UNITED KINGDOM/UNITED STATES AIR TRANSPORT AGREEMENT OF 1977 AND ITS AMENDMENTS: AN ANALYSIS

by

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TO MY WIFE

ABSTRACT

The first post-war air transport agreement between the United States and United Kingdom was signed in Bermuda on February 11, 1946. This agreement became a model for other air transport agreements. The denunciation of this agreement in 1976 by the U.K. triggered the signing of a new agreement on July 23, 1977, which was again to be rejected but in this instance by the U.S. as a model agreement. A review of the negotiations carried out, the attitudes of the contracting parties and the subsequent amendments to this new agreement is made.

RESUME

Le premier accord d'après-guerre sur le transport aérien entre les Etats-Unis et le Royaume Uni fut le 11 novembre 1946. Cette accord servira de modèle pour d'autres accords au niveau du transport aérien. La dénonciation de cet accord en 1976 par le Royaume Uni amena la conclusion d'un nouvel accord le 23 juillet 1977, qui fut encore rejeté, cependant, par les Etats-Unis, comme cadre de négotiations.

Un rappel des discussions encourues, des attitudes des parties contractantes et des amendements subséquents au nouvel accord sera présenté au cours de cette thèse.

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It is hereby stated that notwithstanding the author's occupation in the Pakistan Air Force, the information disclosed and the views expressed in this thesis are so rendered in an exclusively personal capacity, and, in no way, reflect any official position of that Department.

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ABBREVIATIONS USED

AW&ST	Aviation Week and Space Technology
CAB	Civil Aeronautics Board - United States of America
IASL	Institute of Air and Space Law
ICAO	The International Civil Aviation Organization
IATA	The International Air Transport Association
Ibid.	Ibidem (in the same place-herein refers only to the immediately preceding item)
i.e.	(id est), that is
JALC	Journal of Air Law and Commerce
KLM	Koninklijke Luchtvaart Maatscha ppij N.V. - Royal Dutch Airlines
PICAO	Provisional International Civil Aviation Organization
Supra	Above
TIAS	Treaties and other International Acts Series
TWA	Trans World Airlines, Inc.
U.N.	United Nations
UNTS	United Nations Treaty Series
U.K.	United Kingdom
U.S.A.	United States of America
USSR	Union of Soviet Socialist Republic
UST	United States Treaties and other International Agreements

INTRODUCTION

A bilateral agreement is the primary instrument for formulating international aviation law between the countries of the world. Because of the significance of the original Bermuda Agreement of 1946, its denunciation in 1976 was a particularly important development for international aviation. The outcome of the subsequent negotiations was the signing of a new agreement between the U.K. and the U.S. on July 23, 1977.

This thesis is primarily concerned with the air transport agreement of 1977, which is generally referred to as Bermuda 2.

The thesis contains six chapters, with the introductory chapter providing a coverage on the U.K.-U.S. air transport agreement of 1946, and discussing its importance and the circumstances leading to its denunciation in 1976.

Chapter II details the exhaustive negotiations of the Bermuda 2 agreement, while Chapter III analyses the principal features of this agreement. In Chapter IV, the evaluation after its conclusion by the various interests in the contracting parties is discussed. Chapter V deals with the amendments resulting from the exchange of notes and protocols, and finally a conclusion is drawn in Chapter VI.

CHAPTER I

OVERTURE TO BERMUDA II: A REVIEW OF BERMUDA I WITH PARTICULAR REFERENCE TO 1960-1976

INTRODUCTION

While the Islands of Bermuda may conjure visions of the mythical Bermuda triangle, its more serious significance emanates from the agreements related to the aviation industry. Post World War II scheduled Commercial international air transportation has been regulated by a network of bilateral agreements.[1] However, the most important of these agreements was the Bermuda Agreement, an executive agreement, concluded between the United States and the United Kingdom on February 11, 1946.[2] The impact of the Bermuda agreement on other bilaterals was so strong that it has been referred to as the Magna Charta of international aviation.[3] The Bermuda Agreement subsequently served as a model for U.S. and British air transportation agreements concluded since 1946[4] as well as for agreements among numerous other countries.[5]

On June 22, 1976 the British denounced the 1946 Bermuda Agreement, contending that it did not correspond satisfactorily to the conditions of 1970s.[6] Under the terms of that agreement, air services could continue for one year after either country's repudiation. Britain's denunciation was followed by 12 months of heated and frantic negotiations that culminated in the conclusion of a new agreement, Bermuda 2.[7] Given the genesis of Bermuda 2, it is considered necessary first to have regard to the original Bermuda Agreement which has over the years become a veritable article of

faith in the theology of international air transport[8] and then to examine the circumstances leading to its denunciation.

I. THE BERMUDA I: A FLEXIBLE MODUS VIVENDI

A. The Bermuda Compromise

It was due to failure of the Chicago Conference to reach a multilateral approach to civil aviation that the British and American Governments met at Bermuda in 1946 to work out a bilateral system in the postwar period.[9] Although the delegates had come to Bermuda merely «to negotiate bilaterally the exchange of commercial rights between their countries», the Bermuda conference «proved to be one of the most important events in international aviation history».[10]

At the time of the conclusion of the Agreement, both countries expressed their complete accord with each other. On 26 February 1946, President Truemen[11] followed the unusual course of giving out a special statement expressing his satisfaction with it. At the same time official statements were made in both House of the British Parliament and the House of Lords. On February 28, Lord Swinton, the Chairman of the British delegation at the Chicago Conference called it «probably the most important civil aviation agreement that his country had entered into».

Historically, however, the conclusion of this agreement was not that amicable. It was essentially a compromise between the «freedom of the air» U.S. position and the «order of the air» United

Kingdom position. While the U.S. encouraged, as observed at Chicago, the formula most likely to guarantee her post World War II equipment lead over other countries; the U.K. was anxious to protect itself from U.S. competition.[12] Some defined it as a compromise between the liberal American and restrictive British concepts. Mr. J.W.S. Brancker, an airline consultant, gave it rather a concise phraseology «a clash between the liberalism of the 'haves' and the restrictionism of the 'have nots'». Whatever the terminology, it was essentially a compromise and a laborious one, and despite everything, it was uncertain which of the partners had got the upper hand.[13]

The success of Bermuda 1, to a large extent, also lied in the fact that it was nothing more than a compromise. Cooper described the essentials of the compromise in the following words:

> «The United States of America accepted the international control of fares which they were most reluctant to concede and parameters within which the services could be operated; the United Kingdom, on the other hand, abandoned predetermination of capacity. Governments could intervene and seek discussion with each other, but they could not act unilaterally without consultation; this was, in fact, the vital element in the whole Agreement and an element which has stood the test of time well.»[14]

Specifically, the provisions on fares and capacity controls were the keys to the compromise. Thus, in drafting the agreement, cut throat competition was avoided.

(1) The U.S. agreed to permit the fares to be fixed by a rate conference method conducted by the airlines through the International Air Transport Association (IATA), subject to review as it related to the U.S. carriers by the CAB;

(2) Capacity was to be regulated on the principle that the primary objective of each nation's airlines should be the provision of capacity adequate

> to the traffic demands between the country of which such air carrier was a national and the countries of ultimate destination of the traffic, that is, third and fourth freedom traffic. Fifth freedom traffic was to be allowed subject to this general principle, and subject to review and negotiations if a nation thought, retroactively, that this freedom had been abused.[15]

The Final Act of the Bermuda Conference defined certain principles which were to govern the operation of air services under the Agreement. Basically these principles were intended to regulate competition between the air transport services of the two countries. Four standards were prescribed in the principles. These were regarded as the most important and when incorporated in an agreement, that agreement assumed the classification of Bermuda type agreement. The author will discuss these principles in accordance with the interpretation of the original drafters of Bermuda 1 Agreement.

The first standard was contained in Paragraph 3 of the Final Act[16] and provided:

> «That the air transport facilities available to the travelling public should bear a close relationship to the requirements of the public for such transport.»

This clause was usually explained as an obligation for the carriers to operate «at a reasonable load factor», or not to operate at unnecessarily low load factors on certain routes merely for competitive advantage.[17] It was not permitted to operate an air service with excessive capacity without economic justification.[18] Apparently, to operate at 65-70% of an aircraft capacity was considered justifiable.[19] In other words the above paragraph stood as an incentive to the parties to avoid overcapacity.[20]

The second and third standard provided:

(paragraph 4)
«That there should be a fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories (as defined in the Agreement) covered by the Agreement and its annex.»

(paragraph 5)
«That in the operation by the air carriers of either Governement of the trunk services described in the Annex to the Agreement, the interest of the air carriers of the other Govenment shall be taken into consideration, so as not to affect unduly the services which the latter provides on all or part of the same routes.»

While paragraph 4 pleaded for fair competition, paragraph 5 refered to a certain control of competition in the sense that no carrier could strive for a monoply by means of purely destructive practices.[21] In other words: competition but no cut throat competition. «Fair and equal opportunity» meant that even though one designated air carrier might be weaker than the other, it was still entitled to an equal right to operate like the strong carrier and was to be given every opportunity to perform its assigned role.[22] An appeal process was provided in the Agreement, whereby the parties could apply to PICAO for an advisory opinion in order to determine whether certain practices were limiting fair and equal opportunity or were destructive unfair trade practices.[23]

The fourth standard was contained in paragraph 6 of the Act and provided:

«That it is the understanding of both Governments that services provided by a designated air carrier under the Agreement and its Annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier

is a national and the country of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in the Annex to the Agreement shall be applied in accordance with the general principles of orderly development to which both Governments subscribe and shall be subject to the general principle that their capacity should be related:

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

This clause was apparently one of the most important and at the same time the most controversial one. In the words of Mr. G. Baker, the Chairman of the American delegation at Bermuda, the clause was deliberately written as a «somewhat elastic statement.»[24]

The primary objective was to provide air transport adequate for the traffic of the country of origin of the aircraft and the country of destination of the traffic, i.e. the third and fourth freedom rights.[25] The secondary traffic consisted of fifth freedom traffic on the specified route.[26]

The Final Act of the Bermuda Agreement made it very clear that the capacity for the carriage of fifth freedom should have a primary effect on third and fourth freedom traffic.[27] But neither this clause nor any other part of the Bermuda Agreement offered a «concrete answer to the question of the quantity of fifth freedom allowed in relation to the quantity of third and fourth freedom».[28]

The liberal and flexible provisions on capacity were considered to be an outstanding feature of the Bermuda Agreement as opposed to the rules on tariffs which left the rate making to the Conference machinery of IATA, which involved a quasi-universal price control system. Since the Agreement was applied between the United States and the United Kingdom, this meant in practice, price control but virtually no capacity control of international air transport between the two countries.[29] The other outstanding feature was the liberal treatment of fifth freedom traffic, which at the same time, provided for a desirable degree of governmental flexibility.[30]

B. The Bermuda I: A Model Agreement

The significance of the Bermuda Agreement in the world of air transport is not simply because it involved an agreement between the two countries which were the major aviation countries, but because it «served as the test case with which other bilateral arrangements could be compared».[31] The influence of non aviation considerations in bilateral bargainings was not unusual.[32]

After the conclusion of Bermuda 1, the U.K. concluded bilaterals with Turkey, France, Ireland, Argentina, The Netherlands, and Norway which still reflected the traditional British policy of the pre-determination and equal division of capacity and limited fifth freedom rights.[33] The U.S.A. which had concluded very liberal agreements in the period between the Chicago and Bermuda Conferences, concluded after the latter Conference Bermuda type agreements with France on 27 March 1946 and Belgium on 5 April 1946.[34]

The British attitude led to a meeting of aviation officials from both countries in London in September 1946, where both parties issued a joint statement in which they proclaimed Bermuda 1 as the model for all bilateral air transport agreements to be concluded by the two countries.[35] The statement read:

> «[b]oth parties believe that in regulating any new bilateral agreements with other countries, they should follow the basic principles agreed at Bermuda including particularly....the elimination of formulae for the pre-determination of frequencies or capacity or of any arbitrary division of air traffic between countries and or national airlines.»[36]

This joint support of the international aviation policy principles represented by Bermuda 1 was the basis of considerable strength for both countries in their subsequent negotiations with other countries.[37] A large number of other states also followed suit in the years after 1946 by concluding Bermuda type agreements. This was what the chief American delegate at the Conference had clearly pointed out in his statement:

> «What has been worked out here may well form the corner-stone upon which other nations will work out their equally difficult air transport problems.»[38]

The results of this Agreement were not restricted to the mutual understanding between states, but brought impressive growth of world airline traffic and the development of the world air transport system.[39]

The conclusion of the Bermuda Agreement also raised high hopes of its being adopted as a basis for a broader pattern leading to multilateral agreement. As noted by Sir Henry self:

> «It is important that there should be a general appreciation of the significance of the Bermuda Agreement for future international understanding in the field of air transport. It is not a question of two countries coming to an understanding, which they think, would necessarily form a pattern for wider adoption. It would be idle, however, to pretend that the pre-Bermuda position did not represent a seemingly irreconcilable and fundamental difference of out-look between two opposed schools of thought, cyrstallized in the respective United States and United Kingdom policies. These schools of thought were deemed fundamental because they represented, in broad, the standpoint of the Western and Eastern hemispheres. If the gap could be bridged, it would open up real possibilities for further and wider international discussions, which might well bear fruit for a more complete approach to the ultimate objective, viz, a multilateral convention under the aegis of PICAO as the international authority set up by the nations. .....»

Further attempts to find formal multilateral agreement on commercial services, however, could not succeed. The Draft Multilateral Agreement, called the 1947 Draft, submitted to the First Assembly of International Civil Aviation Organization, and later the Geneva Conference, were both failures in reaching an agreement on a text of a multilateral agreement for the exchange of commercial traffic rights. One of the most obvious reasons was that the United States and the United Kingdom had concluded the Bermuda Agreement, and being quite satisfied with its effects in practice, did not want a multilateral agreement less liberal than Bermuda to replace it.

In so far as the United States was concerned, it considered the Bermuda Agreement as a model for all its subsequent bilateral air transport agreements, and had so used it, and «the capacity formula was incorporated in some cases with minor changes not only

in such agreements, but also, with the consent of the other parties, in many of the agreements previously made».[40]

The situation in the United Kingdom was almost the same. It was noted that «with only relatively few exceptions, all United Kingdom bilateral air services agreement entered into after the joint statement of 19 September 1946, were essentially of the Bermuda pattern».[41]

In the ten years following 1946, most of the major bilateral agreements were established, and the two Governments effectively spread the Bermuda principles through out the world. Owing to their integrity in pursuing principles, this combination of bilateralism with multilateralism was probably more effective than any multilateral intergovernmental system which might have been devised in the mid-1940s.

II. THE BERMUDA AGREEMENT AND LATENT PROBLEMS

INTRODUCTION

Over the years since 1946, there have occurred many changes in the whole structure of international air transport. While the basic principles of Bermuda 1 and related agreements generally prevailed over the years, the terms and concepts underwent alterations to maintain Bermuda 1 as a working document, to reflect the pressures in the international aviation environment. Difference in interpretation were applied because the terms had been drafted in very broad and vague language. Although some regions like

Latin America,[42] Africa and Eastern Europe applied rigid regimes, the others adopted a selective approach, tending in some bilateral relations to a pre-determinist (i.e. of capacity) agreement.

After World War II many countries had won their independence and established their own commercial infra-structures and goals. This, of course, included airlines and they soon found Bermuda type bilateral air agreements liabilities in the achievement of their goals of fostering their own airline. It soon came to be realized that traffic rights were valuable to both countries involved in a bilateral. The initial criticism revolved around the provisions of the Bermuda Agreement. This part of the paper focuses on the criticisms of the major provisions of the Agreement; namely, the provisions on capacity control along with those on tariffs and routes. Finally, the amendment of 1966 will be discussed in brief.

A. Provisions on Capacity Control

Capacity determination has, since its inception, been the major bone of contention between U.S. and U.K. It is not entirely because of its importance, but also because of the controversy which surrounded it during and after the Bermuda Conference.[43] The Bermuda capacity principles, as a whole, approach the international air transport from a liberal point of view. The dominant feature of the Bermuda Agreement was the freedom given to airlines to operate services at the frequency and capacity they considered justified, provided that they complied with the general principles set out in

the Agreement and which was subject to an ex post facto review by governments.[44]

One of the controversial aspects of capacity principle had been its vague drafting. This vague drafting in the capacity clause stood practically on its own without any supplemental or corrective provisions[45] and had been subject to different interpretations and method of application. Adriani, while supporting this vagueness, considered it a useful potential creating possibilities for protection as well as necessary amount of freedom.[46] Some attributed this vague framing of Bermuda principles to be an act of wisdom, having a sound basis of reasonableness.[47]

Mr. S.G. Tipton, an ex-president of the Air Transport Association of America, who was initially familiar with the history of air transport explained this issue in the following words:[48]

> «When the Conference between the United Kingdom and the United States began in 1946, the two Governments were about as far apart as they could get on this particularly difficult subject. A compromise was finally arrived at. The United Kingdom was required to forego the rigid mathematical formulas it had previously adhered to. Instead, capacity was to be governed by stated general principles which recognized the interests of both contending parties. All of the services provided under the agreement were to 'bear a close relationship to the requirements of the public for such service.' Carriage of third-country traffic was further sanctioned by the adoption of the principles that in judging capacity the needs of the through airline operator were to be recognized.
>
> Thus, the draftsmen of this provision sought to prohibit the extremes of airline conduct which both parties agreed to regard as objectionable.»

Professor Lissitzyn, on the other hand, had taken a contrary view. He observed that the drafters were evidently more anxious to achieve agreement in the period alloted for the Conference than they were to avoid all potential controversy in the future.[49]

Whatever may have been the intent behind, the adequacy of Bermuda clauses on capacity had been increasingly called into question.[50] They had been criticized for the general and contradictory way in which they were couched, making them unsatisfactory from a legal point of view and resulting in little restrictions on capacity or frequency.[51]

It is important to note that two different points of views concerning the interpretation of Bermuda principles were held by the two contracting parties to the original Bermuda Agreement. The British considered that the Bermuda clauses were a guide to the ethical conduct of business or a gentlemen's agreement. The British noted that during the original talks each side made concessions, but they argued that such concessions were no longer practical in application and that the loose wording describing these concessions left too much room for broad interpretations.[52] Many felt that the United States had bent and twisted the vague terms of the pact to the advantage and the benefit of the United States' carriers in international operations.

One of the most important principles of the Bermuda Agreement was the principle of <u>fair and equal opportunity</u>. This principle had been interpreted in different ways. Whether it meant fair opportunity to compete and operate or to share the market and the

operations. The United States interpretation was based on the fact that there should be fair and equal opportunity for each designated carrier to operate and compete in the market. But the British at Bermuda wanted a 50-50 share of capacity in response to U.S.'s unrestricted operating rights.

The second capacity issue was the market share. The United States had traditionally espoused the Bermuda system under which each carrier determined for itself the level of capacity it believed was warranted, subject only to ex post facto review by the Governments. The United States soon faced the increasing criticism of the Bermuda system by foreign governments whose pre-conceptions of competitive principles differed from that of the U.S.

In relation to the carriage of fifth freedom traffic, section 6 of the Final Act made it clear that the capacity for the carriage of fifth freedom traffic should have a primary effect on third and fourth freedom traffic. However, as mentioned earlier, the Agreement did not offer a concrete answer to the question of the quantity of fifth freedom allowed in relations to the quantity of third and fourth freedom. Thus the grant of fifth freedom, in regulating bilateral agreements, depended....on airlines privately agreeing to live and let live under bilateral agreements worded in a way which was intentionally self contradictory and general.[53]

It would be necessary now to briefly touch upon the sixth freedom traffic associated with the capacity determination. Sixth freedom traffic refers to «traffic between two foreign countries via the country of the airline carrying that traffic». However, the term sixth freedom can be a confusing one because some authorities,

notably Sir George Cribbett, call cabotage the «sixth freedom».[54] Furthermore, sixth freedom has become a dirty word in the lexicon of American civil aviation where it is claimed that this traffic is part of fifth freedom. It is also not particularly well liked by some of the small countries who greatly profit from such traffic.[55] They claim that each sixth freedom flight is, in fact, a fourth freedom flight when coming into their homeland and a third freedom flight when leaving.

Although sixth freedom traffic did not constitute an important percentage of all traffic carried by the large countries. But, in the case of smaller countries, such as Belgium and The Netherlands, with important airlines, this traffic loomed large, since they clearly could not exist on the traffic generated in their own country or even on fifth freedom traffic generated between their own country and the U.S.[56]

This problem had evolved essentially because of the deliberately vague drafting of the Bermuda principles which the author considers as the underlying cause. However, it is now very clear the faults of the Bermuda principles do not lie in what they say but rather in what they do not say.

B. The Bermuda Agreement - Other Provisions

The Bermuda Agreement was the first agreement in which an undertaking was made with respect to rates and fares.[57] A rate-making system was established by Part II of the Annex to the Bermuda Agreement:

> «under which rates are set within IATA (the International Air Transport Association) and approved by governments before going into effect. In a situation where IATA fails to agree on a rate, or one of the two governments fails to approve a rate set by IATA, the contracting parties themselves must negotiate. If they fail to reach an agreement on a rate proposed by either carrier, this proposed rate goes into effect pending an advisory opinion from ICAO (the International Civil Aviation Organization).»[58]

As noted earlier, it was this rate-making scheme by the United States, coupled with abandonment by the United Kingdom of its insistence on pre-determination, which constituted the Bermuda compromise.

It is fortunate that very few bilateral air transport agreements had made the use of IATA's Traffic Conferences compulsory. Usually recourse to IATA rate-making machinery was optional. Bilateral agreements provided for alternate rate-making procedures in the event of a breakdown of the IATA machinery, non availability of the machinery or governmental disapproval of IATA tariffs. This might not have been of paramount importance in the early days of post-Bermuda 1 bilaterals, when IATA was generally able to agree on worldwide fares and rates acceptable to a majority of governmental authorities. It did, however, become important in the '60s and '70s, when IATA became increasingly unable to agree on tariffs internally and to convince governmental authorities of the validity of the tariffs which it did adopt.[59]

In the '60s, IATA's main problem was to cope with non-IATA charter competition. While in the '70s, the problems were the

fuel crises (shortage and price increases). In 1976, as had already been the case for some years, competition from charter carriers was such that no airline was taking any notice of the IATA rates.[60] The IATA fare system was found to be unduly complex, not easily comprehended by consumers, and led to misapplication of fares.[61]

The British which had long supported the IATA framework, started complaining that the provisions covering the establishment of tariffs for air carriage had proved unworkable.[62] Since either party could act unilaterally on tariffs, questions often arose as to what tariffs were applicable.[63] The British complained that the Civil Aeronautics Board (CAB), which was charged with rate reviews in the United States, had caused chaos and confusion among the airlines and public by too often rejecting fare proposals just before they were scheduled to take effect.[64]

Finally, a brief word concerning the treatment of <u>routes</u> under the Bermuda Agreement. Routes to be serviced by the air carriers of the United Kingdom and the United States were clearly defined in Section III of the Annex to the Agreement. The designated air carriers were granted the freedom to use definite routes and airports which were expressly named in the above mentioned section.[65] The point(s) of departure, all intermediate point(s), the destination in the territory of the authorizing states and the point(s) to be served on the route beyond the grantor state were set out and all the traffic rights along the routes between two contracting parties were to be negotiated.[66]

It is worthwhile noting that while the routes specified for the United Kingdom contained only seven main combinations, the routes specified for the United States contained thirteen main combinations.

Under the Bermuda Agreement, for the first time in the history of the United States, foreign air carriers were granted fixed routes across the country:

> «Among the routes named for use by Great Britain were those under which British air carriers could fly from London to New York, then to San Francisco, and then via Honolulu, Midway, Wake, Guam or Manila to Singapore or Hong Kong. Routes were also specified along which a British carrier might fly from London or Scotland to New York, and then either to New Orleans and on to Mexico City, or to Cuba and thence via Jamaica or Panama to Columbia, Ecuador, Peru and Chile. Reciprocally, the United States carriers could fly transatlantic services to London or Scotland, and thence to Holland, Germany, Scandinavia and Russia, or to Belgium, central Europe, the Near East and on to India; also across the Pacific via Honolulu to Hong Kong, China and India, or to Singapore and then to the Netherlands East Indies. At each named point in United States territory, British air carriers could pick up or discharge traffic from or to its own territory or third countries; and reciprocally, at each named point in British territory, American carriers could discharge or pick up international traffic. A British carrier could pick up transpacific traffic in New York, and returning could pick up transatlantic traffic at San Francisco or New York. On other routes a British carrier at New York could pick up traffic for Cuba and South America or for Mexico via New Orleans. Foreign air carriers could compete indirectly with internal American transport operations; and so, of course, could American carriers compete with British carriers on British routes from England to and from Europe and other points. In other words, air transport was now a business in which a foreign commondity was sold in the local market in competition with domestic sellers and without the protection of a tariff.»[67]

However, since the Bermuda plan provided for specific definite international routes and airports and where the trading priveleges were valid within these specific designations,[68] the small

countries felt compelled to resort to capacity and frequency limitations in their negotiations with big countries. Route controls were not available to them under the Bermuda scheme, because in all goodness they had one or two cities worth the match of international air traffic.[69]

C. The Bermuda Amendment of 1966

It was in 1966 that the two Bermuda partners revised the agreement in order to amend the routes. According to this revision, the fifth freedom rights were greatly expanded largely to the benefit of the United States.[70] The British carriers were given fifth freedom rights between points on the pacific ocean, and in return, the U.S. carriers were allowed to carry passengers between London and the continent.[71] British Airways eventually gave up the newly awarded pacific routes when efforts to develop business there failed. Pan American Airlines (Pan Am) and Trans World Airlines (TWA), on the other hand, profited from carrying a large number of passengers between London and cities such as Frankfurt, Paris, and Amsterdam.[72]

The U.S. Department of State claimed that the amendment «represented the most far reaching review....that the two governments have undertaken since that agreement was originally signed,[73] no mention was, however, made of the capacity disequillibrim». Moreover, the United States' goal of maintaining only limited government intervention in carriers decision was also carried.

The British soon felt disturbed by the 1966 Amendment to Bermuda 1.[74] They not only realized that the operation was not to their advantage, but the concept of limited government intervention was also in strict conflict to their later position.[75] The British complained that the United States received «an absolute bonanza» while British «benefits in the Pacific have disappeared».[76] This Amendment was later considered to be one of the main constituents of British complaints forcing the Bermuda 2 negotiations.

III. INTERNATIONAL AVIATION POLICY: EVOLUTION AND CRISES

INTRODUCTION

For three decades international air transport relations between the countries have been governed and regulated by a vast number of bilateral air transport agreements. Many of these relations have been conducted according to the Bermuda principles. For quite sometimes the only significant variation between bilaterals lay in the approach to capacity control, «double designation» was a thing of the future.[77] In the field of tariff clauses, as previously observed, most bilaterals stayed more faithful to the Bermuda 1 principle and delegated the determination of tariffs to the carriers involved, subject to prior governmental approval. A majority of bilateral agreements stipulated that in doing this the carriers might use or could use «whenever possible» the rate-making machinery of International Air Transport Association (IATA). Post Bermuda

agreements also showed a gradual disappearance of intermediate points, and of fifth freedom routes and a gradual appearance of all-cargo routes.[78]

Fundamental changes, impacting the international aviation industry, were brought about with the advent of traffic increase, the emergence of new markets and airlines, charter flights, introduction of jet aircraft, etc. These changes were in sharp contrast with the conditions of international air transport in 1946. Other problems such as «noise abatement and other environmental issues, curfews and airport charges and security, unknown in 1946, were steadily imposing restrictions on scheduling and operational liberties».[79] These changes coupled with other factors like the growth of nationalized industries in U.K., the economic strength of West Germany and Japan, the emergence of the Arab countries with their oil resources, and an expansion of the consumer market, all bore on the question of whether the Bermuda principle were still appropriate to meet the needs of international air transport.[80]

In all fairness, it should be recognized that the Bermuda principles did not always fit, when they were to apply to circumstances that differed largely from those for which they were originally intended. It may be further realized that Bermuda principles were to a large extent written to cover the U.S. and U.K. competition on the North Atlantic run. This meant that they were drawn up to regulate a heavy traffic between two countries, each of which was either the starting point or the terminal point.

Ultimately, all these factors had combined to render the 1946 Bermuda Agreement an anachronism in the 1970s. Next, the major factors will be examined in detail by beginning with the substitution of jet aircraft for propeller driven planes which dramatically increased capacity on the North Atlantic.

A. The Introduction of Jet Aircraft

The most significant factor to the massive growth of capacity was the introduction of jet aircraft in the late 1950s. Prior to the substitution of the jet, air carriers had relied on aircraft such as Douglas DC-7, which had a seating capacity of 89 coach passengers. In contrast, the Boeing 707 could carry 160 coach passengers across the Atlantic.[81] In 1969, the first wide-bodied jet was introduced into North Atlantic service, which had by March 1977 increased the American carriers seats to 232.5, three times the 1959 average.[82]

The history and development of jet aircraft as transport vehicles may, however, be retraced to the beginning of the 1950s, when work on the development of turbine powered transport aeroplanes was concentrated almost entirely in Britian because of a conscious attempt by this country to leap frog into a leading position as a producer of civil aircraft.[83] The real competition between the manufacturing states started in the mid '50s to produce a new product of superior characteristics. In the early 1960s several types of jet aircraft were introduced and the major airlines were faced with the need to replace the

whole of their existing fleets with jet aircraft. This had been one of the basic reasons why the transition to jets had been accompanied by a general problem of excess capacity throughout the industry.[84]

While there is no doubt that the jet age brought great comfort to passengers, the concern on economic front was not that alluring. To this effect, L.L. Doty, a legal expert, asserted that a complete redrafting of the existing bilaterals air pacts, within a year, would be required.[85] This was undoubtedly an exaggeration but was indicative of some of the fears inspired by the jets.

In this connection, it may be pointed out that fears were caused first because the jets were not suitable for shorter hops and thus the need to abandon certain routes to local carriers. Equally fearful was the effect on smaller national carriers which were not able to make the large investments required for the expensive jets, resulting in the abandoning of trans-oceanic rights which they had possessed. Also, it raised the question of change of aircraft, which had been strongly resisted by the governments.

The following French comment indicates the foreign concern about change of aircraft in the jet age:

> «Operations with large jet aircraft will call for the long-haul stops to be few and far between serving the main continental gateways. One idea advocated for some time now is for traffic to be taken from there on to its various destinations in smaller aircraft; the expression 'change of gauge' means just that. But what is to determine the capacity

offered by those regional service aircraft? According to the Anglo-American Agreement, it is 'the traffic traveling in the larger aircraft normally requiring to be carried onward'; and the smaller aircraft 'will operate only in connection with the larger.' Thus if, on a New York-London-Zurich-Athens-Beirut airline, the long-haul aircraft stops only at London and Beirut, passengers going from New York to Zurich or Athens will have to be taken from London onward in an aircraft which:

(a) offers capacity in relation to such American Third Freedom traffic;
(b) operates only in connection with the long-haul flight.»[86]

B. Charter Operations

From the beginning of the 1960s, as jet aircraft were introduced on a large scale, charter transportation grew to represent a significant proportion of total traffic. In 1961, for instance, international charter flight across the North Atlantic carried less than 204,000 passengers. Ten years later, this number had increased to 1.9 million passengers.[87]

This increase in charter operation had unquestionably eroded scheduled traffic rights and brought substantial effects on the industry as a whole. In an environment where there was little basic change in the nature of scheduled service regulation, charter policy provided, from early 1960s onwards, a sensitive barometer of international policy evolution.

It is significant to note that there was no reference in the original Bermuda Agreement to charters. This omission persisted throughout all subsequent Bermuda-type bilaterals.

In fact, the first major bilateral agreement to cover both the scheduled and charter services was the Bermuda II Agreement.[88]

During the mid '60s onwards, the scheduled flag carriers began complaining of the inroads which cheap and unregulated charter services were making on their potential traffic and profits and campaigned for stricter controls. On the other hand, the public, various consumer groups and the tourist industry were pressing for some deregulation of the scheduled section and for even greater freedom for non-scheduled operators, so that all travellers could readily enjoy the cheaper fares which the latter had made possible.[89]

In the early 1960s, the CAB had promulgated a series of regulations easing the number of restrictions that had formerly limited charter carriers. The inevitable result was a further increase in total capacity. In 1963, the CAB authorized the granting of charters-only air service to foreign air carriers, thus opening the transatlantic market to an additional number of new entrants.[90] The 1970s also saw a significant expansion of the number of charter services. During 1975 the CAB relaxed the requirement to travel group charters (TGCs).[91] As a result TGC fillings for 1975 tripled over the previous year.[92]

It must be noted that as the economic fortunes of both scheduled and non-scheduled carriers worsened in 1970 and 1971, and more particularly after the fuel crises of 1973, the pressures on the regulatory system increased. To mitigate the effects of the deteriorating economic fortunes of the industry,

governments and airlines took a series of unconnected decisions which collectively changed the regulatory framework.

Because these various decisions were often contradictory no clear direction of change emerged. Instead one can discern in the various regulatory developments which took place between 1973 and 1977. Certain trends were: first, the distinction between scheduled and non-scheduled services became increasingly blurred and difficult to maintain.[93] Economist Jesse J. Friedman, in a 1976 study of capacity on the North Atlantic, warned that control of scheduled capacity without concomitant control of charter capacity would cause excess charter capacity and undermine the effectiveness of scheduled capacity control.[94] Secondly, there was a trend towards introducing greater regulation of international non-scheduled services both by bringing them within bilateral air service agreements and by controlling charter fares. Finally, a number of governments manifested a growing protectionism towards their scheduled carriers and attempted to protect them not only against the impact of charter competition but also against competition from other scheduled airlines.[95]

C. Growing Trends Towards Restrictionism

The growing trend towards restrictionism by various countries followed by capacity reduction agreements have greatly acted to undermine the vitality and authority of Bermuda's capacity principles. An analysis of this tendency must begin by observing that the Bermuda capacity clauses themselves served as precedents

for restricting the traffic.[96] These problems had arisen between many governments seeking to protect national airlines through renegotiations or by favourable interpretation of Bermuda principles. For instance, Wassenbergh had made the point that:

> «[s]ince it was still regarded as more or less a question of 'boni mores' not to go any further than the Bermuda restrictions, the vast majority of bilateral aviation agreements were of the Bermuda type, although in practice more far-reaching restrictions were often in force. Thus the number of route restrictions and frequency limitations was legion, and there were many 'no local traffic' sections, i.e. sections on which certain airlines were not allowed to embark local traffic.»[97]

The restrictions by the governments may take any form. They may allow limited mumber of foreign airlines to operate into their territory, limit the granting of routes/number of frequencies, restrict the number of passengers, cargo or may exercise restriction on the operation of charter flying, etc.[98]

The freedom of the air proposed by the United States under the Bermuda principles was a special kind of freedom, which had been interpreted by the weak nations as the freedom of the stronger and hence was felt the need for a protective posture. Furthermore, the Bermuda type of agreement was considered well suited to states of relatively equal bargaining strength, and poorly suited to states which were inherently unequal in bargaining strength. This was because:

> «[T]he 20 percent air traffic available for competitive capture under a normal Bermuda went to the stronger airline. For this reason, many of the smaller states had preferred tighter economic airline regulation by the respective governments.»[99]

The following observation made by Gardi, is noteworthy in considering this aspect of inequality between States:

> «...States have tried to safeguard the interests of their own carriers and, at the same time foster development of scheduled international air services for the public transport of passengers, mail and cargo. In view of the complexity of these bilateral controls, it would be difficult to assess what restrictive effects capacity controls have had on development of scheduled services. In an ideal world perhaps these controls would not need to exist, but then we do not live in an ideal world.»[100]

The above observation clearly suggests a vicious pattern towards restrictionism in international civil aviation. This pattern had grown progressively over the years since 1946 and had in turn been responsible to tear the very threads of Bermuda Plan. Means of application of these restrictions are to be found in secret letters or notes between the aviation services of the countries.[101]

It must be clearly pointed out that pre-determination schemes had been vigorously resisted by the U.S.[102] The European States, on the contrary, began to stress the «equality of opportunity» when they recognized the United States' total antagonism towards pre-determination, and the Europeans interpreted this equality to mean reciprocity in routes on a route-for-route basis and reciprocity in traffic centers served.[103]

However, the dramatic phase began in 1970-1975 when the scheduled carriers in particular went through a prolonged period of crises and their opposition to capacity control underwent a change. As indicated, the cornerstone of the U.S. aviation

policy was to restrict any capacity control. Yet by 1971, the CAB recognized the importance of capacity controls as a way out of the financial difficulties confronting the scheduled carriers.

The CAB agreed in March 1971 to allow interline discussions on capacity control and in August 1971 it authorized an agreement reducing frequencies and capacity on four U.S. transcontinental routes. The New York to Puerto Rico route was added in 1972. Subsequently the CAB agreed with the Civil Aviation Authority in Britian to a cut in capacity of 20% between November 1, 1974 and April 1, 1975.[104] These capacity restriction agreements between U.S. and U.K.[105] were supported to "help provide the public with optimum service in the face of the constriants imposed by the international fuel situation.[106]

Similar capacity control agreements were concluded between other states that had Bermuda type bilateral air services agreements which, in theory, precluded capacity regulation. Where the bilateral air services agreements were of the pre-determinist type, capacity control was in any case being exercised by the airlines. But increasingly, governments became further involved in protecting their scheduled carriers.[107]

An attempted agreement in 1976, however, failed to materialize between U.S. and U.K. The British had notified Trans World and National Airlines that they would be unable to provide the amount of North Atlantic frequencies during the winter season that the airlines had desired to operate. The CAB viewed

this notification as a violation of Bermuda 1 requiring «appropriate retialiatory response».[108] The British finally accepted the originally proposed winter schedules.

The two U.S. flag carriers also adopted a capacity pact. Pan American Airways and Trans World Airlines agreed to discontinue head-to-head competition on most of their North Atlantic routes due to the massive operating losses that they had been experiencing during 1974. They implemented an agreement whereby Pan American would, inter alia, suspend service between the United States and France, Austria, Portugal, Spain,[109] and Casablanca. In return Trans World agreed to refrain from trans atlantic service between the United States and Germany and to suspend through plan service between Washington D.C. and London. The CAB approved the agreement in January 1975 for a period of two years.[110]

Another form of protectionism could be seen in the attempts by a number of governments to obtain a more equal share of the total traffic in particular markets for their own carriers. In attempting to restore Pan Am and TWA to profitability, as discussed above, CAB began to pressure a number of European and other governments on the grounds that the latter airlines were capturing significantly more than 50% of the traffic on routes to the United States even though American citizens generated over half the traffic.[111] In this case the U.K. was not subject to such pressure from the CAB because the British flag carriers share of traffic between the U.K. and U.S.A. was less than 40%.

Nonetheless, this time the CAB found itself on the defensive, because a number of governments decided to renegotiate existing Bermuda-type bilaterals in order to introduce some capacity controls and obtain a more equal share of traffic for their own carriers.[112]

D. Structural and Other Problems

The demise of Bermuda agreement, with strongest foundations, was not the outcome of only evolutionary forces but there were so many other factors which all joined gave a cumulative effect. The discussion of other problems should start with what might be called the structural problems.

(a) Proliferation of National Airlines

As long as there were only a handful of international carriers serving routes, Bermuda principles were held in high esteem. The carriers with equipment and financial resources competed openly for the available passengers and remained economically viable because passengers were not divided in so many directions.

The statement that «proliferation of airlines creates difficulties» is an understatement.[113] The statement, however, hints at the reality that the proliferation of airlines is a wholly unavoidable process. This is because:

> «There are many reasons why the requirement of a 'National Airline' is so strongly felt throughout the world. Prestige and political communication are perhaps the most obvious. But there has

> also been the strategic consideration that aircraft available to carry civilians in time of peace are also available to carry military equipment and personnel in time of war. Furthermore, while it may be possible for a country to get cheaper services by leaving them to the airlines of other countries to operate, no country cares to feel entirely dependent on another for the transport of people and goods across its boundaries, especially when this dependence represents a permanent drain on foreign exchange resources. Some countries go so far as to regard air traffic to and from their country as a sort of national property.»[114]

The number of airlines today almost equals to the total number of states as Dr. Wassenbergh calls it a «purely international approach».[115]

Once the international aviation industry expanded to include a flag carrier for virtually every nation, competition became so heavy that abuses of Bermuda began to occur.

The abuses were never contemplated when the Bermuda agreement was written. Notorious abuses were those involving fifth and sixth freedom rights.[116]

(b) Pooling Arrangements

Pooling agreements among West European countries have been in existence since Bermuda 1 was signed. In 1951, fifteen pooling agreements took place among nine airlines,[117] but by 1954, they had progressively been spread accounting for 56 different route sectors.[118]

One of the difficult problems in talking about pools is to define just what an airline pooling agreement entails.

«The Economics of European Air Transport» by Stephen Wheatcraft,[119] and «The Law of International Air Transport» by Bin Cheng,[120] contain relatively extensive discussion on this subject. These writers consider that the essential elements of a pool are:

1. Agreements between the airline parties upon the capacity each is to operate;
2. agreement upon the division of revenues (and in some cases expenses).

The rationale of a pooling agreement is stated to be one of the following:

1. To avoid excess capacity;
2. to limit competition;
3. to reduce costs by improved utilization of aircraft;
4. to provide an improved spread of services throughout the hours of the day;
5. to buy freedom on routes which would otherwise have been restricted by government action.

According to the U.S. viewpoint, the dangers of no. 5 far outweigh any benefits that might be achieved by items 1 through 4. Historically, the U.S. has always frowned on pooling agreements. <u>The U.S. policy on international airline pooling reads:</u>

> «The United States..... Pooling proposals should be disapproved unless there is clear and convincing evidence that the pool would achieve significant U.S. policy objectives, and more competitive alternatives are not available. Strict reporting and tariff conditions must be integral to such agreements to assure that they are not contrary to the public interest.»[121]

Professor Bin Cheng considers that «pooling reintroduces capacity determination, where the bilateral agreement

provides none, through a back-door on a non-governmental but interline basis». However, William Jordan believes that airline pooling arrangements would increase the duration of aircraft replacement cycles and would cause the abandonment of service and quality rivalry.[122] It has also been suggested that cooperation among nations with respect to airline traffic encourages the breaking down of other political barriers as well.

In the final analysis, however, the disadvantage of doing so are even greater in the airline industry such as discharged employees no longer working, supplies of resources no longer needed by the airlines and aircraft manufacturers being put out of business.[123] The indulgence in the pooling arrangement eventually undermined the network of Bermuda-type agreements as they were contrary to the principles originally understood by the parties.

(c) CAB Economic Regulations, Part 213

As mentioned earlier, the restrictive measures were even taken by the U.S.A. itself. In an effort to improve the economic viability of the U.S. flag carriers whose share of international traffic had been worsening, the CAB enacted Part 213 of the Economic Regulations in June 1970.[124] Part 213 empowered the CAB to request, with or without hearing, any foreign carrier operating under a permit to file traffic and schedule data disclosing the extent of that carriers' operations to and from the United States.[125] If the services provided by the foreign

carriers were subject to a bilateral air transport agreement, an additional finding was required before the Board could request such data. It was considered imperative that the permit holder in response to the objectives of the U.S. Government, had:

> (1) Taken action which impaired, limited, terminated, or denied operating rights, or
>
> (2) otherwise denied or failed to prevent the denial of, in whole or in part, the fair and equal opportunity to exercise the operating rights, provided for in such air transport agreement....[126]

The CAB was then authorized to notify the foreign permit holder that its operations were not in accord with applicable law or «adversely affected the public interest».[127] Following which the CAB could order the foreign carrier to refrain from implementing a proposed schedule or to discontinue an existing schedule within 30 days.[128]

In 1974 the Board adopted an amendment to part 213 which extended its existing powers. The Board could now also issue an order to file schedules and take appropriate action when foreign governments had, over the objections of the U.S. Government -

> «otherwise denied or failed to prevent the denial of, in whole or in part, the fair and equal opportunity to exercise the operating rights, provided for in such air transport agreement, of any U.S. air carrier designated thereunder with respect to flight operations to, from, through, or over the territory of such foreign government.»[129]

Three months after the amendment had been adopted, the CAB issued its first order against KLM. According to the

Board, the airline carried too much sixth freedom traffic between the U.S.A. and the Netherlands. KLM declined to comply with the order to file its schedules, the issue was elevated to the diplomatic level but the dispute remained largely unresolved.[130]

A careful analysis of the Section 213, initiated by the U.S. to counter the so-called coercion by other countries, revealed that the American response was inappropriate and annoying for other countries. Instead it was believed, the alternative procedure would have been less abrasive, such as amending the existing bilateral agreements.[131]

Finally, the cumulative effect of all the foregoing factors had rendered the original Bermuda Agreement exceedingly in-effective. No efforts could have resuscitated the once ideal agreement. The U.K.'s denunciation of the agreement in 1977, discussed in the next chapter, was a logical step to reassess this unfortunate situation. While the British considered that this bilateral no longer corresponded to market needs and conditions in the '70s, one cannot resist to admit that it was indeed a victim of historical fallacy.

CHAPTER I - FOOTNOTES

1. B. Cheng, The Law of International Air Transport, 1962, at 26.

2. What constitutes the Bermuda Agreement may not be a simple question. At the end of the Conference held at Bermuda, 15 January - 11 February 1946, between the United Kingdom and the United States, there emerged a Final Act, signed by 8 out of the original 10 U.S. delegates who attended the conference, and by 5 of the 6 U.K. delegates. An Agreement, signed by 6 U.S. and 5 U.K. delegates, was appended to the Final Act. The Agreement has an Annex which was initiated by the same delegates that had signed the Agreement. Under Article 14 of the Agreement, the Agreement, including the Annex, came into force on the day it was signed. No reference, however, is made in the Final Act to its coming into force. Yet almost all the principal features of what is sometimes called the Bermuda Plan are to be found in the Final Act. These include the provisions on «fair and equal opportunity» (para. 4), primary and supplementary capacity criteria (para. 6), and ex post facto review (para. 9).

   See B. Cheng, Beyond Bermuda, in International Air Transport, Law, Organization and Policies for the Future, 1976, at p. 97.

3. Business Week, August 16, 1976, at 104.

4. After informally reviewing the practical operation of the Bermuda Agreement, 6 months after it had been concluded, the two governments issued a joint statement in which they agreed to follow the basic principles enunciated in Bermuda 1 in negotiating future bilateral agreements with other countries. 15 Dep't State Bull. 577-78 (1946) hereinafter cited as Joint Statement .

5. See e.g., Agreement Relating to Air Services, Dec. 12, 1961, Belgium-Switzerland, No. 5996, 416 U.N.T.S. 81.

6. Letter from British Ambassador Peter Ramsbotham to the U.S. Department of State (June 22, 1976).

7. Agreement relating to Air Services, July 23, 1977, United States - United Kingdom - U.S.T. - T.I.A.S. No. 864 hereinafter cited as Bermuda 2 .

8. B. Cheng, supra note 1, at 229.

9. Barry R. Diamond, The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements, 41 & 42 J. Air L. & Com., 1982, at 443.

10. Ibid.

11. Exploration in Aerospace Law: Selected Essays by John Cobb Cooper 382 (I. Vlasic ed. 1968) (reprinted from Foreign Affairs, Oct. 1946) hereinafter cited as Cooper essays .

12. I.A. Vlasic and M.A. Bradley, The Public International Law of Air Transport: Materials and Documents, Vol. II 1974, at 11.

13. Ibid.

14. Jack Thomas, Economic Regulations of Scheduled Air Transport - National and International, 218, 471 (1951).

15. Diamond, supra note 9, at 445.

16. See Final Act of the Civil Aviation Conference held at Bermuda, Jan. 15 - Feb. 11, 1946, TIAS 1507.

17. B. Cheng, supra note 1, at 412-413.

18. «The capacity to be put on any air route should be related to the traffic demands - thereby eliminating uneconomic practice»; see Peter G. Masefield, Anglo-American Civil Aviation, 1 Air Affairs 319 (1946-1947).

19. See Martono, K., Route, Capacity and Tariff Clauses of Selected Bilateral Air Transport Agreements Concluded by Indonesia, a thesis submitted to the Institute of Air and Space Law, McGill University, 1980, p. 57.

20. «Over capacity» has been defined as «unused capacity of the aircraft below a certain standard percentage of the aircraft capacity which must be sold to ensure economical operation on the route concerned over a certain period of time,» see Wassenbergh, Public International Air Transportation Law, at 31.

21. See Baker, The Bermuda Plan as the Basis for a Multilateral Agreement, Lecture delivered at McGill Univ., Montreal, April 18, 1947, in Vlasic and Bradley, The Public International Law of Air Transport, Material and Documents, Vol. I, 1974, at 250.

22. Ibid., at 251.

23. See Bermuda 1, Art. 9.

24. See Bermuda 2, Art. 11, para. 3.

25. Joint Statement by the United Kingdom and the United States Delegations 14 U.S. Dept. of State Bull. 303 (1946).

26. Cheng, Beyond Bermuda, in International Air Transport, Law, Organization and Policies for the Future, at 93.

27. Diamond, supra note 9, at 447.

28. Ibid., at 448.

29. See A.F. Lowenfeld, A New Takeoff for International Air Transport, Foreign Affairs, Vol. 54 (October 1975), at 45.

30. See J.C. McCarroll, The Bermuda Capacity..., 29 JALC, 1963, at p. 120.

31. A. Stoffel, American Bilateral Air Transport Agreements on the Threshold of the Jet Age, 26 (1959) JALC, at 119.

32. The outcome of the bargaining process for routes and traffic rights largely depends on each nations economic and political power. But external factors can affect the negotiating process to a very important extent. Military objectives, aircraft sales considerations and other economic objectives external to the exchange of commercial rights can play an important or even decisive role in the negotiations, see Thornton, International Airlines and Politics, A Study in Adoption to Change, Michigan Univ., 1970, at 80.

33. B. Cheng, supra note 1, at 238-239.

34. See 139 U.N.T.S. 114-141 (1952) (France); 4 U.N.T.S. 125-154 (1946) (Belgium).

35. 15 U.S. Dept. of State Bulletin, 1946, at pp. 577-578.

36. See CAB Regulations: The Bilateral Aviation Agreements, 29 JALC, 1970, at 4.

37. Raymond Young and William Kutzke, Inside Bermuda 2, Airline Executive, Oct. 1977, at 20.

38. See the views of George Baker, Some International Aspects of Air Transport, J. of the Royal Aer. Society 1950, at pp. 669-677.

39. Statistically, World international passenger traffic grew from about 2 billion revenue ton-kilometers in 1946 to over 30 billion RTKs' by 1976; see Raymond Young and Kutzke, supra note 37, at 20.

40. Lissitzyn, The Record of the Association of the Bar of the City of New York, Vol. 19 No.4, April 1964, at 189.

41. Shawcross and Beaumont on Air Law, London 1966, 3rd ed. vol. 1, at pp. 288-289.

42. South American countries have never adhered to the Bermuda principles and as a region have generally favoured pre-determination of capacity and careful control on designation and foreign carrier fifth freedom operations; see Hammarskjold, Trends in International Aviation and Governmental Policies, Aeronautical Journal, May 1980, at 148.

43. Stoffel, supra note 31, at 129.

44. Jack, Bilateral Agreement, 69 J. of the Royal Aeronautical Society, 1965, at 473.

45. Except, of course, for cases when Bermuda language is used, but the bilateral capacity regime includes also an additional and predominant pre-determination component.

46. Adriani, The Bermuda Capacity Clauses, 22 J. Air L. & Com., 1955, at 406.

47. Ibid., at 411.

48. Report submitted by the Interstate and Foreign Commerce Committee on April 30, 1956; see Journal of Air L. & Com., 23 (1970), at 356.

49. Lowenfeld, CAB v. KLM: Bermuda at Bay, 1 Air Law (1975), at 5.

50. Thornton, Power to Spare: A Shift in the International Airline Equation, 36 J. Air L. & Com., (1970) at 37; Doty, Curtis Worsen Payments Deficits, Av. Week, Oct. 30, 1972, at 25-26.

51. Thornton, supra note 64, at 37.

52. L. Doty, Aviation Week and Space Technology, Oct. 18, 1976, at p. 41.

53. Thornton, supra note 32, at 40.

54. Cribbett, Some International Aspects of Air Transport, Royal Aeronautical Society (1950), at p. 7.

55. Countries like Belgium and the Netherlands.

56. Stoffel, surpa note 31, at 130.

57. Cooper, J.C., Exploration in Aerospace Law, I.A. Vlasic ed., 1968, at 387.

58. P. Sand, Civil Aviation Agreements of the Peoples' Republic of China, 14 Harv. Int'l J. (1973), at 336. For a detailed description of IATA rate-making machinery and its role in bilateral agreements, see R. Chung, The International Air Transport Association (1972), at 22-26.

59. Haanappel, Bilateral Air Transport Agreements - 1913-1980, The Int'l Trade L. Journal, at 256 (1980).

60. See IATA Study 1981/No.6, at p. 56.

61. Policy Statement at 10.

62. Diplomatic note from Peter Ramsbotham, Her Majesty's Ambassador to the United States, to Henry A. Kissinger, U.S. Secretary of State (June 22, 1976) at p. 2 hereinafter cited as Notice of Denunciation .

63. Ibid.; Boyd statement, Hearing Concerning U.S. International Aviation Negotiations Before the sub-committee on Aviation of the House Comm. on Public Works and Transportation, 1st sess. 4 n. 4 (1977) hereinafter cited as Hearings .

64. Notice of Denunciation, supra note 76, at 2.

65. Kanaan, Air Transport Bilateralism in the Arab Middle East, a thesis submitted to the Institute of Air and Space Law, McGill University, Montreal, 1970, at 113.

66. Ibid.

67. Cooper Essays, surpa note 11, at 386.

68. A. Thomas, supra note 14, at 219.

69. McCarroll, supra note 30, at 118-20.

70. Hearings, supra note 77, at 24-40.

71. Ibid.

72. Wall St. J., August 27, 1976, at 8, Col. 5.

73. Ibid.

74. Hill, Bermuda II: The British Revolution of 1976, J. Air Law & Com., Vol. XLIV-1978, at 114.

75. Ibid.

76. Supra note 86.

77. With the exception of the U.S., very few States possessed more than one international scheduled flag carrier. This remains true today where two or more scheduled airlines are authorized, they are generally subject to «sphere of influence» control.

78. Haanappel, supra note 73, at 252-253.

79. Doty, supra note 66, at 44.

80. Ibid., at p. 51.

81. Sackrey, Overcapacity in the United States International Air Transport Industry, 32 J. of Air L. & Com. 24, 77 (1966).

82. CAB, Bureau of Accounts and Statistics, Airline Industry Economic Report 9 (Mar. 1977).

83. S. Wheatcraft, Air Transport Policy, London 1964, at p. 91.

84. Ibid. At that time, military jet developments were under way in America and Russia.

85. L.L. Doty, Bilaterals May be Redrafted for Jet Era, Aviation Week, November 17, 1958, at 39.

86. The Bermuda Capacity Clause and Tomorrow's International Operation, 3 ITA Bulletin 1958, at 62.

87. Lichtman, Regularization of the Legal Status of International Air Charter Services, 38 J. Air L. & Com. 1972, at pp. 441-447.

88. Hammarskjold, Trends in International Aviation and Governmental Policies, Aeronautical Journal, May 1980, at 147.

89. Rigas Doganis, Current Trends in the International Regulation of Air Transport, ITA Bulletin 40, Nov. 1977, at 935.

90. Caledonian Airways (Prestwick) Ltd., Foreign Air Carrier Permit, 38 CAB 501 (1973); CAB, Report to Congress Fiscal year 1975, at 12 (1976).

91. Keyes, The Transatlantic Charter Policy of the United States, 39 J. Air L. & Com., 215, 239 (1973).

92. CAB, Report to Congress Fiscal Year 1975, at 12 (1976).

93. Doganis, supra note 103, at 936.

94. J. Friedman, A New Air Transport Policy for the North Atlantic, May 1976, at 117.

95. Doganis, supra note 103, at 936.

96. H. Wassenbergh, Aspects of Air Law and Civil Air Policy in the Seventies, (1970), at 22.

97. Ibid., at 65.

98. Ibid., at 17.

99. P. Sand, supra note 72, at 335; H. Wassenbergh, supra note 109, at 23.

100. Gadzik, Co-existence of Scheduled and Charter Services in Public Air Transport, 77 Aeronautical J. 35 (1973).

101. Wassenbergh, supra note 109, at 64.

102. See e.g. The 1963 Statement on International Air Transport Policy, 30 J. Air L. & Com. 76, 261 (1963).

103. Jones, The Equation of Aviation Policy, 27 Air L. & Com. 21, 234 (1960). See also The Freedom of the Air, (E. McWhinney & M. Bradley eds. 1968), at 117-78 and Wassengergh, supra note 109, at 37-40.

104. Doganis, supra note 103, at 959.

105. CAB order no. 74-10-6, Oct. 2, 1974.

106. CAB, Regulatory Reform: Report of the CAB Special Staff 95 (1975).

107. Doganis, supra note 103, at 959.

108. Traffic World, Nov. 1, 1976, at 92.

109. Pan American Airways, Inc., Ann. Rep. 17 (1976). The Miami-San Juan-Lisbon-Madrid-Rome route was excepted, however.

110. CAB order no. 75-1-1133 (Jan. 30, 1975), reconsideration denied, order no. 75-2-108 (Feb. 27, 1975).

111. Doganis, supra note 103, at 960.

112. Ibid.

113. Jack, supra note 58, at 474.

114. Edwards, British Air Transport in the Seventies, (1970), at 3.

115. Wassenbergh, supra note 109, at 11.

116. Aviation Week and Space Technology, August 5, 1974, at 29.

117. Wheatcraft, supra note 131, at 254.

118. S. Wheatcraft, The Economics of European Air Transport, 1956, at 255.

119. Ibid., at 252-253.

120. B. Cheng, supra note 1, at 280-282.

121. «International Air Transportation Policy of the United States»; approved by the President September 8, 1976.

122. Jordan, Airline Capacity Agreements Correcting a Regulatory Imperfection, 39 J. Air L. & Com. 179, 208 (1973).

123. Ibid., at 209.

124. Note, CAB Regulation of Foreign Air Carriers under Part 213; A Turn Toward Restrictionism in American Aviation Policy, 4 N.Y.U.J. Int'l & Pol. 239, 244 (1971).

125. 14 C.F.R. para. 213.2, 213.3(b) (1977); Macdevitt, The Triangle Claims Another Victim: A Watery Grave for the Original Bermuda Agreement Principles, 7 Denver Journal of Int. L. and Pol., 1978, at 239-277.

126. Ibid., para. 213.3(c).

127. Ibid., para. 213.3(d).

128. Ibid.

129. Ibid.

130. Lowenfeld, supra note 63, at 14.

131. Other measures include the International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. 1159 a, b, (supp. V. 1975).

CHAPTER II

BERMUDA II - NEGOTIATIONS

INTRODUCTION

British Airways in 1973 carried the equivalent of five empty Boeing 747 Jumbo Jets daily between its flights from New York to London.[1] On North Atlantic, the biggest international market in the world, airlines were flying the equivalent of eight wide body aircraft a day.[2] Over capacity on the North Atlantic had assumed serious dimensions.[3]

In as far as the earning imbalance was concerned, the U.S. airlines earned in the year ending 31 March 1976 nearly £300 million from the Agreement, where as the earnings of the British airlines was only some £130 million. Of this latter figure £127 million was earned on the North Atlantic where U.S. airlines earned upwards of £180 million. The provisions governing capacity in 1946 Bermuda Agreement[4] concerning scheduled air transportation had, thus the British asserted, become ineffective.

Also, it became evident that the American airlines would always out-fly and out-earn the British across the pacific on routes between the mainland of the U.S.A. and Bermuda as well as to British points in the Caribbean. However, it was not so self-evident that American airlines would continue to have a wide range of valuable fifth freedom rights at London and Hong Kong, when British airlines could make no practical use of the relatively few fifth freedom opportunities which they

had from points in the United States onwards across the pacific and into the Caribbean.[5]

As discussed in the preceding chapter, the climax to British grievances had built up since at least a decade.[6] They were in 1976 seriously considering the option of terminating the old Bermuda Agreement. But there were two factors which had held them back. One was the Civil Aviation Policy Review set on foot by the Government. The other was the vexed question of Concorde's landing rights in the U.S.[7]

On February 1976 the Policy Review was completed. As for the Concorde, by the summer of 1976 the Coleman hearings had been completed and the Concorde had been admitted to the Federal airport of Washington. It was still blocked at New York and intense diplomatic action by the British and French authorities was in hand to try and secure its entry there.

A further factor was that in America the Transatlantic Route Proceedings of the Civil Aeronautics Board had nowhere near reached conclusion and there was, therefore, some merit in the British going forward while that issue was still undecided in the States.

On June 22, 1976 the United Kingdom announced its denunciation of the Bermuda Agreement of 1946. The termination of Bermuda 1 was to take effect one year later, on June 22, 1977, the day on which both countries were to reach an agreement on a new bilateral air transport agreement.[8] The British memorandum sent to the State Department read: «[W]e shall

be looking for an increase in the earnings of British carriers, and we see no practical means of achieving this except through a reduction in the earnings of United States carriers.»[9]

The U.S. officials were surprised who believed until the notice was given that U.K. would first request consultations before issuing a termination notice. In their view, the British were «very calculating» on the time and manner in which they chose to terminate Bermuda.[10] It was alleged that the British wanted to gain the New York landing rights for the Concorde and as well the embarrassment it might have caused to Queen Elizabeth II during her visit to the U.S. in the first week of July 1976.

The British denied that there was any «Machiavellian process» involved in the decision to terminate. They said a decision was made, after a series of inter-departmental meetings, that Bermuda was so completely outdated it was not applicable to the international air transport industry of today or the future. The fact that the Ford Administration had yet to issue a new international aviation policy and that U.S. national elections were coming in the fall did not play any part in the U.K. decision, the British officials said.[11]

I. U.K.'s DECISION TO DENOUNCE BERMUDA

A. British Complaints

The final factor which apparently prompted the British denunciation of the Bermuda Agreement was the Civil Aeronautics

Board (CAB) decision in March 1976 to disapprove any additional capacity rationalization pacts.[12] Imbalance of benefits in favour of U.S. carriers under the Bermuda Agreement was the primary complaint of the British note of denunciation dated 22 June, 1976.[13] The reasons for the British termination, as set forth in their Diplomatic Note were:

1. The Bermuda Agreement has become out of date «in a number of respects» and did not correspond satisfactorily with the conditions of the 1970s.

2. The United States enjoyed greater benefits under the agreement than did the United Kingdom. U.K. airline revenues were said to be $227.5 million compared with $512.8 million for U.S. airline revenues - a 69-31 split in favour of the United States.[14]

3. Despite recent relative improvement in U.K.'s benefits over the North Atlantic, «substantial revision of the rights conferred» was needed «to achieve a more equitable balance of benefits overall».

4. The capacity provisions needed specific definition. «The understanding reached in 1974 and 1975 for establishing a close relationship between the capacity and the demand need to be consolidated into a new agreement and systematic procedures established for implementing them.»[15]

5. The tariff provisions had proved unworkable - with the practical effect that either party could act unilaterally on tariffs, without consultation, causing great uncertainity as to what tariffs were applicable.[16] With no schedule for tariff filings and government reactions to tariff fillings, last minute and/or hurried actions often could not be avoided.[17]

The British further alleged that the concept «fair and equal opportunity to compete» was no longer applicable. They wanted a new agreement to assure a better balance of benefits and more profitable operations for U.K. airlines. In their view:

1. Routes were to be realigned to give greater benefits for the U.K. carriers;

2. Capacity was to be more tightly regulated to provide greater efficiency of operations and greater opportunity for U.K. carriers;

3. The tariff mechanism was to be improved so that the CAB could no longer issue eleventh hour veteoes of rate increases.[18]

B. U.S. Contra

The first expression of a change in U.S. policy came with the International Air Transportation Policy Statement of President Ford in September 1976.[19] This Policy Statement was seen as the indirect answer to the British note of denunciation.[20] The Policy Statement recognized that capacity agreements were necessary in situation where «excess capacity had a serious adverse impact on the viability of services and where public interest was served by adequate scheduled service by a U.S. carrier».[21] The Statment stressed that such agreements should be of a temporary nature and that agreement between carriers would be preferable to agreements between governments.[22]

In so far as the establishment of fares and rates was concerned, the Statement expressed its preference to rely on the «free market forces».[23] Although the continued role of IATA in price fixing was acknowledged and tolerated, the position set forth in the Policy Statement was that the market place should be permitted to regulate itself bringing greatest efficiency in air carrier service and which was responsive to the needs of passengers and shippers.

It may be mentioned here that the Transatlantic Route Proceedings set on foot by the Civil Aeronautics Board was not a clear statement of the position on Bermuda for two reasons:

(1) This attempt to apply the Agreement was made by a congressional agency rather than by the executive branch, and

(2) President Ford on 24 December 1976 rejected the CAB's proposed route awards.[24]

President Ford rejected the proposed awards on the grounds that the Board had not sufficiently assessed the economic viability of the new U.S. carrier and the possible counter measures which could be expected from foreign carriers to meet the competition of the proposed U.S. service. It was assumed that the President was looking towards the difficult negotiations with the United Kingdom.[25]

On July 14, the United States responded to the Diplomatic Note of termination to the effect that the United States:

(1) Remained basically satisfied with the Bermuda Agreement in force, and

(2) would join with the United Kingdom to negotiate a new agreement.[26]

C. British Objectives

The U.K. followed its notice of termination with a statement of their aims that the new agreement should be more certain in its application, should be precise with few possibilities for misunderstanding, and should be practical to implement.

The British looked at three main objectives which a new agreement would achieve:

(1) Services at the lowest cost to travellers and air freight shippers;

(2) reasonable profitability for airlines; and

(3) economic use of resources of all types.

In terms of government involvement in regulating air transport between the two countries, the British looked towards meeting the following main requirements in a new agreement:

(1) minimum involvement by governments;

(2) maximum ability for airlines to plan the best use of their existing equipment and the timely purchase of new equipment; and

(3) a clear understanding of what happens in the event of disagreement between airlines or between governments on the levels of capacity to be operated on any routes or series of routes.[27]

On the other hand, the objectives of the United States in negotiating the new agreement were based on the need for an economically efficient airline industry, providing safe, reliable, low-cost transportation for the traveller and shipper.[28] According to the Presidential Policy Statement, the principal U.S. objectives were:

(1) reliance on competitive market forces to the greatest extent feasible, recognizing that the views of other nations may differ and that U.S. policies must be modified in some instances in order to reach bilateral and multilateral accommodations.

(2) provisions for the transportation of people, mail and goods, wherever a substantial need

exists, at as low a price as is economically justified;

(3) support of a private U.S. international air transportation industry that is economically viable and efficient, and that will generate sufficient earnings to attract private capital and provide job opportunities;

(4) consistency with and contribution toward U.S. national objectives in defence and security, foreign policy, and international commerce.[29]

It was rightly observed that the start to international commercial aviation was tied to the conclusion of this agreement since it involved the world's two major bilateral partners. While the U.S. had the means of operating air transport, the British with the Empire and the Commonwealth, benefitted from territorial coverage and the necessary operating points. This inter marriage, in other words, would have meant that if the Bermuda Agreement had not existed, it would have had to be invented. This was the background to the dire need in having the agreement negotiated by the deadline i.e. 22 June 1977.[30]

In this connection it may be further noted that much was at stake for both parties. The British by challenging their U.S. partners, called into question a well established system which was the basis of a certain «order in the air», for the model Bermuda Agreement had acquired the respectability that goes with age. The Americans had to defend a certain supremacy and their place as the world's leading air faring state. Although aware of the fact that a balance of forces was increasingly necessary in every field, they had to act extremely cautiously and make concessions only in very compelling circumstances.[31]

The following reasons were anticipated, as instrumental, in making the negotiations long, complex and exacerbating. Firstly, although the complexion of air transport had undergone a radical change since the Chicago days, the world's political pattern had survived, with its national partitions, the defence of the corresponding interests and the reasons for justifying and maintaining them. Thus, the United States still maintained that the Bermuda standards were perfectly valid, although its partners considered them as largely obsolete.

Secondly, the scheduled transport field, to which the 1946 agreement exclusively addressed itself, was not the only one involved in 1970s. The development of the non-scheduled sector had complicated the general situation. These two types of transport were inter-dependent and overlapped with each other, even if they were to be governed by different instruments. The approach to the negotiations of the main clauses in the scheduled service agreement - capacities, routes and fares - were thus new ones and were expected to be comprehensive.[32]

Thirdly, the approach to the negotiations required reflections, patience and the completion, within the prescribed time limit, which in this case was one year. It may also be observed that at the time of negotiations the Bermuda II dialogue was supposed to yield a model agreement. The English started calling it Bermuda Mark II and thence the importance and stress for a workable solution. Finally, the negotiations were to acknowledge through compromise the legitimate interests of their partners.[33]

II. DIFFERENT PHASES OF NEGOTIATIONS

A. Preparatory Phase

Bilateral air transport negotiations are usually conducted by negotiating teams composed of representatives from foreign affairs ministry[34] and the transportation ministry of the respective government[35] with interested carriers either as observers[36] or as the delegation members.

In principle, bilateral air transport negotiations are conducted for the purpose of serving civil aviation interests. In practice, however, many other considerations also get involved. The other considerations may be political, military or economic in nature.[37]

In the Bermuda negotiations too, the dispute bringing was not restricted to only facts and figures, but the conflicting national systems and divergent concepts, standards and methods. It has often been said that bilateralism is often a matter of haggling - point in return for point, route for route, or an aircraft order for a new service or a charter programme. In the Bermuda Agreement, the discussion rather evolved on a higher plane: liberalism against government control, ex post facto control versus pre-determination, cartels versus competition and the respective role and responsibilities of governments and airlines.[38]

At the time of denunciation, there was a British civil aviation delegation in Washington. Advantage was taken of their

presence to resolve an immediate U.S. difficulty, namely what were the major issues of concern to the United Kingdom. There were both minor and major problems. In discussions with the British delegation the major problems of immediate concern to the U.K. were determined to be as follows:

(a) U.S. capacity offered on the North Atlantic. The British suggested that a 70% load factor, while not sacrosanct, represented a reasonable interpretation of the 1975 agreement;[39]

(b) U.S. operations at Hong Kong. The United Kingdom was concerned about Pan Americans layover time at Tokyo, change of gauge at Tokyo, and capacity between Hong Kong and Tokyo. The British objected to Pan Am's Hong Kong-Sydney and round the world capacity, which in British view heavily depended on third country traffic;

(c) CAB action on excess baggage charges;

(d) A disputed normal economy fare filing by British Airways which the U.K. felt was legal and effective.

However, meanwhile, since the U.K. had renounced the Agreement, they were required to furnish an outline of its starting proposals in August 1977, together with a proposed negotiating schedule. The United States had established a special inter-agency task force, chaired by the Under Secretary of State for Economic Affairs, to analyse the globe-circling problems presented by the United Kingdom's termination notice.[40]

The United Kingdom wanted to pursue the central issues of routes and capacity immediately, proposing:

- a two-day September meeting to discuss the U.K.'s proposals;
- a 7-10 day October meeting to discuss capacity provisions, North Atlantic route rights, and designation;

- a 7-10 day December meeting to discuss Hong Kong related issues;
- a 7-10 day January meeting to discuss Bermuda and Caribbean issues and tariffs;
- a 7-10 day March meeting for further discussion of tariffs, the link between tariffs and capacity, administrative articles, and any other not yet resolved issues;
- an April meeting going as long as necessary to reach final agreement.[41]

The United States refused to accept the schedule of meetings. To have settled routes first would have, in the views of the U.S., left them with little leverage to protect competitive opportunity in the capacity area - and the British were clearly not in to yield early on capacity.[42] Instead, the United States suggested that both sides should prepare economic analyses of the market at issue.

B. Negotiation Phase

(a) Opening Round

Both the U.S. and U.K. had constituted a team of 14 delegates for the first session to be held in London on September 9-10. But as one U.S. airline industry observer noted «that's the closest we'd better come to equality».[43] He was clearly referring to the British demand for an equal share of U.K.-U.S.A. traffic.

During the first round, the U.S. proposal for economic analyses was accepted by the British. The acceptance of this proposal allowed more time for both teams to develop data, options and positions for the crucial negotiations

on capacity, routes and rates scheduled for late winter session of 1977.

On the eve of the September 9 opening of the Bermuda re-negotiation, a Presidential Policy Statement on international air transportation was issued. This statement served as the basic guidance for the delegation. This statement also gave explicit guidance on the central issues that were raised during the negotiations of the new bilateral.

General

«Air transport interests are best assured for Americans by the presence of a strong, viable, privately owned U.S. flag international air fleet....There are three major considerations in the development of international air services: route patterns,....capacity, and the fares charged....All three are integrally related economic issues.»[44]

Routes

«The U.S. Government should encourage a system of routes as extensive as can be economically justified....Major trunk routes and markets should be identified....and given priority negotiating attention....closer integration of international routes systems is in the public interest ....In negotiating international route patterns for U.S. carriers, the U.S. Government should structure routes in a way that enables our carriers to draw upon national traffic flows and, thereby, compete effectively with foreign carriers....In granting authority for all-cargo operations, recognition should be given to the need for routing and scheduling flexibility, which may differ considerably from passengers routing and scheduling patterns.»

Competition/Designation

«A basic tenet of U.S. economic philosophy is that market place competition produces improved service and lower total costs for the consumer.

This is as true in aviation as it is in other areas of commercial activity. However, it does not follow that there must be multiple U.S. flag carriers on all international routes ....The United States should authorize more than one U.S. flag airline in scheduled international markets only if they operate profitably taking into consideration the presence of competition from foreign scheduled airlines and from domestic and foreign charter airlines.»

Capacity

«Even under circumstances of extreme financial distress, the preferred approach to excess capacity is unbilateral reduction by the carrier ....The preservation of the competitive concept underlying the Bermuda System is vital, because system under which carriers or governments predetermine capacity for market share reasons can introduce artificial restraints unrelated to carrier efficiency or traffic demand....When other countries advocate less flexibility in capacity competition, we may insist, as a quid pro quo, on greater flexibility in pricing competition, so long as the forecast load factors are well below full utilization load factors.»

Tariffs

«International fares and rates should, to the maximum degree feasible, be cost related, responsive to consumer demand, and established on the basis of competitive market forces....The United States at present intends to continue to accept the International Air Transport Association, the principle vehicle for international negotiations on scheduled tariffs....IATA and its member carriers should revise their tariff-setting structure, so that it can be more responsive to market forces and innovative fare programs including greater flexibility for rate setting by individual carriers.»

Charter Services

«There is a substantial public need for charter-type passenger operations in international markets ....We also recognize the growing demand for low cost services and the inherent efficiencies of full plane operations generally characterized by charter-type services. Most importantly, we recognize the need to have governmental policies

that will accomodate the competitive inter-relationships between these two types (scheduled and charter) of services.»[45]

(b) The Second Round

The second round of Bermuda 2 negotiations was held in Washington, October 18-22, 1976. In this round the discussion mostly revolved around common assumptions for the economic analyses (to facilitate comparisons in December of the completed papers), on the progress in the analyses, and on a number of «non controversial» articles. Here it must be mentioned that since the entire air services bilateral agreement was to be negotiated, articles had to be adopted, revised or drafted anew from the Agreement itself to cover all aspects of air services -- for example, definition of terms, grant of operating rights, air worthiness, aviation security, customs, user charges etc. Throughout the negotiations such articles were generally regarded as «non controversial». This division provided a convenient means to distinguish them from the articles of certain economic importance: routes, designation, capacity, charter linkage and tariffs.[46]

The British were interested to change the existing Bermuda system (fair and equal opportunity to compete with only loose ex post facto review of capacity) for new regulations which they felt would have resulted in the desired objective of enlarging their market share. Various methods for capacity regulation were suggested in the

October 1976 negotiations.[47] Of these the British preferred a system under which the two governments would agree to set a base level of capacity. The carriers would be permitted to agree on more capacity based on their own traffic forecasts.

The U.S. lack of interest in pre-determination of capacity had been obvious. On a short-term basis the Policy Statement would permit inter-carrier agreements to reduce excess capacity if:

(1) excess capacity seriously affects the viability of carrier operations on a particular route,

(2) if it was necessary to provide sufficient service by scheduled carriers, and

(3) other means of capacity reduction have proved to be impossible or would significantly affect the carriers' ability to compete.

The Policy Statement stated that:[48]

> «Capacity agreement arrived at between government generally do not have the benefit of exposure to public reaction and response that carrier aggreements do. Government intervention should be used only where there is a clear need for capacity reduction, as defined above, and attempts at unilateral cutbacks and carrier agreements have been ineffective.»

OTHER ISSUES The United Kingdom continued to press for solution of «immediate problems» in the sessions in October. Principle among these was restraint on the winter 1976-1977. Capacity plans of U.S. carriers - as the sharp difference of opinion continued as to whether the 1975 statement regarding avoidance of excess capacity meant that capacity should be agreed a priori.

The United States insisted that the capacity provisions of the 1946 Bermuda Agreement were governing and that there was no agreement or commitment for a priori government consultation or agreement. This was a particularly significant matter in light of the renegotiation, for to agree to government negotiation of capacity for the winter season, would be equal to accepting a capacity article in the new agreement calling routinely for pre-determination of capacity.

The other side issues addressed in the October session were:

(1) Transatlantic fares for the 1976-1977 winter season;

(2) the conversion of IATA tariffs into local selling prices in the United Kingdom; and

(3) Hong Kong - Sydney capacity.

CHARTER ISSUES Both countries had reached a Memorandum of Understanding (M.O.U.) in March 1976, regarding the charter-worthiness standards. The M.O.U., due to expire December 3, 1976, defined the types of charter programs that could be operated between these countries and the applicable conditions. The basic U.S. position in the Fall of 1976 was that the M.O.U. should be renewed for a period of one year with the addition of Advance Booking Charters (ABC) programs to the list of acceptable charter types.[49]

It may be pointed out that none of the delegates expressed their position in 1976 as to whether and how charter and scheduled services should be related in Bermuda II. Both

sides reserved this «linkage» question for further study, and agreed in principle that renewal of the charter M.O.U. through December 31, 1977 would be desirable as a temporary measure, regardless of the ultimate services in Bermuda II. The United States, however, felt that it would be better to operate charters on an adhoc «comity and reciprocity» basis, than under any M.O.U. the British were then willing to accept.[50]

(c) The Third Round

The third round of negotiations began in London on December 7-14, 1976. Since little headway was made during the second round of discussions on the capacity subject, it became evident that such major items as restricted fifth freedom rights and special routes for all cargo service will be tabled by the British until some understanding on the capacity controversy was reached.[51]

The central issue in the December talks was the U.K.'s insistence upon capacity management by governments and the contrary U.S. position that the principle of 1946 Bermuda Agreement must be preserved. The United States stressed free market on the economic side, the United Kingdom sought a 50-50 split of capacity in each market.[52]

Based on U.S. (7% passenger and 9% cargo growth rate presumed) projections, the U.S. Delegation to the December negotiating session submitted that if the existing Bermuda System was permitted to continue, a 1976 division of total

traffic on the North Atlantic market of 58% to U.S., 38% to U.K. and 4% to other carriers would shift during the following five years in favour of the United Kingdom. In 1978 the U.K. share would increase to 40% and, with minor upward fluctuations, remain stable at this percentage through 1981. The U.S. share would decrease to 56% and the percentage carried by carriers of third nations would remain at 4%. More importantly, in terms of airline revenues the U.S. 1976 share of 57% would decline to 51% in 1979 and would stabilize at 52%. The U.K. revenue percentage would increase from 39% in 1976 to 45% in 1978 and would stabilize at that level. Revenues of third flag carriers would decline from 4% in 1976 to 3% in 1979 and would stabilize at that figure.[53]

This forecast by the U.S. was rejected by the U.K. alleging that the U.S. projections presumed that airlines would act rationally and would reduce the amount of services offered if proven to be unprofitable. The U.K. asserted that only the past behaviour of airlines could be used to predict the future. The delegation stated that airlines would not reduce the amount of service offered when it was unprofitable. The U.K., however, agreed with the United States that the true results of continued Bermuda operation would be (assumed 7% growth rate) that in 1981 the U.K. passenger market share would be 40% and the U.S. share would be 60%.[54]

British White Paper

At the end of the December round the United Kingdom presented with a British White Paper outlining a proposed method of constraining capacity on transatlantic routes. The paper also detailed six alternative plans, including the Bermuda concept, each of which the British found inadequate.[55] The key points of that paper spoke volumes as to the U.K. design for the U.S. international route system:-

(a) no fifth freedom rights into or beyond Great Britian;

(b) no fifth freedom rights beyond Hong Kong;

(c) reduced fifth freedom rights intermediate to Hong Kong;

(d) only one U.S. (and one U.K.) air carrier on each North Atlantic route (between gateway cities);

(e) only one U.S. airline operating all cargo services in North Atlantic markets;

(f) a suitable mechanism to regulate North Atlantic capacity;

(g) no through-plane, single flight number service from behind-gateway points; and

(h) no change of gauge.[56]

It was doubtful at that stage, however, that the U.S. would be persuaded by the paper to depart from its strong support of the Bermuda Agreement.[57] Also, there was no indication during the talks or in the White Paper that the British were ready to relent on their insistence that «little or no» fifth freedom rights should be granted to either U.S. or British carriers on the Transatlantic routes.[58]

The British Paper held that one of the most serious defects in the Bermuda principles was the establishment of capacity as a «principal medium of competition».

The plan further criticized this concept as disasterous by pointing out that the North Atlantic routes have been operated unprofitably for a number of years. It charged that passengers have been subsidizing this operation by paying high fares to cover the cost of flying empty seats.[59]

Fall-Back Level

The Paper also proposed a system whereby the governments agreed on a «base» or «fall back» level of capacity that the carriers of both nations could operate. Airlines could negotiate among themselves the amount of additional capacity that could be introduced for any given period to accomodate actual or expected traffic growth. If the airlines failed to agree on capacity increases, they would be required to revert to the «base» level, which could be adjusted periodically through review by the governments.[60]

In discussing other alternatives in the Paper, the British held that their proposed method fell midway between two extremes: full government control and the liberal Bermuda Agreement. However, this concept was not well liked by the U.S. because they considered that this implied «pre-determination» in setting schedules and flight frequencies.

The Bermuda Agreement was defined in the Paper as a «laissez-faire» system, which left the regulation of airline performance to the airlines. The Paper criticized the

Bermuda ex post facto review procedure, noting that it was used seldom and had proved a failure when put into practice. The Bermuda Agreement had caused today's over-capacity, the Paper concluded.[61]

OTHER ISSUES The United States continued to press on the inequitable conversion of IATA tariffs into pound sterling setting prices. The United Kingdom pressed for governmental agreement on the winter season North Atlantic regular economy and 22/45 day excursion fares. It objected to CAB action regarding most London-Miami fares and British Airways contract and specific commodity cargo rates; sought agreement on regulation of travel agent commission etc. Finally, it may be mentioned that no agreement could be arrived at on any of these issues.

As a result of this failure, the State Department presented an aide memoire to the British Embassy on December 23. It read in part:

> «The U.S. Government has most seriously considered the future course of the re-negotiation of the U.S. - U.K. air services agreement and has come to the conclusion that the next meeting should be postponed from January 17 to February 28....There is a highly substantive reason for postponement. Several of the proposals which the U.K. delegation submitted in London....advance either explicitly or implicitly such extreme positions that they cannot form the basis of a negotiation....The U.S. wants to make clear immediately and unequivocally that it cannot accept as a basis for negotiation either the transitional concepts that document proposes or the implications it leaves with regard to a new agreement.»[62]

January - February 1977

January-February period could be marked as a special time as the new administration was taking office in Washington. However, by this time there was no consensus as to how a final agreement might be reached. It was, therefore, felt that the level of talks be escalated. President Carter appointed Mr. Allan S. Boyd, former Chairman of the CAB, to head the delegation. At the same time, Her Majesty's Government named Deputy Secretary of Trade, Patrick Shovelton, to assume leadership of the U.K. delegation. Thereafter the pace of negotiations quickened.[63]

Throughout January and February, working papers and draft agreement articles were developed, reviewed, and revised. The review of specific issues was not left to government agencies alone. On January 1st, by notice in the Federal Register[64] the Assistant Secretary of State for Economic and Business Affairs welcomed «any relevant submission or presentation». The public was also invited to address the following issues raised by the United Kingdom or of interest to the United States Government. Six issues were discussed: capacity, routes, designation of carriers, fares, charter services, and user charges.

On January 27, the State Department in a second «aide memoire» to the British Embassy, addressed the U.S. concern for the larger economic interest of consumer benefit and public service:

> «While the United States does not assert that unlimited competition is essential in international air transport, it does believe that system efficiency is important to larger economic interests and that it is possible only in an adequately competitive environment.»[65]

(d) The Next Three Rounds

The central economic issues were negotiated in the three rounds beginning February 28 for 2 weeks in London, followed by 4 week round in Washington beginning March 28 and a 6 week round of talk in London again.

On February 28, the British put forward a proposal on capacity calling for:

(a) equal division of capacity between U.S. and U.K. airlines on each route;

(b) carrier agreement on frequency and capacity for North Atlantic passenger routes, and failing that, government negotiations of capacity with a minimum schedule of capacity to operate in the event of no agreement; and

(c) government determination of frequency and capacity for North Atlantic all-cargo route, for all routes in the Bermuda, Caribbean, and Hong Kong markets, and for all route segments involving local traffic rights.

In the two «aide memoires» referred earlier, the United States had made it clear that the U.K. posture to negotiations was unacceptable. Now the United Kingdom persisted in the market determination line. The United Kingdom proposed service to London from the U.S. cities - the existing eleven, less Baltimore, plus Atlanta and Houston[66] and sought to have the U.S. route proposal on the table.

This position was not accepted by the U.S. stating that there was no need to discuss routes or anything else until some progress had been made on the capacity area.

In addition to the central discussion on capacity, the sessions addressed the tariff article, certain «non-controversial» articles and other issues. This time the British were troubled by summer capacity to be mounted by Pan American and TWA between San Francisco and London (a route not served by any British airline) because this could result in the British Airways' projected Los Angeles-London load factor from 82% to 77% and lessen demand for British Airways' Chicago-London service.[67] The United States Delegation tabled position papers on capacity, tariffs, and designation in this round.

During the fifth round (from March 28 to April 25) the discussions centered on the North Atlantic capacity issue. The U.S. put forward their North Atlantic route proposal which called for non-stop routes in the bilateral to London, Manchester and/or Prestwick/Glasgow from all eleven existing gateways points[68] and the eleven new cities[69] that the CAB had recommended in the Transatlantic Route Proceedings. Agreement was reached on U.S.-Bermuda routes. Caribbean and Hong Kong services were discussed intensely, although no agreement was reached.[70]

In the views of Erik Wassberge[71] the results were disappointing, because no agreement was reached on the access to U.S. territory for the Caribbean airlines, which the U.K. wanted to extend and the U.S. to limit. However, he agreed to the fact that certain initially rigid attitudes might become more flexible under the pressure of circumstances. For example, the principle of designating a single carrier could have given way to the requirements of a country like Bermuda which depended heavily on tourism; additionally with the Laker programme on the North Atlantic, the United Kingdom was in the position of the applicant, but this time running counter to this principle, since, there would be multiple designation by the U.K. with competition between two national airlines (Laker and British Airways). The United States presented position papers on tariffs, capacity article, capacity mechanism for the North Atlantic, routes in all market areas, designation, commission rates, «non controversial» articles, CAB's policy on ownership, anti-trust problems in the field of tariffs and the then pending Laker Airways permit application.[72]

C. Conclusive Phase

June 22 - The Target Date

It may be recalled that following the fifth session of negotiation, many points were still pending: nothing seemed to be settled concerning capacity, fifth freedom rights or single

or multiple designation of airlines.[73] The last round was arranged to take place between May 16-June 22, 1977.

Meanwhile, U.S. Transportation Secretary Brock Adams said that unless an agreement was near by the deadline «the whole thing might stop at that point». Replying to one of the questions, said he believed that cessation of airline services between the two nations «is a very realistic possibility at this point. We have so informed the representatives of the United Kingdom....I want to stress that we do no want to have cessation occur. We want to have an agreement.»[74]

The statement was regarded widely by the British as an attempt to put pressure on the British negotiating team to give way on one or more of the unresolved issues. Patrick Shovelton, Chief British negotiator, later said he thought Adam's remarks were 'disappointing' and an 'unnecessary intervention'.[75]

Third week of May was marked with long, hard, but not acrimonious or uncooperative talks on the issues of North Atlantic routes and capacity control. On these issues the following position had been reached:

> Capacity - U.S. was refusing to give the British a veto over capacity and insisted that any disagreement over the control of capacity must be resolved by bilateral consultations. «The Brisith were holding to the position that the markets must be restricted and that the government must control them.» One U.S. official said, «The U.S. position was that the economic viability of the route and the requirement of public service were paramount and that market factors and bilateral consultation could solve any arising problems.»

North Atlantic Routes - The number and names of the U.S. traffic points were discussed most of the last week. At then, the British were authorized to serve 11 U.S. points. However, the U.S. wanted the right of dual designation on all routes, with the understanding that only one carrier would be authorized for either country until the traffic from any given city reached an agreed-upon level. At that point, a second carrier could be designated. The British had asked that Laker Airways service to New York be covered under a separate memorandum of understanding, a position the U.S. had rejected.

Fifth Freedom Rights - The U.S. had made additional proposals for changes in fifth freedom points beyond London. It originally offered to drop Riga and Middle Eastern points and then «reviewed the entire package and made constructive suggestions».[76]

On the issues of tariffs very minor differences existed. The issue of user charges was no longer considered a problem where the U.S. was concerned about the accounting methods used by the British in allocating user charge revenues.

The necessity to reach an agreement by the 22 June was very strong. Neither side by then wanted to extend the old Agreement. Both had been making detailed contingency plans should there be a breakdown in direct services between the two countries. The U.K. had detailed plans for services to the States via Canada and the Bahamas, while the U.S. had made plans for services to the U.K. via the continent of Europe.[77]

The atmosphere of uncertainity loomed heavy. Telegrams to British carriers terminating their foreign air carrier permits were ready for transmission from the Federal Aviation Administration Communication Center, but were stopped shortly before 5 a.m. London time June 22.[78] The new agreement was initialled at 5:10 a.m. London time.[79] The jointly signed agreed minute said that the United States and the United Kingdom:

(1) had agreed upon terms for a new air services agreement;

(2) would review the draft agreement by July 31, 1977;

(3) would resolve any remaining issues which might arise in the course of review; and

(4) would make such drafting modifications as might be required to produce a final text.

During this round, almost all issues, except the already settled U.S.-Bermuda routes, were on the table, including the side issues like the British court suit against - Seaboard for an alleged permit violation and the U.K. insistence on prompt U.S. action on the pending application of Laker Airways.[80]

At a subsequent meeting in Washington, on July 12-15, about 20 substantive points of difference were identified between these two countries. These points plus the non-agreed items left from the June London round, constituted the agenda for the final rounds of Bermuda 2 negotiations.

At the request of the Bermudian Government, the final round (eighth round) was held on July 18-23, in Southampton Princess Hotel, Bermuda to commemorate the signing of the first U.S.-U.K. air transport agreement some 31 years ago.[81] With the negotiation in place, the next chapter's focus will be on the evaluation of the agreement by the two parties.

CHAPTER II - FOOTNOTES

1. Travel Agent, May 30, 1974, p. 6.

2. Note, A New Era in International Aviation: CAB Regulation, Rationalization and Restrictionism on the North Atlantic, 7 N.Y.U.J. International Law and Policy, 1974, pp. 317, 352.

3. H. Wassenberg, Public International Air Transportation Law in a New Era, 31 (1976).

4. Air Services Agreement with the United Kingdom, Feb. 11, 1946; 60 Stat. 1499, T.I.A.S. No. 1507 hereinafter cited as Bermuda Agreement or Bermuda 1 .

5. Shovelton, Bermuda 2: A Discussion of Its Implications, Aeronautical Journal, Feb. 1978, at 51.

6. Erik Wessberge, The End of a Long Reign: The Denunciation of the Bermuda Agreement and its Present Context, ITA Bulletin 40, November 22, 1977, at 879.

7. The controversial issue of landing rights for the Concorde in U.S. loomed in the background throughout the negotiations. The main objectives were that the aircraft had adverse effects on the environment, was wasteful, uneconomic, fuel hungry, and excessively noisy. In February 1976, the Secretary of Transportation, William T. Coleman issued a decision allowing British Airways and Air France to land supersonic airplanes at Dallas and Kennedy airports for a 16 months trial period. Shortly thereafter the New York port authority denied the Concorde landing rights for Kennedy airport; The U.S. policy on International Civil Aviation can be seen in a statement issued by President Ford on September 8, 1976.

8. Air Services Agreement between the Government of the U.S.A. and the Government of the U.K. (July 23, 1977). See Haanappel, Bermuda 2: A First Impression, 2 Annals of Air and Space Law, 139 (1977); For Transatlantic Route Proceedings see CAB order 77-1-98 (1977).

9. Business Week, September 13, 1976, at 37.

10. Ellingsworth, Special Panel to Study Bermuda, AWST, July 5, 1976, at 31.

11. Ellingsworth, British Ready to Renegotiate on Bilateral, AWST, July 26, 1976, at 29.

12. A capacity rationalization pact is an informal agreement between airlines to avoid over competition on specific routes. The Perils of No Policy on International Aviation, Bus. Week, Aug. 16, 1976, at 104. Other factors may have been the CAB's last minute rejection of fare increases chastising language in an earlier capacity agreement concerning the Miami-London route, and failure to reach capacity agreements with Pan Am and TWA. According to the testimony of Alan S. Boyd, the Chief American negotiator, the last minute fare rejection were the primary reason for the British action.

13. Larsen, Status Report on the Renegotiation of the U.S.-U.K. Bilateral Air Transport Agreement (Bermuda Agreement), 2 Airlaw, 1977, at 83.

14. More specifically, the United Kingdom cited the balance of revenues (for the 12-month period ending March 31, 1976) as:

	U.K. Airlines	U.S. Airlines
North Atlantic U.S.-U.K. services	$222.3 million	320.3 million
U.S.-Bermuda services	5.2 million	35.0 million
U.S.-Hong Kong services	-	-
Third country services	-	-
	227.5 million	512.8 million

15. The U.K. Note refers to certain short-term capacity agreements permitted by the U.S. CAB during the Middle East oil embargo, the recession of 1974, the 1974-75 financial crises of major North Atlantic air carriers, and the 1975 U.S.-U.K. «understanding» on capacity to the effect that both countries wanted to avoid excess capacity harmful to the airlines and the public.

16. Specifically, the Note said: «The practical consequence has been, as recent events have demonstrated, that one of the parties may act unilaterally, without consultation, and without any basis in the Bermuda Agreement for such action, only a few hours before new fares were due to come into effect. This had repercussions on the whole fare structure on the very important North Atlantic routes.» While the U.S. believed that each

of its action on U.S.-U.K. tariffs had been in accordance with the provisions of the Bermuda Agreement, one should note that on March 11, 1976, the New York office of the IATA filed, on behalf of the U.S. member carriers of IATA, a schedule of summer North Atlantic tariffs for effect. May 1 1976. The Board disapproved this filing on the afternoon of April 30 (In Europe, it was already evening.).

17. In response to the IATA agreement filed March 11, 1976, the Board approved on March 15 order 76-3-94, served March 18, granting parties and interested persons fifteen days in which to file supporting material and/or comments, and another ten days for replies. This left less than three weeks from the end of the reply period to the date of effectiveness of the tariff.

18. See Hearings Concerning U.S. International Aviation Negotiations Before the Sub-Committee on Aviation of the House Comm. on Public Works and Transportation, 95th Cong. on 29 and October 3, 1977 (statement of Alan S. Boyd, Special Rep. for Bermuda 2 Negotiations) hereinafter cited as Boyd Statement .

19. 12 Weekly Comp. of Pres. Doc. 1319 (Sept. 8, 1976), Dr. Wassenbergh, however, termed it a «fighting document» to primarily advance the interests of the U.S.'s international carriers. Wassenbergh, The Special Air Transport Conference of ICAO April 1977: A New Basis for the Trade in Traffic Rights for International Air Services, 42 J. Air L. & Com. 501, 502, No. 4 (1976).

20. Larsen, supra note 13, at 83.

21. CAB, Report to Congress Fiscal Year 1976, at 79.

22. Ibid.

23. Larsen, supra note 13, at 84.

24. The Federal Aviation Act, 72 Stat. 782, as amended by 86 Stat. 96, provides that CAB's issuance of foreign carrier permits, and certificates to U.S. carriers to engage in foreign service are subject to the approval of the President.

25. Larsen, supra note 13, at 84.

26. Boyd Statement, supra note 18, at 5.

27. Raymond and Kutzke, Inside Bermuda 2, Airline Executive, October 1977, at 22.

28. Ibid.

29. Boyd Statement, supra note 18, at 10.

30. Wessberge, supra note 6, at 877.

31. Aubreton, Bermuda II: A New Deal for the Americans and British, ITA Bulletin 28, July 25, 1977, at 643.

32. Wessberge, supra note 6, 877.

33. Ibid., 878.

34. In the United States, the State Department is the equivalent of the foreign affairs ministry.

35. In the United States, the Department of Transportation is the equivalent. In the United States, representatives of the CAB also participate in bilateral negotiations.

36. In the United States, the carriers are represented through observers appointed by their trade associations ATA (Air Transport Association of America) for scheduled airlines; NACA (National Air Carrier Association) for supplemental airlines.

37. Haanappel, Bilateral Air Transport Agreements - 1913-1980, Int. Trade Law Journal, 1980, at 263.

38. Wassberge, supra note 6, at 878.

39. The U.S. rejected such a load factor standard saying that the load factor appropriate for a given market depends upon circumstances such as the type of aircraft used and market characteristics such as fare structure and length of haul.

40. Ellingsworth, supra note 10, at 29.

41. Boyd Statement, supra note 18, at 8.

42. Indeed the capacity provisions proved to be the most difficult part of the negotiation.

43. Feldman and Sweetman, Bermuda 2 Battle Lines, Flight International, September 25, 1976, at 960.

44. Boyd Statement, supra note 18, at 10.

45. Ibid., at 11.

46. Ibid.

47. 227 Aviation Daily, 292 (26 October, 1976).

48. Policy Statement at 10.

49. This position on ABCs was derived from a September 1976 CAB decision on desirable charter types, and appropriate conditions therefor, and from the September 8 statement of the International Air Transportation Policy of the United States. The M.O.U. appears in TIAS 8303.

50. Boyd Statement, supra note 18, at 14.

51. Laurence Doty, British Ready Focus on Capacity, AW & ST, November 1, 1976, at 25.

52. Boyd Statement, supra note 18, at 14.

53. Economic Analysis of the Transatlantic air service between the United States and the United Kingdom, presented by the U.S. Delegation to the U.S.-U.K. consultations, December 9, 1976.

54. Larsen, supra note 18, at 85.

55. Laurence Doty, supra note 51, at 25.

56. Boyd Statement, supra note 18, at 15.

57. AW & ST, October 18, at 41.

58. Ibid., at 49.

59. Laurence Doty, supra note 51, at 25.

60. Ibid.

61. Ibid., 26.

62. Boyd Statement, supra note 18, at 17.

63. Shovelton, supra note 5, at 52.

64. Department of State, Public Notice 514, «U.S.-U.K. Air Services Agreement (The Bermuda Agreement)», Vol. 42, No. 19, January 28, 1977.

65. Boyd Statement, supra note 18, at 17.

66. i.e. from Atlanta, Boston, Chicago, Detroit, Houston, Los Angeles, Miami, New York, Philadelphia, San Francisco, Seattle, and Washington.

67. Additional «side issues» involved criminal action by the Justice Department against British Airways over cargo rates, Pan American's London-Stockholm service proposed to resume in April, and what could only be described as harangues regarding the USG's position vis-a-vis Concorde operations to the United States - in particular to New York.

68. These eleven cities are Baltimore, Boston, Chicago, Detroit, Los Angeles, Miami, New York, Philadelphia, San Francisco, Seattle, and Washington.

69. These eleven cities are Atlanta, Cleveland, Dallas/ Forthworth, Denver, Houston, Kansas City, Minneapolis/ St. Paul, New Orleans, Pittsburgh, St. Louis, and Tampa.

70. Boyd Statement, supra note 18, at 24.

71. Erik Wessberge, The Bermuda Negotiation and its World Repurcussions, IATA Bulletin 20, May 23, 1977, at 454.

72. Boyd Statement, supra note 18, at 22.

73. Aubreton, supra note 31, at 643.

74. David A. Brown, U.S. Sets June 2 Target in British Talks, AW & ST, May 30, 1977, at 26.

75. Ibid.

76. Ibid., 27.

77. Shovelton, supra note 5, at 52.

78. AW & ST July 11, 1977, p. 33.

79. AW & ST June 27, 1977, p. 26.

80. Boyd Statement, supra note 18, at 22; For comprehensive discussion on Laker's Skytrain Service, see CAB orders 77-6-68 (1977), 78-9-100 (1978), 78-9-44(1978), 78-9-177(1978).

81. Ibid., 23.

CHAPTER III

BERMUDA II: PRINCIPAL FEATURES

INTRODUCTION

Bermuda 2, signed on July 23, 1977,[1] is the compromise that arose out of the lengthy negotiations and tight timetable. The result of these mammoth negotiations would be better discussed if we first had a look at the context of the new agreement. This would be possible by comparing the preambles of Bermuda 1 and Bermuda 2, to see how much the respective aviation context of the two agreements has changed. Bermuda 1 expressed the desire «to foster and encourage the widest possible distribution of the benefits of air travel for the general good of mankind at the cheapest rates consistent with sound economic principles....»[2] The principal concern of Bermuda 2, in contrast, is «to provide safe, adequate and efficient international air transportation responsive to the present and future needs of the public and to the continued development of international commerce».[3]

The approach followed in Bermuda 2 draws its support from the desire for continuing growth of such air transport, at reasonable charges, «without urgent discrimination or unfair or destructive competitive practices», from slightly modified «fair and equal opportunity clause»; and the highest degree of safety and security in international air transportation. Furthermore, it emphasizes on the efficient use of available resources, the

impact that these services will have on the environment and finally the importance of both scheduled and charter services as the essential elements of a healthy international air transport system.[4]

Before discussing the principal provisions of this negotiation, it may appear proper to draw a philosophical distinction between the two agreements. Bermuda 1 was, as evidenced, established to regulate bilateral commercial relations between the two countries, to open up the skies for a system of regulated freedom and to provide new opportunities for both parties in a liberal spirit.[5] Bermuda 2 seeks, in contrast, to restructure already existing aviation relations, combines old principles with new regulatory techniques relying less on self-regulatory forces. It is more concerned with finding remedies to present aviation-inherent problems on a bilateral level than with laying a new, long-term foundation of a general or universal scope.[6]

A. Capacity Principles

Capacity control was one of the primary objectives of the British in seeking the Bermuda 2 Agreement. They realized that over capacity was simply leading to loss for both passengers having to pay higher fares and for the airlines flying the empty seats. Even the U.S. Department of State recognized the excess capacity problem.[7] During the negotiations, as observed earlier, the British aimed at the introduction of a system of inter-government pre-determination of capacity and frequencies,

based upon a 50-50 sharing of air traffic between U.S. and British carriers. The U.S., on the other hand, wanted a continuance of the Bermuda 1 provisions but was prepared after long discussions to accept some form of capacity control for the North Atlantic.

The outcome of the compromise on capacity control is set out in Annex 2 of Bermuda 2. Article 11 of the Agreement (which has to be read in conjunction with Annex 2) also embodies the provision of an airline already serving a route marking time for a period to allow an inaugurating competitor airline of the other country to match its frequencies. This provision is particularly important in relation to those routes - such as San Francisco, Seattle, Atlanta and Dallas - where a British operator will be coming on to the routes after their initial exploitation by a U.S. carrier.[8]

The mutual commitment to fair competition is set forth in the main article on capacity determination,[9] which states:

> «The designated airline or airlines of one contracting party shall have a fair and equal opportunity to compete with the designated airline or airlines of the other contracting party.»

It would be recalled that in the original Bermuda Agreement, the competition basis was «fair and equal opportunity to operate». This now becomes «compete» in Bermuda 2. This change is not explained but direction may be to ensure that all airlines can compete on an equal basis i.e. a move towards the British negotiating stance of «equal competition». However, there are three

important additions designed to enhance fair and equal competitive opportunity. First, there is a restraint on the capacity of an incumbent airline, when a new airline enters a market,[10] for a period of time not to exceed two years nor to extend beyond the time when the frequency of the inaugurating airline matches that of the incumbent. Second, to counter airline actions leading to excess capacity, a special mechanism for capacity review in North Atlantic market was included. Third, to avoid future confrontations over capacity, neither of the parties would unilaterally restrict the operations.

In markets other than North Atlantic combination services, the ex post facto concept of capacity of the 1946 Bermuda Agreement is retained, «except that, where frequency or capacity limitations are already provided for a route specified», no additional limitations on capacity are permitted.[11]

Although unilateral restriction of capacity is prohibited, the new agreement includes complex and elaborate procedures for reviewing and controlling the capacity of North Atlantic flights. The purpose of these procedures is:

> «....to provide a consultative process to deal with cases of excess provisions of capacity, while ensuring that designated airlines retain adequate scope for managerial initiative in establishing schedules and that the overall market share achieved by each designated airline will depend upon passenger choice rather than the operation of any formulae or limitation mechanisms....»[12]

The comments of American and British officials after the signing of Bermuda 2 as to the purpose of this «consultative process» reflect the conflict of viewpoint. Alan Boyd, Head of

the U.S. Delegation, sees the mechanism as «no more than a consultative process».[13] Other U.S. negotiators viewed the clause as putting pressure on capacity rather than dictating market shares.[14] On the other hand, the British Secretary of State, Edmund Dell, evaluated the process as more of a capacity limitation device in and of itself. «This is designed to reduce the waste of fuel and other resources that results from flying too many empty seats....»,[15] he said.

The other capacity limitation method utilized by Bermuda 2 is a relatively complicated prescreening procedure and fall back mechanism, according to which, each carrier must file proposed schedules 180 days in advance, of the summer and winter traffic seasons.[16] The schedules must specify the type of aircraft to be used, the destination of the aircraft, and the frequency of the flight.[17] Amendments to the original fillings can be tendered but must be filed 165 days before the commencement of the season.[18] Adjustments to these subsequent filings must be tendered on a «timely» basis.

Thereafter, if one of the parties believes that an increase in frequency contained in any of the proposed schedules is excessive or otherwise inconsistent with the principles set forth in Article 11, it may call for consultations with the other government (the Requesting Party) not later than 150 days before the beginning of the next traffic season.[19] If, however, the level of frequency provided in the proposed schedules to and from a gateway city is 120 or fewer round trips during the summer or 88

or fewer round trips during the winter, neither party may complain to the other.[20]

While reviewing the frequency level under dispute, the party proposing the increased frequency is required to take into consideration:

- the public requirement for adequate capacity,
- the need to avoid uneconomic excess capacity,
- the development of routes and services,
- the need for viable airline operators, and
- the capacity offered by airlines of third countries between the points in question.[21]

After such review, the Requesting Party must, not later than 120 days before the traffic season in question, notify the other government of the level of frequency it believes to be in conformity with Article 11. If the Receiving Party does not agree with the Requesting Party's determination, it must notify the other party not later than 105 days before the coming season.[22] In the event of disagreement, consultations must be held not later than 90 days before the beginning of the next season. If no agreement on the number of frequencies has been reached 75 days before the next traffic season begins, an automatic «fall back» mechanism would be triggered.

It may be of interest to note that paragraph 8 of Annex 2 exempts the British Concorde services to the U.S.A. for the operation of the Annex. In fact, this is the only point in the Agreement where Concorde services are mentioned.[23] The question of permanent Concorde services between U.K. and U.S.A. has thus been kept out of the Agreement. Finally, Annex 2 remained

in force for a period of five years and was renewed after this period. It was, however, stipulated that in case of non-renewal, the Annex was to remain in force for another two years and then lapse automatically.

B. Tariff

The Tariffs Article of Bermuda 2, attempts to respond to both the British complaint regarding the CAB tariff review practices and the U.S. complaint that tariffs set by the IATA were unresponsive to market forces. Like Annex 2 to Bermuda 1, Article 12 of the Bermuda 2 contains the system of Governmental approval of tariffs and the possibility of using the rate-making machinery of the International Air Transport Association (IATA) for setting the air fares and rates. When compared with Bermuda 1, the new tariff procedures of Bermuda 2 have been considerably streamlined and brought into line with post-Bermuda 1 practices.[24]

The important philosophical difference in the tariff article of Bermuda 2 from the original Bermuda Agreement is in the policy declaration:

> «The Tariffs charged by the designated airlines of one contracting party for public transport to or from the territory of the other contracting party shall be established at the lowest level consistent with a high standard of safety and an adequate return to efficient airlines operating on the agreed routes. Each tariff shall, to the extent feasible, be based on the costs of providing such service assuming reasonable load factors. Additional relevant factors shall include among others the need of the airline to meet competition from scheduled or charter air services, taking into account differences in cost and quality of service, and the prevention of unjust discrimination and undue preferences

> or advantages. To further the reasonable interests of users of air transport services, and to encourage the further development of civil aviation, individual airlines should be encouraged to initiate innovative, cost based tariffs.»[25]

It may be noted that for the first time in a major U.S. bilateral agreement, the tariff policy declaration focuses on the lowest level of fares and rates consistent with high safety standards and an adequate return for efficient operations, whereas the existing U.S. «standard article» language was:

> «All rates to be charged by an airline of one contracting party for carriage to or from the territory of the other contracting party shall be established at reasonable levels, due regard being paid to all relevant factors, such as costs of operation, reasonable profit, and all rates charged by any other airlines, as well as the characteristics of each service.»[26]

Bermuda 2, in contrast to Bermuda 1, has a reference to reasonable load factor which is new and in accordance with the tariff procedures of the U.S. CAB. Other factors are: prevention of unjust discrimination and undue preferences, or advantages in construing a fare or rate including competition for scheduled or charter air services, and finally the encouragement given to individual airlines to initiate innovative, cost based tariffs.[27]

It may be recalled the Bermuda 1 had become quite outmoded in its ability to take into account the modern circumstances. In particular, both sides wanted to safeguard as far as possible against a late intervention or a late approval by one or other governments in relation to particular tariff. Thus, to avoid

this last minute confusion, a significant procedural change in the tariff article from the Bermuda 1 agreement was brought in. This meant the detailed provision of Article 12 requiring the submission of tariff agreement/or tariff fillings at certain prescribed time well in advance of their coming into operation, together with a provision for late fillings. The timetable agreed to is appended below:

	DAYS BEFORE TARIFF EFECTIVENESS	ACTION
a.	105	Tariff agreements (e.g. IATA agreements) to be filed with each party
b.	75	Individual airline tariffs, if required, to be filled with each party
c.	60 following step a, but not less than 45 days before effectiveness	Each party to have approved or disapproved tariff agreements, in whole or in part
d.	30 following step b, but not less than 15 days before effectiveness	A party may express dissatisfaction with a tariff filed by an airline of the other party. Consultations may be requested.

Article 12 of Bermuda 2 further stipulated that the two governments will furnish appropriate guidance to their carriers during IATA Conferences.[28] A Tariff Working Group, composed of experts in accounting, statistics, economics, financial analysis and market forces[29] from each country was to be established to discuss rate-making standards.[30] This group was to make recommendations to the two governments on «load factor

standards and evaluation and review criteria for North Atlantic tariffs».[31] The parties were, in turn, to use these recommendations in reviewing tariffs and agreements reached under the authority of IATA.[32]

Moreover, in Article 12(7), it is provided that if agreement is not reached on new tariffs or if no consultations are requested, the party expressing dissatisfaction with a tariff may «take action to continue in force the existing tariffs beyond the date on which they would otherwise have expired at the levels and under the conditions (including seasonal variations) set forth therein». This factor was amiss in the original Bermuda Agreement.[33]

It may be noted that possibility which existed under Bermuda 1, that an airline could be penalized at one end of a route for charging a fare which it was authorized to charge by the authorities at the other end, has been removed under Bermuda 2.[34]

In the ultimate analysis, the general guidelines for tariff levels, with the exception of no reference to value of service, are broadly compatible with IATA's position in allowing factors other than cost («market place pressures») to be applied. The Tariff Working Group findings on load factor and cost criteria were found to be critical. Interpretation of the «prevention of unjust discrimination» etc. was found as something of an unknown factor in this context. The dispute avoidance procedure, particularly the parts relating to exchange during IATA Traffic Conferences served to improve the chances of U.S./U.K. consensus in their approach to the conferences.

C. Designation

In the 1946 Bermuda Agreement, each party could designate «an airline or airlines» to operate the agreed routes. The Agreement had no provision for consultation or delay. This pattern changed with the 1966 Amendment[35] calling for consultation in the event that either party might wish to designate a second or subsequent airline over any route.[36]

As discussed earlier, the traffic on the North Atlantic had grown when the airlines had increased the size of their aircraft. For instance, an airline to operate a daily B-747 round trip at 60% load factor required 175,000 passengers annually in a market. Only New York had more than 350,000 passengers annually to and from London.[37] The U.K. had forcefully argued over the past several years that multiple U.S. widebody frequencies per day (e.g. one each for each of two U.S. airlines) destroyed the viability of markets. The U.K. position on this issue was straight forward - one airline for each side on each combination and all-cargo service route - including New York.

The new Agreement provides in Article 3, paragraph 1(a):

> «Each contracting party shall have the right to designate an airline or airlines for the purpose of operating the agreed services on each of the routes specified....»[38]

The United States, although it initially considered this provision closer to its position, was unable to preserve fully the right to multiple designation established in Bermuda 1.

The compromise worked out was that on high density routes multiple designation would be permitted, whereas on North Atlantic low density routes, a single designation regime, allowing for exceptions, was introduced.[39]

The U.K. objective of single designation on the North Atlantic was also partly secured. It was agreed that each country might designate two airlines for two gateway route segments and the other segments might qualify for dual designation.[40] In three instances an additional carrier could be designated to serve a one-carrier gateway:

(1) if one country decides not to compete on the route or operates a token service;

(2) if the number of one way revenue passengers carried by the designated airline of each country exceeds 600,000 in each of two consecutive years; or

(3) in the alternative, 450,000 passengers in each of two consecutive years by one country's airline.[41]

Regarding the passengers service, multiple designation of carriers by each party was in principle allowed on two North Atlantic routes, selected by each contracting party.[42] The routes determined were London-New York and London-Los Angeles. Pan Am and TWA were the American carriers on these routes, while British Airways was to serve both routes. In addition Laker Airways of Britian inaugurated on 26 September 1977[43] its low cost, no reservation skytrain service between London and New York. British Caledonian Airways was the second British airline on the London-Los Angeles route.

It was further provided that after the agreement had been in effect for three years, the United States will be permitted to choose an additional U.S. gateway city. One carrier from each country was allowed to render non-stop service to that gateway from London.[44]

For all cargo services, three airlines each were designated and further airlines could be added to compete with designation by the other party on routes not previously operated by all cargo services. Accordingly,U.S. designated Pan American, Seaboard and TWA for all cargo routes. In addition, in case the U.K. were to designate an airline to operate all cargo service to Houston, then the United States could, if it so chose, designate an airline other than Pan American, Seaboard, and TWA to operate all cargo services between Houston and London.[45]

It, however, soon became evident that while these restrictions did not greatly affect the existing situation, they substantially inhibited the future market entry plans for scheduled combination services between the U.S. and the U.K. (for example by supplemental carriers seeking scheduled rights, as well as further scheduled carriers). There is markedly greater entry possibility for all-cargo operators between the U.S. and the U.K., which must be seen as part of an overall bias in the agreement towards all cargo operation rather than cargo on combination services. This resulted in changes in operating economics, both by dilution of combination service revenues and by expanded all cargo operations relative to combination.

D. Charter Linkage

During the early stages of negotiations, it was recognized that, within the time scale prescribed, and given the complexity of the subject and the differences of view on both sides of the Atlantic, it would be very difficult to cover the charter issue. But as the time passed, the U.S.'s side took up a very strong stance to the effect that if a satisfactory charter agreement was not reached by a certain date (April 1, 1979 was suggested) the whole of the Bermuda 2 should lapse. Although the U.K. was initially reluctant to accept this demand, the compromise was, however, reached which is set out in Article 14 and Annex 4.[46]

It would be recalled that the original Bermuda Agreement was only concerned with scheduled international air services. The non-scheduled services were mostly performed on the basis of unilaterally issued government permits or occasionally pursuant to separate charter bilaterals or memoranda of understanding.[47] Bermuda 2 is the first bilateral to contain a number of provisions relating to charter air services between the U.S.A. and the U.K. Charter air transportation was added to the preamble of Bermuda 2:

> «Believing that both scheduled and charter air transportation are important to the consumer interest and are essential elements of a healthy international air transport system.

Article 14 of the Bermuda 2 contains important policy language regarding the facts that charter air services are part

of the total air service system and that their further development is imperative:

> «The contracting parties recognize the need to further the maintenance and development, where a substantial demand exists or may be expected, of a viable network of scheduled air services, consistently and readily avialable, which caters for all segments of demand and particularly for those needing a wide and flexible range of air services.
>
> The contracting parties also recognize the substantial and growing demand from that section of the travelling public which is price rather than time sensitive, for air services at the lowest possible level of fares. The contracting parties, therefore, taking into account the relationships of scheduled and charter air services and the need for a total air service system, shall further the maintenance and development of efficient and economic charter air services so as to meet that demand.»

Article 14 aims at maintaining and developing a «viable scheduled network where a substantial demand exists or may be expected» for «consistently and readily available» scheduled services. And with this background, the scheduled network may cater «for all segments of demand and particularly those needing a wide and flexible range of air services». The Article further elaborates that «there is a substantial and growing demand» from that section which is «price rather than time sensitive...at the lowest possible level of fares». «Efficient and economic» charter services are, therefore, to be maintained and developed to meet <u>this</u> demand, bearing in mind the relation between scheduled and charter services and the «need for a total air service system».

Finally, Article 14 establishes a separate Annex to deal with charter services.[48] Annex 4 subsequently applies to all charter operations between the respective territories. This application has, however, been found to be confusing, as the Article cleary relates to all passenger operations, while the Annex concentrates on the North Atlantic, and refers also to cargo charters for the proposed bilateral.

Annex 4, however, states by omission that Article 3, Designation and Authorization of Airlines, and Article 11, Fair Competition, are not applicable to those services.[49] The Annex further committed the contracting parties to negotiations before the end of the year with a view towards establishing a bilateral or hopefully even a multilateral agreement with respect to North Atlantic charter services.[50]

The Charter Annex, although incorporating the U.S./U.K. Charter Memorandum, still failed to release charter/scheduled pricing and capacity (despite the detailed pricing and capacity provisions of scheduled operations, particularly on the North Atlantic). The Memorandum permits objection to prices where they are «uneconomic, unreasonable or unjustly discriminatory taking into account all relevant costs» of the minimum scheduled requirement for cost-based tariffs, assuming reasonable load factors. The Memorandum contains no capacity control for charters, nor relatively with scheduled capacity.

The following Bermuda 2 Articles are applied to authorized charter airline operations (i.e. effective 23 July, 1977):

Article 1	(Definitions)
Article 2	(Grant of Rights-Paragraph 1, 3, and 4 only)
Article 4	(Application of Laws)
Article 6	(Airworthiness)
Article 8	(Commercial Operation)
Article 9	(Custom Duties)
Article 10	(User Charges)
Article 14	(Charter)
Article 16	(Consultations)
Article 17	(Settlement of Disputes)
Article 18	(Amendment)
Article 19	(Termination)
Article 20	(Registration with ICAO)
Article 21	(Entry into Force)

As mentioned earlier, a controversial provision in Annex 4 is the one which expresses the consensus of the contracting parties on the need for a «multilateral arrangement of Charter Air Services in the North Atlantic market».[51] While the U.S.A. had always been the champion of North Atlantic bilateralism, the Britian and other European Civil Aviation Conference (ECAC) nations had preferred multilateral understanding on international charter air services. This approach by ECAC had raised fierce protest from the National Air Carrier Association (NACA) and the Trade Association of the U.S. Supplemental (Charter) air carriers of the U.S.A.[52]

A careful analysis of the charter provisions discloses that it was an untidy compromise. For example, little consideration had been given to cargo charters and primary attention is paid to the North Atlantic. Moreover, by leaving open the

question of a new charter bilateral, many contentious issues remained unresolved. There is no provision for establishing pricing/capacity relativity between charter and scheduled services - the critical element in establishing a stable and meaningful regulatory framework.

E. Routes

Article 2 and Annex 1 of Bermuda 2 contain the new air routes for scheduled air services between the U.K. and the U.S.A. The new agreement (Annex 1 - Route Schedules) with the United Kingdom provides for combination passenger/cargo services of U.S. airlines.

(1) Unlimited rights beyond London (and Prestwick/Glasgow) for the operation of through flights (with transit traffic rights);

(2) Unlimited rights for on-line transfer of traffic at U.K. points for onward carriage;[53]

(3) The addition of Anchorage, Atlanta, Dallas/Fort Worth, and Houston as gateways for non-stop services to London;[54]

(4) Unlimited rights for «change of gauge» at U.K. or third-country points;[55]

(5) Unlimited rights to operate behind gateway segments with or without change of aircraft or flight number;[56]

(6) Continuation of a round the world routing through London and Hong Kong; and

(7) Rights to carry local traffic between London and Prestwick/Glasgow on the one hand, and on the other Frankfurt, Hamburg, Munich and Berlin, for an indefinite period; and Austria and Belgium until July 23, 1980; and the Netherlands, Norway, and Sweden until July 23, 1982.[57]

It may be noted that the routing flexibility provisions in the above list (i.e. points 1,2,4, and 5) apply not only to North Atlantic passenger services, but to all routes and services covered by Bermuda 2 - for both parties. However, there is no doubt that their potential value is especially great for North Atlantic passenger services.[58]

The U.S. fifth freedom rights through London were in turn considerably reduced.[59] While in 1946, U.S. airlines could carry local traffic between London and 40 points as far away as India, they could now carry local traffic between London and 16 points and only 11 points after 1982. In exchange for giving up traffic rights, the U.S. gained the right to operate with transit and on-line connecting (but not local traffic) rights beyond London to the world. This allowed U.S. flights to continue to the continent, thereby extending the direct European services available from U.S. cities.[60]

Bermuda 2 opens up the United States territory to U.K. carriers by introducing more gateway points. The major benefits gained by the United Kingdom are:

(1) Equal access to San Francisco and Seattle;[61]

(2) New U.S. gateways of Atlanta, Dallas/Ft. Worth, and Houston;[62]

(3) The flexibility to combine U.S. gateways as they choose;[63]

(4) The right to operate from continental cities through London to the United States without a change of flight number;

(5) The right to serve Canada enroute to or beyond certain U.S. cities;[64]

(6) The right to serve Mexico City beyond certain U.S. cities;[65] and

(7) The right to serve Venezuela, Colombia, Manaus, and Peru beyond Atlanta and Houston.[66]

Bermuda 2 introduces special routes exclusively for cargo services, which constitutes an innovation.[67] The U.S. all cargo services may operate to London, Manchester, and/or Prestwick/Glasgow from any point through one of seven designated gateways (Boston, Chicago, Detroit, Houston, Los Angeles, New York, and Philadelphia) and beyond to any point in Europe, Africa, or Asia,with or without a change of gauge, at London or elsewhere. This ability to combine traffic flows, which is of great importance for the viability of freighter operations, provides greatly expanded routing flexibility for U.S. all-cargo operations. Additionally, the U.S. all-cargo operators may carry local traffic on their flights through London to Belgium, the Netherlands, Federal Republic of Germany, Turkey, Lebanon, Syria, Jordan,[68] Iran, and India. In particular, the all-cargo operators of the United States have greatly improved access to the major air freight markets of Frankfurt and the Middle East.

Bermuda 2 provides valuable all-cargo route rights to the British airlines. The British will now have routes from London, Manchester, and Prestwick/Glasgow - (1) to Boston, Chicago, Detroit, Los Angeles, New York and Washington/Baltimore with immediate and/or beyond rights to Canada and beyond rights to Panama;[69] (2) to Atlanta and Houston, with beyond rights to

Venezuela, Columbia, Manaus, and Peru;[70] and (3) to Miami with local traffic rights beyond to Mexico City.

As far as routes between the mainland of the U.S.A. and Bermuda are concerned, new gateways have been opened up which are of considerable benefit to the economy of Bermuda and the U.S. airlines.[71] The Bermuda 2 expands the U.S. gateway to Bermuda with the addition of Atlanta, Miami, and Philadelphia, bringing to nine the number of U.S. gateways designated for non-stop services to Bermuda. In addition, provision is made for a route from Atlanta, Baltimore, Miami and/or Washington via Bermuda to the Azores and two points in continental Europe to be determined later.[72] There was no intention of a British airline operating the new routes from Bermuda to the U.S. Mainland, however, adequate routes and rights are available when required.

In the Caribbean, the U.K. airlines have been given greater access to the United States. The British who initially had five mainland points, have been given two of the following points to serve in this area: Miami, Houston, New Orleans, Tampa, Washington and Baltimore - in any one season, in addition to their existing rights to U.S. Caribbean points.[73]

In as far as the Pacific routes (combination services) were concerned, the U.S.A. accepted the continuation of the existing Japan-London routing via Anchorage, obtaining for the first time an Anchorage-London route for a U.S. carrier with open behind gateway authority. The Tarawa-Christmas Island-Honolulu routing was granted to the U.K. carrier. The routes to Hong Kong, however, proved to be very controversial. In

the Pacific, there are slight differences under Bermuda 2 between all-cargo and combination service routes. In terms of gateway, U.S. all-cargo operators may serve Chicago and any of the combination gateways.[74] The U.S. gateways for U.K. all-cargo services are the same as far as U.K. combination services, except that any or all of the three West Coast points - Los Angeles, San Francisco and Seattle - may be served each season.

In the final analysis, it is significant to realize that the impact of the route network remains, as in Bermuda 1, largely in the fact that many of the world's major routes are affected by the operation of U.S. and U.K. carriers authorized under the Agreement. Its influence on the North Atlantic and Caribbean is critical, but impact has also been realized in the Pacific and South East Asia, to a lessor extent through the round-the-world service and in continental America.

As observed earlier, Bermuda 2 extends a wide exchange of rights for all-cargo services. In this area, the Agreement shows a significant degree of liberality, three all-cargo U.S. operators being allowed on the North Atlantic and beyond. There is also in the Notes applicable to all routes provisions for total flexibility of routing which, of course, is particularly essential, for all-cargo services.[75]

The Agreement introduces the concept of the «blind sector» by permitting so-called «combination flight» as a means of compensation. Accordingly, the respective carrier is allowed to carry traffic from the territory of the other contracting

party to beyond points provided that this traffic has initially originated from the territory of the carrier's home state. The converse applies as well. Thus, the carrier may combine third and fourth freedom rights under two different bilateral agreements.

Finally it should be noted that the right to change of gauge[76] was also agreed (as it had been in Bermuda 1 though on more clearly defined terms). Moreover, the current practice of combining third and fourth freedom traffic under different bilateral air transport agreements - also called sixth freedom traffic - has been officially sanctioned in the Agreement.[77]

F. Other Provisions

In the opinion of the author, amongst the remaining Articles of Bermuda 2, three merit a brief discussion. Starting with Article 7 which deals with aviation security, where emphasis is placed on the Tokyo (1964), Hague (1970), and Montreal (1971) anti-hijacking conventions, and a commitment is made between the contracting parties «to provide maximum aid to each other with a view to preventing hijacking and sabotage to aircraft, airports and air navigation facilities and threats to aviation security».

It is submitted that it would have been more apt if these two of the most powerful civil aviation states in the world, had gone a little further in support of the three conventions

and agreed that they would actively pursue the conventions, even to the point of making this a condition of other bilateral agreements.

Article 10 deals with the thorny issue of user charges. According to the Article, user charges shall be «just and reasonable», cost-based and in no event shall a contracting party «impose or permit to be imposed on the designated airline of the other contracting party user charges higher than those imposed on its own designated airlines».[78] This is a substantial advance in governmental user charge philosophy. The main constituents of this Article are:

- «just and reasonable»,
- equitably opportioned among categories of users,
- non-discriminatory as between each party's international operators,
- based on sound economic principles and on the generally accepted, accounting practices in each party's territory,

and may:

- reflect «but not exceed the full cost» of airport and navigation facilities and services,
- including «a reasonable rate of return on assets, after depreciation».

Furthermore, in providing the facilities and services «such factors as efficiency, economy, environmental impact and safety of operations» are to be taken into consideration.

It is submitted that this is a significant statement and should have been intended as a model clause between the U.S. and the U.K. while entering in bilaterals with other countries.

Finally, in view of the very widespread airline practice of illegal kickbacks to travel agents, the following provision in Article 13 is of particular significance:

> «The aeronautical authorities of each contracting party shall exercise their best efforts to ensure that the commission and compensation paid by the airlines of each contracting party conform to the level or levels of commissions and compensation filed with the aeronautical authorities.»

In Article 13, mandatory filling is not required, which produces the anomaly that where one party requires filling, it undertakes best efforts to ensure compliance with the filed levels, yet the other party, which may not require filing, accepts no form of complementary obligation to control commission. Whatever the results, it is submitted that there is a tendency towards «country of origin» commission rules.

CHAPTER III - FOOTNOTES

1. Agreement Relating to Air Services, July 23, 1977 United States-United Kingdom-U.S.T.-, T.I.A.S. No. 8641 herein after cited as Bermuda 2 .

2. See the Final Act of the Bermuda Conference, T.I.A.S. 1507, Resolution, P. 18, para. (1).

3. See the Preamble to Bermuda 2. It is to be noted that the new Agreement was intended not only to replace the Bermuda 1 Agreement itself, but also the Final Act to the Bermuda Conference of 1946, containing the so-called Bermuda principles; see clause 8 of the Preamble.

4. See clauses 2 to 5 of the Preamble to Bermuda 2.

5. Dr. N. Matte, Treatise on Air Aeronautical Law, 3rd ed., p. 237.

6. Ibid., during the negotiations for Bermuda 2, parallel negotiations with Japan on a new bilateral agreement were held, in which Japan took a position similar to the United Kingdom. See L. Doty, «Japan Joins Bermuda Principles Attack» AW&ST Tech., August 23, 1976, at 24; a similar situation arose with respect to Italy.

7. Business Week, August 16, 1976, at 108.

8. Shovelton, Bermuda 2: A Discussion of its Implications, Aeronautical Journal, Feb. 1978, at 53.

9. Article 11 of Bermuda 2, which is entitled «Fair Competition».

10. «....When a designated airline of one contracting party proposes to inaugurate services on a gateway route segment already served by a designated airline or airlines of the other contracting party, the incumbent airline or airlines shall each refrain from increasing the frequency of their services to the extent and for the time necessary to ensure that the airline inaugurating service may fairly exercise its rights....» (Article 11, paragraph 2)

11. In particular, U.S. capacity on the round the world service (limited to seven frequencies per week in each direction) or on the Hong-Kong-Tokyo segment (limited to 14 frequencies per week in each direction) are exempt from review.

12. Bermuda 2, supra note 1, annex 2(3).

13. Quoted in Barnard, U.S., U.K. sign New Air Services Pact: Unlikely to Much Alter Present Imbalance, J. Com. (N.Y.) June 23, 1977, at 1 Col. 1.

14. Business Week, May 9, 1977, at 32.

15. Traffic World, July 4, 1977, at 91.

16. MacDevitt, The Triangle Claims Another Victim: A Watery Grave for the Original Bermuda Agreement Principles, 7 Denver Journal of Int'l. L. & Pol. 1978, at 269. The summer season includes the period April 1 through October 31. The winter traffic season begins November 1 and continues through March 31. Bermuda 2, Annex 2, para. 13.

17. Ibid., para. 3.

18. Ibid., at 270.

19. Bermuda 2, supra note 1, Annex 2, para. 4.

20. Ibid.

21. Ibid.

22. Bermuda 2, supra note 1, Annex 2, para. 5.

23. Haanappel, Bermuda 2: A First Impression, Annals of Air and Space Law, 1977, at 144.

24. Ibid., at 144.

25. Paragraph 2 of Article 12, Tariffs, of Bermuda 2.

26. Boyd Statement, Hearing concerning U.S. International Aviation Negotiations Before the Sub-Committee on Aviation of the House Committee on Public Works and Transportation, 1st sess. 4 n.4 (1977) hereinafter cited as Hearings , at 59.

27. Bermuda 2, supra note 1, Article 12, para. 2.

28. See Article 12 (9)(a)-(b).

29. Ibid., Annex 3(1).

30. Ibid., Art. 12(9)(a).

31. See Annex 3(4), Bermuda 2.

32. Art. 12(9)(a); Annex 3(5).

33. Shovelton, supra note 8, at 53.

34. Ibid.

35. Hearing, supra note 26, at 41.

36. The United States has taken the position that even if the consultations reached no agreement, they could make additional designations. The U.K. never accepted that view. Thus had the issue ever been forced, it was likely that an additional designation could have been made only in exchange for some concession. This is quite different from the unmodified right to make multiple designations.

37. CAB traffic flow data for 1976 were:

Between London and	Passengers in 1976
New York	1,078,811
Los Angeles	337,300
Miami	256,434
Boston	252,736
Washington/Baltimore	252,282
Chicago	250,857
Seattle	100,869
San Francisco	95,000
Philadelphia	78,851

38. Bermuda 2, supra note 1, Article 3, para. 1(a).

39. See Art. 3, paras. 1 to 3 of the Agreement; see Dr. Matte, supra note 5, at 243.

40. Bermuda 2, supra note 1, Art. 3(2).

41. Ibid., Art. 3, para. 2(b)(i)-(ii).

42. Ibid., Art. 3, para. 2(a).

43. Trans International Airlines (TIA), a U.S. Supplemental (charter) air carrier, had filed for permission to inaugurate a similar, scheduled low cost, no reservation air service between New York and Brussels.

44. Bermuda 2, supra note 1, Annex 1, para. 1, U.S. route 1 n. 2.

45. Hearings, supra note 26, at 45.

46. Shovelton, supra note 8, at 54.

47. The multilateral Paris Agreement of 1956 on Non-Scheduled Air Services in Europe is an exception to this rule. The scope and application of this Agreement, however, are rather limited; See Haanappel, supra note 23, at 146.

48. Bermuda 2, Art. 14, para. 3.

49. Bermuda 2, Annex 4, para. 2.

50. Bermuda 2, Annex 4, para. 3; MacDevitt, supra note 16, at 272.

51. Bermuda 2, Annex 4, para. 3.

52. Haanappel, supra note 23, at 147.

53. Hearings, supra note 26, at 26; see the Agreement, Note 1 in section 5 of Annex 1.

54. Ibid., The economic data indicated there was not sufficient traffic at Atlanta, Dallas/Ft. Worth, and Houston to support non-stop services at reasonable frequencies by two airlines (one U.S., one U.K.) competitive services were to be phased in. Atlanta and Dallas/Ft. Worth were to be served non-stop only by U.S. airlines until July 23, 1980; Houston could be served non-stop only by U.K. airlines until July 23, 1980. U.S. could designate an additional city as a gateway for non-stop services after July 23, 1983.

55. The Agreement; Note 6, the U.K. had earlier objected to this practice.

56. The Agreement, Note 5.

57. Hearings, supra note 26, at 27; Two U.S. airlines may serve Frankfurt from London; only one U.S. airline may serve the other points from London.

58. Ibid.

59. Shovelton, supra note 8, at 52.

60. Hearings, supra note 26, at 28; It may be recalled that the new routes agreed to in 1966 provided for very limited beyond London operating rights. In Bermuda 2, these restrictions were eliminated for Los Angeles, Miami, San Francisco, and Seattle traffic.

61. If exercised, this access provides competitive services, Seattle-London, for the first-time, and assures the continuation of two airlines, San Francisco-London.

62. See Footnote 54 above.

63. U.K. airlines may not carry local traffic between U.S. cities.

64. Specifically, Boston, Chicago, Dallas/Ft. Worth, Detroit, New York, Philadephia, and Washington/Baltimore. Local traffic rights are included but will require canadian approval.

65. Specifically, Boston, Detroit, New York, Philadelphia and Washington/Batimore. Local traffic rights are included, but will require Mexican approval.

66. Includes local traffic rights between Houston and Peru.

67. See sections 2 and 4 of the Route Schedule. Thus, the Route Schedule provides for 2 sections on combination services (passengers and cargo), Section 1 and 3, and for 2 sections on all cargo services, section 2 and 4.

68. This is a new point, not provided for in the 1966 Amendment to Bermuda.

69. Local traffic rights are included except between Los Angeles and either Canada or Panama.

70. Local traffic right are included except between Houston and Peru. Atlanta could have not been served non-stop until July 23, 1980.

71. Shovelton, supra note 8, at 52.

72. This was provided at the U.K.'s request. No. U.S. carrier has expressed an interest in such a routing.

73. Shovelton, supra note 8, at 52.

74. For example, Anchorage, Guam, Honolulu, Los Angeles, New York, San Francisco, and Seattle.

75. Shovelton, supra note 8, at 52.

76. For example, change from a larger to a smaller aircraft.

77. Haanappel, supra note 23, at 142.

78. Ibid., at 147.

CHAPTER IV

A CRITICAL EVALUATION OF REACTIONS TO BERMUDA II

INTRODUCTION

The initial reaction by the chief negotiators of both sides to the new agreement was a pleasant one. British Secretary of State for Trade, Edmund Dell, called it, «reasonable and sensible and satisfactory for both sides».[1] Alan S. Boyd, Special Ambassador and Chairman of the U.S. Delegation, termed it «very satisfactory.»[2] Secretary of Transportation, Brock Adams stated that the new agreement supported the principle of competition in the international market place and though the British side clearly had sought a more restrictive agreement, our negotiators held firm for that principle. He believed in certain respects more competition was permitted «under the new agreement than under the old.»[3]

President Carter himself hailed Bermuda 2 Agreement in these words:

> «The Agreement is one that reflects well on our two great nations. Its quality, its fairness, and its benefits to the consumer and to the airlines should make it last as long as the original 1946 Bermuda Agreement. It continues our long historic relationship with the United Kingdom.»[4]

There were those, however, who did not share the enthusiasm of the Government. Soon sharp criticism arose from opposition conservatives in Britian who believed the negotiations had resulted in an obvious failure for Britian. A spokesman for

that group complained that Britain had restricted its rights to compete on every route in return for very few gains.[5]

On the U.S. side, just days before the new agreement was signed, the chairmen of the House Committee on Public Works and Transportation and the Aviation Sub-Committee of the House Committee on Public Works and Transportation unsuccessfully urged President Carter to delay concluding the pact for 30 days in order to give Congress an opportunity to review it.[6] Once the full details of Bermuda 2 were made clear to the President and his policy advisors, the White House «was less than pleased» with the results of the agreement.[7] The justification for this change in reaction by the President was explained as the President's minimal background in aviation and hence his inability to realize the full extent and scope of the agreement.

The American opposition, however, centered not so much upon «how much the British received as compared to the share of the American airlines», but on the negotiating body, the form the Agreement took, and the anti-competitiveness of the Agreement.[8] Some congressmen were so disturbed by the outcome of the negotiations that they argued that Bermuda 2 should be classified as a treaty instead of an executive agreement so that it would require the advice and consent of the Senate before binding the United States.[9]

While the U.K. maintained a relatively peaceful posture after the negotiations, the response in the U.S.A. to the Bermuda 2 Agreement ranged from cheers to castigation and

from praise to predictions of doom. The following quotations from various public figures in the U.S.A. would indicate the diversity of views held with respect to the agreement:

Secretary of Transportation - Brock Adams

«Americans from every section of our country will find air travel cheaper and more convenient as a result of the new 'Bermuda Agreement' signed today 23 July 1977.»

Reuben Robertson - ACAP (Aviation Consumer Action Project

«The so-called Bermuda 2 agreement is a complete sell out of the American public, and an inexcusable abdication by the Executive Branch of the fundamental economic philosophy to which we have long adhered. It is ironic that the Carter administration's first major setback in international diplomacy came not from the Soviet Union, the PLO or other hostile forces, but rather at the hands of our great ally, the U.K., and the President's own hand picked friends and advisors, Mr. Boyd and Secretary of Transportation Brock Adams.»

Captain J.J. O'Donell - President ALPA

«In plain words we believe we were taken for a ride. The losses we have suffered were immense and the gains virtually non-existent.»

Edward J. Driscoll - President, National Air Carriers Association

«We take great issue with the U.K. Agreement, as it relates to charters. I know the U.K. Agreement has been described as the most anti-competitive agreement the U.S. has ever entered into, and we believe that is true.»

George Beam - Hillsborough County Aviation Authority Tampa, Florida

«....(the) agreement contravenes all of our country's most important principles in international aviation. (the agreement) overruled the CAB's determination of the PC & N. We believe the Bermuda 2 Agreement is illegal and void.»[10]

Notwithstanding the diversification of the views expressed, a more comprehensive analysis of Bermuda 2 would involve the changes and developments in the civil aviation policies of both countries and the situation of the interests affected by the Agreement. This entails the political influences as they impact their international aviation programme. Shakespeare once said «policy sits above conscience». Does politics sit above policy? The question should preferably be left unanswered.

A. U.S. Views

There is no doubt that the Bermuda 2 Agreement was presented to the world with pride and praise by highest officials in both governments. However, as observed earlier, the initial response in the U.S. was not very encouraging. No sooner the complete text of the Bermuda 2 Agreement became available, it triggered demands for congressional hearings and raised the possibility of a court challenge of the validity and constitutionality of the pact.[11] After the conclusion of the Agreement, Alan S. Boyd, U.S. Chief negotiator in the talks, tried to defuse these mis-apprehensions. He asserted that the capacity restrictions in the agreement would help increase the efficiency of airline operations by forcing more careful planning. This increased efficiency would, in turn, with independent initiative on the price side, result in relatively lower fares for the public.[12]

Later while defending the new capacity agreements, Boyd said in testimony before the Senate Commerce, Science and Transportation Aviation Sub-Committee[13] that they were needed because the U.K. had increasingly interpreted the 1946 Bermuda agreements unilaterally. He further said that the U.S. inter-agency policy group had approved the Bermuda 2 proposal whereby each government could review any increase of scheduled North Atlantic seat capacity of more than 15%. This position was not particularly well taken by Howard W. Cannon, Sub-committee Chairman, who expressed the concern that Bermuda 2 was unfairly restrictive of free enterprise. He said «what we want to find out here is how U.S. policy is made, by whom and how it is implemented.»[14]

The Sub-Committee on Aviation of the House Public Works and Transportation Committee,[15] while holding the public hearings on Bermuda 2, included the following remarks in their opening statement:

> «The general principle which has governed United States'international aviation policy is that competition provides the best service for the public. We have resisted the desires of foreign airlines to move to a system where the government controls schedules, and revenues are pooled by the airlines serving a route. Our belief has been that capacity controls and revenue sharing encourage inefficiency and results in high fares for the consumer. A leading example is air transportation within Europe, where there are significant limitations on competition, and fares are two or more times the level charged within the United States. On the other hand, our experience, domestically and internationally, has been that competition encourages efficiency, imaginative marketing, and low fares. Bermuda 2 restricts competition to much greater degree than

> Bermuda 1. As we will hear in greater detail from our witnesses, under Bermuda 2 the United States has given up the right to designate more than one U.S. carrier in most markets, and we have retreated from our principle that there be no advance control of schedules. In these hearings we will determine whether the Executive Branch and the CAB view Bermuda 2 as a 'special case', and whether they intend to press for agreements with other countries which do more than Bermuda 2 to require a competitive system.»

In the testimony that followed, Mr. Bill, Deputy Assistant Secretary of State for Transportation, Telecommunication and Commercial Affairs, Mr. Davenport, Assistant Secretary of Transportation and Mr. Boyd, the chief negotiator, testified in favour of Bermuda 2. Other witnesses including Mr. John Barnum formerly Deputy Secretary of Transportation and, most significantly, the then Chairman of CAB, Mr. Kahn found problems with Bermuda 2.

In their testimony both Mr. Biller and Mr. Davenport stated that they considered the U.S.-U.K. situation was a special case and Mr. Davenport said specifically that Bermuda 2 would not be a «complete model» for other agreements. Mr. Kahn, on the other hand, was unwilling to criticize the negotiators but did see serious shortcomings with Bermuda 2. In his testimony he underlined the following objectives that the U.S. should strive to attain in international negotiations:

(1) elimination of anti-competitive restrictions on charters and supplemental carriers;

(2) expanded opportunties for new low-fare scheduled service;

(3) maximum access to markets by expansion of non-stop U.S. gateways;

(4) adequate multiple carrier designations;

(5) avoidance of capacity or frequency restrictions; and

(6) maximum flexibility for air carriers to operate to points beyond or on the way to the country with whom the agreement is negotiated.[16]

In terms of these objectives, Mr. Kahn observed the Bermuda 2 agreement left much to be desired. He said that the agreement met one of these objectives by providing two new non-top London gateways immediately - Atlanta and Dallas/Ft. Worth- and two additional non-stop gateways in three years - Housten and a point not then named. It also guaranteed U.S. carriers the right to operate flights from interior U.S. cities through the designated gateways and to points beyond the United Kingdom, without substantial limitations. Furthermore, the agreement incorporated following restrictive features which could seriously interfere with competitive development of the market:

(a) It limited the possibility of low fare scheduled service by a new carrier from any gateway, other than Laker Airlines' Skytrain service from New York, by imposing restrictions on carrier designations;

(b) It added a new mechanism for limiting increases in capacity through a control of frequencies on North Atlantic routes;

(c) It imposed restrictions on non U.S. local traffic - commonly referred to as fifth freedom which could have a heavy impact in the Pacific, where U.S. flag all cargo-carrier were no longer able to carry traffic between Hong Kong and points between Hong Kong and the United States, and

(d) It failed to ensure British acceptance of U.S. rules on charter transportation and left the important subject of improved opportunities for charter competition to later negotiations.[17]

In his opening statement before the Aviation Sub-Committee considering the divergent views on Bermuda 2, the sub-committee Chairman Representative, Glenn Anderson said that there were several areas of congressional dissatisfaction with Bermuda 2. In his opinion they were: the cutback of multiple designations, the possibility of advance control of schedules, the economic rights relinquished by the U.S. and the failure of its negotiators to secure a more definite agreement on the right of charter carriers.[18] The sub-committee expressed particular concern that the restrictions on multiple designations would eliminate the possibility of a new U.S. low fare carrier from entering the market.[19]

It may be noted that this sharp reaction to the Bermuda 2 agreement was not only opportune for U.S. but urgent. What most U.S. observers were asking was whether the agreement would set a precedent so as to help manifest their attitude in the forthcoming negotiations with Japan,[20] which was to redress the grievous imbalances in the old bilateral of 1952. In his letter to Mr. Kahn on 6 October 1977, the President Jimmy Carter wrote the following:

> «The work you are about to undertake in negotiating bilateral agreement with Japan is of great importance. Two related problems face international aviation today: empty seats and high fares. Both problems can be resolved if we work to remove restrictions on low

> and innovative fares in both chartered and scheduled service. I am convinced that increased competition can make convenient, low cost transportation available to many poeple who cannot now afford it, while at the same time bringing greater prosperity to the international aviation industry. Our goal in international aviation should be to move towards a truly competitive system. Market forces should be the main determiner of the variety, quality and price of air services.... .....our policy should be to trade opportunity rather than restrictions. To achieve these goals will require close inter-agency cooperation and a firm negotiating posture....»[21]

Certainly this approach by the President did not bode well for considering Bermuda 2 as a model. Similar strategy was also being envisaged for the U.S.-Italy talks.[22] Italy's grievances tied in with already expressed by the United Kingdom and Japan and mainly dealt with three points: capacity control with pre-determination aimed at reducing total U.S. capacity, abandonment by the U.S. of the principle of multiple designation of airlines (in particular, a single U.S. carrier to compete with Alitalia at Rome and Milan), and a reduction in fifth freedom rights - on routes beyond Rome, especially to the Middle East - which gave U.S. airlines substantial advantages compared with the marginal benefits for Alitalia.

After providing a general overview over the conflicts and criticisms emanating from aviation committees and other interested parties, it will be appropriate now to provide a more indepth coverage on the areas of major criticism.

a. Criticism of the Capacity Control Measures

One of the criticisms of the Bermuda 2 agreement is that by restricting the number of carriers as well as capacity, the agreement may violate the U.S. anti-trust laws.[23] Hearings were called in by the Aviation Sub Committee of the House Committee on Public Works and Transportation pointing out that the capacity and airline designation provisions were contrary to the Federal Aviation Acts' mandate of competition.[24] Several court challenges were also organized by Ralph Nadar Consumer Action Project and by Tampa, Florida, which was named as a gateway city in the Transatlantic Route Proceedings but which was excluded by Bermuda 2.[25]

It may be an interesting paradox here to note that the issue of capacity had been the subject of much discussion before the agreement was concluded. The United States stance against controls had been heavily criticized. In fact, in 1974 officials within the State Department, the Department of Transportation, and the airline industry were admitting that the original Bermuda Agreement position on capacity was becoming weaker and less defensible because of intense competition, high costs and economic problems.[26] Various writers had suggested for a change in the U.S. approach in view of the diminished share of the market American planes carry, the overall decline in air traffic,[27] and the lack of any real control of fares by the current system.[28] Andreas Lowenfeld, a specialist in international aviation law, even suggested a total reversal of U.S. stand on capacity

regulations and argued for the reasonable allocation of the resources through negotiations of restraints on capacity.[29]

Notwithstanding the above, the politician and users in the United States thought that the agreement violated the anti-trust laws. But, after through study of the question, the U.K. experts finally came to a compromise solution. This emerged very clearly from the document which stated the concepts of the United Kingdom on capacity regulation on the North Atlantic and was submitted by its delegation to the ICAO Special Air Transport Conference in April 1977. As in the Harbridge House Study[30] we could find a list of possible formulae, ranging from complete liberalism to protectionism through pre-determination and control. The solution recommended in the U.K. document, which now appeared in Bermuda 2, is half way between these extremes. This statement of the U.K. theses spelled out at ICAO, did not make a model of Bermuda 2, but it was, in no way, either designed to illustrate the famous saying - «Publish and be damned!».[31]

b. Criticism of the Legal Status of the Agreement

In the United States bilateral air transport agreements[32] are concluded without the advice and consent of the Senate and are thus characterized as executive agreements rather than as treaties[33] It is except for a vaguely drawn precedent the U.S. Government has maintained the position that an air service agreement does not constitute a treaty. The precedent

is, only if an international agreement significantly affects U.S. military, political or economic affairs, it is considered a treaty, and the President can enter into it only with the advice and consent of the Senate.[34]

Most countries in the world, however, consider a bilateral agreement a treaty.[35] Shortly after Bermuda 1 was signed, considerable debate took place in the houses of congress as to the legal status of that agreement. These debates re-emerged soon the Bermuda 2 was concluded.

During the course of congressional sub-committee hearings, the following charges were raised by a witness from the city of Tampa and by a witness from a Ralph Nader Group:

(1) The CAB, which is an arm of the congress, had found certain routes to be required by the public convenience and necessity. In executing Bermuda 2, the President exceeded his powers in that he nullified Congressional Policy and usurped the Congress' constitutional role;

(2) Bermuda 2 has all the hallmarks of a treaty but since it was not submitted for the advice and consent of the Senate, it is a nullity. In this connection, the witnesses pointed out that although bilateral air transport agreements have historically been considered as executive agreements, no court has so decided and there is no act of Congress expressly giving the President such power;

(3) The appointment of Mr. Boyd as a 'Special Ambassador' to conduct the negotiations on behalf of the U.S. violated the constitution because the President failed to seek or obtain Senatorial advice and consent which is required for the appointment of Ambassadors; and

(4) The failure of Mr. Boyd to make provision in the U.S. Delegation for consumer and civil groups representatives violated the Federal Advisory Committee Act.[36]

The author would not like to express any views as to the validity of the various charges of illegality levelled above. In his opinion, one of the strong reasons that Bermuda 2 was being so strenuously challenged was that the Government chose to lay all of its tenets out on the table instead of hiding them in separate memoranda of understanding and informal, executive agreements.

This view point has further support in the Statements of State Department and Transportation Department officials, who said; many agreements with foreign countries - particularly in South America and the U.S.S.R. - contain more restrictive capacity and schedule clauses than Bermuda 2 contains. A Transportation Department official specifically said «Every bilateral agreement we have contains some sort of restrictive clauses.»

In the U.S. Executive Branch officials saw a great danger in having the Senate ratify bilaterals. They argued that the Senate moves slowly on treaties and gave as an example a U.S./ U.K. taxation treaty that was signed more than two years ago still awaited Senate ratification. In addition to possible delays on ratification, without a specific requirement that the Senate act in a set number of days, Executive Branch officials contemplated routes and carrier designations getting tangled in politics.[37]

In Greater Tampa Chamber of Commerce vs. Neil Goldschmidt, Secretary of Transportation,[38] the U.S. Court of Appeals discussed the challenges made against the legality of Bermuda 2 agreement. The plaintiffs-appellants were the Greater Tampa Chamber of Commerce: 'The Tampa Bay Area International Air Service Task Force; the Aviation Consumer Action Project; Hillsborough County, Florida; the city of Cleveland, Ohio; and eleven individuals who used international air service on March 23, 1978. They filed a complaint alleging that Bermuda 2 was an invalid agreement and asked for declaratory and injunctive relief against the Secretary of Transportation, the Secretary of State, and the United States. The Appellants identified as the injury which motivated the suit that Bermuda 2 was «anti-competitive» and therefore diminished the quantity and quality of transatlantic air service available to them.

The Court of Appeal dismissed this case for lack of standing because the complaint failed to allege facts showing a substantial likelihood that a grant of relief would redress the asserted injuries. Moreover, the Court held that there was no substantial likelihood that the Senate would refuse to ratify the agreement if Senate ratification were necessary, and even if the Senate declined to ratify the agreement, there was no evidence that the United Kingdom would accept terms other than those in the Bermuda 2 Agreement.

The legal debate over the status of the Agreement bore no fruit, and the bilaterals still continue to enjoy the status

of «executive agreements». Finally, the author endorces the views of the U.S. administration that if the Court had to rule that bilaterals were treaties and required ratification, it might have severally disrupted the international air transport system.

c. Other Criticisms

One of the initial criticism of the agreement from the American point of view was concerning the number of gateways the British gained into the United States compared to only one major gateway in the United Kingdom for the United States. Other criticism centered on the limits on flights in the Pacific arena and lost fifth freedom rights. The first area of criticism may be valid, but it should be noted that there was reciprocity for each route allowing American carriers to fly to Britian,[39] and there were other points in British Commonwealth open to the United States. The second area, limited flights in the Pacific, was of significance primarily because of the requirements of the around the world services.[40] The third area, lost fifth freedom rights, was probably the most serious in its effects on the amount of traffic United States carriers could have handled in Europe, even though the United States did retain fifth freedom rights for around the world service and for the major German cities. The American carriers were particularly concerned of the comparatively larger number of fifth freedom rights granted to Britian-South America, Mexico City -

and because all points in Canada were intermediate points to the United States.[41]

The issue of fifth freedom losses was taken up by CAB Chairman Kahn in his statement before the House Sub-Committee on Aviation. In his views, one goal of international aviation negotiations should be maximum flexibility in fifth and sixth freedom rights. One of the specific areas he was concerned about was the possible impact of fifth freedom restrictions on all-cargo flights involving Hong Kong.[42]

The other criticisms centered around the viability of the negotiating body. In the U.S. the Secretary of State is empowered to advise and consult the Secretary of Transportation, the CAB, and the Secretary of Commerce with respect to negotiating aviation agreements with foreign governments.[43] Soon after the conclusion of Bermuda 2, the State Department was criticized for placing the diplomatic relations before the economic welfare of the U.S. airlines and for its lack of intergovernmental cooperation.[44] The authority of the State Department was further questioned through the draft proposal submitted under the Carter administration which placed the State Department in a negotiating position subordinate to that of the Department of Transportation.[45]

B. The United States Attitude: A Review of Agreement by the Airlines

As far as the U.S. airline industry was concerned, Pan Am, to start with, expressed some dissatisfaction with the new agreement, complaining that it «transferred net economic benefits

from the U.S. flag system to the British flag» but added quickly that the agreement «was one the U.S. flag system could live with».[46]

Explaining the Pan Am's perspective, Elihn Schott, the Senior Vice-President, said that the U.S. side was effectively represented during the negotiations. The airline considered that the agreement was tailored to the specific air transport situation of the two countries and in most respects made no fundamental changes. Following reasons were considered as responsible:

(a) The architects of 1977 agreement were not confronted with the need for constructing a wholly new blueprint but simply with the task of revising the old one;

(b) No extraordinary changes were envisaged because the intervening 31 years had seen the development of the world's greatest international air transport route systems and neither party wanted to destroy what had been achieved.

Pan Am was not particularly critical of the difficult course between excessive competition and too much regulation. They believed that even with the limitation of Bermuda 2, the United States would still be able to designate more airlines on transatlantic routes to Britian than it had seen fit to designate at anytime in the past three decades. The airline considered that the rate provisions of Bermuda 1 have been without substantial change carried into Bermuda 2. As to the increasing intervention of governments in the rate-making process, the Pan Am was supportive of the possibility of selecting

any one of the various courses available under Bermuda 2. These courses included the extensive use of traffic conference machinery with the agreed rates subject to approval or conditioning by the governments. Alternatively, the governments could, to a large extent, prempt the functions of the traffic conferences by agreements between themselves and there could be a large degree of freedom for rate setting by individual airlines subject to acceptability of these rates by the governments.[47]

The Pan Am considered the area of capacity on scheduled services as a significant change, but were somewhat skeptical as to whether the circumscribed freedom guaranteed by Bermuda 2 represented a step towards pre-determination. However, in their view, the most dramatic and substantial change effected by Bermuda 2 was the elimination of the fifth freedom rights previously enjoyed by U.S. carriers and particularly Pan American at many points beyond London and Hong Kong in Europe, Asia, and Australia. They were not surprised that the agreement posted «no trespassing» signs on British third and fourth freedom traffic which had previously been available as fifth freedom to U.S. airlines. What was surprising for them was that the U.S. conceded that British carriers could continue to trespass in U.S. third and fourth freedom markets - that was, traffic moving between the United States and third country points in Europe or Asia by the simple expedient of routing the traffic through a British point such as London.

As far as the loss of fifth freedom rights beyond London and Hong Kong were concerned, the Pan Am was particularly critical of the resultant waste of fuel and vastly restricted choice for passengers, bringing economic penalty to U.S. carriers as well as to the public. Finally, while generally praising the Bermuda 2 agreement, the airline felt that such complex international agreements should not be drafted under the pressures of inflexible deadlines.[48]

The views of the Trans World Airlines were no different. In representing the views of the airline, Thomas Taylor, the Vice-President of the Government Affairs said that Bermuda 2 was a good agreement. He believed that while the period of infancy for Bermuda 2 agreement seemed difficult, if would finally out-last its immediate critics and outgrow its problems, and will serve with distinction for sometime to come.[49]

Other U.S. carriers, such as National Airlines, which did not gain anything under the new agreement, were not so easily placated. In the Transatlantic Route Proceeding Decision issued on July 13, 1976, the CAB had recommended that National Airlines be given authority to operate non-stop to London from Tampa and New Orleans.[50] Neither of these cities is mentioned in Bermuda 2 as a gateway for non-stop service to London.

Before the sub-committee on Aviation, the real criticism came from the air charter industry, where Edward J. Driscoll, the President and Chief Executive officer of the National Air Carriers Associations, an organization of supplemental carriers

(carriers then authorized only to engage in charter air transportation) pointed to the absence of charter linkage clause or a charter understanding in Bermuda 2 as the focus of charter carrier criticism.[51]

During the sub-committee meeting on aviation, Senator Cannon asked the airline executives if they would recommend a congressional veto of Bermuda 2 if such a statutory provision existed. Driscoll gave an unqualified «yes», but C.E. Meyer, President of the Trans World Airlines, and Elihn Schott, senior Vice-President - international and regulatory services, Pan American World Airways, said they would not have asked for a veto. Schott said the U.S. negotiators «did the best they could», but, as discussed earlier, listed the following objections by the Pan American:

(a) Substantial reduction in U.S. fifth freedom rights;

(b) strict limitations on the frequency of service on fifth freedom routes that were retained, particularly round the world and in the Orient;

(c) British access to most of the U.S. transatlantic gateways allowed now on a non-stop basis for U.S. carriers;

(d) British non-stop service from Housten three years before a U.S. airline; and

(e) Limitation on U.S. carriers gateways to London, with only two U.S. cities allowed two U.S. airlines each.

Another problem not addressed by Bermuda 2, according to Meyer, was escalating user charges in London. He said landing fees, parking charges and terminal traffic control at Heathrow

cost TWA $4.5 million in 1974, a figure that would amount to $7 million in 1978. He further complained about higher en-route navigational charges and the «shocking increase» in air traffic control charges of the Euro-control system. He stated:

> «I should note that the U.S. does not impose en-route charges or air traffic control charges on foreign airlines entering air space subject to our control.»[52]

On the other hand, J. Donald Reilly, Executive Vice-President of the Airport Operators Council International, called for more prior consultation with airport operators as well as the airlines in the next round of bilateral talks. He asserted that negotiators should more carefully assess the effect of an agreement on the user charges of every airport involved.

C. British Views

The British accomplished a great deal in Bermuda 2. Many of the new provisions put the British carriers on more of an even par with American airlines.[53] Edmund Dell, British Secretary for Trade termed the agreement reasonable and satisfactory for both sides and predicted that the agreement would result in more opportunity for British airlines, less waste of resources, and real advantage to air travellers. Furthermore, he said that the capacity control mechanisms would lead to lower fares in real terms.[54] The response by the opposition

conservatives in Britain labelling the agreement as failure was not well taken by the general consensus. Most agreed that Bermuda 2 was the «British revolution of 1976», as described by Harriet Oswalt Hill.[55]

The other commentators, however, suggested that although the British taxpayer would win, the state-owned British Airways would probably obtain a larger portion of the market - the passengers would lose because of less competitive service.[56] Evaluating the British position, Lord Thomas E. Bridges, observed that the agreement had successfully attained the following objectives:

(1) The new text was a far more precise document than its predecessor and contained careful formulations on problems which had been a source of disagreement in the past. These included such important matters as tariffs, aviation security, commercial operation, user charges and the settlement of disputes;

(2) Capacity control was one of the main objectives of the British in re-negotiating the agreement. The provisions on capacity control in the agreement satisfied the British on the mechanism to prevent the excessive capacity and all the consequences which flew from it;

(3) Another important gain in this agreement was the increase in number of gateways in the United States. The following reasons were advanced by the British to explain this point:

    (a) Given the growth in international air travel, it was desirable that there should be more direct flights from originating points in the United States across the North Atlantic. It was, therefore, the duty of government to facilitate this in a way which was equitable to airlines, the travelling public, and the national interest concerned;

(b) The British have not succeeded in negotiating Bermuda 2 a principle namely that British and U.S. carriers should be given equal opportunities at each of the gateways. One reason for this was that on certain new routes, it made sense to give the carrier opening the route an exclusive period in which to establish the service. Secondly, the U.S. side felt that they could not concede total parity to the British at all the U.S. gateways available to American carriers under the Agreement.[57]

According to the British it was not correct to view the Bermuda 2 agreement as restrictive or illiberal. On the contrary, they believed that they were able to preserve the liberal character of previous agreement. The British considered that the main area of interest was the competitive low fares and charters and their relation to each other. Here the reference was drawn from the decision of English Court of Appeal, in December 1976, which considered that the guidance given by the British Government to British Civil Aviation Authority, over the Laker Skytrain service, was ultra vires.[58] This decision was instrumental in bringing about significant changes in the policy of «single designation», which the British followed in their negotiations with the U.S., and the eventual designation of Laker Airways as the British's second scheduled operator on London/New York.

The British felt that on the American side the starting point in the low cost fare area was quite different. The American had very forcibly expressed their view that since the

British capacity control mechanism had imposed limits on competition in scheduled services, an additional competitive spin in the charter sector was essential to counter balance the effect of the capacity mechanism. The British, however, did not accept the view that capacity mechanism would involve such an effect. In their view it merely helped to limit some of the wasteful effects of the competitive process.[59]

The British considered the agreement was a compromise. It was thus not a rigid system and allowed the operator a considerable measure of freedom. In their view the government role in the agreement was designed to challenge the individual judgements of operators and to suspend within certain limits increases in capacity. Finally, the overall British viewpoint was that the United Kingdom received most of what it had sought, particularly because capacity control had been adopted.

D. The British Attitude: A Review of Agreement by the Airlines

British Airways was very pleased with the new pact.[60] Peter Jack, representing the British Airways, said that «Bermuda 2 was for British Airways a great advance on the Bermuda of 1946 - an advance which well justified the U.K.'s denunciation of that Agreement.»[61] The Airline believed that taken together, the new route points, restricted double designation, and the capacity control mechanism, the airline would have the opportunity of earning considerably more resources on their transatlantic services into the U.S.A. than before and a

higher percentage of the total Atlantic market between the U.K. and the U.S.A.[62] The officials for the state-owned airline estimated that this gain in earnings would be about 15 million pounds as a result of Bermuda 2.[63]

British Airways, however, had some criticism at the Transatlantic Capacity Control. They felt that the capacity was not so controlled as to produce equal capacity for the airlines of each side, particularly as only frequency and not seat contol was established.[64]

Laker Airways also scored impressive gains.[65] However, British Caledonian, the U.K.'s second flag carrier, was not as jubilant. The airlines' critcism mostly devolved on provisions which undermined its competitive position, and which placed Britian in generally inferior position in terms of market share opportunity.[66] The airline, which was licensed to fly the New York-London route, but suspended service three years before, had lost its rights on that route, which were then being operated by British Airways and Laker Airways.[67] British Caledonian had lost 5.3 million pounds in the first year of the agreement as a result of the introduction of services by U.S. carriers on the Houston-London and Dallas/Ft. Worth-London routes.[68] British Caledonian further contended that British Airways and Laker Airways would not be able to adquately compete with Pan-Am and TWA on the London-New York route.[69]

C.E. Powell, Manager International Relations, British Caledonian, explained the reasons of its airline in being a loser.

The airline believed that since it was the first airline to have taken up any wholly new opportunity offered by Bermuda 2, it became more quickly affected by the agreement than any other airline.[70]

British Caledonian, therefore, considered the results of Bermuda 2 disappointing. In their view, the new agreement offered no solutions to the sort of problems that had afflicted most North Atlantic operations over a long period of time. The airline considered that the main problems on the North Atlantic have been of three types:

(1) The excessive rate of capacity growth following the introduction of new aircraft types;

(2) the cost escalation and traffic slump after the oil crises;

(3) the competitive relationship between scheduled and charter services.

In the views of British Caledonian Airways, since the Bermuda 2 agreement made only minimal provision for excessive rates of capacity growth and no provisions for the above problems, the Americans have won on this basic point. Moreover, if the agreement provided American interests less than they had sought, it was because of the failure of the American's own internal consultation procedures, and hence, they could not blame Bermuda 2.

The British Caledonian Airways believed that Bermuda 2 provided for a very competitive situation. Consequently, they made a decision very shortly after Bermuda 2 was initialled to

start a daily service to Housten. This non-stop service on the London-Housten route faced major competition from their existing North Atlantic services and from Concorde. Concerning the routes, the airline believed that revision of route structure should take place regularly. In their view, in five to six years' time when all the new routes would be assimilated into the system, their effect should be assessed vis-a-vis the new industrial and business centres which may have developed meanwhile between the two countries.

The airline was critical of Annex 2, but on a completely different basis from the Americans. While they did not believe in the American criticism that the Annex was restrictionist and anti-competitive, they wanted the system to have been more appropriate for the sort of crises which affected the North Atlantic. They believed there were three defects in the procedures:

(1) If there was too much capacity on any route at the outset of the new agreement, it was difficult for this capacity to be reduced;

(2) There was no effective restraint on capacity when Boeing 707 or DC-8 type aircraft were replaced by higher capacity wide-body types. Equally, there was no restraint if, say DC-10's were replaced by 747's or even larger aircraft;

(3) There was no provision for reducing capacity on routes where traffic levels were decreasing.

According to this airline, it was clearly a major defect of the new agreement that none of the main crises - 707 introduction, 747 introduction and the oil crises - were covered by the capacity procedures. Nonetheless, the Agreement on the

other hand, the airline believed, gave a more precise tariff article than its predecessor. However, the new Agreement did not offer any reassurance that future tariff levels would be any more economic than they had been in the past. Similarly the Agreement did not offer any reassurance that the major regulatory factors affecting tariff levels, particularly the relationship with charters, would be any better managed than in the past.

Finally the airline, while reluctantly agreeing with the British evaluation that the Agreement was worth tens of millions of pounds for Britian, asserted that Bermuda 2 would become famous only if it provided a better basis for regulatory international air services than its predecessor. It would prove to have been a British victory if Britian did better in relative terms than it did before.[71]

CHAPTER IV - FOOTNOTES

1. Wall St. Journal, June 23, 1977, at 4.

2. Ibid.

3. Statement of U.S. Secretary of Transportation, Brock Adams on the signing of the U.S.-U.K. Air Services Agreement, in Bermuda (July 23, 1977).

4. Robert Gray, The Impact of Bermuda II on Future Bilateral Agreements, Air Law Vol. III, 1978, at p. 17.

5. Journal of Commerce, June 24, 1977, at 1.

6. Washington Post, July 21, 1977, at 13.

7. Aviation Week & Space Technology, September 12, 1977, at 29.

8. MacDevitt, The Triangle Claims Another Victim: A Watery Grave for the Original Bermuda Agreement Principles, 7 Denver Journal of Int. Law and Pol. 1978, at 273.

9. See gnerally Letters from Senator Edward Kennedy to Jimmy Carter (July 18, 1977) reprinted in Aviation Daily, July 27, 1977 at 135; Aviation Daily, Aug. 1, 1977, at 159.

10. Shovelton, Bermuda 2 - A Discussion of its Implications, Negotiations and Agreement, Aeronautical Journal, Feb. 1978, at 61.

11. K. Ellingsworth, Bermuda Pact Sparks Opposition, Aviation Week & Space Technology, Aug. 1, 1977, at 26.

12. Griffiths, Bermuda Pact Provisions Backed, Aviation Week & Space Technology, December 5, 1977, at 23.

13. Ibid.

14. Ibid., at 24.

15. Robert Gray, supra note 4, at 19.

16. Ibid.

17. Hearings concerning U.S. International Aviation Negotiations Before the Sub-Committee on Aviation of the House Committee on Public Works and Transportation, 95th Cong., 1st Sess. 8 (1977) (Statement of Alfred E. Kahn, Chairman) hereinafter cited as Hearings .

18. Hearings, (Statement of Representative Glenn Anderson).

19. Law and Policy in Int. Business, vol. 9 (1977), at 1278.

20. Civil aviation negotiations between Japan and the United States were scheduled for October 6-19 in Tokyo and November 14-25 in Washington, D.C.

21. Robert Gray, supra note 4, at 20.

22. Ibid., at 21.

23. Aviation Daily, Oct. 5, 1977, at 189.

24. Letter from Rep. Glenn M. Anderson, Chairman, Sub-Committee on Aviation, and Rep. Norman Y. Mineta to Secretary of State Cyrus Vance (Oct. 5, 1977), reprinted in Aviation Daily, Oct. 7, 1977, at 204.

25. K. Ellingsworth, supra note 11, at 26; Aviation Daily, Oct. 5, 1977, at 189.

26. Heightened Competition Sparks Turn from Bermuda Principles, Aviation Week & Space Technology, Aug. 5, 1974, at 29.

27. Diamond, The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements, 41 J. Air L. 419, 442 (1975), at 477.

28. Lowenfeld, A New Takeoff of International Air Transport, 54 For. Aff. 36, at 45.

29. Ibid.

30. «U.S. International Aviation Policy at the Crossroads», Harbridge House, 1975.

31. Wassenbergh, The Consequences of Bermuda II, IATA Bulletin 40, 28 November 1977, at 934.

32. As of June 30, 1975, a total of 74 U.S. bilateral agreements were in effect; see supra note 8, at 274.

33. Ibid.; See Lissitzyn, The Legal Status of Executive Agreements on Air Transportation (pts. 1,2), 17 J. Air L. & Com. 436 (1950), 18 J. Air L. & Com. 12 (1951).

34. K. Ellingsworth, supra note 11, at 19.

35. Lissitzyn, see supra note 33.

36. Robert Gray, supra note 4, at 22.

37. Ellingsworth, supra note 11, at 27.

38. Greater Tampa vs. Neil Goldschmidt, (U.S. Court of Appeals for the District of Columbia Circuit, Feb. 8, 1980), CCH Aviation cases, vol. 15, at 17, 956.

39. Lowenfeld, High Stakes in a New Air Pact, N.Y. Times July 3, 1977, at 1 Col. 5-6.

40. Pact Seen as Dangerous Precedent, Av. Week & Space Tech, July, 18, 1977, at 25.

41. Ibid.

42. Hearings, supra note 17, at 102.

43. Federal Aviation Act of 1958, 49 U.S.C. para. 1462 (1970).

44. Bus. Week, Aug. 16, 1976, at 106.

45. Doty, International Aviation Policy Shift Urged, Av. Week & Space Tech. Feb. 6, 1978, at 36.

46. Wall St. J. June 23, 1977, at 4.

47. Shovelton, supra note 10, at 61.

48. Ibid., at 62.

49. Ibid.

50. Transatlantic Route Proceedings, Docket No. 25, 908, at 1 (CAB July 13, 1976).

51. Hearings, supra note 17, (Statement of Edward J. Driscoll).

52. Griffiths, supra note 12, at 24.

53. H. Oswalt Hill, Bermuda II: The British Revolution of 1976, J. of Air L. and Comm., 1978, at 129.

54. Reed, U.S. Views Air Pact with Britian as Victory For All, The Times (London), June 23, 1977, at 1.

55. Hill, supra note 53, at 111.

56. Britain Wins, Travellers Lose, Economist, June 25, 1977, at 90.

57. Lord Thomas Bridges, Bermuda II and After, Air Law, Vol. III, 1978, at pp. 11-16.

58. See Air Law 1977 (2), p. 31 (Board of Editors).

59. Lord Bridges, supra note 57, at 13.

60. See supra note 19.

61. Shovelton, supra note 10, at 56.

62. Ibid.

63. See generally Journal of Commerce, June 24, 1977, at 1.

64. Shovelton, supra note 10, at 55.

65. See supra note 63.

66. Reed, Airline Sees Pact on Atlantic as Unfair, The Times (London), June 24, 1977, at 7. No reasons for that feeling were given.

67. Aviation Daily, July 8, 1977, at 380.

68. Ibid.

69. Ibid. Laker operations were limited to Skytrain scheduled service between Stansted and New York under a 1 year license. Pan Am and TWA, on the other hand, had virtually unrestricted rights between Kennedy airport and Heathrow.

70. Shovelton, supra note 10, at 57.

71. Ibid., at 60.

CHAPTER V

BERMUDA II: AMENDMENTS AND REVISION

INTRODUCTION

It is evident that influential interests in the United States had not been satisfied with the Bermuda 2 agreement. Within less than one year of the conclusion of Bermuda 2, the Carter Administration began the trend of negotiating liberal bilateral air transport agreements with a number of countries in order to encourage competition through low competitive prices and to eliminate all regulatory restrictions concerning capacity, frequencies, routes and charter flights.[1]

The first liberal Protocals were concluded with the Netherlands and Singapore in early 1978.[2] Agreements with other countries (such as Israel, Germany and Belgium) followed.[3] At the end of 1979, the U.S.A. had signed about eleven of such bilateral agreements with different countries including Jamaica, Papua New Guinea, Fiji and Thailand.[4]

The objectives of the new American negotiating policy were formally set down during 1978. It was a strong call for international deregulation. Under this new policy economic decisions were left to the determination of individual airlines and to the free forces of the market place.[5] Deregulation originated in the domestic American air transport system, but was gradually transposed to the international field as well.

The approach in the United States, however, had been to remove the barriers to market entry in order to oblige the big airlines on the domestic network to face up to the others; to those who would never have hoped for the same treatment under the old regime, or who would have wanted years to obtain much less. Thus the new regime has been generally well received by those who seized these opportunities and much more cooly, of course, by those who were obliged to share the cake.

International Deregulation, on the other hand, was, in fact, nothing more than an attempt by the U.S.A. to reintroduce on a country by country basis their traditional liberal aviation policy as an answer to growing restrictionism from various countries. There is no doubt that the liberal agreements did work well for the North Atlantic, but it was certainly not acceptable on a world wide basis. This liberalization had been introduced mainly on routes between industrial countries or between them and the new «industrial countries» (South-East Asian countries in particular) because those countries generated the bulk of the traffic market. Third world countries operated mostly in these markets and were often high-cost operators which made it very difficult for them to adopt liberal policies. The latter states strongly rejected the American policy within the framework of ICAO.

According to the U.S. viewpoint, Deregulation was on more solid grounds and succeeded in increasing the productivity of individual airlines. The U.S. claimed that the average

annual increase in the load factor was four times higher in 1977-1979 than in 1972-1977 when the airlines were regulated. The increase in revenue ton miles per gallon of fuel was almost 50%. The United States gave these results in greater detail to illustrate its paper on capacity submitted by its delegation to the Second Air Transport Conference of ICAO.[6] However, for the Americans the concern was not the financial aspect alone, but the problem of extrapolating the system internationally.[7]

The international aspect of deregulation eventually became a subject of serious criticism in the U.S.A. Marvin Cohen, for instance, while lecturing to the New York Society of Security Analysts in 1979 said «we have abandoned entirely the concepts of our international airlines as chosen instruments of our foreign policy.» Some critics complained that it was a self delusion to set up universal standards for fair competition and sound management which were respected in one region and scoffed at in another. Conclusively, it was impossible to speak about equality of opportunity in such a one sided system.

The ex-chairman of Air France ellucidated the deregulatory concepts of U.S.A. taking into account the economic benefits in the following words:

> «Internationally speaking, the market would be balanced to some extent if all the airlines operated rich and poor routes, as their respective markets and economic situations would then be comparable. Under deregulation these prospects are precluded or minimized, as some airlines are able to chose the best routes, without being

> obliged to accept the obligations imposed on others due to their status or other factors. Thus operators who can achieve profitability while lowering fares are confronted with others who cannot match this competition without a varying degree of subsidy. It is probably excessive to speak here of unfair competition, but it may be concluded that this situation is ill-adapted to the principle of equality of opportunity. It is an argument which can be used both against deregulation and its current detractors in the United States who are attacking foreign aviation policies.»[8]

Deregulation is a vast subject and author does not wish to expand the discussion or draw any conclusions, should it be premature to do so. However, it is noteworthy that Bermuda 2 was not denounced during the period the deregulation movement was at its height (when it was generally accepted uncritically and capable of exporting in its pure form). However, these attitudes were instrumental in the U.S. seeking and amendments being made to Bermuda 2.

A. The Amending Agreements

In the years after Bermuda 2, low-fare agreements between the U.S.A. and the U.K. have been concluded. In the exchange of letters signed at Washington on September 19 and 23, 1977, the various low-fare innovations (including Skytrain) were approved for use on the North Atlantic during the forthcoming winter traffic season. It was agreed that because of their innovative nature, these fares were to be reviewed by both governments as soon as sufficient experience with them had been

acquired. Furthermore, due to their experimental nature, both governments agreed not to apply the provisions of the U.S.-U.K. Air Services Agreement[9] to similar low-fare fillings for effectiveness during the 1978 summer traffic season.[10]

Further negotiations took place in London and Washington on the question of Charter Air Services in the North Atlantic Market.[11] As a result of these negotiations, the first Exchange of Notes was signed at Bermuda between the United Kingdom and the government of the United States on 25 April 1978.

According to this agreement, Article 14 of the Agreement and Annex 4 to the Agreement (including the Memorandum of Understanding on Passenger Charter Air Services between the two governments) was replaced by the new Article 14 and the new Annex 4. In the Article 14, both governments recognized the needs and demands of the low price oriented travelling public and, therefore, for the maintenance and development of efficient and economic charter air services. Each party granted to the other contracting party the right for its airlines to uplift and discharge international charter traffic in cargo between:

(1) on the one hand, any point or points in the United States; and

(2) on the other hand, any point or points in the United Kingdom of Great Britian and Northern Ireland (referred as «the United Kingdom»).

This traffic could be carried either directly or via intermediate or beyond points in other countries with or without stop-overs. This Article, however, did not cover the following charter air services: (i) having their origin outside United States and the United Kingdom or (ii) services operated by an airline of United Kingdom, having their origin in the United States and a traffic stops outside the United States without a stop-over in the United Kingdom lasting for at least two consecutive nights; or (iii) services operated by an airline of the United States, having their origin in the United Kingdom and a traffic stop or stops outside the United Kingdom without a stop-over in the United States for at least two consecutive nights.

Under the new Article the airline or airlines were to be designated in writing and were to be transmitted to the other party through diplomatic channels. The Article also provided for fair competition, charter worthiness and the filling of prices or rates with their respective aeronautical authorities. The new Annex 4, on the other hand, provided for Passenger charter worthiness requirements, liberal provisions concerning cargo charters and the procedure to modifying the charter worthiness requirements.[12]

Another round of talks between these countries took place at Washington, on November 6-8, 1979, to review major elements in the aviation relations between the two countries. The second amendment was effected through the Exchange of Notes

signed at Washington on December 27, 1979. According to this amendment the Delegations agreed to advance from July 23, 1980 to June 1, 1980 the permitted inaugural date for non-stop scheduled combination service by the United Kingdom designated airline between London and Atlanta; and of non-stop scheduled combination service by a U.S. designated airline between London, and the additional U.S. gateway point to be agreed in accordance with the provisions of U.S. Route 1 in Annex 1 to the Agreement.[13]

Furthermore, in line with Article 18 of the Agreement, the Footnote 1 to «U.S. Route 1: Atlantic Combination Air Service», set out in section 1 of Annex to the Agreement, was amended to read «may not be served non-stop until three years after this Agreement enters into force». This condition was, however, subject to the fact that «additional points to be agreed between the contracting parties may be served non-stop from June 1, 1980». Similarly, the Footnote 1 to «U.K. Route 1: Atlantic Combination Air Service», set out in section 3 of Annex 1 to the Agreement was amended to read «may not be served non-stop until three years after this Agreement enters in force, except that Atlanta may be served non-stop from June 1, 1980».[14]

These talks, which started in November, were again resumed in late January and then in late February, ended with a signature of a protocol of consultation on 5 March, 1980. These negotiations had a full schedule, covering practically all the

major items in the Bermuda 2 agreement, except the capacity clause: new routes, designation of carriers, traffic rights, tariffs, freight services, charter flights plus the major problem of the use of Gatwick to relieve saturation at Heathrow. The major issues resolved at these talks will now be briefly discussed.[15]

a. Routes with Multiple Designation of Airlines

New routes with multiple designation of airlines, formerly limited to New York and Los Angeles, were risen to include two more: Boston and Miami.[16] The applicant airlines for Boston were Braniff and PAA, while on the British side a single carrier was allowed to serve this point. The Miami-London route was served by British Airways and PAA.

(i) Miami-London

> The Miami-London route is the most important in the vast transatlantic market. This agreement modified the situation concerning competition, which was then open to two airlines from each country, including service to Heathrow with a new airline. Three airlines were thus to be chosen. Following the negotiations, it seemed that these new conditions would increase PAA's chances of obtaining the route, and such was the decision taken by the CAB on 4 April 1980. But it must be clearly pointed out that the authority granted to PAA was of a temporary and tentative nature, with validity limited to three years, and that although the criterion for serving Heathrow was very important, it was not the only one to be taken into account.[17]

(ii) Boston-London

This route moved into the category of duel designation class as a result of this agreement. The CAB had selected the second carrier - World Airways - which was to compete with the other certificate holder, TWA. Both of these airlines had received temporary permits enabling them to open their services on 1 June 1980.[18]

b. Service Timetable

The new Agreement provided for a timetable for a number of services approved under this agreement or previously. These services were opened as follows in 1980 and 1981:

(a) Spring-1980: London-St. Louis by Caledonian and London-Miami by the second U.K. carrier,

(b) June-1980: Boston-London by a second U.S. carrier and Denver-London by a U.S. carrier,

(c) January-1981: Miami-London by a second U.S. carrier, and

(d) April-1981: London-New Orleans by a U.K. carrier.

c. Selection of Points by the Applicant

The new agreement in principle worked out a time-table, whereby each of the countries could choose service points on the territory of the other for future operation. The formula, which was to be applied from 1981 to 1984, worked on the basis of two points. These points were to be selected by each of the parties for operation in 1981 and only one point a year in 1982, 1983, and 1984. These were the gateways served by direct non-stop flights. In

four years' time they could number 15 or so. But the British suggested and the Americans finally agreed to the future services being curtailed for a period of three years. This meant that each country had the possibility of not assigning a second carrier to them.

d. Traffic Rights

There could be no agreement on this point, which meant no fifth freedom rights for the Americans from the U.K. to Europe, and no cabotage rights for the U.K. in U.S. territory.[19]

In case of traffic rights beyond London, the U.K. maintained the lock-out approved by Bermuda 2 whereby the fifth freedom to Belgium and Austria was to be eliminated during the summer of 1980 and to the Netherlands, Sweden and Norway in 1983. A minor concession was, however, granted for traffic rights between Prestwick and Oslo.[20]

e. Fares

The United States did not succeed in winning over its partner to its most liberal tariff formula: i.e. requiring agreement by the two parties for a fare to be rejected.[21]

In practice, however, tariff liberalization has made inroads on the North Atlantic, and both countries agreed, in an exchange of letters, to pursue this policy.

f. Freight Services

The two partners had endeavoured for a year to arrive at an agreement on freight transport to replace the agreement which expired on 31 March 1979. They did not succeed and since then services had been operated on a provisional basis.

The differences were not overcome in the negotiations, but it was agreed that the same approach to tariffs would be taken in this field as in passenger transport, with progressive deregulation of operation up to 1985 on both scheduled and charter services.

g. Charters

The 1978 U.K.-U.S. Agreement concerning charter services, which expired on March 31, 1980 could not be renewed. However, these negotiations had brought both countries considerably closer on the charter issue, but not enough to lead up to a general agreement. The Interim system was, therefore, to continue to operate on the basis of national regulations, but with the principle of reciprocity and balance being respected as far as possible.

h. Airports

The U.K. scored a victory on this point by successfully managing to promote the use of the second London airport, i.e. Gatwick.[22] Gatwick was not actually the only airport involved in the talks. In the United States,

> the towns of Baltimore and Newark, already served via Washington and New York, were among the candidates for direct services. The British tried to oppose the move, but agreed to a compromise providing for the use of neighbouring airports for these new services.[23]

These negotiations were the first attempt at a general adjustment to the 1977 Agreement. It gave both the partners substantial satisfaction. The analysis of these negotiations reveals that the United Kingdom won the Gatwick battle, and the United States made a few more moves on the deregulation chessboard, with some prospect of reasonable progress on certain basic aspects, in particular fares. The U.S. was disappointed on certain issues (traffic rights and charters) but conceded it was asking for much more than the U.K. in this case.

Perhaps the most interesting reaction came from the U.S. airlines. Many of them were of the opinion that the new agreement might well be obsolete before it was implemented. They considered that relatively few of the services planned were valid markets, that those which were would not justify all the increased competition authorized by the agreement, and that operation in generalwas heavily compromised by the fuel crises.

B. Trend in the North Atlantic Rates Structure

International air freight rates were normally set on a multilateral basis at IATA Traffic Conferences. Until 1980, the

participating airlines as a whole had to agree on rates and these had to be approved by the respective governments to be implemented. This rule has now been modified by the Bermuda 2, April 1980 amendmant.[24]

How has this situation come about? Before examining what has happened in recent years, it is useful to recall a few general concepts. There were, as we know, six main categories of scheduled air freight rates:

(1) The general rate which is fixed at different levels depending on weight without taking into account the value of goods. Reductions or surcharges may be applied to certain products, which result in:

(2) the classification rates (for example for the transport of newspapers, live animals, gold, etc.);

(3) the co-rates or specific rates which are promotional rates with restrictions (minimum weight, precise nature of the goods, scope limited geographically). There are several thousand possibilities, which explain why these rates have often been referred to as a hopeless mess;

(4) the ULD rates (i.e. rates for unit load devices, meaning pallets and containers). A reduction is granted for shippers owing this kind of equipment;

(5) the FAK («Freight-all-kinds») rates. The goods are carried in unit load devices and the charge depends on the weight. These rates are not connected with the others and are published separately. They are relatively recent and have come in response to the wish for simplification which has often been demanded by the industry and users;

(6) contract rates which are very low rates for users (exporters or air freight agents) undertaking to provide the carrier with a minimum tonnage for a given period. It is the most recent type of air freight rate.[25]

It should be noted that these six possibilities were not avialable for all destinations. A survey conducted by ICAO in 1979[26] showed that the breakdown of air freight by rate was as follows:

- Share of the general or classification rate 34%
- Share of the FAK rates 11%
- Share of the contract rates 7%
- Share of the specified rates[27] 48%

(The share of the ULD rates is included with the first, third and fourth categories.)

During the last five years before the amendment, it can be said that two main events had marked the rate situation on the North Atlantic:

(a) the advent, repetition and the generalization of an open tariff situation, which means that airlines do not agree on common tariffs within IATA Conferences;

(b) the advent and the generalization of contract rates accompanied by FAK rates.

The open tariff situation on the North Atlantic started in 1975 following a conference held in Nice. The following meetings in Vancouver in 1977 and Los Angeles a few months later did not produce a solution. It was not until a new conference was held in Geneva in April 1981 that the IATA airlines agreed on new rates. In May 1979, IATA rates the world over were increased because of the fuel crises. This open rate situation finally ended in April 1981 in Geneva. An agreement was signed

enabling rates on eastbound routes to be raised by 12 to 20% in an attempt at arresting the chaos. An important new development occurred as a result of this conference. The airlines could now apply innovative rates without their being approved by others, provided that a prior notice of 30 days was given.

The open tariff situation arose as a result of the IATA rates not being applied by the airlines. In 1976, as observed earlier, competition from charter carriers was such that IATA rates became rather theoretical than real. In this year the British Airways devised and launched its contract rate formula. The reaction of the CAB, with which this formula had to be filed for approval, was negative on several occasions, the criticism being that this rate structure was not to the advantage of smaller shippers. Despite this opposition from the U.S.A., British Airways decided to implement its rates unilaterally on westbound flights.[28]

Finally, with the ratification of the new United States/ U.K. bilateral - Bermuda 2 in April 1980 confirmed tariff freedom for U.K. and U.S. airlines in the case of air freight. The airlines were no longer obliged to submit their rates to the authorities and obtain their approval, except in cases where the authorities found these rates unfair, discriminatory, too high or too restrictive.[29]

C. Latest Amendment

The United States government signed an amendment on November 9, 1982 with the United Kingdom granting British airlines rights for an additional point beyond the U.S. to South America and extending permanent fifth freedom rights for U.S. carriers between Shannon, Ireland, and Prestwick/ Glasgow, Scotland.

The United States and British officials signed a memorandum of consultation amending for an interim period the Bermuda 2 agreement in London after a two-day negotiating session that ended «serious differences» between the two countries over bilateral agreement.[30]

British officials had broken off earlier talks with the U.S. in Washington in March/April 1982, after failing to win concessions concerning British carrier rights in the U.S.[31] The British Government then proposed scrapping Annex 2 of the Bermuda 2 agreement and replacing it with a more mechanical process with as little consultation as possible.[32] They had asked the U.S. to agree to delay inauguration of service on new routes between the two countries as a means of holding down capacity on the North Atlantic during the summer.[33]

The British proposal was presented to the U.S. during first round of bilateral air services negotiations in October 1982. The U.K. has suggested that Annex 2 be replaced by a consultative process that calls on the U.S. to exempt carriers from anti-trust laws prohibiting discussions of over capacity and to allow the carriers to resolve problems themselves.[34]

The new agreement settled a key fifth freedom issue for Pan American World Airways when the British Government agreed to permit the U.S. carrier to serve New Delhi from London on a turn around basis during the winter season. The New Delhi service ~~permitted~~ Pan American to fly from London from April 1, 1983 to April 1, 1985 and allowed the U.S. carrier to stop at Bombay when it reinstates its around-the-world service. The British agreed to a U.S. request that U.S. carriers serve a point in Western Europe beyond Prestwick, Scotland. The U.S. may also, as of April 1, 1983, select a carrier to operate from Newark International Airport to London, restricting the number of round trips to 416 until April, 1985.[35]

Furthermore, both governments agreed that new gateway selections will be deferred for two years beginning April 1 1983, except for Newark and San Juan, Puerto Rico The British airlines were granted the right to carry stop-over passengers between any two U.S. points, but no more than two at one time.

In the agreement, the U.S. also agreed to extend the capacity regime through 1986, which was part of the original Bermuda 2, 1980 amendments. The U.K. received the right to carry fifth freedom traffic beyond San Juan to Venezuela, Colombia, Peru or other points in South America. The trips beyond San Juan were limited to four round trips a week.[36]

Finally, it may be noted that the agreement gave further evidence of resurgent regulation which appeared in two paragraphs

refering to the need for action in the areas of tariffs and capacity. Paragraph 7 indicated an intention to refer pricing problems to the Tariff Working Group established under Article 12 of Bermuda 2. Paragraph 9 sets up a new Working Group to examine «on a factual basis» the extent to which the operation of the procedures set out in Annex 2 to Bermuda 2 have succeeded in avoiding either excess capacity or the under provisions of capacity, and if necessary to make recommendations to the two governments for the improvement of the procedures.[37]

CHAPTER V - FOOTNOTES

1. For an up-to-date list of all these agreements see Driscoll, Deregulation - The U.S. Experience, 9 Int'l Business Lawyer at 158 (1981).

2. Protocal Relating to the Netherlands - United States Air Transport Agreement of 1957, Wahsington, March 31, 1978, TIAS 8998, hereinafter cited as Netherlands Protocol; Air Transport Agreement between the Government of the Republic of Singapore and the Government of the U.S.A., Singapore, March 31, 1978, ICAO Reg. 2787, hereinafter cited as U.S.A. - Singapore Agreement.

3. Protocal Relating to the U.S. - Israel Air Transport Agreement of 1950, Washington, Aug. 16, 1978, TIAS 9002, hereinafter cited as Isreal Protocal; Protocal Relating to the Federal Republic of Germany - U.S. Air Transport Agreement of 1955, Washington, Nov. 1, 1978, CATC (55) 196, hereinafter cited as German Protocal; Protocal Between the Government of the United States of America and the Government of Belgium Relating to Air Transport, Brussels, Dec. 12, 1978, TIAS 9207, hereinafter cited as Belgium Protocal.

4. Competitive Drive Shifts to Bilaterals, AWST, Dec. 31, 1974, at 20-21; Protocal Between the Government of Jamaica and the Government of the U.S.A. Relating to Air Transport, Kingston, April 4, 1979, CATC (79) 74, hereinafter cited as Jamaica Protocal; Air Transport Agreement Between the Government of the U.S. and the Government of Papua New Guinea, Port Moresby, March 30, 1979, TIAS 9520, hereinafter cited as U.S.A. - Papua New Guinea Agreement; Air Transport Agreement Between the Government of Fiji and the Government of the U.S.A., Fiji, October 1, 1979, ICAO Reg. 2907, hereinafter cited as U.S.A. - Fiji Agreement; Air Transport Agreement Between the Government of the U.S. and the Government of Thailand, Bangkok, Dec. 7, 1979, CATC (80) 252, hereinafter cited as U.S.A - Thailand Agreement.

5. Cooper, International Aviation Policy of the United States and Its Objectives, ITA Bulletin 10, March 13, 1978, at 227.

6. Wessberge, Some Remarks on International Air Transport Policy: Constancy and Change, ITA Bull. 17, May 1980, at 394.

7. On August 21, 1978 new plicy objectives were announced by President Carter asking for greater opportunities for innovative and competitive pricing. The International Air Transportation Competition Act of 1979 further provided a permanent policy for conducting bilateral negotiations. The International market, however, remained quite unchanged in its response to Deregulation.

8. Wessberge, Fair and Equal Opportunity: Diversity of National Policies, ITA Bulletin 12, March 23, 1981, at 289.

9. TIAS 8641; 28 UST.

10. TIAS 8811.

11. United States Treaty Series No. 85 (1978).

12. Ibid.

13. TIAS 9722.

14. Ibid.

15. Wessberge, Sequel to Bermuda 2: New Negotiations Between the United States and the United Kingdom, ITA Bulletin 15, April 21, 1980, at 359.

16. Bernard Peguillin, Trend in Air Freight in the North Atlantic, ITA Study 5, 1981, at 20.

17. Wessberge, New Prospects for the Transatlantic Market Between the United States and the United Kingdom Following Revision of the Bermuda 2 Agreement, ITA Bulletin 19, May 19, 1980, at 439-440.

18. Ibid., at 440.

19. Bernard Peguillin, supra note 16, at 20.

20. Wessberge, supra note 15, at 361.

21. Bernard Peguillin, supra note 16, at 20.

22. Ibid.

23. Wessberge, supra note 15, at 362.

24. Bernard Peguillin, supra note 16, at 51.

25. Ibid.

26. «A Survey of Policies and Practices in the Establishment of International Freight Rates» conducted for the 4th meeting of the Panel of Experts on the machinery for the establishment of international fares and rates, held in Montreal in September-October, 1979.

27. This share was 70% on the North Atlantic in 1978.

28. Bernard Peguillin, supra note 16, at 56.

29. Ibid., at 58.

30. Aviation Week & Space Technology, November 15, 1982, at 27.

31. Ibid.

32. Av. Week & Space Tech., October 18, 1982, at 11.

33. Aviation Week & Space Tech., April 5, 1982, at 29.

34. Ibid.

35. Aviation Week & Space Tech., November 15, 1982, at 27.

36. Ibid.

37. Arnold Kean, Bermuda 2, Air Law, Vol. VIII, 1983, at 117.

CHAPTER VI

CONCLUSION

In 1976, the U.K. formed a voluminous and carefully thought-out case aimed at presenting Bermuda 1 as being clearly to the advantage of the United States, as the revenues on the U.S. side were substantially three times those of U.K. carriers. This was, as observed earlier, largely due to the massive transatlantic operation by two major airlines, PAA and TWA - compounded by the 1966 negotiations which practically gave the United States unlimited fifth freedom rights beyond the United Kingdom. The denunciation of the old agreement and the negotiations of Bermuda 2 was therefore an attempt by the U.K. at striking a new bilateral balance.

The new arrangement is essentially a middle-of-the-road approach and the compromise between two conflicting philosophies which characterized Bermuda 1 in 1946. The absence of a strict formula for determining capacity is balanced by a pre-screening mechanism which limits the discretion of the individual carriers. Moreover, due to vague drafting of Bermuda 1, its fault was not in what it said but what it left unsaid. Bermuda 2 at least attempts to say what needs to be said.

Despite the strengths and potential of Bermuda 2 as a workable arrangement, ramifications emanating from the current complexities of the aviation world can hardly render it to be a standard bilateral much like the Bermuda 1. This is so because Bermuda 2 was concluded in the midst of many secondary

bilaterals, whereas Bermuda 1 was agreed at a time when there were very few agreements in force. Further, one of the underlying motivation behind the creation of Bermuda 1 was to make it a model agreement, whereas Bermuda 2 was decidedly lacking in such a strong underpinning. Also, the unfavourable U.S. reception, apart from the special interest group, in combination with the lack of consistency in American aviation/administrative policies, have created impediments to Bermuda 2 taking its due course.

Notwithstanding the above, the Bermuda 2 is an agreement between two highly developed aviation nations, tailored to meet the North Atlantic situation. Since North Atlantic problems do not only arise with respect to the United States and the United Kingdom, the agreement can be used by other states for the purpose of solving excess capacity and other issues.

While the objectives and principles of any agreement can be precisely defined, it is a well known fact of aviation history that the bilateral air transport agreements are interpreted and enforced by the parties themselves on the basis of their bargaining strength and power. At the time of Bermuda 1, United Kingdom was in a weaker position and therefore negotiated for specific definitions of routes and capacities to be exchanged. Bermuda 2, unlike the original agreement, appeared to be more in favour of United Kingdom and reflected the stronger bargaining position of the U.K. in 1977.

The U.S.A. which could not live up to its expectations, complained the agreement was restrictive and illiberal and adopted an averse attitude to its healthy growth. While the Bermuda 1 agreement had its first major amendment after 20 years (1966 amendment), the Bermuda 2 has been subjected to four amendments in a short span of five years. The fact, however, is that agreement still exists and does not seem to indicate a breakdown in foreseeable future. The reason is not hard to understand; a number of foreign or international markets differ from the U.S. markets in terms of volume, structure, or operating arrangements. Similarly the status of airlines and, therefore, the basic motivation behind aviation policies differ. They cannot be the same for private carriers run on a strict economic basis and for carriers which have to continue this objective with defence of the flag.

The reaction of U.S. against the Bermuda 2 agreement culminated in its policy to export domestic deregulation to the international bounds by adopting the policies of the U.S. Aviation Deregulation Act of 1978. This American action amounted to a bombshell and caused tremors across the world. The old order of international aviation, the ancient regime, was threatened and the world aviation community mustered all the strength at its disposal and reacted violently against this. The pertinent criticism was - will not freedom of competition destroy the very fabric that it seeks to protect? Is not monoply which is the negation of competition the result of unfretted competition etc.

The experiment of deregulation did result in gains to U.S. in its first two years 1978-1979. However, with all its well publicized strength, deregulation from the first half of 1980 has seen most of the major United States carriers suffering severe losses. In Europe and other parts of the world voices are being raised that these losses are attributable to deregulation.

During the last decade, ICAO became more and more involved in economic matters relating to air transport. This involvement gained momentum in the 1977 and 1980 Air Transport Conferences. In general these Conferences rejected the new American policy and advocated a more restrictive framework.

The June 4, 1982, signing of an interim air agreement of United States with Japan is a clear indication that the Reagan Administration has returned to a more traditional way of doing business. The grand design of the Carter years is gone, the country by country approach is back in. From the time the Reagan Administration assumed office, in January 1981, there has been a concerted effort to reverse the Carter administration's policy of attempting to export domestic air competition.[1]

The U.S.-Japan discussions have been going on since the mid-1970s, when the Japanese decided it was time to try to correct what they considered to be grievous imbalance in the old bilateral signed in 1952. The Japanese took heart from the signing of Bermuda 2 agreement. In the U.S., as observed earlier, the deregulations of the Carter Administration made

sure in the four years following the Bermuda 2 agreement, that every bilateral discussion and every CAB international route award was a direct rebuttal of the agreement. The Japanese timing was not good so Japan continued to talk, and to ask for more rights and more restrictions. Both countries had remained at conflict specifically over exactly how much capacity U.S. carriers should be permitted to fly out of Tokyo.

Ever since the signing of interim arrangement between U.S. and Japan, questions have been raised over the long term U.S. policy goals in response to its policy of settling bilaterals on a short term, «problem-solving» basis. For example, the U.S. also recently signed a one year pact with Brazil, which denounced the previous treaty. That pact for a time, had included country of origin rules. The new pact removes country of origin rules and retains the two-airlines limit for U.S. passenger operations. Then there is the current case of Venezuela, which has sought new talks. The Venezuelans are pursuing for capacity limits and additional constraints.[2]

Viewed over the long term, the various trends in air transport agreements reflect lack of cohesion among countries and an inability to resolve philosophical differences over exactly how international aviation should be structured. One thing, however, becomes very clear is that these agreements are actually nothing if not nationalism in disguise. The traffic is considered as national property, which legalizes

the advantages of the greater traffic producer of the two bilateral partners. In the day comes when the proportions are reversed, the argument is reversed. One nationalism is thus countered by another - on the road always leading to a dead end.

The present understanding of the countries as to the nationalistic gains can not be underscored either. It would be totally unrealistic to do so. Lord Pamlerston who advocated this approach in 1848, said:

> «But all I say is, that our guiding rule is to promote and advance, as far as we can, the interests of the country to which we have the good fortune to belong, and which we have the honour to serve. We have no overlasting union with this or that country - no identification of policy with another. We have no national enemies - no perpetual friends. When we find a power pursuing that course of policy which we wish also to promote, that power, for the time, becomes our ally; and when we find a country whose interests are at variance with our own, we are involved for a time with the Government of that country. We find no fault with other nations for pursuing their interests; and they ought not to find faults with us if, in pursuing our interests, our course may be different from theirs.»[3]

It would be worthwhile to now discuss another important aspect which manifests the outcome of bilateral agreements, namely; Politics; it has been observed that «[t]he work (of negotiating bilateral agreements) is never done: politics see to that».[4] An American writer, Professor Thornton, has been more direct in noting that international air negotiations can include items that are totally unrelated to aviation, such as wheat agreement effecting an air right.[5] Thornton further

sought to identify the external factors which modify a states intrinsic power.[6] They are important because they «can absorb a portion of nations bargaining strength and divert it to the achievement of goals external to the airline industry.»[7]

Therefore, even though states recognize air traffic carriage as a valuable potential source of revenue to the national economy[8] factors other than airline generated revenues can play an important or even a decisive role in the negotiations. For example, one of the underlying «political motives» in Bermuda 2 could have been President Carter's concern that a cessation of U.S.-U.K. air services would force British Prime Minister Callaghan's Labour Government to resign.[9]

The political factor is particularly complicated because of the possible differences of states as between themselves and vis-a-vis more universal policies having the common welfare of mankind as their fundamental goal. Due to these political considerations and tactics it would be as difficult for anyone much less the author to draw up any concrete recommendations as to a new regulating framework of air transport.

> «The international lawyer is entitled and probably not least qualified, to point out the inherent advantages and shortcomings of any particular blueprint and the conditions on which its attainment depends. The choice, however, is for governments and public opinion. It involves political decisions which are outside the lawyer's province.»[10]

Finally, in the impossibility of reaching a uniform regulation based on a multilateral agreement, which is very unlikely in the world of today, the existing problems are likely to persist; uniformity must therefore be sought through bilateral agreements with a view to satisfying both the interests of states parties and the requirements of international aviation viewed as an activity of universal scope.

To conclude, it is evident that, as a result of the importance gained by air transport in contemporary life, a proper regulation will entail yet another contribution of law to the benefit of mankind. To accomplish this, it is imperative to make a fair evaluation of the rights of individuals, the rights of private, mixed, governmental or multinational airlines, the right of states in their pursuance of the common welfare and the right of mankind as a whole, that is to say as the sum of all human beings created by the Lord.

CHAPTER VI - FOOTNOTES

1. Joan M. Feldman, U.S. Bilateral Negotiations Cautious, Heavily Flavored with Realistic Goals, Air Transport World, Aug. 1982, at 23-24.

2. Ibid.

3. Pamlerston, Lord, May 15, 1848 Hansard, 3rd series, Vol. 98, pp. 1129-30.

4. Jack, Bilateral Agreements, 69 J. of the Royal Aeronautical Soc'y, 1965, at 475.

5. R. Thornton, International Airlines and Politics, 1970, at 34. This example, written in 1970, has an ironic quality in view of the 1972 and 1975 U.S.-U.S.S.R. Wheat-Sales.

6. Ibid., at 79.

7. Ibid.

8. Wassenbergh, Aspects of Air Law and Civil Air Policy in the Seventies, 1970, at 9.

9. Av. Week & Space Tech., July 18, 1977, at 26.

10. Schwarzengerger and Brown, A Manual of International Law, Rothman & Co., South Hackensack, New York, 1976, at 20.

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ANNEX

Air Transport Agreement between the United States of America and the United Kingdom, 23 July 1977. (Bermuda 2)

AGREEMENT
BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND CONCERNING AIR SERVICES

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland;

Resolved to provide safe, adequate and efficient international air transportation responsive to the present and future needs of the public and to the continued development of international commerce;

Desiring the continuing growth of adequate, economical and efficient air transportation by airlines at reasonable charges, without unjust discrimination or unfair or destructive competitive practices;

Resolved to provide a fair and equal opportunity for their designated airlines to compete in the provision of international air services;

Desiring to ensure the highest degree of safety and security in international air transportation;

Seeking to encourage the efficient use of available resources, including petroleum, and to minimize the impact of air services on the environment;

Believing that both scheduled and charter air transportation are important to the consumer interest and are essential elements of a healthy international air transport system;

Reaffirming their adherence to the Convention on International Civil Aviation opened for signature at Chicago on 7 December 1944; and

Desiring to conclude a new agreement complementary to that Convention for the purpose of replacing the Final Act of the Civil Aviation Conference held at Bermuda, from 15 January to 11 February 1946, and the annexed Agreement between the Government of the United States of America and the Government of the United Kingdom relating to Air Services between their Respective Territories, as subsequently amended ("the 1946 Bermuda Agreement");

Have agreed as follows:

(j) "International air service" means an air service which passes through the air space over the territory of more than one State;

(k) "Revenue passenger" means a passenger paying 25 percent or more of the normal applicable fare;

(l) "Stop for non-traffic purposes" means a landing for any purpose other than taking on or discharging passengers, cargo or mail carried for compensation;

(m) "Tariff" means the price to be charged for the public transport of passengers, baggage and cargo (excluding mail) on scheduled air services including the conditions governing the availability or applicability of such price and the charges and conditions for services ancillary to such transport but excluding the commissions to be paid to air transportation intermediaries;

(n) "Territory" means the land areas under the sovereignty, jurisdiction, protection, or trusteeship of a Contracting Party, and the territorial waters adjacent thereto; and

(o) "User charge" means a charge made to airlines for the provision for aircraft, their crews and passengers of airport or air navigation property or facilities, including related services and facilities.

ARTICLE 2

Grant of Rights

(1) Each Contracting Party grants to the other Contracting Party the following rights for the conduct of international air services by its airlines:

(a) the right to fly across its territory without landing; and

(b) the right to make stops in its territory for non-traffic purposes.

(2) Each Contracting Party grants to the other Contracting Party the rights specified in this Agreement for the purposes of operating scheduled international air services on the routes specified in Annex I. Such services and routes are hereafter called "the agreed services" and "the specified routes" respectively. The airlines designated by each Contracting Party may make stops in the territory of the other Contracting Party at the points specified and to the extent specified for

ARTICLE 1

Definitions

For the purposes of this Agreement unless otherwise stated, the term:

(a) "Aeronautical authorities" means, in the case of the United States, the Department of Transportation, the Civil Aeronautics Board, or their successor agencies; and in the case of the United Kingdom, the Secretary of State for Trade, the Civil Aviation Authority, or their successors;

(b) "Agreement" means this Agreement, its Annexes, and any amendments thereto;

(c) "Air service" means scheduled air service or charter air service or both, as the context requires, performed by aircraft for the public transport of passengers, cargo or mail, separately or in combination, for compensation;

(d) "Airport" means a landing area, terminals and related facilities used by aircraft;

(e) "All-cargo air service" means air service performed by aircraft on which cargo or mail (with ancillary attendants) is carried, separately or in combination, but on which revenue passengers are not carried;

(f) "Combination air service" means air service performed by aircraft on which passengers are carried and on which cargo or mail may also be carried if authorized by the relevant national license or certificate;

(g) "Convention" means the Convention on International Civil Aviation, opened for signature at Chicago on 7 December 1944, and includes: (i) any amendment thereto which has entered into force under Article 94(a) thereof and has been ratified by both Contracting Parties; and (ii) any Annex or any amendment thereto adopted under Article 90 of that Convention, insofar as such amendment or Annex is at any given time effective for both Contracting Parties;

(h) "Designated airline" means an airline designated and authorized in accordance with Article 3 of this Agreement;

(i) "Gateway route segment" means that part of a route described in Annex 1 which lies between the point of last departure or first arrival served by a designated airline in its homeland and the point or points served by that airline in the territory of the other Contracting Party;

each route in Annex 1 for the purpose of taking on board and discharging passengers, cargo or mail, separately or in combination, in scheduled international air service.

(3) Each Contracting Party grants to the other Contracting Party the rights specified in Annex 4 for the purposes of operating charter international air services.

(4) Nothing in paragraphs (2) or (3) of this Article shall be deemed to confer on the airline or airlines of one Contracting Party the rights to take on board, in the territory of the other Contracting Party, passengers, cargo or mail carried for compensation and destined for another point in the territory of that other Contracting Party except to the extent such rights are authorized in Annex 1 or Annex 4.

(5) If because of armed conflict, political disturbances or developments, or special and unusual circumstances, a designated airline of one Contracting Party is unable to operate a service on its normal routing, the other Contracting Party shall use its best efforts to facilitate the continued operation of such service through appropriate rearrangements of such routes, including the grant of rights for such time as may be necessary to facilitate viable operations.

ARTICLE 3

Designation and Authorization of Airlines

(1) (a) Each Contracting Party shall have the right to designate an airline or airlines for the purpose of operating the agreed services on each of the routes specified in Annex 1 and to withdraw or alter such designations. Such designations shall be made in writing and shall be transmitted to the other Contracting Party through diplomatic channels.

(b) A Contracting Party may request consultations with regard to the designation of an airline or airlines under subparagraph (a) of this paragraph. If, however, agreement is not reached within 60 days from the date of the designation, the designation shall be regarded as a proper designation under this Article.

(2) Notwithstanding paragraph (1) of this Article, for the purpose of operating the agreed combination air services on US Routes 1 and 2, and UK Routes 1, 2, 3, 4 and 5, each Contracting Party shall have the right to designate not more than:

(a) two airlines on each of two gateway route segments of its own choosing;

(b) one airline on each gateway route segment other than those selected under subparagraph (a) of this paragraph, except that each Contacting Party may designate not more than:

(i) two airlines on any gateway route segment other than those selected under subparagraph (a) of this paragraph, provided: (A) the total on-board passenger traffic carried by the designated airlines of both Contracting Parties in scheduled air service on a gateway route segment exceeds 600,000 one-way revenue passengers in each of two consecutive twelve month periods; or (B) the total on-board passenger traffic carried by its designated airline in scheduled air service on the gateway route segment exceeds 450,000 one-way revenue passengers in each of two consecutive twelve month periods. For the purpose of this subparagraph, the revenue passenger levels specified must be reached for the first time after the entry into force of this Agreement; and

(ii) two airlines on any gateway route segment other than those selected under subparagraph (a) or permitted under subparagraph (b)(i) of this paragraph, where either the other Contracting Party has not made a designation three years after the right to operate that gateway route segment becomes effective or the airline designated by it does not by then operate (either nonstop or in combination with another gateway route segment) or operates fewer than 100 round trip combination flights within a twelve month period. An additional designation under this subparagraph shall continue in force notwithstanding subsequent regular operation by an airline of the other Contracting Party.

If coincident gateway route segments appear on more than one route, the limitations set forth in this paragraph apply to the coincident segments taken together. A Contracting Party making designations under this paragraph shall specify which subparagraph applies.

(3) Notwithstanding paragraph (1) of this Article, for the purpose of operating the agreed all-cargo air services on US Route 7 and on UK Routes 10, 11 and 12 (taken together), each Contracting Party shall have the right to designate not more than a total of three airlines, except that, if the airline or airlines designated by one Contracting Party are licensed or certificated by their own aeronautical authorities and authorized by the other Contracting Party to offer all-cargo air services on a gateway route segment on which the airline or airlines designated by the other Contracting Party are not licensed or certificated by their own aeronautical authorities to offer such services, that other Contracting Party may designate an additional airline on the relevant route or routes to operate all-cargo air services only on that gateway route segment, notwithstanding the fact that such designation will result in the designation of more than three airlines on the relevant route or routes.

ARTICLE 4

Application of Laws

(1) The laws and regulations of one Contracting Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of the airline or airlines designated by the other Contracting Party and shall be complied with by such aircraft upon entrance into or departure from and while within the territory of the first Contracting Party.

(2) The laws and regulations of one Contracting Party relating to the admission to or departure from its territory of passengers, crew, cargo or mail of aircraft, including regulations relating to entry, clearance, immigration, passports, customs and quarantine, shall be complied with by or on behalf of such passengers, crew, cargo or mail of the airlines of the other Contracting Party upon entrance into or departure from and while within the territory of the first Contracting Party.

ARTICLE 5

Revocation or Suspension of Operating Authorization

(1) Each Contracting Party shall have the right to revoke, suspend, limit or impose conditions on the operating authorizations or technical permissions of an airline designated by the other Contracting Party where:

(a) substantial ownership and effective control of that airline are not vested in the Contracting Party designating the airline or in nationals of such Contracting Party; or

(b) that airline has failed to comply with the laws or regulations of the first Contracting Party; or

(c) the other Contracting Party is not maintaining and administering safety standards as set forth in Article 6 (Airworthiness).

(2) Unless immediate revocation, suspension or imposition of the conditions mentioned in paragraph (1) of this Article is essential to prevent further noncompliance with subparagraphs (b) or (c) of paragraph (1) of this Article, such rights shall be exercised only after consultation with the other Contracting Party.

(4) Notwithstanding paragraph (1) of this Article, a Contracting Party receiving a designation of an airline which is authorized by that airline's own aeronautical authorities only to operate aircraft having a maximum passenger capacity of 30 seats or less and a maximum payload capacity of 7,500 pounds or less and which was not designated under the 1946 Bermuda Agreement may refuse to regard such designation as a proper designation under this Article if it would result in more than three such airlines or more than the number designated under the 1946 Bermuda Agreement (whichever is greater), operating at any point in the territory of the Contracting Party receiving the designation.

(5) If either Contracting Party wishes to designate an airline or airlines for the routes set forth in paragraphs (2) or (3) of this Article, in addition to the designations specifically permitted by those paragraphs, it shall notify the other Contracting Party. The second Contracting Party may either: (i) accept such further designation; or (ii) request consultations. After consultations the second Contracting Party may decline to accept the designation.

(6) On receipt of a designation made by one Contracting Party under the terms of paragraphs (1), (2) or (3) of this Article, or accepted under the terms of paragraph (5) of this Article, and on receipt of an application or applications from the airline so designated for operating authorizations and technical permissions in the form and manner prescribed for such applications, the other Contracting Party shall grant the appropriate operating authorizations and technical permissions, provided:

(a) substantial ownership and effective control of that airline are vested in the Contracting Party designating the airline or in its nationals;

(b) the designated airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air services by the Contracting Party considering the application or applications; and

(c) the other Contracting Party is maintaining and administering the standards set forth in Article 6 (Airworthiness).

If the aeronautical authorities of the Contracting Party considering the application or applications are not satisfied that these conditions are met at the end of a 90-day period from receipt of the application or applications from the designated airlines, either Contracting Party may request consultations, which shall be held within 30 days of the request.

(7) When an airline has been designated and authorized in accordance with the terms of this Article, it may operate the relevant agreed services on the specified routes in Annex 1, provided, however, that the airline complies with the applicable provisions of this Agreement.

ARTICLE 6

Airworthiness

(1) Certificates of airworthiness, certificates of competency, and licenses issued or rendered valid by one Contracting Party, and still in force, shall be recognized as valid by the other Contracting Party for the purpose of operating the air services provided for in this Agreement, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established pursuant to the Convention. Each Contracting Party reserves the right, however, to refuse to recognize as valid for the purpose of flights above its own territory, certificates of competency and licenses granted to its own nationals by the other Contracting Party.

(2) The competent aeronautical authorities of each Contracting Party may request consultations concerning the safety and security standards and requirements maintained and administered by the other Contracting Party relating to aeronautical facilities, aircrew, aircraft, and the operation of the designated airlines. If, following such consultations, the competent aeronautical authorities of either Contracting Party find that the other Contracting Party does not effectively maintain and administer safety and security standards and requirements in these areas that are equal to or above the minimum standards which may be established pursuant to the Convention, they will notify the other Contracting Party of such findings and the steps considered necessary to bring the safety and security standards and requirements of the other Contracting Party to standards at least equal to the minimum standards which may be established pursuant to the Convention, and the other Contracting Party shall take appropriate corrective action. Each Contracting Party reserves the right to withhold, revoke or limit, pursuant to Articles 2 (Grant of Rights), 3 (Designation and Authorization of Airlines), and 5 (Revocation or Suspension of Operating Authorization), the operating authorization or technical permission of an airline or airlines designated by the other Contracting Party, in the event the other Contracting Party does not take such appropriate action within a reasonable time.

ARTICLE 7

Aviation Security

The Contracting Parties reaffirm their grave concern about acts or threats against the security of aircraft, which jeopardize the safety of

persons or property, adversely affect the operation of air services and undermine public confidence in the safety of civil aviation. The Contracting Parties agree to provide maximum aid to each other with a view to preventing hijackings and sabotage to aircraft, airports and air navigation facilities and threats to aviation security. They reaffirm their commitments under and shall have regard to the provisions of the Convention on Offences and certain other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970, and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971. The Contracting Parties shall also have regard to applicable aviation security provisions established by the International Civil Aviation Organization. When incidents or threats of hijacking or sabotage against aircraft, airports or air navigation facilities occur, the Contracting Parties shall assist each other by facilitating communications intended to terminate such incidents rapidly and safely. Each Contracting Party shall give sympathetic consideration to any request from the other for special security measures for its aircraft or passengers to meet a particular threat.

ARTICLE 8

Commercial Operations

(1) The designated airline or airlines of one Contracting Party shall be entitled, in accordance with the laws and regulations relating to entry, residence and employment of the other Contracting Party, to bring in and maintain in the territory of the other Contracting Party those of their own managerial, technical, operational and other specialist staff who are required for the provision of air services.

(2) Each Contracting Party agrees to use its best efforts to ensure that the designated airlines of the other Contracting Party are offered the choice, subject to reasonable limitations which may be imposed by airport authorities, of providing their own services for ground handling operations; of having such operations performed entirely or in part by another airline, an organization controlled by another airline, or a servicing agent, as authorized by the airport authority; or of having such operations performed by the airport authority.

(3) Each Contracting Party grants to each designated airline of the other Contracting Party the right to engage in the sale of air transportation in its territory directly and, at the airline's discretion,

(b) spare parts including engines introduced into the territory of a Contracting Party for the maintenance or repair of aircraft used in an international air service of a designated airline of the other Contracting Party; and

(c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Contracting Party for use in an aircraft engaged in an international air service of a designated airline of the other Contracting Party, even when these supplies are to be used on a part of the journey performed over the territory of the Contracting Party in which they are taken on board.

(3) Equipment and supplies referred to in paragraphs (1) and (2) of this Article may be required to be kept under the supervision or control of the appropriate authorities.

(4) The reliefs provided for by this Article shall also be available in situations where the designated airlines of one Contracting Party have entered into arrangements with another airline or airlines for the loan or transfer in the territory of the other Contracting Party of the items specified in paragraphs (1) and (2) of this Article provided such other airline or airlines similarly enjoy such reliefs from such other Contracting Party.

ARTICLE 10

User Charges

(1) Each Contracting Party shall use its best efforts to ensure that user charges imposed or permitted to be imposed by its competent charging authorities on the designated airlines of the other Contracting Party are just and reasonable. Such charges shall be considered just and reasonable if they are determined and imposed in accordance with the principles set forth in paragraphs (2) and (3) of this Article, and if they are equitably apportioned among categories of users.

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

(3) User charges may reflect, but shall not exceed, the full cost to the competent charging authorities of providing appropriate airport and air navigation facilities and services, and may provide for a reasonable

through its agents. Each airline shall have the right to sell such transportation, and any person shall be free to purchase such transportation, in the currency of that territory or in freely convertible currencies of other countries.

(4) Each designated airline shall have the right to convert and remit to its country on demand local revenues in excess of sums locally disbursed. Conversion and remittance shall be permitted without restrictions at the rate of exchange applicable to current transactions which is in effect at the time such revenues are presented for conversion and remittance. Both Contracting Parties have accepted the obligations set out in Article VIII of the Articles of Agreement of the International Monetary Fund.

(5) Each Contracting Party shall use its best efforts to secure for the designated airlines of the other Contracting Party on a reciprocal basis an exemption from taxes, charges and fees imposed by State, regional and local authorities on the items listed in paragraphs (1) and (2) of Article 9 (Customs Duties), as well as from fuel through-put charges, in the circumstances described under those paragraphs, except to the extent that the charges are based on the actual cost of providing the service.

ARTICLE 9

Customs Duties

(1) Aircraft operated in international air services by the designated airlines of either Contracting Party, their regular equipment, fuel, lubricants, consumable technical supplies, spare parts including engines, and aircraft stores including but not limited to such items as food, beverages and tobacco, which are on board such aircraft, shall be relieved on the basis of reciprocity from all customs duties, national excise taxes, and similar national fees and charges not based on the cost of services provided, on arriving in the territory of the other Contracting Party, provided such equipment and supplies remain on board the aircraft.

(2) There shall also be relieved from the duties, fees and charges referred to in paragraph (1) of this Article, with the exception of charges based on the cost of the service provided:

(a) aircraft stores, introduced into or supplied in the territory of a Contracting Party, and taken on board, within reasonable limits, for use on outbound aircraft engaged in an international air service of a designated airline of the other Contracting Party;

rate of return on assets, after depreciation. In the provision of facilities and services, the competent authorities shall have regard to such factors as efficiency, economy, environmental impact and safety of operation. User charges shall be based on sound economic principles and on the generally accepted accounting practices within the territory of the appropriate Contracting Party.

(4) Each Contracting Party shall encourage consultations between its competent charging authorities and airlines using the services and facilities, where practicable through the airlines' representative organizations. Reasonable notice should be given to users of any proposals for changes in user charges to enable them to express their views before changes are made.

(5) For the purposes of paragraph (4) of this Article, each Contracting Party shall use its best efforts to encourage the competent charging authorities and the airlines to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles set out in this Article.

(6) In the event that agreement is reached between the Contracting Parties that an existing user charge should be revised, the appropriate Contracting Party shall use its best efforts to put the revision into effect promptly.

ARTICLE 11

Fair Competition

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

(2) The designated airline or airlines of one Contracting Party shall take into consideration the interests of the designated airline or airlines of the other Contracting Party so as not to affect unduly that airline's or those airlines' services on all or part of the same routes. In particular, when a designated airline of one Contracting Party proposes to inaugurate services on a gateway route segment already served by a designated airline or airlines of the other Contracting Party, the incumbent airline or airlines shall each refrain from increasing the frequency of their services to the extent and for the time necessary to ensure that the airline inaugurating service may fairly exercise its rights under paragraph (1) of this Article. Such obligation to refrain from

increasing frequency shall not last longer than two years or beyond the point when the inaugurating airline matches the frequencies of any incumbent airline, whichever occurs first, and shall not apply if the services to be inaugurated are limited as to their capacity by the license or certificate granted by the designating Contracting Party.

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

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

(b) the requirements of through airline operations; and

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

(4) The frequency and capacity of services to be provided by the designated airlines of the Contracting Parties shall be closely related to the requirements of all categories of public demand for the carriage of passengers and cargo including mail in such a way as to provide adequate service to the public and to permit the reasonable development of routes and viable airline operations. Due regard shall be paid to efficiency of operation so that frequency and capacity are provided at levels appropriate to accommodate the traffic at load factors consistent with tariffs based on the criteria set forth in paragraph (2) of Article 12 (Tariffs).

(5) The Contracting Parties recognize that airline actions leading to excess capacity or to the underprovision of capacity can both run counter to the interests of the travelling public. Accordingly, in the particular case of combination air services on the North Atlantic routes specified in paragraph (1) of Annex 2, they have agreed to establish the procedures set forth in Annex 2. With respect to other routes and services, if one Contracting Party believes that the operations of a designated airline or airlines of the other Contracting Party have been inconsistent with the principles set forth in this Article, it may request consultations pursuant to Article 16 (Consultations) for the purpose of reviewing the operations in question to determine whether they are in conformity with these principles. In such consultations there shall be taken into consideration the operations of all airlines serving the market

(4) Any tariff agreements with respect to public transport between the territories of the Contracting Parties concluded as a result of inter-carrier discussions, including those held under the traffic conference procedures of the International Air Transport Association, or any other association of international airlines, and involving the airlines of the Contracting Parties will be subject to the approval of the aeronautical authorities of those Contracting Parties, and may be disapproved at any time whether or not previously approved. The submission of such agreements is not the filing of a tariff for the purposes of the provisions of paragraph (5) of this Article. Such agreements shall be submitted to the aeronautical authorities of both Contracting Parties for approval at least 105 days before the proposed date of effectiveness, accompanied by such justification as each Contracting Party may require of its own designated airlines. The period of 105 days may be reduced with the consent of the aeronautical authorities of the Contracting Party with whom a filing is made. The aeronautical authorities of each Contracting Party shall use their best efforts to approve or disapprove (in whole or in part) each agreement submitted in accordance with this paragraph on or before the 60th day after its submission. Each Contracting Party may require that tariffs reflecting agreements approved by it be filed and published in accordance with its laws.

(5) Any tariff of a designated airline of one Contracting Party for public transport between the territories of the Contracting Parties shall, if so required, be filed with the aeronautical authorities of the other Contracting Party at least 75 days prior to the proposed effective date unless the aeronautical authorities of that Contracting Party permit the filing to be made on shorter notice. Such tariff shall become effective unless action is taken to continue in force the existing tariff as provided in paragraph (7) of this Article.

(6) If the aeronautical authorities of one Contracting Party, on receipt of any filing referred to in paragraph (5) of this Article, are dissatisfied with the tariff proposed or desire to discuss the tariff with the other Contracting Party, the first Contracting Party shall so notify the other Contracting Party through diplomatic channels within 30 days of the filing of such tariff, but in no event less than 15 days prior to the proposed effective date of such tariff. The Contracting Party receiving the notification may request consultations and, if so requested, such consultations shall be held at the earliest possible date for the purpose of attempting to reach agreement on the appropriate tariff. If notification of dissatisfaction is not given as provided in this paragraph, the tariff shall be deemed to be approved by the aeronautical authorities of the Contracting Party receiving the filing and shall become effective on the proposed date.

(7) If agreement is reached on the appropriate tariff under paragraph (6) of this Article, each Contracting Party shall exercise its

in question and designated by the Contracting Party whose airline or airlines are under review. If the Contracting Parties conclude that the operations under review are not in conformity with the principles set forth in this Article, they may decide upon appropriate corrective or remedial measures, except that, where frequency or capacity limitations are already provided for a route specified in Annex 1, the Contracting Parties may not vary those limitations or impose additional limitations except by amendment of this Agreement.

(6) Neither Contracting Party shall unilaterally restrict the operations of the designated airlines of the other except according to the terms of this Agreement or by such uniform conditions as may be contemplated by the Convention.

ARTICLE 12

Tariffs

(1) Tariffs of the designated airlines of the Contracting Parties for carriage between their territories shall be established in accordance with the procedures set out in this Article.

(2) The tariffs charged by the designated airlines of one Contracting Party for public transport to or from the territory of the other Contracting Party shall be established at the lowest level consistent with a high standard of safety and an adequate return to efficient airlines operating on the agreed routes. Each tariff shall, to the extent feasible, be based on the costs of providing such service assuming reasonable load factors. Additional relevant factors shall include among others the need of the airline to meet competition from scheduled or charter air services, taking into account differences in cost and quality of service, and the prevention of unjust discrimination and undue preferences or advantages. To further the reasonable interests of users of air transport services, and to encourage the further development of civil aviation, individual airlines should be encouraged to initiate innovative, cost-based tariffs.

(3) The tariffs charged by the designated airlines of one Contracting Party for public transport between the territory of the other Contracting Party and the territory of a third State shall be subject to the approval of the other Contracting Party and such third State; provided, however, that a Contracting Party shall not require a different tariff from the tariff of its own airlines for comparable service between the same points. The designated airlines of each Contracting Party shall file such tariffs with the other Contracting Party, in accordance with its requirements.

best efforts to put such tariff into effect. If an agreement is not reached prior to the proposed effective date of the tariff, or if consultations are not requested, the aeronautical authorities of the Contracting Party expressing dissatisfaction with that tariff may take action to continue in force the existing tariffs beyond the date on which they would otherwise have expired at the levels and under the conditions (including seasonal variations) set forth therein. In this event the other Contracting Party shall similarly take any action necessary to continue the existing tariffs in effect. In no circumstances, however, shall a Contracting Party require a different tariff from the tariff of its own designated airlines for comparable service between the same points.

(8) The aeronautical authorities of each Contracting Party shall exercise their best efforts to ensure that the designated airlines conform to the agreed tariffs filed with the aeronautical authorities of the Contracting Parties, and that no airline rebates any portion of such tariffs by any means, directly or indirectly.

(9) In order to avoid tariff disputes to the greatest extent possible:

(a) a continuing Tariff Working Group shall be established to make recommendations on tariff-making standards, as provided in Annex 3;

(b) the aeronautical authorities will keep one another informed of such guidance as they may give to their own airlines in advance of or during traffic conferences of the International Air Transport Association; and

(c) during the period that the aeronautical authorities of either Contracting Party have agreements under consideration pursuant to paragraph (4) of this Article, the Contracting Parties may exchange views and recommendations, orally or in writing. Such views and recommendations shall, if requested by either Contracting Party, be presented to the aeronautical authorities of the other Contracting Party, who will take them into account in reaching their decision.

ARTICLE 13

Commissions

(1) The airlines of each Contracting Party may be required to file with the aeronautical authorities of both Contracting Parties the level or levels of commissions and all other forms of compensation to be paid or

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

(2) The level of commissions and other forms of compensation paid with respect to the sale, within the territory of a Contracting Party, of air transportation, shall be subject to the laws and regulations of such Contracting Party, which shall be applied in a nondiscriminatory fashion.

ARTICLE 14

Charter Air Service

(1) The Contracting Parties recognize the need to further the maintenance and development, where a substantial demand exists or may be expected, of a viable network of scheduled air services, consistently and readily available, which caters for all segments of demand and particularly for those needing a wide and flexible range of air services.

(2) The Contracting Parties also recognize the substantial and growing demand from that section of the travelling public which is price rather than time sensitive, for air services at the lowest possible level of fares. The Contracting Parties, therefore, taking into account the relationship of scheduled and charter air services and the need for a total air service system, shall further the maintenance and development of efficient and economic charter air services so as to meet that demand.

(3) The Contracting Parties shall therefore apply the provisions of Annex 4 to charter air services between their territories.

ARTICLE 15

Transitional Provisions

(1) Designation: On the entry into force of this Agreement, and until 1 November 1977, all designations and authorizations in effect pursuant

ARTICLE 16

Consultations

Either Contracting Party may at any time request consultations on the implementation, interpretation, application or amendment of this Agreement or compliance with this Agreement. Such consultations shall begin within a period of 60 days from the date the other Contracting Party receives the request, unless otherwise agreed by the Contracting Parties.

ARTICLE 17

Settlement of Disputes

(1) Any dispute arising under this Agreement, other than disputes where self-executing mechanisms are provided in Article 12 (Tariffs) and Annex 2, which is not resolved by a first round of formal consultations, may be referred by agreement of the Contracting Parties for decision to some person or body. If the Contracting Parties do not so agree, the dispute shall at the request of either Contracting Party be submitted to arbitration in accordance with the procedures set forth below.

(2) Arbitration shall be by a tribunal of three arbitrators to be constituted as follows:

(a) within 30 days after the receipt of a request for arbitration, each Contracting Party shall name one arbitrator. Within 60 days after these two arbitrators have been nominated, they shall by agreement appoint a third arbitrator, who shall act as President of the arbitral tribunal;

(b) if either Contracting Party fails to name an arbitrator, or if the third arbitrator is not appointed in accordance with subparagraph (a) of this paragraph, either Contracting Party may request the President of the International Court of Justice to appoint the necessary arbitrator or arbitrators within 30 days. If the President is of the same nationality as one of the Parties, the most senior Vice-President who is not disqualified on that ground shall make the appointment.

(3) Except as otherwise agreed by the Contracting Parties, the arbitral tribunal shall determine the limits of its jurisdiction in accordance with this Agreement, and shall establish its own procedure. At the direction of the tribunal or at the request of either of the

to the 1946 Bermuda Agreement shall remain in effect. Additional designations shall be subject to the provisions of Article 3 (Designation and Authorization of Airlines) of this Agreement. By 1 November 1977, each Contracting Party shall indicate to the other all the initial designations applicable under this Agreement. Nothwithstanding the provisions of Article 3, until 1 November 1977:

(a) the United States shall be entitled to retain two designated airlines to operate combination air services on each of three gateway route segments on US Routes 1 and 2, taken together; and

(b) the United Kingdom shall be entitled to retain three designated airlines to operate combination air services on one gateway route segment on UK Routes 1, 2, 3, 4 and 5, taken together.

(2) Capacity. Notwithstanding the provisions of Annex 2, as regards the winter traffic season of 1977/78 the following procedures shall apply:

Paragraph (3): Airlines shall file schedules not later than 120 days prior to the winter traffic season, instead of 180 days.

Paragraph (3): Airlines shall refile amendments not later than 105 days prior to the winter traffic season, instead of 165 days.

Paragraph (4): A Contracting Party's notice of inconsistency shall be given within 90 days, instead of 150 days.

Paragraph (5): If requested, consultations shall begin not later than 75 days prior to the winter traffic season, instead of 90 days.

Paragraph (6): If agreement on capacity to be operated is not achieved, paragraph (6) procedures shall apply within 60 days prior to the winter traffic season, instead of 75 days.

(3) Tariffs. All tariffs filed to become effective on or after 1 November 1977, and all agreements filed to become effective on or after 1 January 1978 shall be subject to the provisions of Article 12 (Tariffs). Agreements filed to become effective prior to 1 January 1978 shall be subject to the provisions of Article 12 to the greatest extent feasible. Tariffs filed to become effective prior to 1 November 1977 shall be subject to the provisions of the 1946 Bermuda Agreement, and all tariffs in effect under the 1946 Bermuda Agreement shall continue in force, but either Contracting Party may notify the other Contracting Party of its dissatisfaction with any such tariffs, and the procedures set forth in this Agreement shall then apply.

Contracting Parties, a conference to determine the precise issues to be arbitrated and the specific procedures to be followed shall be held no later than 15 days after the tribunal is fully constituted.

(4) Except as otherwise agreed by the Contracting Parties or prescribed by the tribunal, each Party shall submit a memorandum within 45 days of the time the tribunal is fully constituted. Replies shall be due 60 days later. The tribunal shall hold a hearing at the request of either Party or at its discretion within 15 days after replies are due.

(5) The tribunal shall attempt to render a written decision within 30 days after completion of the hearing or, if no hearing is held, after the date both replies are submitted, whichever is sooner. The decision of the majority of the tribunal shall prevail.

(6) The Contracting Parties may submit requests for clarification of the decision within 15 days after it is rendered and any clarification given shall be issued within 15 days of such request.

(7) Each Contracting Party shall, consistent with its national law, give full effect to any decision or award of the arbitral tribunal. In the event that one Contracting Party does not give effect to any decision or award, the other Contracting Party may take such proportionate steps as may be appropriate.

(8) The expenses of the arbitral tribunal, including the fees and expenses of the arbitrators, shall be shared equally by the Contracting Parties. Any expenses incurred by the President of the International Court of Justice in connection with the procedures of paragraph (2)(b) of this Article shall be considered to be part of the expenses of the arbitral tribunal.

ARTICLE 18

Amendment

Any amendments or modifications of this Agreement agreed by the Contracting Parties shall come into effect when confirmed by an Exchange of Notes.

ARTICLE 19

Termination

Either Contracting Party may at any time give notice in writing to the other Contracting Party of its decision to terminate this Agreement. Such notice shall be sent simultaneously to the International Civil Aviation Organization. This Agreement shall terminate at midnight (at the place of receipt of the notice) immediately before the first anniversary of the date of receipt of the notice by the other Contracting Party, unless the notice is withdrawn by agreement before the end of this period.

ARTICLE 20

Registration with ICAO

This Agreement and all amendments thereto shall be registered with the International Civil Aviation Organization.

ARTICLE 21

Entry into Force

This Agreement shall enter into force on the date of signature.

ANNEX 1 - Route Schedules

Section 1: Scheduled Combination Air Service Routes for the United States

1. Atlantic Combination Air Serice
2. Round the World Combination Air Service
3. Pacific Combination Air Service
4. Bermuda Combination Air Service
5. Bermuda Combination Air Service - Beyond
6. Caribbean Combination Air Service

Section 2: Scheduled All-Cargo Air Service Routes for the United States

7. Atlantic All-Cargo Air Service
8. Pacific All-Cargo Air Service
9. Bermuda All-Cargo Air Service
10. Bermuda All-Cargo Air Service - Beyond
11. Caribbean All-Cargo Air Service

Section 3: Scheduled Combination Air Service Routes for the United Kingdom

1. Atlantic Combination Air Service
2. Atlantic Combination Air Service via Canada
3. Atlantic Combination Air Service Beyond to Mexico City
4. Atlantic Combination Air Service Beyond to South America
5. Atlantic Combination Air Service Beyond to Japan
6. Pacific Combination Air Service
7. Pacific Combination Air Service via Tarawa
8. Bermuda Combination Air Service
9. Caribbean Combination Air Service

Section 4: Scheduled All-Cargo Air Service Routes for the United Kingdom

10. Atlantic All-Cargo Air Service
11. Atlantic All-Cargo Air Service Beyond to South America
12. Atlantic All-Cargo Air Service Beyond to Mexico
13. Pacific All-Cargo Air Service
14. Pacific All-Cargo Air Service via Tarawa
15. Bermuda All-Cargo Air Service
16. Caribbean All-Cargo Air Service

Section 5: Notes Applicable to All Route Schedules

Section 1: Scheduled Combination Air Service Routes for the United States
US Route 1: Atlantic Combination Air Services

(A) US Gateway Points	(B) Intermediate Points	(C) Points in UK Territory	(D) Points Beyond 2/ 3/
Anchorage		London	Frankfurt
Atlanta		Prestwick/Glasgow	Hamburg
Boston			Munich
Chicago			Berlin
Dallas/Ft. Worth			
Detroit			
Houston 1/			
Los Angeles			
Miami			
New York			
Philadelphia			
San Francisco			
Seattle			
Washington/Baltimore			
An additional point to be agreed between the Contracting Parties 1/			

1/ May not be served nonstop until three years after this Agreement enters into force.

2/ In addition, Austria and Belgium may be served for three years after this Agreement enters into force; the Netherlands, Norway and Sweden may be served for five years after this Agreement enters into force; and these points shall be considered as appearing in Column (D) for the specified periods.

3/ Only one US airline may be designated to serve each point in Column (D) on this route, including those in footnote 2, except for Frankfurt for which two airlines may be designated on US Routes 1 and 2 taken together.

US Route 2: Round the World Combination Air Service [1/]

(A) US Gateway Points	(B) Intermediate Points	(C) Points in UK Territory	(D) Points Beyond
Segment (a):		London	Frankfurt [2/]
New York			Turkey
Washington/Baltimore			Lebanon
			Syria
			Iran
			Pakistan
			New Delhi
Segment (b):			Calcutta
Honolulu			Points on Segment (b) [3/]
Los Angeles	Japan	Hong Kong	Thailand
San Francisco			Points on Segment (a) [3/]

1/ Not more than seven flights per week may operate in each direction on each segment.
2/ Not more than two US airlines may be designated to serve Frankfurt on US Routes 1 and 2, taken together.
3/ Segments (a) and (b) shall be combined, except as may be agreed pursuant to Article 2, paragraph (5).

US Route 3: Pacific Combination Service

(A) US Gateway Points	(B) Intermediate Points	(C) Points in UK Territory	(D) Points Beyond
Anchorage	Japan 1/	Hong Kong	Thailand 2/
Guam			Singapore 2/
Honolulu			
Los Angeles			
New York			
San Francisco			
Seattle			

1/ Not more than 14 round trip combination flights per week may serve Japan with full traffic rights between Japan and Hong Kong. Flights which serve Japan on US Route 2 shall count toward this number.

2/ Thailand and Singapore may not both be served on the same flight. Not more than 7 round trip combination flights per week may serve these points taken together with full traffic rights between Hong Kong and these points. Flights which serve Thailand on US Route 2 shall count toward this number.

US Route 4: Bermuda Combination Air Service

(A) US Gateway Points	(B) Intermediate Points	(C) Points in UK Territory	(D) Points Beyond
Atlanta		Bermuda	
Baltimore			
Boston			
Chicago			
Detroit			
Miami			
New York			
Philadelphia			
Washington			

US Route 5: Bermuda Combination Air Service - Beyond

(A) US Gateway Points	(B) Intermediate Points	(C) Points in UK Territory	(D) Points Beyond
Atlanta		Bermuda	Azores
Baltimore			Two points in Europe (other than the United Kingdom) to be agreed between the Contracting Parties
Miami			
Washington			

US Route 6: Caribbean Combination Air Service

(A) US Gateway Points	(B) Intermediate Points	(C) Points in UK Territory	(D) Points Beyond
Any point or points in US Territory	Aruba Bahamas Barbados Bonaire Cuba Curacao Dominican Republic Grenada Guadeloupe Guyana Haiti Jamaica Martinique St. Maarten St. Martin Trinidad & Tobago US points in the Caribbean area Venezuela	Antigua Dominica St. Christopher (St. Kitts)-Nevis-Anguilla 1/ St. Lucia St. Vincent Belize British Virgin Islands Cayman Islands Montserrat Turks & Caicos Islands	

1/ Any one or more of the points may be served.

Section 2: Scheduled All-Cargo Air Service Routes for the United States
US Route 7: Atlantic All-Cargo Air Service

(A) US Gateway Points	(B) Intermediate Points	(C) Points in UK Territory	(D) Points Beyond
Boston		London	Belgium
Chicago		Manchester	Netherlands
Detroit		Prestwick/Glasgow	Federal Republic of Germany
Houston 1/			Turkey
Los Angeles			Lebanon
New York			Syria
Philadelphia			Jordan
			Iran
			India

1/ May not be served nonstop until three years after this Agreement enters into force.

US Route 8: Pacific All-Cargo Air Service

(A) US Gateway Points	(B) Intermediate Points	(C) Points in UK Territory	(D) Points Beyond
Anchorage		Hong Kong	
Chicago			
Guam			
Honolulu			
Los Angeles			
New York			
San Francisco			
Seattle			

US Route 9: Bermuda All-Cargo Air Service

(A) US Gateway Points	(B) Intermediate Points	(C) Points in UK Territory	(D) Points Beyond
Atlanta		Bermuda	
Baltimore			
Boston			
Chicago			
Detroit			
Miami			
New York			
Philadelphia			
Washington			

US Route 10: Bermuda All-Cargo Air Service - Beyond

(A) US Gateway Points	(B) Intermediate Points	(C) Points in UK Territory	(D) Points Beyond
Atlanta		Bermuda	Azores
Baltimore			Two points in Europe (other than the United Kingdom) to be agreed between the Contracting Parties
Miami			
Washington			

US Route 11: Caribbean All-Cargo Air Service

(A) US Gateway Points	(B) Intermediate Points	(C) Points in UK Territory	(D) Points Beyond
Any point or points in US Territory	Aruba Bahamas Barbados Bonaire Cuba Curacao Dominican Republic Grenada Guadeloupe Guyana Haiti Jamaica Martinique St. Maarten St. Martin Trinidad & Tobago US points in the Caribbean area Venezuela	Antigua Dominica St. Christopher (St. Kitts)-Nevis-Anguilla 1/ St. Lucia St. Vincent Belize British Virgin Islands Cayman Islands Montserrat Turks & Caicos Islands	

1/ Any one or more of the points may be served.

Section 3: Scheduled Combination Air Service Routes for the United Kingdom

UK Route 1: Atlantic Combination Air Service

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
London		Atlanta [1/]	
Manchester		Boston	
Prestwick/Glasgow		Chicago	
		Dallas/Ft. Worth [1/]	
		Detroit	
		Houston	
		Los Angeles	
		Miami	
		New York	
		Philadelphia	
		San Francisco	
		Seattle	
		Washington/Baltimore	

1/ May not be served nonstop until three years after this Agreement enters into force.

UK Route 2: Atlantic Combination Air Service via Canada

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
London	Canada	Boston	
Manchester		Chicago	
Prestwick/Glasgow		Dallas/Ft. Worth 1/	
		Detroit	
		New York	
		Philadelphia	
		Washington/Baltimore	

1/ May not be served nonstop until three years after this Agreement enters into force.

UK Route 3: Atlantic Combination Air Service Beyond to Mexico City

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
London		Boston	Mexico City
Manchester		Detroit	
Prestwick/Glasgow		New York	
		Philadelphia	
		Washington/Baltimore	

UK Route 4: Atlantic Combination Air Service Beyond to South America

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
London		Atlanta 1/	Venezuela
Manchester		Houston	Colombia
Prestwick/ Glasgow			Manaus
			Peru 2/

1/ May not be served nonstop until three years after this Agreement enters into force.
2/ Without rights to carry local traffic between Houston and Peru.

UK Route 5: Atlantic Combination Air Service Beyond to Japan

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
London		Anchorage	Japan

UK Route 6: Pacific Combination Air Service

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
Hong Kong	Japan 1/	Guam	Vancouver 2/
		Honolulu	
		Los Angeles 3/	
		San Francisco 3/	
		Seattle 3/	

1/ As long as there is any frequency limitation on combination air services of US designated airlines between Japan and Hong Kong, UK designated airlines may not serve Japan with more than 7 round trip combination flights per week with full traffic rights between US points and Japan.

2/ The route segment Honolulu-Vancouver may not be served nonstop until five years after this Agreement enters into force.

3/ Only two of the points, San Francisco, Seattle or Los Angeles, may be served during a traffic season. A designated airline may, in its discretion, and with not less than 90 days notice, change from one of these points to another each season.

UK Route 7: Pacific Combination Air Service via Tarawa

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
Tarawa	Christmas Island	Honolulu	

UK Route 8: Bermuda Combination Air Service

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
Bermuda		Three points to be selected by the UK and notified to the US	

UK Route 9: Caribbean Combination Air Service

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
Antigua	Bahamas	Baltimore 1/	
Dominica	Barbados	Houston 1/	
St. Christopher (St. Kitts)-Nevis-Anguilla 2/	Cuba	Miami 1/	
St. Lucia	Dominican Republic	New Orleans 1/	
St. Vincent	Grenada	Puerto Rico	
Belize	Guadeloupe	Tampa 1/	
British Virgin Islands	Guyana	US Virgin Islands	
Cayman Islands	Haiti	Washington 1/	
Montserrat	Jamaica		
Turks & Caicos Islands	Martinique		
	St. Maarten		
	St. Martin		
	Trinidad & Tobago		
	Any point or points in Column (A)		

1/ Each UK designated airline may not during a traffic season serve more than two of the following US points: Baltimore, Houston, Miami, New Orleans, Tampa or Washington. Each designated UK airline may, in its discretion, and with not less than 90 days notice, change from one of these points to another each season.

2/ Any one or more of these points may be served.

Section 4: Scheduled All-Cargo Air Service Routes for the United Kingdom

UK Route 16: Atlantic All-Cargo Air Service

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
London	Canada 1/	Boston	Panama 1/
Manchester		Chicago	
Prestwick/Glasgow		Detroit	
		Los Angeles 1/	
		New York	
		Washington/Baltimore	

1/ Without rights to carry local traffic between Los Angeles and Canada and between Los Angeles and Panama.

UK Route 11: Atlantic All-Cargo Air Service Beyond to South America

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
London		Atlanta 1/	Venezuela
Manchester		Houston	Colombia
Prestwick/ Glasgow			Manaus
			Peru 2/

1/ May not be served nonstop until three years after this Agreement enters into force.
2/ Without rights to carry local traffic between Houston and Peru.

UK Route 12: Atlantic All-Cargo Air Service Beyond to Mexico

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
London		Miami	Mexico City
Manchester			
Prestwick/Glasgow			

UK Route 13: Pacific All-Cargo Air Service

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
Hong Kong		Guam	
		Honolulu	
		Los Angeles	
		San Francisco	
		Seattle	

UK Route 14: Pacific All-Cargo Air Service via Tarawa

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
Tarawa	Christmas Island	Honolulu	

UK Route 15: Bermuda All-Cargo Air Service

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
Bermuda		Three points to be selected by the UK and notified to the US	

UK Route 16: Caribbean All-Cargo Air Service

(A) UK Gateway Points	(B) Intermediate Points	(C) Points in US Territory	(D) Points Beyond
Antigua	Bahamas	Baltimore 1/	
Dominica	Barbados	Houston 1/	
St. Christopher (St. Kitts)-Nevis-Anguilla 2/	Cuba	Miami 1/	
St. Lucia	Dominican Republic	New Orleans 1/	
St. Vincent	Grenada	Puerto Rico	
Belize	Guadeloupe	Tampa 1/	
British Virgin Islands	Guyana	US Virgin Islands	
Cayman Islands	Haiti	Washington 1/	
Montserrat	Jamaica		
Turks & Caicos Islands	Martinique		
	St. Maarten		
	St. Martin		
	Trinidad & Tobago		
	Any point or points in Column (A)		

1/ Each UK designated airline may not during a traffic season serve more than two of the following US points: Baltimore, Houston, Miami, New Orleans, Tampa or Washington. Each designated UK airline may, in its discretion, and with not less than 90 days notice, change from one of these points to another each season.

2/ Any one or more of these points may be served.

SECTION 5

NOTES APPLICABLE TO ALL ROUTES

1. In addition to the right to carry transit, connecting, and local traffic between points in column B and points in column C and between points in column C and points in column D, designated airlines may carry transit and on-line connecting traffic between points in column C and points in other countries, including countries not listed in columns B or D. Such on-line connecting traffic may be connected at any points in columns A, B, C or D or at any points in countries not listed in such columns.

2. Each designated airline may carry transit and on-line connecting traffic between any two points in the territory of the other Contracting Party which appear in either column C or column D on any route for which that airline is designated.

3. Except as may be otherwise specifically provided, a designated airline may, on any or all flights, and at its option, serve points on a route and operate via points not listed in columns A, B, C or D in any order, operate flights in either or both directions, and omit stops at any point or points, without loss of any right to uplift or discharge traffic otherwise permissible under the relevant routes or notes applicable thereto, provided that the service begins or terminates in the territory of the Contracting Party designating the airline. Unless specifically restricted, a point on a route appearing in column B shall be considered as also appearing in column D, and a point in column D shall be considered as also appearing in column B.

4. A designated airline may carry traffic between points in column A and points in column C, on the same flight or otherwise, via points in other countries, including countries not listed in columns B or D.

5. A designated airline may serve points behind any homeland gateway point shown in column A with or without change of aircraft or flight number and may hold out and advertise such services to the public as through services.

6. A designated airline of one Contracting Party may make a change of gauge in the territory of the other Contracting Party or at points in column B or column D or at points in other countries, provided that:

   (a) operations beyond the point of change of gauge shall be performed by an aircraft having capacity less, for outbound services, or more, for inbound services, than that of the arriving aircraft;

(b) aircraft for such operations shall be scheduled in coincidence with the inbound or outbound aircraft, as the case may be, and shall have the same flight number;

(c) in the case of combination air services only, the onward flight, inbound or outbound as the case may be, shall be scheduled to depart within three hours of the scheduled arrival of the incoming aircraft, unless airport curfews, airport slots, or other operational constraints, at the point where change of gauge occurs or at the next point or points of destination of the flight, prevent such scheduling; and

(d) if a flight is delayed by unforeseen operational or mechanical problems, the onward flight may operate without regard to the conditions in paragraphs((b) and (c) of this Note.

7. Stops for non-traffic purposes may be made at any point in connection with the operations on any route.

8. Notwithstanding the terms of Notes 1, 4 and 7 of this Section, US designated airlines serving Hong Kong shall not make stops for traffic or non-traffic purposes at any point or points in the mainland territory of the People's Republic of China.

9. In these Notes:

"Transit traffic" means that traffic which is carried on a flight through a point. Flight, for the purpose of this definition, means either:

(a) The arrival and onward operation of an aircraft by an airline whether or not under the same flight identification number, or

(b) the arrival of one aircraft and next onward operation of another aircraft under the same flight identification number, as other wise allowable under this Agreement, including Note 6 of this Section; and

"On-line connecting traffic" means that traffic which is carried on an incoming flight of an airline and is transferred to an onward flight of the same airline under a different flight identification number. For passengers only, the onward transfer shall be ticketed on the first available onward flight of that airline for the point to which a passenger is connecting, provided that the time between the scheduled arrival of the incoming flight and the scheduled departure of the onward flight does not exceed 24 hours.

ANNEX 2 - Capacity on the North Atlantic

(1) In order to ensure the sound application of the principles set forth in Article 11 (Fair Competition) of this Agreement and in view of the special circumstances of North Atlantic air transport, the Contracting Parties have agreed to the following procedures with respect to combination air services on US Routes 1 and 2 and UK Routes 1, 2, 3, 4 and 5, specified in Annex 1.

(2) The purpose of this Annex is to provide a consultative process to deal with cases of excess provision of capacity, while ensuring that designated airlines retain adequate scope for managerial initiative in establishing schedules and that the overall market share achieved by each designated airline will depend upon passenger choice rather than the operation of any formula or limitation mechanism. In keeping with these objectives, the Contracting Parties desire to avoid unduly frequent invocation of the consultative mechanism or limitation provision in order to avoid undue burden of detailed supervision of airline scheduling for the Contracting Parties.

(3) Not later than 180 days before each summer and winter traffic season, each designated airline shall file with both Contracting Parties its proposed schedules for services on each relevant gateway route segment for that season. Such schedules shall specify the frequency of service, type of aircraft and all the points to be served. The designated airlines may amend their filings in the light of the schedules so filed and shall file such amendments with both Contracting Parties not later than 165 days before each summer and winter traffic season. In the event that adjustments in schedules are later required, such adjustments shall be filed with both Contracting Parties on a timely basis. A resulting increase in frequency by an airline on any gateway route segment shall be subject to the approval of the other Contracting Party.

(4) If a Contracting Party (the "Receiving Party") believes that an increase in frequency of service on a gateway route segment contained in any of the schedules so filed with it by a designated airline of the other Contracting Party (the "Requesting Party") may be inconsistent with the principles set forth in Article 11 of this Agreement, it shall, not later than 150 days before the next traffic season, notify the Requesting Party, giving the reasons for its belief and, in its discretion, indicating the increase, if any, in frequency of service on the gateway route segment which it considers consistent with the Agreement. Such notification shall not, however, be permitted in respect of a schedule for a summer traffic season which specifies a total of 120 or fewer round trip frequencies on any gateway route segment or for a winter traffic season which specifies 88 or fewer such frequencies. The Requesting Party shall review the increase in frequency of service called into question in the light of the principles set forth in Article 11, taking into account the public

requirement for adequate capacity, the need to avoid uneconomic excess capacity, the development of routes and services, the need for viable airline operations, and the capacity offered by airlines of third countries between the points in question. The Requesting Party shall, not later than 120 days before the next traffic season, notify the Receiving Party of the extent to which it considers that the increase in frequency is consistent with the principles set forth in Article 11.

(5) If the Receiving Party is not satisfied with the Requesting Party's determination with respect to the increase in frequency in question, it shall so notify the Requesting Party not later than 105 days before the next traffic season, and consultations shall be held as soon as possible and in any event not later than 90 days before that traffic season. In such consultations, the Parties shall exchange relevant economic data, including forecasts of the percentage increase in total on-board revenue passenger traffic expected on the gateway route segment in question when the next traffic season is compared with the previous corresponding season.

(6) If, 75 days before the traffic season begins, agreement has not been reached through such consultations, each designated airline on the gateway route segment in question shall be entitled to operate during the next traffic season the schedule it proposes to operate, but not more than the sum of:

(a) the total number of round trip frequencies (excluding extra sections) which that airline was allowed under this Annex to operate on that gateway route segment during the previous corresponding season; and

(b) such number of round trip frequencies as are determined by applying to the number described in subparagraph (a) the average of the forecast percentages mentioned in paragraph (5) of this Annex. An addition of 20 round trip frequencies during a summer traffic season or 15 during a winter traffic season shall in any event be permitted.

In no event shall a designated airline be required to operate fewer than 120 round trip frequencies during a summer traffic season or 88 during a winter traffic season.

(7) A designated airline of one Contracting Party which inaugurates service on a gateway route segment already served by a designated airline or airlines of the other Contracting Party shall not be bound by the limitations set forth in paragraph (6) of this Annex for a period of two years or until it matches the frequencies of any incumbent airline of that other Contracting Party, whichever occurs first.

(8) Operations of Concorde aircraft by United Kingdom designated airlines shall not be subject to the provisions of this Annex. In order, however, that this exclusion should not unfairly affect United States

(3) The Tariff Working Group shall develop procedures for the exchange, on a recurrent basis, of verified financial and traffic statistics in order to assist each Contracting Party in assessing tariff proposals.

(4) The Tariff Working Group shall, by 23 July 1978, make recommendations to the Contracting Parties on load factor standards and evaluation and review criteria for North Atlantic tariffs.

(5) The Contracting Parties shall review the recommendations of the Tariff Working Group and, subject to the outcome of this review, shall give due consideration to these recommendations in reviewing tariffs and agreements reached under the auspices of the International Air Transport Association.

(6) Either Contracting Party may from time to time request that the Tariff Working Group be convened to consider specific issues.

ANNEX 4 - Charter Air Service

(1) The Memorandum of Understanding on Passenger Charter Air Services between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, applying from 1 April 1977, shall be regarded as being incorporated in this Annex for as long as it remains in force.

(2) Articles 1, 2 (paragraphs (1), (3), and (4)), 4, 6, 8 (except that paragraph (3) shall apply only to the extent authorized by the aeronautical authorities in the relevant territory), 9, 10, 14, 16, 17, 18, 19, 20, and 21 of this Agreement shall apply to airlines authorized by both Contracting Parties to operate charter international air services between the territories of the two Contracting Parties.

(3) In furtherance of paragraphs (1) and (2) of Article 14 of this Agreement, the Contracting Parties agree that it is desirable to work toward a multilateral arrangement for charter air services in the North Atlantic market. The Contracting Parties also agree that a bilateral agreement would be an appropriate means of achieving their common objective. Such bilateral agreement should include, among other matters, progressive charterworthiness conditions, freedom of market access, arrangements for designation and authorization of charter airlines which lead to the issue of permits rather than individual flight licenses, minimization of administrative burdens, all-cargo charter arrangements, and capacity and price arrangements consistent with those contained in the Memorandum of Understanding on Passenger Charter Air Services. The Contracting Parties shall enter into negotiations as soon as possible

designated airlines, the United States airline designated to operate combination air services on the Washington-London gateway route segment may not be required, under paragraph (6) of this Annex, to operate fewer than seven round trip flights per week.

(9) Each Contracting Party shall allow filed schedules which have not been questioned under paragraph (5) of this Annex to become effective on their proposed commencement dates. Each Contracting Party shall allow schedules which may have been determined by agreement through consultations or, in the absence of such agreement, as provided in paragraph (6) of this Annex, to become effective on their proposed commencement dates. Each Contracting Party may take such steps as it considers necessary to prevent the operation of schedules which include frequencies greater than those permitted or agreed under this Annex.

(10) Each designated airline shall be entitled to operate extra sections on any gateway route segment, provided that such extra sections are not advertised or held out as separate flights.

(11) In the event that either Contracting Party believes that this Annex is not achieving the objectives set forth in paragraph (2), they may consult at any time, pursuant to Article 16 (Consultations) of this Agreement, to consider alterations to the procedures or numerical limitations.

(12) Subject to Article 19 (Termination) of this Agreement, this Annex shall remain in force for a period of five years. The Contracting Parties shall consult during the first quarter of the fifth year after the entry into force of this Agreement to review the operation of the Annex and to decide as to its extension or revision. If the Contracting Parties do not agree on extension or revision, this Annex shall remain in force for a further period of two years and shall then lapse.

(13) For the purposes of this Annex, "summer and winter traffic seasons" mean, respectively, the periods from 1 April through 31 October and from 1 November through 31 March.

ANNEX 3 - Tariffs

(1) A Tariff Working Group shall be established and shall consist of experts from each Contracting Party in areas such as accounting, statistics, financial analysis, economics, pricing and marketing.

(2) The Tariff Working Group shall meet within 90 days of the entry into force of this Agreement and thereafter as necessary to accomplish the objectives of this Agreement.

and, in any event, not later than 31 December 1977, to work towards the foregoing objectives. In the absence of agreement by 31 March 1978, the Contracting Parties agree to consult further with a view to a continuation of liberal arrangements for charter air services.