community traffic.

AVIATION AUTHORITY OR AIRUNION.

The execution of such a common air transport policy demands specialisation. It could not be left to the institutions mentioned in the Treaty itself. Of course, the creation of a sort of Community Air Authority as an independent body without being subjected to the supervision of the Commission and Council and beyond parliamentary control would not be acceptable. Nevertheless, the creation of a body controlled and supervised by the institutions of the Treaty seems necessary in order to guarantee a reasonable execution of this policy 646). This body would have to be composed in a similar way to the Commission, so as to warrant the strict and indisputable independence of the members. Its task would be the granting of concessions both in international and domestic-Community traffic according to the principle of equal opportunities within the framework of such regulations as would be necessary to prevent unhealthy competition. Those regulations will have to be based on the provisions of Chapter 1 of Title I of the Third Part of the Treaty. In my opinion the Community would

have to reserve its right to set the rates for intra-Community transport, but there is no doubt that for many practical reasons the rates for extra-Community traffic should be left subject to IATA Conference machinery.

Another solution could be accomplished by the airlines themselves. If KLM eventually joined Airunion, this consortium would be the only representative major air transport company in the Community. The legislative role of the Community in that case could be confined to setting the frontiers between non-scheduled traffic and Airunion and between Airunion and foreign airlines. The achievement of a common policy would be considerably stimulated and facilitated by such private initiative. It could be expected that the Member States would gladly renounce any objections to such a trust forming on the basis of the Treaty's competition rules. For the danger of competition which is inherent in concentrations of this kind, would be almost negligible so far as competitors are concerned. The danger which a concentration is likely to constitute for the public, in this case would be taken care of by rail and road transport within the Community and by foreign airlines in intercontinental traffic.

Additional Community legislation which might still appear necessary would not meet with difficulties in any way comparable to those to be caused by the establishment of a common policy along the lines indicated above. Think only of the simplification of the choice of the "chosen instrument". A solution of this kind, however, could be frustrated by other countries joining the EEC.

A common air transport policy would necessarily have its impact on the equipment policy of the companies, whether these companies would be united in Airunion or not. The establishment of a Eurofinair 647) will be facilitated by co-operation with the European Investment Bank. The co-ordination of the European aircraft industry 648) will also become possible after the adoption of a common policy and the consequent standardisation. Its products will only have to meet the specifications of one code instead of six. The problems of facilitation which are already considerably decreased by the establishment of the customs union, and by the financial regulations of the Treaty, will be further decreased by the adoption of common immigration, health and hygiene rules.

The Transport Commission of the European Parliament mentions as an attendant possibility to a common transport policy the co-ordination and co-operation between air transport and the other branches of transport. It points to the necessity of a certain harmonisation, especially between air transport and rail transport because of their supplementary nature.

THE STIMULANCE OF AN EEC AIR LAW.

It is conceivable that the establishment of EEC with its Common Market will be followed by a still closer co-operation also in the political field towards a sort of federation. Air transport in a federally constructed Europe would offer fewer problems as it would become a federal matter. In this respect the examples of Canada and the U.S. are pertinent 649).

However, even before the creation of such a federation, the European Community could be the cradle of a rule of air law limiting the arbitrary and irresponsible exercise of power by which air communication is often obstructed. For, mutatis mutandis, the same reasoning applying to EEC applies also to EFTA. This means that compliance with both of the Treaties would constitute the reduction of a partition of Western-Europe into thirteen restricted airspaces into two liberalized airspaces.

As a result of their development the members of the Community have already obtained a greater voice in the world and, as the Montreal Star observed in one of its articles on the Common Market 650), they are well aware of it. As the idea of the European Economic Community becomes more popular and other States apply for membership or association, so the influence of the liberalized airspace will grow and the aviation position of the members will become stronger. In the same way their main partners in the trade of air transport will become inclined to adapt their policies in order to keep their position in the Common Market. It may be expected that the EFTA countries eventually will join the common airspace; some of them have already applied for membership or association 651). Whereas an airspace from Hamburg and Amsterdam to South-Italy may still be considered as relatively unpretentious compared for instance with that of North-America and of the Soviet Republics, the addition of Scandinavia, Britain, Austria and Greece would constitute the most populated and industrialized area in the world. The creation of a liberal legal system in the airspace over such an area will be the greatest achievement in the history of air law. It would mean that air law would

have overtaken its backlog to the technical development of civil aviation.

And, considering in this connection the possible consequences of the United States President's clarion call on July 4th, 1962, for a "declaration of interdependence between the U.S. and Western-Europe", the consequent results could be literally world-shaking.

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496) See Law and Politics in the World Community - Essays on Hans Kelsen's Pure theory and Related Problems in International Law; compiled by G.A. Lipsky (Berkeley and Los Angeles - 1953) p. 114 seq.
J.G. Starke - "Regionalism as a problem of International Law".

497) Art. 51 and 52 of the U.N. Charter.

498) See Int'l & Comp. L.Q.,Suppl. Publication No.1 (1961) - Legal Problems of the European Economic Community and the Free Trade Association (The British Institute of International and Comparative Law, London) p. 89 seq. - A. Martin "Restrictive Trade Practices in the E.F.T.A."

499) Art. 2.

500) Art. 3.

501) Art. 145 - 154.

502) Art. 155 - 163.

503) Art. 137 - 144.

504) Art. 164 - 188.

505) See also art. 181/182.

506) See Legal Problems ....., supra 498, p. 76 seq. - P. Verloren van Themaat - "Rules of Competition and Restrictive Trade Practices".

507) Austria, Denmark, Norway, Portugal, Sweden, Switzerland, United Kingdom.

508) E.g. the British relations with the Commonwealth.

509) Membership of the EEC includes also political commitments, which constitute an obstacle to such countries as Switzerland and Austria who are obliged to stick to a policy of strict neutrality.

510) See Martin, supra 498.

511) Art. 86.

512) Report of the Heads of the Delegations to the Ministers of Foreign Affairs, Intergovernmental Committee established by the Conference of Messina (Brussels - April 21st, 1956), Part III, Chapter 2.

513) Title IV of Part II of the Treaty.

514) See Interavia 1957, No. 10, p. 1058 - M. Lemoine "Marché Commun et Transport Aérien".

515) See R.F.D.A. (1958) Vol. 2, p. 101 seq. - L. Cartou "La Structure Juridique du Transport Aérien en Europe à la Veille du Marché Commun".

516) Cf. Europäische Wirtschaft (1959) Jahrgang 2, No. 18, p. 456 -J.B. Hallmann "Airunion, europäisch oder weltweit?".

517) Cf. (a) EEC doc. VII/5930/60-F - Exposé par M.Lambert Schaus,, fait le 27 octobre à Brême, devant le Grand Comité des Transports de la Confédération des Chambres de Commerce et d'Industrie d'Allemagne;

518) (a) Economisch-Statistische Berichten (1958) 43e Jaargang No. 2159, p. 894 seq. - J.H. Spiegelenberg "Europese Integratie en luchtvaart";
and
(b) Economische-Statistische Berichten (1958) 43e Jaargang, No. 2161, p. 947 seq. - J.H.Spiegelenberg "Rationalisatie van de Europese luchtvaart in het kader van het integratiestreven".

519) Cf. (a) R.G.A. (1960) Vol. 23, p. 87 seq. - P.H. Sand "Marché Commun et libéralisation du transport aérien;

520) Cf. (a) EEC Europees Parlement Zittingsdocument 107 (18 december 1961): Verslag namens de Commissie voor het Vervoer nopens de vraagstukken van het luchtvervoer in het kader van de Europese Economische Gemeenschap. Rapporteur: E. Corniglion Molinier. (European Parliament Session doc. 107 - December 18th, 1961 - Report on behalf of the Transport Commission on the questions of air transport in the framework

of the EEC. Reporter E. Corniglion Molinier).
Hereafter this report will be referred to as "Report of the Transport Commission of the European Parliament" or also as "The report Corniglion Molinier" or "Corniglion Molinier".
and
(b) EEC Europees Parlement Zitt ingsdocument 117 (20 December 1961): Aanvullend Verslag namens de Commissie voor het Vervoer op het verslag nopens de vraagstukken van het luchtvervoer in het kader van de Europese Economische Gemeenschap. Rapporteur C. Battistini (APE 6796/def. Or.Fr.)
This report is additional to the former. It contains a draft resolution submitted by the Transport Commission to the European Parliament.

521) Facilitation. This is, however, discriminatory implementation, as it does not cover the relations with non-EEC-Member States.

522) The Common Market shall be progressively established in the course of a transitional period of twelve years. The transitional period is divided into three stages of four years, the first of which was completed at the beginning of 1962. The Treaty contains some provisions according to which the length of each stage may be modified with respect to specially mentioned topics. (art. 8)

523) Art. 234, 1.

524) Cf. also articles 7 and 9 of the Chicago Convention.

525) See supra pp.102 seq; 168.

526) Cf. also hereafter pp. 253 seq.

527) Art. 234, 2.

528) Art. 235.

529) Cf. art. 60.

530) Art. 74 and 75, 1(a).

531) Art. 76.

532) See supra p. 229.

533) This is a translation of the Dutch text of the Treaty, which possesses legal authority. The English text issued by the Community which has no legal authority, reads: "It shall contain, in particular, an agricultural section and a transport section, which are the subject of special provisions included ..... etc." The English text differs from the official text in so far as in the latter the word "provisions" refers to "section" and in the former to "agriculture" and "transport".

534) Supra 515.

535) Supra 517 (a).

536) Supra 517 (b).

537) Supra 518 (b)

538) Art. 59.

539) Supra 519 (a) and (b).

540) Supra 512; and CECA (Communauté Européenne du Charbon et de l'Acier) doc. 6 (Luxembourg - 1957) Rapport sur la coordination des transports européens, par P.J. Kapteyn.

541) Chapter 1, Title I of Part II of the Treaty.

542) See supra pp.223/224.

543) Art. 75.

544) Cf. Art. 75, 3; art. 77; art. 80,3.

545) Corniglion Molinier, supra 520 (a), p. 12.

546) Cf. Nederlands Juristenblad 1961. Afl. 19, p. 407 - I.H.Ph. de Rode Verschoor "Het Verdrag betreffende de Europese Economische Gemeenschap en het luchtvervoer".

547) Art. 234.

548) L. Oppenheim, H. Lauterpacht "International Law", Vol. I - 7th ed. (London - 1948), p. 859 seq.

549) G. Scharzenberger "International Law", Vol. I, part V - 3rd ed. (London - 1957), p. 491 seq.
McNair "The Law of Treaties" (Oxford - 1961) p. 364 seq.
C.C. Hyde "International Law, chiefly as interpreted and applied by the U.S.", 2nd ed. (Boston - 1945), p. 1468 seq.
Académie de Droit International- Recueil des Cours 1951, I, chapt.II, p. 579 seq. - S. Bastid "La jurisprudence de la Cour International de Justice".
The Grotius Society (1934) Vol. 20, p. 123 seq. - C. Fairman "The Interpretation of Treaties".

550) Cf. arts. 61 and 197.

551) Chapter 3, Title III of Part II of the Treaty.

552) Sect. 101 (4) Federal Aviation Act 1958.

553) EEC doc. S/05367/61: Rede van de Heer Von der Groeben voor het Europese Parlement op 19 october 1961 naar aanleiding van de bespreking van het voorstel betreffende een Verorde-

ning voor de toepassing van de artikelen 85 en 86 van het E.E.G. Verdrag.

554) Supra 517 (b).

555) Supra 521 (a), p. 15.

556) Supra 519 (a).

557) Art. 232.

558) Art. 222.

559) Art. 42.

560) Cf. M. le Goff "Manual de Droit Aérien - Droit Privé" (Paris - 1961), pp. 421/422.

561) Cf. Schaus, supra 517 (b).

562) EEC doc. VII/COM (62) 88 def. (May 23rd, 1962). Programme of Activities in the field of the Common Transport Policy (Statement of the Commission to the Council), sections 236/237.

563) It is interesting to compare in this respect the procedure provided for in the E.C.S.C. Treaty by art. 81, Annex I and art. 95 of that Treaty which provides for the possibility of modifying the definitions of "coal" and "steel", or rather for the possibility of completing them by a unanimous decision of the Council. This means that the power of the Coal and Steel Community has a certain elasticity (the importance of which should not be underestimated). The fact that the subject of the latter Treaty is defined and the Rome Treaty does not contain a corresponding definition may plead for the Universality of this Treaty.

564) See Programme, supra 562.

565) Cf. EEC doc. VII/COM (61) 50 def. (April 10th, 1961): Memorandum relating to the Direction to give to the Common Transport Policy.

566) See Memorandum, supra 565, sections 60, 61 and 62.

567) Cf. art. 157.

568) Cf. art. 146.

569) Cf. art. 48.

570) Cf. art. 51.

571) Cf. art. 49.

572) Cf. art. 52.

573) That is to say, subject to national regulations.

574) Cf. le Goff, supra 560, pp. 422/423.

575) Art. 223, 1 (b) reads: "Any Member State may take the measures which it considers necessary for the protection of the essential interests of its security, and which are connected with the production of or trade in arms, ammunition and war material; such measures shall not, however, prejudice conditions of competition in the Common Market in respect of products not intended for specifically military purposes.

576) Cf. articles 100 and 102.

577) Cf. Cartou, supra 515.

578) Cf. art. 57.

579) Cf. art. 101.

580) Cf. Legal Problems ....., supra 498, p. 45 - B.A. Wortley "The need for more uniformity in the law relating to the international sale of goods in Europe".

581) Currently the Netherlands is the only country of the Six where registration of foreign owned aircraft is allowed; this is subject to certain conditions.

582) Cf. art. 223.

583) Cf. art.223.

584) See art. 26 of the Chicago Convention.

585) Art. 15 of the Chicago Convention already contains the provision concerned, but this provision in practice provides for several loopholes e.g. such as provided for by a reference to art. 68 of the Convention enabling the States to designate the routes to be followed and the airports to be used.

586) Art. 110.

587) Art. 111(1).

588) Art. 112, 1.

589) On the understanding that the common policy would contain appropriate measures for their competition.

590) In this respect it is interesting to read in I.C.C. doc. 310/29 (October 2nd, 1951), p. 3: "Never shall the U.S. accept the obligation to renounce its aviation advantages for the profit of a European air unity".

591) Partly as a result of the U.S. status as occupational power in West Germany and partly as a result of the U.S. bargaining power constituted by an enormous area containing several major airports under the same jurisdiction, the U.S. airlines have several 5th freedom rights in Europe and a consequent considerable share in intra-European traffic.

592) Cf. Spiegelenberg, supra 518 (b).

593) Cf. articles 101/102.

594) Cf. Verloren van Themaat, supra 498.

595) Art. 85, 1.

596) Art. 86.

597) Art. 90, 2.

598) Art. 90, 1 and art. 7.

599) Art. 92, 1.

600) Luxair, the national company of Luxembourg, is not of a size comparable to Air France, KLM, Sabena, Lufthansa and Alitalia.

601) Art. 92, 3(b).

602) Art. 92, 3(d).

603) Art. 90, 2; Cf. also Sand, supra 519 (b).

604) Art. 85, 3.

605) Supra 520 (a).

606) See supra 520 (b).

607) Supra 562, section 237.

608) Cf. art. 66 of the Treaty establishing the European Coal and Steel Community.

609) Cf. art. 86, 1.

610) Cf. section 408 seq. of the Federal Aviation Act.

611) Articles 85, 1 and 86, 1. In practice, however, such concentrations would only be conceivable in respect to transport entirely ouside the region of the Community.

612) A recent example was given by the efforts to merge Pan American World Airways with its only rival in the North Atlantic routes Trans World Airways, in order to cope with the increasing competition on these routes. It seems that the enor-

mous size of the combination and its consequent competitive power has been reason for the CAB (see Chapter XII) to closely examine the results of such a merger with respect to trust forming which is greatly feared in the U.S. (See Time, June 8th, 1962).

613) Cf. art. 89.

614) Art. 87.

615) Art. 100.

616) According to N.R.C. Overzeese Weekeditie, June 19th, 1962.

617) Cf. art. 3.

618) Cf. art. 84, 2.

619) Cf. Nederlands Tijdschrift voor Internationaal Recht (1957) Vol. 4, p. 121 seq. - I. Samkalden "De Europese Integratie als Vraagstuk van Nationale Wetgeving".

620) In this respect it is useful to examine the question as to how far the appointment of an independent arbitrator or arbitration committee modelled on the Swedish institution known as the ombudsman - the civic watchdog against inequity and autocratic bureaucracy - could overcome difficulties. (See infra 692).

621) Title IV, Part II of the Treaty.

622) Art. 76.

623) Art. 78.

624) See supra p. 169.

625) Personnel Licensing.

626) Cf. the discussion of this subject by ECAC, see Chapter VII.

627) See supra p. 253.

628).Cf. Cartou, supra 515.

629) Cf. Spiegelenberg, supra 518 (b).

630) Cf. J.A.L.C. (1957) Vol. 24, p. 273 - D. Goedhuis "The role of air transport in European integration".

631) See Memorandum, supra 565, section 30.

632) See preamble of the Chicago Convention.

633) Cf. Programme of the Commission, supra 562, sections 31 - 41.

634) Cf. Corniglion Moulinier, supra 520 (a), pp. 23/24.

635) Cf. Memorandum, supra 565, sections 2 and 2.

636) Cf. supra p. 75.

637) See Draft Resolution submitted by the Transport Committee, supra 520 (b).

638) In this respect the example of the U.S., where air transport is performed by private enterprises, is pertinent. Although the U.S. pretend to be in favour of a system of complete freedom and private initiative, in reality air transport by its very nature has led to the necessity for an intensive regulation, including pool agreements, routes and fares.

639) Cf. J.A.L.C. (1959) Vol. 26, p. 101 seq. - L.J. Hector in an address to the New York Society of Security Analysts (November 1958) on "Problems of Economic Regulation of Civil Aviation in the U.S.A.".

640) See also Advice of the Political Committee in regard to the political and juridical aspects of air transport in the E.E.C., Annex I to the Report Corniglion Molinier, supra 520 (a), p. 31.

641) Art. 113, 1.

642) Art. 113, 3.

643) Art. 114.

644) Cf. Report of the Transport Commission of the European Parliament, supra 520 (a), p. 23.

645) Cf. SAS clausule, supra Chapter VIII.

646) Cf. O. Philip "Le Problème de l'Union Européenne (Paris - 1950), p. 334.

647) See supra p. 82.

648) See supra p. 83.

649) See J.A.C.L. (1957) Vol. 24, p. 127 seq. - E.A. Weibel "Problems of Federalism in the Air Age".

650) See the Montreal Star of May 28th, 1962.

651) Until now Ireland, Norway, Denmark and Great Britain have applied for membership.
Sweden, Switzerland, Austria, Greece, Turkey, Spain and Portugal have applied for association (which includes the application of the same rules in regard to the commercial exchanges and the right of establishment (articles 131 -

136 included). The first three countries mentioned insist, however, on the preservation of their neutral status. Greece in the meantime has become the first European country to be associated.
For varying reasons the Six are not likely to accept all applicants in the immediate future.

After the failure of the negotiations on Britain's entry into the Common Market, at Brussels -early 1963 -, it became moreover likely that the extension of the Community will not be achieved very easily.

CHAPTER XII - THE U.S. SYSTEM AND EUROPE.

The example of the U.S.A. several times already has been pointed to. The situation in this federally structured country, indisputably the wealthiest in the world, seems for many writers on many subjects the kind of "El Dorado" to be aimed at by the European States. Also in the field of civil aviation the U.S. system has been the basis of several proposals aiming at the amelioration of the European air transport situation 652). A statement of one of the delegates at Strasbourg 653) "Everything in the garden would be lovely if the European airlines were operating in the U.S.A.", speaks in this respect for itself.

THE GENERAL U.S. ECONOMIC CLIMATE.

As stated earlier, the domestic U.S. area is to a certain degree comparable to the European area. Its land surface is larger, but on the other hand the European area has a greater population and its airspace is about the same.
Owing to the more favourable air regime in the U.S.A., the advantage of the U.S. airlines after the war and the facilities and excellent conditions for the American aircraft industry, U.S. civil air transport has procured a share of nearly seventy per cent of the world's civil air transport 654). It maintains a world wide network of services, many of them operated under fifth freedom rights which are paralelled by no European country 655).

Unlike the situation in Europe, Americans consider air transport as the most natural form of transportation for medium

and long distance travel and air transportation in the U.S.A. is used also by that part of the public which in Europe travels by train. This situation is not only due to the fact that the American standard of living is higher than that in Europe, but is also stimulated by better utilisation of aircraft and the consequent lower costs and fares 656).

Although the legal obstacles which make it difficult for European airlines to enter into co-operation agreements concerning interchange of aircraft and routes, common maintenance 657) etc., do not exist in the U.S.... domestic area to the same extent, the U.S. air transportation industry nevertheless cannot be looked upon as an entirely free enterprise. Several legal precautions keep U.S. air transport out of the inexorable process of survival of the fittest, with the weakest driven to the wall, the most efficient remaining and the government keeping its hands off 658), which in the U.S.A. generally is considered as healthy economy.

Also in the U.S.A., of all industries public utilities are the least free to operate under any technical law of economic mechanics. Of all public utilities, air transport is probably the most minutely regulated by the Government and is normally subsidized by the Government as well. Although air transport is not expressis verbis mentioned in the U.S. constitution as a federal matter, its very nature made the courts decide it to be an element of international and interstate commerce "of which it takes the place of a continuous channel" 659).

THE U.S. AVIATION POLICY.

The air transport policy of the U.S.A. is outlined in the Federal Aviation Act of 1958 660). The act deals with all kinds of matters regarding air transport, economics, safety, licenses, airworthiness, etc. Two control bodies are established by the Act, the Civil Aeronautics Board (CAB) and the Federal Aviation Agency (FAA). The former is given extensive powers in the economic and technical field, the latter deals chiefly with safety matters.

The Act provides for a degree of proper competition in order to develop an aerial transport system adapted to the demands of internal and external commerce, of postal services and of national defense 661).

In the scope of this work, especially the sections 401 - 407 and 408 - 412 are important, as they respectively contain provisions for economic control and constitute a lex specialis to the U.S. anti-trust law 662). They form the basis of the regulation in regard to the granting of traffic rights and competition. Although in principle every form of concentration is forbidden, sections 412 - 414 seem to leave the way open for the forming of pools. Moreover the CAB has the power to allow exceptions from many of the rules.

The U.S. policy in general is distinguished by the desire to provide every carrier with an equal chance to take part in the communications within the country and to create a well established moderately competing external air transport. The system shows moderated monopolistic tendencies, one could call it semi-monopolistic.

Every operator wanting to service a certain route, cannot do so without permission of the CAB. In order to obtain this permission he has to prove not only that he is able to comply with all the safety and regularity regulations etc., but also that his service is necessary for the public convenience and better communications 663). During the last fifteen years the CAB was utterly reluctant to make use of its power to grant exceptions to the non-concentration rules. Concentrations are considered to entail dangers both to the public and to the competitors. Only during the recent years of recession and with the fact of impending bankruptey in the background, did a few of the U.S. domestic carriers manage to obtain permission to reorganize their business by a merger. The same applies to permissions for interchange of routes agreements 664).

After the U.S. had denounced the International Air Transport Agreement (in 1946) 665), of which it had been the chief-advocate two years earlier the liberal U.S. foreign air transport policy became more restrictive, particularly after the economic set-backs resulting from the introduction of jet civil aircraft 666). Currently, U.S. carriers, hard-pressed by over-capacity troubles, contest all route license applications by foreign competitors or ask the CAB to demand from the foreign carriers pool agreements before granting licenses. They even demand the cancellation of granted rights 667).

The airlines are supported by branches of the U.S. commerce to which they are related, inthe first place their financers 668). In general the protectionist activities are motivated by statements holding that the foreign carriers are government owned and

therefore do not care too much about profits or losses and thus constitute unfair competition to the U.S. airlines. The U.S. Government is pressed to grant route awards to foreign airlines only if it can be shown how commensurate awards can be made to U.S. international airlines.

On the other hand the U.S. airlines seek to expand their working-area by co-operating with foreign airlines, parlicularly with airlines established by newly independent or other semi-developed countries 669).

There is no such institution as a U.S. Department of Transport. Transport in general is dealt with by two agencies: the Civil Aeronautics Board and the Federal Aviation Agency.

THE CAB 670).

The Civil Aeronautics Board, "modelled after the Interstate Commerce Commission", is a creation of the Civil Aeronautics Act of 1938. Before that time Americans could start a public air transportation business without any Government approval, except with respect to the safety aspects of the equipment involved. The Civil Aeronautics Act did not affect intra-State transport. The functions of the Board are legislative, juridical and executive Some of them may be readily tagged with its appropriate label, others involve two or three of these functions to such an extent that it is impossible to separate one function from the other.

Legislative functions of the Board are e.g. the promulgation of Civil Air Regulations and of Economic Regulations. The latter provide for the proper methods of keeping records, of

furnishing reports, of filing tariffs, and items of similar nature. The Civil Air Regulations are of a wider scope, as they apply to both domestic and foreign carriers flying over the territory of the U.S.A. They include regulations relating to licenses, airworthiness, air traffic rules, etc. Before establishing such regulations, the Board is required by the law, to publish the proposed regulations in the official U.S. newsorgan in order to solliciit comments from the public on the proposed rules, and to consider such comments.

The main functions of the Board in the field of judicial activities are the revocation of economic certificates of public convenience and necessity, the revocation of airmen, airworthiness and other safety certificates, and cease and desist orders directing a carrier to refrain from engaging in unfair or deceptive practices and unfair methods of competition. In the case of safety certificates the Board may revoke airmen, airworthiness and air carrier operating certificates for any cause which at the time of revocation would justify the refusal to issue a like certificate to the defendant. Economic certificates can only be revoked after the holder has been given a second chance to comply with the provisions the Board has found to have been violated. Such a second chance is not required to be given in regard to violation of safety rules.

In the case of both safety and economic violations the stipulation applies that the defendant shall be given full opportunity to be heard and to present evidence on his own behalf and that the case shall be tried by an impartial trial of facts. Appeal from the

decision of the Board is open to the courts, who , however, are entitled to re-examine the findings of fact, when they find that there is no substantial evidence to back them up.

The executive functions of the Board consist in maintaining the same vigilance over the enforcement of the economic rules relating to air transport 671) as do law enforcement officers in the general field of law.

The Board also serves as adviser of other Government agencies with respect to financial matters regarding U.S. carriers. E.g. no loan may be made by a Government agency to such carrier without the approval of the Board.

Another primarily executive function of the Board involves the investigation of accidents. Accidents are investigated by the Board of Inquiry consisting of members of the CAB's Safety Bureau (Bureau of Safety Investigation) and the General-Counsel of the Board. It is the practice of the Board in all important cases involving air accidents caused by structural failure, pilot error or faults of the control services, to hold accident inquiry hearings which are open to the public and at which sworn testimony is taken. However, the accident inquiry is in no sense a trial - and no one is made a defendant - but is exclusively a fact finding hearing. Consequently witnesses are in this case not represented by counsel and questions are asked only by members of the Board of Inquiry. Suggestions may be submitted by the audience, but it is in the sole discretion of the Board whether such question will be put to the witness or not.

As for the wreckage of the aircraft concerned, the CAB has exclus-

ive power over the examination of it. The normal judicial officers, representatives of the carriers or passengers and others interested, are only allowed to take part in the investigation as far as the Board allows them to do so. With regard to aircraft accidents the federal authority thus has an extraordinary power excluding the authorities loci delicti from their normal civil and criminal law enforcement activities. According to Rentzel 672), this is the only way to achieve greater safety through the investigation of accidents, since otherwise all the circumstantial evidence might be destroyed by officials or other private individuals not trained in the primary task of accident investigation. Although the principle and the importance of ensuring an investigation by experts (in itself) is not questionable, Rentzel's statement is nevertheless not very convincing, as it could apply to many other kinds of investigations as well.

In general the Civil Aviation Act gives the CAB the mandate to study, develop and implement the general policy of the U.S. Government with regard to civil aviation. This applies to the use of all the means and methods covered by the expression, "policy-making", as well as the conditions required for the exercise of such functions. Included are the competency of experts and the quarantees of objectivity and indispensably the co-ordination of all interested branches of aviation 673).

Owing to the American Constitution and system of government the Board is acting both as an arm of Congress and as an arm of the Chief Executive, the President. Whereas the Board in matters

of domestic air transport is acting independently of executive control, the agency is subordinated to the President in matters of U.S. carriers seeking the sponsorship of the Government to engage in foreign air transportation or when a foreign carrier seeks to engage in public air transport in or over the U.S.A. and its dependent territories 674); the latter being matters of U.S. foreign policy which is part of the presidential duties.

In the field of domestic transport applications for the award of a new route or the grant of permission to compete with another carrier on an existing route, have to be filed with the Board. The Board examines the applications with regard to the public convenience and the necessity of the operation and also with regard to the fitness, the willingness and the ability of the applicant to conduct it. As there are in practice often more than one applicant, the Board after having established that the applicants comply with these criteria, must also determine their comparative merits and the effect on the entire air transportation system of the certification of one of such applicants as against the certification of the other 675). The proceedings are carried out in the same manner as a judicial function.

Negotiations on air transport bilaterals with foreign countries are conducted by the State Department on behalf of the Executive. As in most countries, the signing of the bilateral agreement is the major step in the authorization of the chosen instruments of the contracting States to perform the flights concerned. For the carrier, wanting to serve points in the U.S., however, it is not sufficient to point to the bilateral; he has to go through a lot of "CAB red tape" before he can start. The reason for this is that

the Executive although competent to agree on bilateral arrangements, cannot alter the supreme rules set by Congress (in casu the Civil Aeronautics Act) which entail the accomplishment of formal hearings before the Board to be held prior to the issuance of a permit to the carrier. The result is that in most cases the carrier will have to delay the execution of his plans until the Board has finished the formalities involved 676). The existence of the bilateral is in itself strong evidence of public interest in the service and consequent permits are not likely ever to be refused 677). It goes without saying that this inconvenient practice has given rise to several complaints from the foreign States concerned and in the U.S.A. itself several efforts have been made to change this situation 678).

With respect to both international and domestic transportation, the CAB has the power to fix the passengers and cargo rates for U.S. carriers.
Through its power to approve or disapprove the IATA fixed rates, the CAB thus has also the indirect power to fix the rates of foreign carriers performing services to the United States 679).

Last but not least, the CAB has the power to fix the mail rates to be paid for the carriage of mail by U.S. carriers. The importance of this power goes far beyond the field of air mail itself 680). In fact the air mail rates are often not a mere compensatory payment for the carriage of mail, but may include substantial sums by way of subsidy necessary to make up for the operating deficits of air carriers.

THE CAB POWER CRITIZED.

The American system as summarized above has given rise to both unsparing approval 681) and severe criticism. In general even critics of the system admit that it has prevented the situation in U.S. air transport from becoming chaotic and they also agree that it would be difficult to think of a workable system based on entirely different principles. In its twenty years of existence the Board has shown considerable merit in helping to bring U.S. air transport to its present level. According to critics, however, it appears ever more clear that the increasing complexity of the situation in the U.S.A. itself, and in the world generally, calls for some changes. The wide field of "policy making" to be covered by the CAB connected with its status as an "independent regulatory Commission" rendered it incapable of carrying out its essential tasks, especially because of the requirement to co-ordinate its action with that of other responsible government agencies. The necessity for carrying out planning both on a long- and short-term basis and on a day-to-day basis, constitutes an over-dispersal into the complex and varied ramifications of its functions 682). The combination of regulatory, administrative, and investigatory functions, already difficult in themselves, with a status as a commission entrusted with allocating routes among operators and with judicial powers, makes it difficult for the Board to preserve its independence. The fact that the Board has judicial powers over the same persons and companies which it has to deal with in other respects resulting from its planning and policy making functions, cannot but affect this

independence in some way 683).
Hector 684) therefore suggests a separation of functions as the only way to cope with - what he calls - the apparent incompatibility of the functions the CAB is called upon to assume. Its policy function (including regulation, planning and aviation administration), calling for free discussion and frequent contact with the industry's various branches, should be allocated to an "executive". Allocation of routes, with its requirements in terms of competency and procedure, should be handled by a "court of experts" with power to judge on appeal against administrative decisions. An executive agency should be created to handle investigations and subsequent actions.

THE F.A.A.

The Federal Aviation Agency is headed by an Administrator, appointed by the President, who is responsible for the exercise and discharge of all duties of the Agency and has authority and control over all activities thereof 685). The Administrator is independent that is to say he is not bound by decisions or recommendations by other institutions created by Executive Order. His duties are: The regulation of air commerce in such a manner as to best promote its development and safety and fulfil the requirements of national defense; the promotion, encouragement and development of civil aeronautics; the control of the navigable airspace of the United States and the regulation of both military and civil operations in that airspace in the interest of the safety and efficiency of both; the consolidation of research and

development with respect to air navigation facilities, as well as the installation and operation thereof; and the development and operation of a common system of air traffic control and navigation for both military and civil aircraft 686).

Shortly, the chief regulatory power conferred upon the CAA is the control of safety: the keystone of a succesful civil aviation 687). This includes airworthiness, personnel licensing, air traffic control, meteorological services, and the establishment of training schools.

The Administrator has enforcement functions with respect to safety regulations, not fully parallel to the functions of the CAB with respect to economic regulations. In the enforcement field one of his functions is to present revocation cases as prosecutor before the Board's examiners. So far as the revocation of safety certificates goes, his work parallels that of the CAB in regard to prosecution of economic rules. However, in both cases the hearing is conducted by an examiner of the CAB and the decision is rendered by the CAB.

The FAA also needs co-ordination and co-operation with government agencies. There is no question that the Agency has the control of allocation of airspace. In maintaining that control and in exercising it in an effective way it often comes across the authority of other governmental institutions and it is not always clear where the boundaries of power must be drawn 688).

THE CAB AND FAA SYSTEM APPLIED TO EUROPE.

As pointed out in earlier chapters, a European integration or effective close co-operation in civil air transport

does not seem feasible without the establishment of a common control body or common control bodies. The question is, however, whether a system conforming to the pattern of that in the federal U.S.A. would fit into the European framework and in how far it could provide for a solution of the European problem. Several writers agree upon the necessity of a common Aviation Authority, but in speaking of such an institution they do hardly ever mean the same 689).

It seems clear that a close copy of the U.S. CAB and the U.S. FAA established to control the common airspace and aviation industry of several European States, even of the Common Market States, could not constitute a workable system, at least not in the present situation. Both agencies are endowed with powers which are too arbitrary to be transplanted to the European scene. A European Authority should in any case avoid the combination in one body of legislative, executive and judicial powers such as are conferred upon the CAB. Moreover it seems advisable that such (an) Authority(ies) should be subjected to parliamentary control, rather than be endowed with independent powers as an extension of the Executive.

Before anything else there should be established a common air transport policy, hedged around by sufficient precautions in order to apply the same principles of air commerce as are established in regard to commerce in general by the stipulations of the Rome Treaty. Such principles could only be applied in the same gradual way as has been proven succesful in the establishing of EEC, in stages, e.g. according to a schedule as suggested before

690). At the same time appropriate bodies should be created to keep pace with the liberalisation of the air regime and to prevent it from economic excrescenses by laying down the rules for limited monopolies such as exists in the U.S.A. That is to say, by considering the public convenience and the desirability of the granting of rights as applied for, and by an impartial determination of the applicants which would best serve the route and be most in the public interest; this with due regard to the capability of the airlines concerned and an honest allocation of equal opportunities. It does not seem feasible to create a system under which only one or two airlines are permitted to function outside the European region, but it appears desirable to limit their number to that of the airlines which presently perform such services. It also seems desirable to prevent these from excessive competition, in particular on international routes, by either stimulating mergers or pools, or redistribution of routes or schedules. The policy of the British Air Transport Licensing Board in this case maybe could serve as a better example than that of the CAB 691). A participation on an advisory basis of this Authority in the negotiations on bilateral agreements with third States appears logical as such negotiations are bound to interfere with the decisionary functions of that body.

The legislative function of the Authority should be separately dealt with by an extension of the legislative powers of the participating countries. In case co-operation is confined to the EEC States, the Commission of EEC appears the most appropriate institution to prepare such legislation.

Eurocontrol seems suitable for being extended to a body comparable to the FAA. Its roots in the Transport Ministries of the participating States seem to warrant a workable solution to the technical and safety matters involved.

Earlier the creation of an institution endowed with investigatory powers on the basis of the Scandinavian conception of the ombudsman has been suggested.In case of the integration of aviation within EEC, such ombudsman 692) could presumably achieve the best results if they were related to the European Court of Justice, or in any case were provided with a similar independent status as that Court and were appointed according to rules similar to those under which the members of the Court are appointed. They should be endowed with the power to act independently or on complaint in case of infractions of economic rules (both in case of infractions by the economic Authority and by the carriers), and on complaint of the technical Authority (Eurocontrol?) or the defendant, in case of a breach of technical regulations.
Appeal from their findings to the Court itself should be available under similar conditions to those allowing appeals from CAB decisions to the U.S. Courts.

A judicial authority also should be charged with the investigation of aircraft accidents, the preparatory examination of which could be allocated to the technical authority or be conducted by a group of experts of the judicial body itself.
It almost goes without saying that the European Civil Aviation Conference could play an important role in this development 693).

CONCLUSION.

Concluding this chapter it may be stated that the philosophy behind the U.S. Federal Aviation Act: "the desire to protect the national aviation and the desire to extend international aviation and air communications" 694), should be the same for a co-operative European aviation policy. The principal rules and regulations of the U.S.A. could also broadly serve as an example for Europe 695). The execution of these principles, however, should be adapted to the European situation.

Particularly with respect to the creation of executory bodies, the fact that the realisation of the European integration is still far off should be duly taken into account. Therefore arbitrary power should be avoided. Instead, the necessary regulatory and judicial powers could be distributed according to the basic principles of democracy, that is separating the legislative, executive and judicial functions. With a view to the fact that the problem of European aviation is one of extreme delicacy, it might even be advisable to start with advisory bodies or bodies acting by means of a unanimous vote before proceeding to a federally based system 696).

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652) See Chapters: II, VI, IX and XI.

653) See Interavia 1958 No. 3, p. 207 - E.E. Heiman "European Transport Problems".

654) That is to say that part of the world whose States are members

of ICAO. See J.A.L.C. (1957) Vol. 24, p. 273 - D.Goedhuis "The role of air transport in European integration".

655) An example: In 1954 more than 50% of the air passengers on the route Paris-Rome-Athens were carried by U.S. carriers. See also R.F.D.A. (1958) Vol. 12, p. 101 - L. Cartou "La structure juridique du transport aérien en Europe à la veille du marché commun".

656) See B. Dutoit "La collaboration entre companies aériennes; ses formes juridiques" (Lausanne - 1957), p. 14 seq.

657) A unique agreement was that concluded between Pan-American and National Airlines in 1959, involving as it does exchanges of stock and equipment leasing (N.A.L. had its peaks in winter on its services to Florida, P.A.A. has its summer trans-atlantic peaks).

658) Cf. J.A.C.L. (1953) Vol. 20, p. 379 - D.W. Bluestone "The problem of competition among domestic trunk airlines".

659) Cited from J.A.L.C. (1959) Vol. 1, p. 101 - L.J. Hector, in an address to the N.Y. Society of Security Analysts (New York 1958).

660) The Civil Aeronautics Act of 1938, modified in 1952, became Federal Aviation Act in 1958.

661) Section 2 of the Fed. Av. Act. Cf. also R.G.A. (1951) Vol. 14, p. 31 seq. - W.H. Wager "Coopération internationale et Scandinavian Airlines System".

662) See section 414.

663) Cf. Z.L.R. (1954) Band 3, p. 223 - A. Meyer "Der internationale Luftlinienverkehr und der internationale entgeltliche Gelegenheitsverkehr nach geltendem Recht und de lege ferenda unter besonderer Berücksichtigung einer Koordinierung des europäischer Luftverkehrs".

664) In an article on the proposed merger of Pan American World Airways and Trans World Airlines, Time (June 8, 1962) wrote: "But the sheer size of the proposed airline will send a shiver through CAB. Approval of the merger would also end a longstanding CAB policy of denying domestic routes to PanAm".

665) Agreement additional to the Chicago Convention which provided for the mutual granting by the contracting States of fifth freedom rights on direct routes.

666) The Kennedy Administration of the early Sixties re-examined the air transport policy of the U.S.A., the result of which is an even more restrictive policy. See ITA Bulletin September 17, 1962, p. 1009 - "Le contrôle préconisé par le CAB sur

l'exploitation des compagnies étrangères préfigure une politique aéronautique nuancée et opportuniste".

667) See Interavia 1961 No. 10, p. 1363 - (Editorial) "Air transport cannot live by mileage alone".

668) Cf. Interavia 1961 No. 3, p. 282 - (Editorial) "U.S. Bankers speak of an Air Transport Crisis".

669) Cf. ITA Bulletin, February 13, 1956, 104/IS.

670) Part of the information on this topic is taken from IATA Bulletin No. 13 of june 1951 - D.W. Rentzel "U.S. Regulation and the C.A.B.

671) See FAA, infra p.304.

672) Supra 670.

673) Cf. ITA Bulletin 1960, January 18th, pp. 57/58 - (Editorial) "A critical opinion on the structure and operation of the Civil Aeronautics Board".

674) Cf. C & S Air Lines v. Waterman Corp. 333 U.S. 103.

675) Cf. supra 670.

676) An often quoted example of a few years back (1955) was Seaboard and Western Airlines' request for North-Atlantic Service, which after seven years' waiting went through seventy days of hearings and eight thousand six hundred pages of written matter, before it was refused.

677) Except in cases of non-compliance with the stipulations of the Fed.Av.Act concerning substantial ownership (sect. 101). See J.A.L.C. (1960) Vol. 27, p. 247 seq. - J. Scoutt and C. Lear "Regulation by the C.A.B. of the ownership and control of foreign air carriers".

678) Cf. J.A.L.C. (1955) Vol. 22, p. 253 seq. - C.N. Calkins "The role of the Civil Aeronautics Board in the grant of operating rights in foreign air carriage".

679) See supra 666).

680) Cf. J.A.L.C. (1952) Vol. 19, p. 379 seq. - B.J.F. Mott "The effect of political interest groups on C.A.B. policies".

681) Cf. American Economic Review (1945) Vol. 35, p. 239 - K.T. Healy "Workable competition in air transportation".

682) Cf. Hector, supra 673.

683) Cf. Mott, supra 680.

684) L.S. Hector, member of the C.A.B. who resigned in 1959; see supra 673.

685) Section 301 Fed.Av.Act.

686) Section 103 Fed.Av.Act.

687) Cf. J.A.L.C. (1957) Vol. 24, p. 127 seq. - E.A. Weibel "Problems of federalism in the air age".

688) Cf. E.R. Quesada "The Government's role in aviation in the sixties" (Text of an address at the National Press Club - Washington D.C. November 17, 1960).

689) Cf. inter alia: Interavia 1957 No. 3, p. 219 - M. Hymans "European Air Transport is Indivisible; Interavia 1957 No. 3 p. 232 - C. Giuseppe "The Road to Integration"; Interavia 1958 No. 3, p. 207 - E.E. Heiman "European Transport Problems"; W.Coulet "L'organisation européenne des transports aériens" (Toulouse - 1958), p. 114 seq.; R.F.D.A. (1958) Vol. 12, p. 101 seq. - L.Cartou "La structure juridique du transport aérien en Europe à la veille du marché commun"; R.G.A. (1951) Vol. 14, p. 359 seq. - the Bonnefous, Sforza and Van de Kieft plans; R.G.A. (1951) Vol. 14, p. 31 seq. - W.H. Wager "Coopération internationale et S.A.S."; J.A.L.C. (1957) Vol. 24, p. 273 seq. - D.Goedhuis "The role of air transport in European integration"; B.Dutoit "La collaboration entre compagnies aériennes, ses formes juridiques" (Toulouse - 1957), p. 180 seq.; Z.L.W. (1960) Band 9, p. 111 seq. - P.H. Sand "Die Airunion und das Wettbewerbsrecht des Gemeinsamen Marktes"; etc. (See also supra Chapter VI.

690) See supra pp. 273/274.

691) The British Air Transport Licensing Board deals with the granting of permits to foreign and domestic airlines. It is British policy to avoid competition among British airlines on international routes.

692) It is obvious that the composition of a strictly independent and at the same time fully competent body will meet with difficulties. The aviation policies of the Six are rather divergent and the necessity for converting them into a uniform policy could easily result in differences of interpretation, as all European experts happen to be affected by their national conceptions. Also because of the sensibility of the matter it therefore might be wise to create a special arbitrator or arbitrational institution for air transport, to which all disputes could be referred, if necessary with the possibility of appeal to the other institutions of the Community, the Commission and the Court of Justice. Such an arbitration tribunal should be independent and have broad investigatory powers and the right to scrutinize the legal and administrative procedures of the institutions of the Community (except of the Court) and in particular of the Community's Air Transport Board(s). The institution would be similar to the ombudsman (grievance man) of the Scandinavian countries (see supra 620) particularly in regard to the pu-

blicity of the investigations.

693) Cf. De Rode Verschoor, supra 546.

694) According to Reuter, many in the U.S.A. considered the realisation of an economic unity in Europe as an act of hostility towards them (M.P. Reuter - "Cours d'organisations européennes" (Paris - 1959/60).

695) Cf. R.G.A. (1960) Vol. 23, p. 87 - P.H. Sand "Marché Commun et libéralisation du transport aérien".

696) It goes without saying that Europe also certainly should not adopt the extensive and (often unnecessary) delays caused by red-tape (e.g. hearing practices) of the CAB.

CHAPTER XIII - SUMMARY AND CONCLUSIONS.

PARADOXES.

This is the last chapter of a work describing various stages of the road towards a common air market, a road whose end does not yet seem to be within sight. Much has been written on this controversial subject. All this writing chiefly shows that nobody knows exactly what to do with the paradox of air transport, described by the Director-General of IATA at the general meeting of his association in 1962 697) with the words: "The world's air transport industry during years past has done more work, carried more traffic, rendered more service to the public, and ended up with less in the till".

The proposed remedies for solving this paradox are not less paradoxical than the problem itself. In 1956 the same Director-General, Sir William Hildred, spoke of three existing thoughts on the subject: a. Cheap airline fares to encourage tourist traffic, rendering the airlines into a position of the "loss leaders" to subsidize and prime the pump for the rest of the tourist economy; b. Give it for nothing; c. The growth of air transport makes it able to provide for nearly everything 698).

Sir William Hildred himself stressed the necessity of cheaper air travel. He did so again at the 1962 meeting by calling on the airline presidents to seriously consider establishing further "low, low fares", which he said were more important than ever before. He did not suggest specific figures.

At the same meeting of IATA, the Irish Minister of Transport and Power called for an end to government subsidies to airlines on

the ground that they force tax-payers to pay for something they may never use. He said: "I and most other administrations look forward to an end of all subsidies for the current operation of scheduled services, whether direct or in the form of unremunerated capital. I look forward to the growth of the non-subsidy principle so evident in the European Economic Community".
It does not appear clear how "low, low fares" and the abandonment of subsidies could go together in the immediate future. Solving one evil would mean a change for the worse for the other. Neither is the vicious circle broken by a solution such as "Intensify the traffic and reduce the cost of aircraft and the tariffs"699). On their own acceptable to all, unspecified proposals like these and others stir deep controversies between the supporters and opponents of the scale of different policies as exist between extreme liberalism and extreme protectionism, as soon as it comes to elaborating them.

SOVEREIGNTY - SECURITY - ECONOMY.

Probably owing to the fact that aviation underwent its main development thanks to two wars which were fought for the sovereignty in Europe and in the world, it has ever since been related to sovereignty. Both the Paris Convention of 1919 and the Chicago Convention of 1944 begin with stipulating that everything which will be agreed among States on air transport, will be done on condition that the sovereignty of the States will not be affected.

Sovereignty and security was still the "leitmotiv" of the statement of President Truman of the United States in 1947: "The airlines have a fleet of great value to the military services as a reserve in time of war. The airlines must be kept strong and healthy". From there it took only one step to emphasize the economic importance of air transport and to practicing mutatis mutandis (and without openly acknowledging so) the maxim of Thomas Moore of 1669: "..... the true form and worth of foreign trade is: the nursery of our mariners, the walls of the Kingdom, the means of our treasure, sinews of our wars, the terror of our enemies" 700).

As a result air transportation in the United States, although in name a private enterprise, is in fact subjected to a system of guided economy (in contrast to U.S. trade and commerce in general) 701), and in Europe it is a semi-government business or a business in the hands of "crown companies".

All efforts to break through the walls besetting air transport and to provide it with the means, particularly the legislation to spread its wings without impediments, usually only succeed if they leave the military and economic sovereignty of the States concerned unaffected.

This is the image of world aviation and the image of European aviation. The Bonnefous, Van de Kieft and Sforza plans, the proposals for the liberalisation of freight traffic, interchange, or non-scheduled traffic, all of them were only accepted in so far as the States could do so without committing themselves with regard to their sovereignty (in post-war Europe nearly exclusively economic sovereignty). The same applies to all other efforts to

co-operate and co-ordinate, both to arrangements between States and between airlines themselves.

GOVERNMENT INTERFERENCE UNAVOIDABLE.

As a result most forms of co-operation and co-ordination constitute no more than tinkering measures obviating as far as possible the necessary limitation of the sovereignty principle. States are only willing to enter into agreements such as Cartou describes them 702), containing: " a. effective liberalisation; b. loosening of restrictions founded on the distinction of the different freedoms in the air; c. certain dispositions in substance similar to the existing European bilaterals; d. certain provisions enabling the States to take measures against excessive competition; e. an assurance of an equitable regime for every carrier, be it understood that the routes will continue to be granted only through bi- or multilaterals; and last but not least, f. the multilateral agreement should not do any harm to the fundamental principle of the sovereignty of the State over its airspace".
Such an agreement seems hardly feasible. Its very stipulations contradict each other. It is hardly conceivable how an effective liberalisation can be achieved and the distinction of freedoms of the air can disappear, and at the same time competition can be barred, a regime upon the equitability of which the various States agree can be established, and the States can continue to exercise their fundamental (exclusive and complete) sovereignty in their airspace.
It is the same illusionary plea as that made by Interavia critis-

izing the "narrow minded" U.S. policy in 1961, and advocating an organisation on a private or a government basis and new agreements with foreign countries. "Such agreement would have to be liberal enough to guarantee the interests of all participating companies and at the same time tight enough to be proof against all efforts to circumvent them". What type of efforts were thought of, was not indicated 703).

Slotemaker, director of KLM, saw the solution in "a certain degree of voluntary co-ordination of airline operations, not by the governments, but by the airlines themselves, which - after a certain transition period - may lead to a self-supporting industry 704). Slotemaker advocated such a voluntary co-operation six years before his company left the negotiations on Airunion, thus proving that voluntary negotiations between government owned airlines without the governments, also create their problems.

Goedhuis on several occasions advocated unrestricted freedom of the air as the only solution. Indeed this seems to be the proper direction to follow in the future, but at present the freedom of the air has to be hedged around with sufficient precautions to prevent it from becoming unrestricted competition. Furthermore such a freedom is never likely to be reached. Many examples, contemporary as well as historical, prove that unrestricted freedom is a chimera. The freedom of the seas and of maritime commerce never was fully unrestricted either and the current trend is rather more restrictive than the opposite, with freedom-loving countries leading that trend 705). The freedom of trade as enjoyed in North-America and as to be enjoyed in the countries of the European Common Market are in fact also regulated freedoms.

Unrestricted freedom is the opposite of co-ordination and the only chance to achieve an amelioration of the current situation cannot but be offered by co-ordination.

Supporters of international co-operation and integration among airlines find little help in the Chicago Convention. Although article 77 of that Convention states that "nothing in this Convention shall prevent two or more contracting States from constituting joint air transport organisations or agencies" its other stipulations seem to disregard the realisation of such co-operation. In fact the Convention contains no provision stimulating them, but rather seems to put all kinds of legal obstacles in the way of co-operatively operated air services 706). From the experience of recent years it seems not very likely that a proposal to amend the Convention's respective provisions could be successful. The multitude of the members of the Convention and the variety of their opinions renders the probability of the success of such efforts to any but technical changes almost nil.

With regard to their economic interests the people of Western-Europe have chosen an economic unity. They have established the European Economic Community which seems to enjoy an increasing popularity also with those who have not yet joined it. Air transportation is not likely to remain an exception in that Community 707). Therefore a European Authority, whether it will be a Federal Authority or something else, seems inevitable in the long run, despite possible disadvantages 708). It is true, it would require a change in attitude and it would amount to a complete illusion to expect such a change in the immediate future. Furthermore, it is quite conceivable that because of the reluctance of European

States to surrender their decisionary powers, it will need an advisory European international body to pave its way 709). Questions such as "What will be the position of the various States in such an international body? Will there be a majority vote or a unanimous vote? What will exactly be the Authority's powers? Will it have to be a true copy of the C.A.B. or not?" could be left to the experience of such an advisory body.

EEC TO PAVE THE WAY .

Of course it would be preferable if ECAC could serve as such a predecessor of an ultimate European Civil Aeronautics Board 710). But, if the countries of the E.E.C. are not able to persuade the other members of this greater European organisation, the future of European air transport will gain no benefit from waiting till the time when they eventually will be willing.
In case the initiative for taking such steps towards integration is left to the E.E.C., the preparatory work on the establishment of an Aviation Authority should be included in the common air transport policy 711) and in the appropriate measures to be taken by the Council of the E.E.C. 712). As a matter of fact the establishment of the Authority in that case would not be necessary immediately, but would become gradually desirable as the various stages of the progressively established liberalisation would come into force.
In view of the principles of the E.E.C. and the possibility for other countries to join, as contained in art. 237 of the Rome Treaty, there would be little danger of a regional positivism taking the place of state-positivism 713). For this region does

not regard itself as self-contained and profess to follow only such rules of international law as the States belonging to it recognize as binding. The Common Market offers a solution for liberalisation and co-ordination at the same time. Its aim is not a restrictive policy but instead a liberalisation to the greatest possible degree of trade and communication.

The creation of one or more European international companies serving as the freight agency(ies) of the existing national companies, or the establishment of one or more European airline syndicates conforming to the example of S.A.S., would not form an obstruction to such a development, but would rather facilitate it.

Benjamin Franklin in 1787 wrote to a friend in France that he could not understand why the Europeans did not move towards a federal union constituting one great republic instead of all these different States 714). One hundred and seventy years later some of the European States seemed to start a move in the direction of such a federalism with regard to their economic activities, partly in order to be able to compete with Franklin's countrymen. There is no reason why they should not include their air transport in this federalism as this would eventually benefit both the travelling public and the carriers 715).

However, especially in this field it appears difficult to ban the ghosts which have been conjured up. The fact that rarely in the world anyone gets something for nothing also applies to a solution of the European air transport problem.

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697) Held at Dublin, September 1962.

698) See Interavia 1956 No. 9, p. 694 - Sir William Hildred "Air transport's Biggest Challenge".

699) See R.G.A. (1951) Vol. 14, p. 309 seq. - H. Mourer "Pour un "pool" européen des transports aériens".

700) Maxim cited from S. Wheatcroft "The Economics of European Air Transport" (Manchester Univ. Press - 1956), p. 203.

701) See also W. Gil and G.H. Bates "Airline Competition" (Boston - 1949) p. 506, 631, 678.

702) See R.F.D.A. (1958) Vol. 12, p. 112 - L. Cartou "La structure juridique du transport aérien en Europe à la veille du marché commun".

703) Interavia 1961 No. 10, p. 1363 - (Editorial) "Air Transport cannot live by mileage alone".

704) See J.A.L.C. (1959) Vol. 26, p. 209 - L.H. Slotemaker "Address to the XVIIth Congress of the International Chamber of Commerce"(Washington - April 1959).

705) Cf. e.g. The U.S. Bonner Act- Act of October 4th 1961, holding protective measures for U.S. shipping.

706) Particularly articles 5, 17/18, 26, 30/31/32, jo. 77 of the Convention.

707) It is likely that the EEC Commission, after having succeeded in establishing a full implementation of the EEC surface transport rules, will pay much more attention to this matter.

708) See for disadvantages of one central authority I.T.A. Bulletin 1960, January 18th, pp. 57/58.

709) Cf. J.A.L.C. (1957) Vol. 24, p. 281 - D. Goedhuis "The role of Air Transport in European Integration."

710) Cf. N.J.B. 1961, Afl. 19, p. 407 seq. - I.H.Ph. de Rode Verschoor "Het Verdrag betreffende de Europese Gemeenschap en het Luchtvervoer".

711) See art. 3 of the Rome Treaty.

712) See art. 84 sect. 2 of the Rome Treaty.

713) "Law and Politics in the World Community", compiled by G.A. Lipsky (Berkeley and Los Angeles - 1953) - J.G. Starke "Regionalism as a problem of International Law".

714) National Geographic Magazine of June 1962.

715) In this respect the example with regard to common trade is encouraging. As it appears, EEC is a stimulant to the commercial activity of others too. Several countries - among them some denouncing the Common Market as a piece of economic agression - increased their exports to the Six considerably during the last years (i.e. Turkey, Portugal, South Africa, Japan, Latin America).
Moreover the economy of the Community seems sufficiently prospering to afford easier import conditions for several third countries. Or with the words of W. Hallstein, President of the Commission, at Omaha (U.S.A.) - December 1962 -:
"We are not only willing to consider the problems of nations on whom our very existence has an impact, we are obliged to. We have reached the age of commitment, and we accept it".

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