BILATERAL AIR SERVICES AGREEMENTS OF SRI LANKA

by

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ABSTRACT

The main objective of this thesis is to analyze the bilateral air services agreements of Sri Lanka under the existing legal, regulatory and the infrastructural framework of civil aviation in Sri Lanka. In order to achieve this objective, this thesis is divided into following chapters,

Chapter One – Deals with the history and evolution of bilateral air services agreements in the history of world civil aviation.

Chapter Two – This Chapter has two sections. Section one addresses briefly the history and evolution of the air transport industry of Sri Lanka. Section two looks into the legal and regulatory framework within which the air transport industry works in Sri Lanka. Negotiation and Conclusion of bilateral air services agreements is also explained in this section.

Chapter Three – Contains a detailed analysis of the main provisions of the bilateral air services agreements concluded by Sri Lanka.

Chapter Four – The existing infrastructure and the prospects for the future is discussed in this chapter along with the challenges faced and to be faced in the future.

Finally, the findings of this research are presented with recommendations for the betterment of air transport industry of Sri Lanka.

RESUME

L'objectif principal de ce mémoire est l'analyse des accords bilatéraux de services aériens conclus par le Sri Lanka dans le cadre juridique, réglementaire et structurel de l'aviation civile au Sri Lanka. Pour atteindre ce but, ce mémoire se compose des chapitres suivants :

Chapitre un – Il se rapporte à l'histoire et à l'évolution des accords bilatéraux de services aériens dans le contexte de l'aviation civile mondiale.

Chapitre deux – Ce chapitre comprend deux parties. La première partie traite brièvement de l'histoire et de l'évolution de l'industrie sri lankaise du transport aérien. La seconde partie étudie le cadre juridique et réglementaire dans lequel évolue l'industrie du transport aérien au Sri Lanka. On trouve également une explication de la manière dont les accords bilatéraux de services aériens sont négociés et conclus.

Chapitre trois – Ce chapitre contient une analyse détaillée des dispositions principales contenues dans les accords bilatéraux de services aériens conclus par le Sri Lanka.

Chapitre quatre – Les infrastructures existantes et les perspectives futures de même que les défis à relever sont examinées dans ce chapitre.

Finalement, les conclusions de cette recherche sont présentées et des recommandations visant à une amélioration de l'industrie du transport aérien au Sri Lanka sont dévoilées.

TABLE OF CONTENTS

INTRODUCTION 1

CHAPTER ONE 5

1.1 HISTORICAL EVOLUTION OF BILATERAL AGREEMENTS 5
1.1 (a) Pre World War II Bilateralism 5
1.1 (b) Post World War II Bilateralism 7
1.1 (b) (i) Chicago Form of Standard Agreement for Provisional Air Routes 9
1.2 BERMUDA I AGREEMENT 11
1.3 BERMUDA II AGREEMENT 13
1.4 OPEN SKIES AGREEMENTS 14
1.5 NEW TRENDS IN MODERN LIBERAL BILATERALISM – A BRIEF OVERVIEW 16

CHAPTER TWO 19

SECTION I 19
2.1 History and evolution of the air transport industry in Sri Lanka 19
1.2 (a) History of Civil Aviation of Sri Lanka 20
SECTION II 24
2.2 Legal and Regulatory Framework governing the Air Transport Industry in Sri Lanka 24
2.2 (a) The Aviation Policy of Sri Lanka 24
2.2 (b) Legal and Regulatory Framework 26
2.2 (b) (i) Air Navigation Act No. 15 of 1950 as amended 27
2.2 (b) (ii) Air Navigation (Special Provisions) Act No. 2 of 1982 28
2.2 (b) (iii) Air Navigation (Special Provisions) Act No.55 of 1992 28
2.2 (b) (iv) Civil Aviation Authority Act No.34 of 2002 29
2.2 (b) (v) Civil Aviation Bill of 2001 31
2.3 NEGOTIATION AND CONCLUSION OF BILATERAL AGREEMENTS 34

CHAPTER THREE 37

3.1 ANALYSIS OF THE BILATERAL AIR TRANSPORT AGREEMENTS OF SRI LANKA 37
3.1 (a) General Overview 37
3.2 ANALYSIS OF THE IMPORTANT CLAUSES OF BILATERAL AIR TRANSPORT AGREEMENTS 38
3.2 (a) Granting of Rights 38
3.2 (a) (i) Reciprocity Clause 38
3.2 (a) (ii) Operating Permission 40
3.2 (a) (iii) Transit Rights 42
3.2 (a) (iv) Traffic Rights 44
3.2 (a) (v) Cabotage 46
3.2 (b) (i) Ancillary Rights 47
3.2 (b) (ii) Non- discrimination 47
3.2 (b) (iii) Use of Airports and other facilities and systems 49
3.2 (b) (iv) Facilitation 50
3.2 (b) (iv) User Charges (Airport and similar charges) 51
3.2 (b) (v) Exemption from Custom Duties and other Charges 52
3.2 (b) (vi) Aviation Security 54
3.2 (b) (vii) Aviation safety 57
3.2 (b) (viii) Certificates of Airworthiness and License of Personnel 59
3.2 (b) (ix) Commercial opportunities 60
3.3 INAUGURATION OF SERVICES 61
3.3 (a) Designation of an airline or airlines 61
3.3 (b) Operating Permission 63

3.3 (c) Substantial Ownership and Effective Control *64*
3.3 (d) The Regulation of Capacity and Frequency Control *68*
3.3 (e) Code Sharing *72*
3.3 (f) Tariffs *73*
3.3 (g) Change of Gauge *78*
3.3 (h) Settlement of Disputes *79*
3.3 (i) Consultations, Amendments and Modifications, Entry into Force and Termination *83*
3.3 (i) (i) Consultations *83*
3.3 (i) (ii) Amendment and Modification *84*
3.3 (i) (iii) Entry into Force *85*
3.3 (i) (iv) Termination *86*

CHAPTER FOUR **87**

4.1(a) Bilateral Air Services Agreements *87*
4.1(b) Opening the market *88*
4.1(c) The Infrastructure *89*
4.1(d) Domestic Air Transport Industry *90*
4.2 CHALLENGES FACED AND CHALLENGES AHEAD 91
4.2 (a) Civil War *91*
4.2 (b) Tsunami Factor *91*
4.2 (c) SARS and other communicable diseases *92*
4.2 (d) Peaking fuel prices *93*

CONCLUSIONS AND RECOMMENDATIONS **94**

BIBLIOGRAPHY **98**

Introduction

> "Air power is today the most dynamic force in the life of nations. Properly used, it can be the means to better understanding among the peoples of the world. Improperly used, it can be a threat to the general security, even in the time of peace....."[1]

This is a miracle age of civil aviation. The skies are congested in every minute of everyday with hi tech flying machines carrying billions of people and cargo. The demand to travel by air is ever rising, as the transportation by air has become the safest and speediest mode to move around the globe. Aviation today attracts recognition and regulation as opposed to other modes of transportation due to its inherent international nature of operations. But the industry is not without its quota of problems. The increasing security awareness, anti competitive practices, ballooning aviation fuel prices makes the life harder for the states and the carriers in equal proportions.

As the world is rotating with these changing positives and negatives, the relationships between the states are still hanging on the bilateral framework of exchanging air traffic rights. The repeated efforts to induce states to agree on a multilateral framework of exchanging traffic rights became fruitless as the safeguarding of interests of states became a sensitive issue. Therefore even after ninety odd years of the first bilateral agreement between France and Germany[2], the states are compelled to stick on to the existing mechanism as it is proven to be safe and comfortable. However, the states have not abandoned the idea of multilateralism. The world, while recognizing that the best tailored mechanism of exchanging traffic rights is bilateralism accepts that there is a possibility of

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[1] John C. Cooper, *The Right to Fly*, (New York: Henry Halt and Company, 1947) 1.

[2] P.P.C. Haanappel, "Bilateral Air Transport Agreements – 1913 – 1980" (1978-1980) 5 Int'l. Trade L. J. 241 [Haanappel].

regional arrangements, which facilitates to enter the market place as a block with great potential of bargaining and to reap the best for the states.

In an environment where everything is changing, bilateralism alone cannot be static. Therefore bilateral agreements too are changing to meet the needs of the states. Started with the Bermuda I model, followed ICAO model clauses and the states have come a long way in the path of privatization and liberalization of the air transport industry relaxing most important provisions of the agreements. The European Community, the Caribbean block and Latin American Community have formed into community networks and entered into agreements as community of states and not as individual states. It seems that every state should be aware of the winds of change in order to survive in the industry.

Sri Lanka, the pearl of the Indian Ocean entered into the air transport industry under the auspices of British colonial power. At the beginning Air Ceylon had only two aircraft and at one time both were grounded for the want of certification of airworthiness.[3] Over the years, the air transport industry has improved a lot. Aviation is a major driver of the economy of the country. With only one international carrier, viz Sri Lankan Airlines, the country has been able to compete with the other regional carriers strongly and effectively. In the year 2004 alone, 4,078,474 passengers have moved into, from, and through Sri Lanka and it is projected that a total of 5,123,000 passengers will choose Sri Lanka as their destination or transit point by the end of 2005.[4]

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[3] Panduka Senanayake, "Air Ceylon Suspends All Flights Pending Certification of Airworthiness" *Ceylon Daily News* (2 August 1978).

[4] H.M. Nimalsiri, "Progress Review-2004, Report of the Director General of Civil Aviation and Chief Executive Officer, Civil Aviation Authority of Sri Lanka", *Annual Report 2004*(31 March 2005), online: Civil Aviation Authority of Sri Lanka <http://www.caa.lk/anu_reps.htm> (date accessed 31 September 2005).

As of September 2005, Sri Lanka has entered into 62 bilateral air transport (service) agreements and Sri Lankan Airlines is flying into 48 destinations in 27 states.[5] The frequencies that are being utilized by the national carrier are proven to be inadequate for the increasing demand. Therefore in order to cater for the demand, the first and the immediate solution would be, to have multiple designations. It is imperative to introduce competent carriers to operate internationally on the routes not utilized by the national carrier. This would be useful to expedite the mission to make Colombo a hub between the two major hubs, viz Dubai and Singapore, between the gateways to Europe and Eastern Asia and Europe and Australia. Another area to be improved with the expansion of the international operations is the infrastructure of air transport industry. Basically the expansion of the Bandaranayke International Airport, completion of the proposed highways and a proper domestic aviation network is a must for the betterment of the aviation industry of Sri Lanka. Tourism is one of the major contributors to the national economy, which is highly dependent on air transport. And one million tourists are expected to tour the country in the year 2006. Therefore the infrastructure should be maintained in a travel friendly manner. The air taxi service provided by the Sri Lankan airlines is a commendable step towards achieving this target. However, there should be a service, which connects the international airport with the major tourist areas in the country.

As a long-term solution, it is suggested that grouping of South Asian states and negotiate as a community in future bilateral bargaining. South Asia has a huge tourist market. A regional arrangement would be immensely beneficial to all the states in the region.

Under these circumstances the author intends to evaluate the history of the bilateral agreements in the first place and move onto the Sri Lankan example of bilateralism. The

[5] Interview with Priyani Abeysekara, Senior Manager Legal Affairs, Sri Lankan Airlines (9 October 2005).

first step would be to understand the history of civil aviation of Sri Lanka, briefly, and the legal and regulatory framework within which the air transport industry of Sri Lanka operates. A detailed analysis of the major provisions of the existing bilateral agreements is contained in Chapter III. The projections for the future are then looked into before the concluding chapter, which carries conclusions and recommendations.

CHAPTER ONE

1.1Historical Evolution of Bilateral Agreements

1.1 (a) Pre World War II Bilateralism

Bilateral air transport agreements could be generally understood as international trade agreements[6], which facilitate the exchange of reciprocal rights and privileges regarding air traffic between two states. These agreements generally carry comprehensive and fully responsive clauses to the needs of both parties at the time of conclusion of such bilateral agreements.[7] Once states conclude international air transport agreements, the airlines take over the performance. These agreements need not be on a proper format as they could be concluded as treaties, executive agreements or exchange of notes and further an agreement could well be reached orally as well.[8]

Bilateralism in international civil air navigation could be traced to 1913 when the first bilateral air transport agreement concluded between France and Germany.[9] Aviation unlike other modes of transportation is inextricably interwoven with the fundamental issues of national sovereignty and always connected with international relationships.[10] However, the first attempt to achieve multilateralism in air transport was taken at the Paris Conference in 1919[11]. The drafters of the 1919 Convention, while recognizing the customary international law principle of the sovereignty of the states[12], envisaged that there should be no obstacles

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[6] Haanappel, *Supra note* 2 at 241.
[7] Bernstein I, "Liberal Bilateral Air Transport Services Agreements and Sixth Freedom Traffic Carriage and Pricing" (1980) 14 Int'l. L. 281[Bernstein].
[8] Bin Cheng, *Law of International Air Transport*, (London, Stevens and Sons Limited, 1962) 465 [Cheng].
[9] Haanappel, *Supra note* 2 at 241.
[10] Jhonson, "The International Aviation Policy of the United States" (1963) 29 J. Air L. and Com. 366.
[11] *Convention Relating to Regulation of Ariel Navigation*, 13 October 1919, 11 L.N.T.S. 173, 1922 U.K.T.S. 2 (hereinafter Paris Convention).
[12] Article 1 of the 1919 Convention reads as follows,

for the parties to the convention to exercise traffic rights on international air routes according to their will.[13]

Therefore the exchange of traffic rights was subjected to the Article 15 of the Paris Convention that required prior authorization to enter into the air space of another state.[14] It has been noted that this condition was intended to serve the security requirements than the commercial aspects of air navigation.[15] The states moved towards bilateral agreements during this time as multilateralism in commercial aviation was a dim prospect. Gradual increase of bilateral agreements between the contracting parties, namely, the Paris Convention of 1919, the Madrid Convention of 1926 and the Havana Convention of 1928 was highlighted during 1930s.[16] Although most agreements were negotiated between governments, it is interesting to note that there had been agreements negotiated between airlines and the governments concerned.[17] By 1939 bilateralism was established as the basic tool by which states exchanged commercial traffic rights on international routes.[18]

> The high contracting parties recognize that every power has complete and exclusive sovereignty over the air space above its territory.
> For the purpose of this convention, the territory of a state shall be understood as including national territory, both that of the mother country and of the colonies and the territorial waters adjacent thereto.

[13] Sir George Cribbett, "Some International Aspects of Air Transport', Journal of the Royal Aero. Society (1950) 669, Reprinted in I.A. Vlasic and M.A. Bradley, *The Public International Law of Air Transport; Materials and Documents*, Vol. 1, 1974 (McGill University) [Cribbett].

[14] Article 15 § 1 of the Paris Convention carries the general principle of air carriage. It states, "Every aircraft of a contracting state has the right to cross the airspace of another State without landing. In this case it shall follow the route fixed by the state over which the flight takes place. However, for reasons of general security, it will be obliged to land if ordered to do so by means of the signals provided in Annex D. And the exception lies in the § 2 of Article which specifies 'Every aircraft which passes from one state into another shall, if the regulations of the other state require it, land in one of the aerodromes fixed by the latter. ... And § 3 states that the establishment of international airways shall be subject to the consent of the states flown over.

[15] Bernstein, *Supra note* 7.

[16] Haanappel, *Supra note* 2 at 242.

[17] Cribett, *Supra note* 13 at 672.

[18] *Ibid* at 673.

1.1 (b) Post World War II Bilateralism

The Second major attempt to achieve a multilateral approach to the exchange of traffic rights was tabled at the Chicago Conference in 1944.[19] But again the conference ended up without any success over convincing the world to agree on a multilateral framework for exchange of economic rights. Even though the Chicago Conference failed to achieve multilateral agreement to the exchange of traffic rights, two agreements namely, the Air Transit agreement,[20] which carries the first two freedoms of air and the Air Transport agreement,[21] which lays down the five freedoms of the air, were opened to signature at the conference. The Five Freedoms of the air are,

a. The privilege to fly across a state's territory without landing;
b. The privilege to land for non traffic purposes;
c. The privilege to put down passengers, mail and cargo taken on in the territory off the State whose nationality the aircraft possess;
d. The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possess;
e. The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.

Out of these five freedoms, the first two freedoms are regarded as technical rights and the third, fourth and fifth freedoms are considered as the important economic or commercial traffic rights.[22] Therefore in every bilateral air transport agreement, the first two freedoms are exchanged almost automatically and the exchange of the third, fourth and fifth freedoms lead to much discussion and concern.

The Air Transit Agreement gained wide acceptance by the international community but the Air Transport Agreement, which was tabled by the United States with the expectation to

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[19] *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S 295, ICAO Doc. 7300/8, 8th Edition 2000 (hereinafter Chicago Convention).
[20] *International Air Services Transit Agreement*, 7 December 1944, 84 U.N.T.S. 389, ICAO Doc. 7500.
[21] *International Air Transport Agreement*, 7 December 1944, 171 U.N.T.S. 387.
[22] Haanappel, *Supra note* 2 at 244.

make good the losses of failure to achieve multilateralism in exchanging third, fourth and fifth traffic rights at the Chicago conference attracted only a few ratifications making the concept of multilateralism in air transport almost impossible to achieve.[23] The United States withdrew from the agreement in 1946. Therefore the world had to fall back on the bilateral agreements in exchanging traffic rights with the abandonment of multilateralism for the time being by the states.

As Bin Cheng had correctly perceived bilateral agreements would be the order of the day and for some time to come.[24]

Even though The Chicago Convention of 1944 failed altogether in laying down economics of the air transport industry, it did include provisions facilitating inter state negotiations for bilateral air transport agreements. Article 1 of the Chicago Convention reiterates the customary international law principle of sovereignty of states over its air space, "every state has complete and exclusive sovereignty over the air space above its territory"[25], repeating the Article 1 of the Paris Convention 1919.

Accordingly Article 6 of the Chicago Convention specifies that,

> 'No scheduled International air service may be operated over or into the territory of a contracting state, except with the special permission or of the authorization of that state, and in accordance with the condition of such permission or authorization.'

Article 6 of the Chicago Convention places a restriction on international flights from flying into the territories[26] of the contracting states. That is to say that if an airline wishes to enter

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[23] Only Bolivia, Burundi, Costa Rica, El Salvador, Ethiopia, Greece, Honduras, Liberia, Netherlands, Paraguay and Turkey have ratified the Air Transport Agreement so far.

[24] Cheng, *Supra note* 8 at 25.

[25] Michael Milde, "The Chicago Convention – After Fourty Years" (1984) 9 Ann. of Air & Sp. L.119.

[26] 'Territory' has been identified in the Chicago Convention as 'the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State' (Article 2).

into the air space of a territory of another contracting party, the airline must obtain special permission to enter into the air space of that contracting state and be bound by the conditions specified in the permission. It should be noted that even the provision seems to limit its application to the contracting states; every state follows this basic air law principle.

Chapter VII of the Convention authorizes the states to negotiate over their own rights and privileges regarding air transport.[27] Article 81 of the convention provides for the registration of all existing agreements between contracting states themselves and between contracting states and airlines with ICAO. Article 82 makes all the arrangements, (obligations and understandings) between contracting states themselves and non contracting parties which are inconsistent with terms, abrogated and the contracting parties agree not to enter into any obligation, which are inconsistent with the terms of the convention.[28] And Article 83 provides for the registration of new arrangements entered into by contracting parties.

1.1 (b) (i) Chicago Form of Standard Agreement for Provisional Air Routes

At the Chicago Conference an agreement was reached on a Form of Standard Agreement for Provisional Air Routes as a model for the bilateral agreements between the states.[29] This agreement was intended to be non-binding model for bilateral agreements, which could be followed by the states.[30] The form of agreement is silent on which commercial rights to be exchanged and does not specify routes but indicates that these commercial

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[27] Joseph Z Gertler, "Obsolescence of Bilateral Air Transport Agreements: A Problem and a Challenge" (1988) XIII Ann. of Air & Sp. L. 39.
[28] Supra *note* 19, Article 82.
[29] Paul Stephen Dempsey, "Evolution of Bilateral Air Transport Agreements", *The McGill/Concordia Report on International Civil Aviation Policy for Canada* (McGill University Center for Research on Air and Space Law, 2005) 87 at 89.
[30] Haanappel, P.P.C, *Pricing and Capacity Determination in International Air Transport - A legal Analysis* (Deventer: Kluwer Law and Taxation Publishers, 1984) 16.

rights to be included in annexes to the agreements.[31] The clauses contained in the form of standard agreements are as follows,[32]

1. The grant of rights to fly to be specified in an annex.
2. Provision for the designation of airlines and grant of the appropriate operating permission;
3. Non – discriminatory charges for Airports and other facilities;
4. Provisions for the treatment of fuel, lubricating oils and spare parts;
5. The applicability of national laws and regulations
6. Mutual recognition of certificates of airworthiness, competency and licenses;
7. Withholding of rights under certain conditions,
8. Registration of agreements and contracts with the provisional organization
9. Optional provision for arbitration
10. Such bilateral agreements to continue in force until amended or suspended by a general multilateral aviation convention, with provision however, for termination before such date on one year's notice.

It is clear by the time of this agreement there was a hope for a multilateral framework of exchanging commercial rights until the concerns were expressed by a Resolution at the Seventh Session of the ICAO Assembly in 1953, which stated that ' there is no present prospect of achieving a universal multilateral agreement.'[33] It has been observed that the basic objective of the standard form of agreements was to update the bilateral agreements existed during the pre war period.[34]

The USA was fast to adopt the form of standard agreement clauses to a number of bilateral agreements concluded in the immediate aftermath of the Chicago Conference. Even though the important clauses exchanging commercial rights were replaced by the clauses of

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[31] *Ibid*

[32] 'Standard form of agreement for Provisional Air Routes', (Section VIII) in Chicago Conference, Final Act, pp. 39-41.

[33] See ICAO Assembly, 7th Session, Minutes of the Plenary Meetings, ICAO Doc. 7409 A7-P/2, (1 September 1953) 67.

[34] Gertler Joseph Z., "ICAO and Bilateralism: The Case of Standard Bilateral Clauses" (1991) XVI Ann. of Air and Sp. L. 61.

Bermuda I type clauses later, most of the clauses in the standard form of agreement were to be found in such bilateral agreements.[35] The reason being that the Bermuda I agreement had the effect of expanding the provisions of the Standard Form, adding to the provisions of the Standard Form and supplementing the Standard Form regarding the commercial rights of aviation rather than negating the effect of the Chicago Standard Form of Provisional Routes.

1.2Bermuda I Agreement

With the failure of the Chicago Conference to secure the support of the states to agree on a multilateral framework for exchange of economic rights including the exchange of third, fourth and fifth freedom traffic rights, capacity matters, frequencies and tariffs,[36] the United States of America and the United Kingdom sat down to negotiate a fresh agreement on sharing rights and privileges.

By the time negotiations were started, the pre World War II strength of aviation power of the two countries had completely changed. That is to say that prior to World War II, the United Kingdom was pressing on the free access to the market and the United States was catering on the pre determination of capacity.[37]World War II resulted in a complete twist in the positions of the two states and when the Chicago conference was initiated, the United Kingdom was catering on the pre determination of the capacity and the United States was bargaining on the free access to markets. However, the two aviation powers across the Atlantic were hard on getting access to each other's markets and beyond. After lengthy

[35] *Supra note* 30 at 20.
[36] Haanappel, *Supra note* 2 at 246.
[37] Haanappel, *Supra note* 2 at 243.

discussions between the two strong bargaining powers a final agreements was reached at Bermuda on 11th February 1946.[38]

The Bermuda I agreement has a Final Act, an Agreement and several Annexes. Traffic rights, ratemaking and other technical matters are embodied in annexes while capacity and frequency issues are included in the Final Act. The reason why important matters are embodied in the annexes is that they are likely to change frequently and it is easy to amend those provisions in the annexes.

The Bermuda I agreement provided discretion to the air carriers to a certain degree in determining capacity, frequency and tariff matters.[39] Their decision was only subjected to an *est post facto* review by the governments.[40] Another important feature of Bermuda I agreement was the recognition of IATA ratemaking clause, which was treated as achieving some sort of multilateralism through bilateralism.[41]

With the successful implementation and application of the Bermuda I type agreements between USA and UK; many states concluded bilateral agreements, which followed the Bermuda I type stated as having an accepted standard form of bilateral agreement, with of course deviations in frequency and capacity clauses.[42] As the bilateralism matured after the Bermuda I model, states embodied all-important provisions in the agreement itself with providing space for route schedules in the annexes.[43]

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[38] *Agreement between the United Kingdom and the United States*, 11 February 1946, 3 U.N.T.S. 253 (hereinafter Bermuda I Agreement).

[39] Sion Gillies, L., "Multilateral Air Transport Agreements Reconsidered: The possibility of a regional agreement among North Atlantic States", (1981-1982) 22 Va. J. Int'l. L. 164.

[40] *Ibid.*

[41] R.I.R. Abeyratne,"The Economic Relevance of Chicago Convention – A Retrospective Study" (1994) XIX-II Ann. of Air & Sp. L. 17.

[42] Haanappel, *Supra note* 2 at 251.

[43] *Ibid*

Bermuda I agreement had a lifespan of 30 years before it was replaced by more restrictive Bermuda II agreement. The shortcomings that led to the demise of Bermuda I was observed by Dr. Ruwantissa Abeyratne as, " One of its (Bermuda type) main disadvantages however, was that it gave governments a basis to formulate their civil aviation policies and sometimes adopt an unduly restrictive stance on their sovereignty, leading to traffic rights that were being frequently withdrawn by states."[44]

1.3 Bermuda II Agreement

Thirty years later, in 1976, the United Kingdom withdrew from the Bermuda I Agreement. The main reason for such a step was the 'dissatisfaction' on the part of the United Kingdom over the capacity issue.[45] UK felt that USA had more access to the UK than the other way about.

After The reconsideration of traffic rights between the states, Bermuda II agreement was signed on 23rd of July 1977.[46]

It has been noted that Bermuda II agreement has not deviated much from the Bermuda I agreement despite the attempts made by UK to share the traffic on equal basis. Dr. Haanappel views the Bermuda II Agreement as,[47]

> "More generally, one can say that in the key areas of capacity, frequency and tariffs, Bermuda II reiterates Bermuda I with some elaborations and minor restrictions. As to capacity, attention is drawn to the obligation of the contracting parties to avoid over capacity and under capacity."

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[44] *Supra note* 41.
[45] Haanappel, *Supra note* 2 at 260.
[46] *Air Services Agreement between USA and UK*, 1977 U.K.T.S. 76 (hereinafter Bermuda II Agreement).
[47] Haanappel, *Supra note* 2 at 260.

One of the important features of the Bermuda II Agreement is the inclusion of a security clause with weight. The Agreement was discussed in an environment where the security concerns were high among states, especially after a series of hijackings of aircrafts had taken place and several multilateral international agreements concluded to combat unlawful interference with civil aircraft.[48] In conformity with the situation the two parties agreed to incorporate a security clause and pledged to each other to provide "maximum aid to each other" in preventing threats to the civil aviation and went on to the extent to agree to give "sympathetic consideration" to any request for special security measures by each other.[49] Even though it was expected that Bermuda II model would follow the same path of Bermuda I and set a standard model for the other states to follow, it was not to be so. Principally because the aviation industry had come a long way since Bermuda I and states were carving out their own needs. Other reasons being that the Bermuda II agreement was meant almost exclusively for the USA and UK markets and the so-called deregulation policy of the United States, which was closely scrutinized by the other states.[50]

1.4 Open Skies Agreements

When the USA was at the negotiation table with the UK discussing the Bermuda II Agreement, the Aviation Policy of United States was changing towards a more liberal aviation policy. This came with the introduction of the deregulatory initiatives started

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[48] *Convention on Offences and Certain other Acts Committed on Board Aircraft*, 14 December 1963, ICAO Doc. 8364, *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, ICAO Doc. 8920, *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, ICAO Doc.8896.

[49] Gertler, Joseph. Z., "Obsolescence of Bilateral Air Transport Agreements: A Problem and a Challenge" (1988) XIII Ann. of Air and Sp. L. 46.

[50] Haanappel, *Supra note* 2 at 261.

during early 70s and the re introduction of the free access pro competitive approach adopted by the USA at the Chicago Conference in 1944.

The birth of first era of liberalization of aviation market or the 'open skies agreements' was marked with the passing of the United States Deregulation Act in 1978. The deregulation in the aviation industry proved to be fruitful during the first few years as the new carriers entered the market providing low fares to passengers. The CAB (Civil Aeronautics Board, with a focus on strict economic regulation of carriers) was replaced by DOT (Department of Transportation), which facilitated the new entries to the market resulting in more competition. Under this favorable background USA wanted to export this liberal approach beyond its borders. And as a result USA was able to amend the existing bilateral agreements and concluded a considerable number of bilateral agreements specially with European States.[51]

However, this liberal approach was not very successful as intended by the USA. It was proved as an attempt to attract the states under deregulated environment and as such did not impress most of the states.[52] This was purely because the states were very much concerned about their national carrier's interests under these open economic circumstances.

Therefore USA toned down canvassing the deregulation policy beyond borders for a while.

The next era of open skies agreements and perhaps the most influential era was started in 1992. The DOT began negotiating liberal bilateral agreements with defined elements. Thus the definition of 'Open Skies Agreement' would include,

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[51] Haanappel, *Supra note* 2, USA concluded the first post Bermuda II agreement with Netherlands and after that entered into bilateral agreements with Australia, Belgium, Fiji, Finland, West Germany, Iceland, Israel, Jamaica, Papua New Guinea and Singapore.

[52] Bernstein, *Supra note* 7 at 281.

1. Open entry in all routes;
2. Unrestricted capacity and frequency on all routes;
3. Unrestricted route and traffic rights, that is, the right to operate services between any point in the United States and any point in the European country, including no restrictions as to intermediate and beyond points, change of gauge, routing flexibility, co-terminalization, or the right to carry Fifth freedom traffic;
4. Double disapproval pricing in Third and Fourth freedom markets and (1) in intra EC markets: price matching rights in third country markets, (2) in non intra EC markets: price leadership in third country markets to the extent that the Third and Fourth freedom carries in those markets have it;
5. Liberal charter arrangements (the least restrictive charter regulations of the two governments would apply, regardless of the origin of the flight);
6. Liberal cargo regime (criteria as comprehensive as those defined for the combination carriers);
7. Conversion and remittance arrangements (carriers would be able to convert earnings and remit in hard currency promptly and without restriction);
8. Open code-sharing opportunities;
9. Self-handling provisions (right of a carrier to perform/control its airport functions going to support its operations);
10. Pro competitive on commercial opportunities, user charges, fair competition and intermodal rights; and
11. Explicit commitment for non-discretionary operation of and access for computer reservation systems.[53]

The modern open skies agreement should include the above clauses along with the important provisions regarding safety and security.

This generation of liberal bilateral agreements paved the way to other states to get extensive access to more US destinations, making the liberal approach successful.

1.5 New Trends in Modern Liberal Bilateralism – a Brief Overview

European Community has taken the leadership to liberalize the air transport industry regionally and stepping towards full open sky agreements within the community and outside the community. This approach was given a boost by the decision of the Court of Justice of the European Communities on 5th November 2002, rendering the bilateral agreements entered into by 8 States of the community with United States were not in

[53] "In the matter of defining 'open skies', Department of Transportation, United States of America, Docket 48130, (92-8-13).

conformity with the community laws and that the agreements had violated the ' external exclusive competences of the community'.[54] The notion of Trans Atlantic Aviation Area is being discussed with the USA and at the same time the community is interested in the Open Aviation Area within the community, which enables the community to enter into air transport agreements as a single state.

When the major aviation powers move towards liberalization, the other states too started realizing the importance of opening up their respective markets. However, the significance in this process lies in the regional approach of securing the traffic rights.

The Andean Pact and Mercosur Pact of South America, CARICOM in the Caribbean, NAFTA in the North America, COMSEA and Yamoussoukro in Africa, ASEAN in the Southeast Asia and the recently concluded Pan- Pacific APEC multilateral agreement are examples of evolving regional arrangements.

Bilateralism has survived to be the ultimate tool in exchanging air traffic rights since 1913 despite efforts to establish multilateralism on the same subject. This is due to the fact that a bilateral agreement is entered into between two states and could be adjusted according to the circumstances easily. And also the states are comfortable in bargaining traffic rights safeguarding their interests.

However, the ever-expanding aviation industry has compelled states to enter into more and more liberal agreements to facilitate the growing demand of the public. As the earlier attempts made to get the world community to agree on a multilateral framework on the issues regarding economics of air law faded away, new agreements within regional

[54] Commission of the European Communities V Eight European Union States (ECJ), 466/98, 467/98,469/98, 470/98,471/98,472/98, 475/98 and 476/98.

framework started to come on to the scene with greater assurance. Thus regionalism is in the process of being established as an alternative to multilateralism.

CHAPTER TWO

Section I

2.1 History and evolution of the air transport industry in Sri Lanka

Democratic Socialist Republic of Sri Lanka is an island in the Indian Ocean with an area of 65,525 square kilometers. Sri Lanka has a multi-ethnic and multi-cultural population of about 18.5 million consisting mainly of Sinhalese, Tamil, Muslim and Burger communities belonging to Buddhism, Catholic faith, Christianity, Islam and other religious groups.

Sri Lanka has been identified in the past by many names like Serendib, Sealand, Seilavo, Taprobane, Thambapanni by many explorers and other countries. During the British colonial days the island was identified as Ceylon, which is still used occasionally.

The geographical situation of the island is so unique that it stands in the routes connecting East and the African Continent and Australia and Europe. The history reveals that the situation of this tropical island was important for traders traveling from east to west and *Vice versa*. As a result Portuguese and Dutch were able to colonize the Maritime Provinces of the country and used the natural harbours as centres for their trade. In 1815 British took control of the whole Island and Ceylon became a colony of the United Kingdom until the independence was declared in 1948. The island was called Ceylon until the 1972 Constitution was passed by the Constituent Assembly, which severed all the constitutional ties with the United Kingdom, and 'Ceylon' was officially changed to the Democratic Socialist Republic of Sri Lanka.[55]

[55] The terms Sri Lanka and Ceylon would be used in this thesis according to the context it appears.

The main mode of international transportation during the British era was by the Sea. The reason may have been the natural harbours situated around the island and there was no immediate need to build airstrips for some time. However, as the world moved to speedier modes of communication and transportation, Ceylon too had to respond to the changing winds of navigational trends. Ceylon commenced international operations in 1947 with 2 aircraft and today Sri Lankan Airlines; the national carrier, is flying with a fleet of 12 modern aircraft.[56] Following is a brief history of the civil aviation of Sri Lanka.

1.2 (a) History of Civil Aviation of Sri Lanka

The aviation history of Sri Lanka could be traced back to 1911. 8 years after the heroic first flight of an airplane by the Wright brothers in 1903, an airplane was brought to Ceylon by ship on 12 September 1911.[57] The Type of the aircraft was 'Bleriot' monoplane and the report reveals that it was brought for the use of the Governor General Cohn Brown. In the same year, two French travelers, Virminck and Poupre touched down the soil off Colombo on 10 December 1912 in an aviation exhibition.[58] They were on their way around the world by air and became the first ever flight, which touched down the soil of Ceylon.[59] After these two incidents there was nothing much on record regarding the activities of civil aviation in Ceylon. The first ever official flight to Ceylon by an aircraft was made by the Director of Civil Aviation of India in 1932.[60] 20 years later, a series of serious discussions

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[56] See *Sri Lankan Airlines Annual Report 2003/2004* (16 August 2004) 68.
[57] "Akasha yathrawa lankawata paminima" (Arrival of the air plane to Ceylon), *Dinamina* (13 September 1911) at 1 (translated by the author).
[58] "Two French Aviators will fly on the Racecourse, Cinnamon Gardens" *Times of Ceylon* (8 December 1912).
[59] Sir Graham Wilson, *Monara Rising – The History of Civil Aviation in Sri Lanka*, (London, Media Prima, 2005) 15.
[60] Aviation History, online: Sri Lankan Airlines <http://www.Srilankan.aero> (date accessed 1 October 2005).

began between the British authorities and the Ceylonese postal authorities about the extension of the Empire Air Mail, which existed between United Kingdom and India (Karachchi), to Ceylon. As a result the Empire Air Mail service was extended to Ceylon on 28 February 1938.[61] Ratmalana aerodrome was declared open on the same day for the inauguration of the Empire Air Mail Services and the operations were conducted from there.[62] This was the first step to regularize the civil aviation activities in Ceylon and the year 1938 marked the starting point of civil aviation in many respects. However, it should be noted that the regulations promulgated in 1938, relating to the safety of persons and goods carried by aircraft, were same as the navigation directions issued in 1937 and applied basically to the British aircrafts registered in Ceylon.

The Director of Public Works was appointed as the Director of Civil Aviation and the local air navigation regulations were drafted along with the civil aircraft register.[63] The steps were taken to transfer the subject of civil aviation to the ministry of Communications and works.[64] And later civil aviation was brought under the roads committee.[65] In the same year 3 airplanes were added to the civil aircraft register.[66] They were named as Viharamaha Devi, Sita Devi and Sunetra Devi.[67] The first Aerodrome was built at Ratmalana in 1938 and TATA aircraft of New Indian Airlines started operating an airmail service under the Empire Air Mail service.[68]

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[61] Janus, "The Air Age Takes Off – Yesterday's auspicious inauguration" *Ceylon Daily News* (1 March 1938) 1.
[62] *Ibid.*
[63] *Ibid.*
[64] "Director of Civil Aviation-Ministry's New Arrangements" *Ceylon Daily News* (9 December 1938).
[65] "Civil Guwan meheye katauthu mangmawath karaka mandalaya wetha pawarannata yama" (Attempt to transfer the civil aviation to the roads committee), *Dinamina* (3 August 1938) (translated by the author).
[66] *Supra note* 61.
[67] *Supra note* 60.
[68] *Supra note* 61.

During the period 1943 -46 Qantas Empire Airways operated a record non-stop flight from Perth to London via Ceylon.[69]

A Department by itself for Civil Aviation was established under the Ministry of Transport in 1946.[70] The following year, Air Ceylon was established as the national carrier. Interestingly, Air Ceylon was established under the ministry of communication and public works as a statutory body.[71] Air Ceylon engaged in domestic flights to several destinations before starting operations internationally.[72]

Ceylon adhered to the Chicago Convention of 1944 on 1 June 1948 and became a member of the International Civil Aviation Organization in the same year. Air Ceylon started its scheduled services to Madras with an intermediate stop at Jaffna in 1948.[73] Ceylon became an independent country on 4th February 1948. Two years later Air Ceylon initiated passenger flights to Australia via Singapore.[74]

In 1950, the Air Navigation Act No.15 of 1950 was passed and Air Ceylon became a public corporation by the Act No. 7 of 1951.

By the time Ceylon was negotiating for independence, the British government had started to convert the air force base at Katunayake into a new international airport. The new Katunayake International Airport was officially handed over to Ceylon by the British in

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[69] *Supra note* 60.
[70] Annual report of the Civil Aviation Authority of Sri Lanka 2003 (31 March 2004), online: Civil Aviation Authority of Sri Lanka <http://www.caa.lk/anu_reps.htm> (date accessed 1 October 2005).
[71] *Ibid.*
[72] See Ceylon Daily News (Colombo edition) (1 November 1957) at 3 for the inauguration of the new flight to Galoya, See also Ceylon Daily News (City edition) (3 June 1961) at 3 for the inauguration of the new flight to Anuradhapura.
[73] *Supra note* 60.
[74] *Ibid.*

1957.[75] From that point onwards, Katunayake International Airport became the only international airport in Sri Lanka as the Ratmalana aerodrome was used primarily as a military base.

Air Ceylon went into liquidation and died, paving the way to the birth of Air Lanka Limited, a private company registered under the Companies Ordinance of 1938 (Cap 145), in 1979. Over the past 58 years of its history of civil aviation, Sri Lanka had only one international airline, the national carrier, which has made great contributions to the economy of the country and carried the Sri Lankan flag around the globe.

The Airports Authority was established in 1980 for the development, operation and maintenance of civil airports in the country.[76] However, the lifetime of the airports authority was shortened with the privatization of the airport maintenance, air navigation facilities, airports services, air traffic control etc. Today Airport and Aviation Services Ltd, a government corporation is in charge of the aviation and air navigation facilitation and development in Sri Lanka.

The first scheduled domestic passenger air services began in 1994 when Lion Air Ltd started operations between Colombo and Jaffna. However the business was short lived as the government prohibited all domestic civil air services for security reasons in 1995.[77] Today with the ceasefire agreement between the government and LTTE (Liberation Tigers of Tamil Elam), domestic passenger air services have resumed and as of September 2005, three domestic carriers are operating to several destinations of the country under security restrictions.

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[75] "The Ceremony that made our independence complete – PM pays tribute to UK at Katunayake take over" *Ceylon Daily News (Colombo edition)* (2 November 1957).

[76] Airports Authority Act No.46 of 1979, c 229.

[77] The country suffered from a 20 year long civil war and today he two parties are at a ceasefire which has paved the way for resumption of normal work including the domestic air services.

The period between 1990 and 2005 marked a remarkable development in the air transport industry in Sri Lanka. In 1990, the government decided to liberalize the carriage by air, starting with the carriage of cargo. In 1998, Air Lanka, the national carrier, entered into a shareholder's agreement with Emirates, the national carrier of U.A.E where over 40% of the shares was sold to Emirates.[78] In the following year the name of the national carrier was changed to Sri Lankan airlines and the logo was changed too.

The Civil Aviation Authority of Sri Lanka was created in 2002 by the Civil Aviation Authority of Sri Lanka Act No. 34 of 2002 pursuant to the recommendations made by the ICAO after the safety and security audit conducted by the ICAO in 1997[79]. Today, the Civil Aviation Authority is responsible for safe and secure operations of civil aviation in Sri Lanka and act in close collaboration with the Ministry of Ports and Aviation.

Section II

2.2 Legal and Regulatory Framework governing the Air Transport Industry in Sri Lanka

2.2 (a) The Aviation Policy of Sri Lanka.

The Minister in charge of the subject of civil aviation is responsible for the drafting the national aviation policy for Sri Lanka with the assistance of the Civil Aviation Authority.[80] The national aviation policy changes from time to time keeping in line with the global challenges in the industry and the existing needs of the country. The national aviation policy adopted during the initial stages of the civil aviation of Ceylon was purely of

[78] The Share Holders Agreement between Democratic Socialist Republic of Sri Lanka and Emirates, the International Airline of the United Arab Emirates, a company incorporated in the Emirates of Dubai, U.A.E. and Air Lanka Limited, a company incorporated under the laws of Sri Lanka 30 March 1998 (hereinafter referred to as the Agreement with Emirates).
[79] *Supra note* 70.
[80] *Infra note* 103.

protectionist nature. The main focus was protecting the interests of the national carrier. However, when the global trend started to twist towards liberalization, Sri Lanka too started to respond to the situation by abandoning the protectionist aspect to a certain extent. The national aviation policy existed in 1999[81] clearly reflects the intention to move towards liberalization. It should be noted that we are not prepared to open up our skies fully because fully blown open skies is still not a reality anywhere in the world. We are more willing to have a 'managed open skies access' as our broad policy approach. But from 1990, the all cargo restrictions were lifted and as of today open skies policy applies to the cargo operations.[82]

The 1999 policy statement makes it clear that the government would only designate Air Lanka as the carrier designated by Sri Lanka in bilateral air services agreements. While ensuring the open competition for Air Lanka with other scheduled carriers, the policy statement hints that there would be a privatization or restructuring of the national carrier 'at the appropriate time and encourage infusion of foreign capital, managerial and technical know-how.'[83] Another feature of the policy of 1999 is the attention paid to the harmonizing aviation within the South Asian Regional Block.'[84]

The draft national aviation policy of 2003 reveals that the intention of the government to open the market access for the local competitors to enter into the Sri Lankan market and fly to destinations which are not currently utilized by the national carrier. Several local companies have shown their interest in entering the business. Moreover the open skies policy is being accepted as a policy but the emphasis is again on managed open skies.

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[81] See *The National Aviation Policy of Sri Lanka 1999.*
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*

As for the policies adopted in bilateral negotiations, these change form case to case. As we would see at a later chapter we have followed open skies policy in agreements with Singapore, USA and Malaysia while in other agreements liberal and more liberal policies are being adopted depending on the interests and markets of the parties.

2.2 (b) Legal and Regulatory Framework

Sri Lanka is under the influence of both civil law and the common law traditions. The Dutch introduced the civil law system and it has taken roots in the legal system of Sri Lanka and in most fields of law broad principles of civil law are still applicable. Common law, on the other hand, came with the British. Initially, Common law was applied in the commercial areas and slowly absorbed into other areas of law as well. Therefore, the legal system existing in Sri Lanka today could be best explained as a hybrid system reflecting both systems of law.

The legal regime of the air transport industry in Sri Lanka is centered on the following legislative enactments and the regulations enacted therein and the international conventions ratified by Sri Lanka.

1. Air Navigation Act No. 15 of 1950 as amended and the regulations made under the Act.
2. Air Navigation (Special Provisions) Act No. 2 of 1982
3. Air Navigation (Special Provisions) Act No. 55 of 1992
4. Civil Aviation Authority Act of Sri Lanka Act No. 34 of 2002
5. Civil Aviation Bill of 2001

2.2 (b) (i) Air Navigation Act No. 15 of 1950 as amended

The first legal instrument to govern the air transport industry of Ceylon came into effect on 18 May 1951. The objectives for drafting the Act were to give effect to the international multilateral agreements existed at that time namely the Chicago Convention of 1944[85] and the Warsaw Convention of 1927[86] and to provide for the general regulation and control of air navigation.[87]

The Act provides for the appointment of a Director of Civil Aviation[88] who was vested with the powers, duties and functions to administer the air navigation, which are conferred or imposed upon, or vested in him under any order or regulation or delegated by the Minister.[89]

The Minister in charge of the subject of civil aviation is empowered to make regulations and orders[90] except in matters relating to 'the application, adaptation and modification of the enactments relating to customs in relation to aerodromes and to aircraft and to persons and property carried therein and the prevention of smuggling by air.'[91] In those matters the Minister of Finance is in charge to make regulations. Generally this Act provides the foundation on which the regulations to be promulgated, the establishment and administration of aerodromes, accident investigation and other technical and administrative matters.

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[85] Air Navigation Act No.15 of 1950, C. 230, Section 3(1).
[86] *Ibid,* Section 16. (1)
[87] *Ibid,* Preamble.
[88] *Ibid,* Section 20.
[89] *Ibid.*
[90] *Supra note* 85, Section 24
[91] *Ibid,* Section 3 (2) (n).

2.2 (b) (ii) Air Navigation (Special Provisions) Act No. 2 of 1982

This Act amends the section 20 of the Air Navigation Act No.15 of 1950 to provide for the appointment of an Agent for the purposes of the development, maintenance, administration and facilitation of aerodromes and airports.[92]

The Agent should be an agent of the government or a company registered under the Companies Ordinance No. 17 of 1982.[93] Currently the Airport and the aerodromes are managed by the Airports and Aviation Services (Lanka) Limited.

2.2 (b) (iii) Air Navigation (Special Provisions) Act No.55 of 1992

The objectives of this Act were to create the post of the Director General of Civil Aviation repealing the existing position of the Director of Civil Aviation appointed under the parent Act of 1950,[94] to provide for the application of the Hague Protocol of 1955[95] and the Warsaw Convention 1929[96] within Sri Lanka and importantly to provide for the security of airports and aircrafts.[97]

The Director General of Civil Aviation is vested with wide powers to issue and revoke licenses for airlines to carry on business of air transportation within Sri Lanka,[98] to enter and inspect premises,[99] to issue notices to operators of aircraft and agents[100] and to issue

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[92] Air Navigation (Special Provisions) Act No. 2 of 1982, Section 3.
[93] *Supra note* 85 Section 21 A. (amended Act of 1950).
[94] Air Navigation (Special Provisions) Act No. 2 of 1992, Section 2.
[95] Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Hague, 28 October 1955, ICAO Doc. 7632.
[96] *Supra note* 94, Section 6(1).
[97] *Ibid,* Section 14.
[98] *Ibid,* Section 9.
[99] *Ibid*, Section 11.
[100] *Ibid*, Section 15.

directions to operators regarding the security of airports and aircraft.[101] In drafting regulations regarding carrying on business of air transport the Minister in charge of civil aviation is required to consult the Minister of Tourism and the Minister of Finance.[102]

2.2 (b) (iv) Civil Aviation Authority Act No.34 of 2002

This Act provides for the establishment of the Civil Aviation Authority of Sri Lanka as a body corporate.[103] The authority was set up in response to the suggestions made after the ICAO audit, which was carried out in 1997. The motive of setting up such an independent authority was to divorce the civil aviation matters from politics and other unnecessary interferences and to facilitate smooth functioning of the industry.

All the powers, functions and duties exercised by the Department of civil aviation have been transferred to the Civil Aviation Authority. The Civil Aviation Authority was established on 27 December 2002 as a public enterprise for the purposes of auditing of accounts under the Article 154 of the 1978 Constitution of Sri Lanka.[104]

The Director General is appointed as the chief executive of the Authority and vested with the powers hither to enjoyed by the Director General of Civil Aviation under the Air Navigation (Special Provisions) Act No.55 of 1992.[105] The constitution of the Authority consists of (a) the Secretary to the Ministry in charge of the subject of Defence, (b) a representative of the Ministry of the Minister in charge of the subject of Finance, nominated by that Minister, (c) five persons appointed by the Minister of whom no less than two shall have considerable experience or knowledge in the field of civil aviation and

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[101] *Ibid,* Section 16.
[102] *Ibid*, Section 13.
[103] Civil Aviation Authority of Sri Lanka Act No. 34 of 2002, Section 2.
[104] The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Article 154.
[105] *Supra note* 103, Section 11.

(d) the Director-General[106] Powers and duties of the authority include *inter alia* regulation of civil aviation operations of aircraft registered in Sri Lanka both within Sri Lanka and internationally according to the act and any other written law,[107] assisting the Minister in formulating the civil aviation policy in Sri Lanka,[108] making plans for the development of civil aviation of Sri Lanka,[109] developing, promulgating or adopting by reference measures and strategies to enhance the safety and ensure the compliance by all persons of the standards and such aviation safety requirements and practices and procedures,[110] to make known the aviation community the importance of obliging to the safety standards,[111] issuing licenses, permits and other documents required under the law,[112] initiating accident investigations,[113] assist the Minister in international negotiations and consultations regarding air services agreements,[114] establishing programmes for the implementation standards regarding facilitation, aviation security, environmental protection, carriage of dangerous goods etc.,[115] co-ordinate with International Civil Aviation Organization in implementing standards and the registration of agreements and arrangements, promotion of Sri Lanka's participation at global and regional level.[116]

Section 39 Regulations under this Act are to be made by the minister in consultation with the Authority and such regulations should be enforced from the date of the Gazette notification.

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[106] *Ibid*, Section 3.
[107] *Ibid*, Section 7 (a).
[108] *Ibid*, Section 7 (b).
[109] *Ibid*, Section 7 (c).
[110] *Ibid*, Section 7 (e).
[111] *Ibid*, Section 7 (f).
[112] *Ibid*, Section 7 (g).
[113] *Ibid*, Section 7 (h).
[114] *Ibid*, Section 7 (j).
[115] *Ibid*, Section 7 (l).
[116] *Ibid*, Section 7 (m).

This Act clearly lays down the framework within which the authority is required to perform its duties to upgrade the civil aviation in Sri Lanka.

2.2 (b) (v) Civil Aviation Bill of 2001

The Civil Aviation Act No.....of 2001 (still at bill stage) was drafted with the objectives of framing regulations for civil aviation of Sri Lanka and to give effect to the Convention of International Civil Aviation.[117] This draft Act is considered to be the core of civil aviation laws and regulations of the country as it encompasses every aspect of the spectrum of civil aviation. This bill again has been drafted in response to the ICAO indications for a better regulated legal framework. Director- General of civil aviation is vested with certain powers and functions by this Act as well.[118] The Minister is responsible with the control and regulation of civil aviation by formulating the Aviation Policy according to the needs from time to time, implementing SARPs and other matters related to the smooth functioning of the industry.[119] An important feature of the Act is the appointment of service providers. Service providers are appointed under section 6, subject to certain terms and conditions, to provide 'aeronautical services.' The term 'aeronautical services' has been defined in Section 30 to include *inter alia*, maintenance, operations and improvement of aerodromes and their facilities, provision and maintenance of search and rescue services and fire fighting at aerodromes, provision and maintenance of security services, provision of air traffic services, aeronautical information and communication services and other services

[117] Civil Aviation Bill of 2001, Preamble.
[118] *Ibid,* Section 42.
[119] *Ibid,* Section 4.

such as the ground handling, supplying fuel and lubricants to aircraft and catering services.[120]

Chapter III of the Act lays down provisions regarding the regulation of civil aviation. Provisions relating to registration and marking of aircraft is dealt in Chapter IV of the Act. This chapter lays down provisions for the procedure to be adopted in applying for a Certificate of Registration and specifies the qualifications of the applicant. It is interesting to note the relaxation of substantial ownership and effective control requirement in adopting the 'principle place of business' for 'effective control'.[121]

The Act also provides for the aviation personnel and training, aircraft operation and commercial air transportation.[122] The provisions of the Convention are expressly made applicable for the above aspects of aviation matters. Chapter X explains the offences and penalties for the breach or non-adherence of the provisions of the Act. The penalties have become five times or more comparing to the penalties specified under the Air Navigation Act No. 15 of 1950. And the currency has been changed to Special Drawing Rights.[123]

The author believes that the delay in the coming into force of an important piece of legislation of this kind may delay the regulation of the orderly conduct of the industry.

2.2 (c) International Conventions Ratified by Sri Lanka.

As of September 2005, Sri Lanka is a party to the following International Conventions and Agreements relating to Air Law.

(a) The Warsaw Convention 1929[124]

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[120] *Ibid,* Section 30.
[121] *Ibid,* Section 40.
[122] *Ibid,* Chapters VII, VIII and IX.
[123] *Ibid,* Section 101.
[124] Ratified on May 1951 and the enabled by the Air Navigation Act of 1950.

(b) The Hague Protocol to the Warsaw Convention[125]
(c) The Chicago Convention 1944[126]
(d) The Air Transit Agreement 1944[127]
(e) Convention on Offences and Certain other Acts Committed on Board Aircraft, (Tokyo) 14 September 1963 (the Tokyo Convention)[128]
(f) Convention for the suppression of unlawful seizure of aircraft, (Hague) 16 December 1963 (the Hague Convention)[129]
(g) Convention for the suppression of unlawful acts against the safety of civil aviation, (Montreal) 23 September 1971 (the Montreal Convention)[130]
(h) Convention on the Marking of Plastic Explosives for the purpose of Detection 1991[131]

Sri Lanka has become a party to the above agreements so far. Sri Lanka was forced to ratify the conventions on suppression of unlawful acts on board aircraft after the first and last hijacking of an aircraft by a Sri Lankan in 1982.[132] The notable factor is the delay in ratifying the 1999 Montreal Convention for the Unification of Certain Rules Relating to International Carriage by Air (hereinafter Montreal Convention 1999) that intends to bring the private air law matters under one umbrella. The author believes that the reason for the delay is the low priority given by the government regarding these matters. Montreal Convention 1999 is an attempt to modify and update the Warsaw Regime to keep in line with all the inter carrier passenger and cargo liability agreements. Sri Lanka, today, has ratified the IATA Passenger Liability Agreement and therefore there are no reasons to hold back the ratification of the most important Montreal Convention of 1999.

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[125] Ratified on 21 February 1997 and yet to be enabled (proposed to be enabled by the bill 2001).
[126] *Supra note* 19 enabled by the Air Navigation Act 1950.
[127] *Supra note* 20 enabled by Air Navigation Act 1950.
[128] Ratified on 28 August 1978 and the enabled by the Offences Against Aircraft Act No. 24 of 1982.
[129] Ratified on 30 May 1978 and enabled by the Offences against Aircraft Act No.24 of 1982.
[130] Ratified on 30 May 1978 enabled by the Offences against Aircraft Act No. 24 of 1982.
[131] Ratified on 10 December 2001 and yet to be enabled.
[132] Ekanayake Vs The Attorney General (1987) 1 SLLR at 107.

2.3 Negotiation and conclusion of bilateral agreements

Bilateral air transport agreements are the instruments by which the states exchange air traffic rights, basically third, fourth and fifth freedom rights. As the sovereignty of airspace is an indispensable concept under customary international law, governments engage in bilateral negotiations with great concern regarding the interests of their respective market forces. The reason being that the derogation of the aspects of sovereignty in order to permit others to fly over the jealously guarded airspaces is a matter of great importance. In bilateral air transport negotiations, the interests of the carriers come to the forefront. Dr. Haanappel observes "In many countries, the carriers often do the ground work for bilateral negotiations with governmental authorities only stepping in at a later stage."[133] The exchange of routes depends on the bargaining power of the two parties. Inequality of bargaining power may create discrimination in exchanging rights and privileges.[134] But on the other hand these types of inequality could be justified on the grounds of the actual needs of the parties at the point of negotiations. This may be the reason why we see the agreements getting modified, amended or repealed and replaced often.

In Sri Lanka, the authority to participate and negotiate bilateral agreements is vested with the Minister in charge of the subject of civil aviation, and this authority is always delegated to negotiating party with the approval of the cabinet of ministers. The Sri Lankan negotiating party is appointed on a case-by-case basis and the composition of the delegation is always subject to change. Generally a negotiation team is comprised of,

The Secretary of the Minister in charge of the subject of Aviation
Additional Secretary of the Minister in charge of the subject of Aviation

[133] Haanappel, *Supra note* 2 at 263.
[134] *Infra note* 143.

A representative of the Ministry of Foreign Affairs
Two representatives from the Civil Aviation Authority of Sri Lanka
A representative of the Ministry of Tourism
A representative of the Attorney General (Attorney General's Department)
A representative of Sri Lankan Air Lines

Therefore, it is evident that the delegation consists of the representatives of all concerned ministries and authorities. In certain negotiating parties, a representative from the Ministry of Defence is included, and the absence of a representative from the Ministry of Transport is also notable.

Once a bilateral air transport negotiation is successful, the initial text of the agreement will be presented to the parliament for approval. The implementation of bilateral air transport agreements on the domestic scene is done according to the constitutional laws of the parties. As a dualist state, Sri Lanka needs enabling legislation to give effect to the international agreements.[135] However, Article 157 of the 1978 Constitution of Sri Lanka provides for the passing of investment agreements by two third majority of the parliament. Therefore the two-thirds majority of the parliament without an enabling legislation approves air transport agreements.[136] After the approval of the bilateral agreement by the parliament, it is then sent for translation. The signing ceremony follows next. The cabinet of ministers on approval of the draft empowers an agent of the government to sign the agreement on behalf of the state. Usually head of the mission, an ambassador or a high commissioner of Sri Lanka signs the bilateral under the authority given to him or her by the government. All the correspondence from the beginning of negotiations to the signing ceremony is done through the Ministry of Foreign affairs. In Sri Lanka, bilateral air

[135] *Supra note* 104, Article 157
[136] *Ibid.*

transport agreements posses the nature of international treaties.[137] The date on which the agreement comes into force is different in each agreement. Some agreements enter into force upon signature while other agreements enter into force by exchange of notes. There are agreements, which are enforced provisionally on signature and be fully enforced after the relevant constitutional requirements are satisfied.[138]

Every bilateral air transport agreement is required to register with ICAO according to Article 83 of the Convention. It is noteworthy to see that most of the air services agreements entered into by Sri Lanka are yet to be registered with ICAO.

The memoranda of understanding to the bilateral air transport agreements are always confidential in nature. This confidentiality has been criticized as undesirable.[139] The argument is that since the agreements are entered into in the public and the nature of the agreement could be completely changed by these secret memoranda.[140]

Having understood the legal and regulatory framework and the mechanism of negotiating bilateral air transport agreements, the next step is to analysis the important provisions of the agreements concluded by Sri Lanka.

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[137] In USA bilateral air transport agreements posses the nature of the executive agreements.
[138] *Infra note* 288.
[139] Haanappel, *Supra note* 2 at 263.
[140] *Ibid.*

CHAPTER THREE

3.1 Analysis of the Bilateral Air Transport Agreements of Sri Lanka

3.1 (a) General Overview

Article 6 of the Chicago Convention makes it clear that no scheduled international air service could be operated in a territory of a contracting party without the prior permission of that state. This is the foundation of the bilateral air transport (services) agreements. The restriction imposed by Article 6 enables the states to permit other states to enter into their territories for commercial aviation. The main purposes sought by bilateral agreements are to provide the general public with a speedier mode of transportation between states and to allow the national carrier to compete with the foreign airlines and achieve similar benefits.[141] But, Sri Lanka expects more than the above stated benefits. As manifested in the draft policy of International Civil Aviation Policy for Sri Lanka (2003), the country expects to increase the national economy via tourism. Therefore the aviation industry is more than a mode of public transportation for Sri Lanka.

With the 'death' of any multilateral agreement on exchange of commercial or traffic rights, especially the failure of the Air Transport Agreement, bilateral agreements have now become the driving force of the international air transport industry.

The first bilateral Air Transport Agreement was entered into by Sri Lanka with India on 21 December 1948. And as of 2005, 62[142] bilateral air transport agreements have been entered

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[141] W. Gilliland, " Bilateral Agreements" The Freedom of the Air, edited by E. McWhinney and M.A. Bradley, (1968) 140.

[142] The countries are Australia, Austria, Bahrain, Brunei, Belgium, Bulgaria, Burma, Bangladesh, China, Czech Republic, Cyprus, Czechoslovakia, Denmark, Egypt, Ethiopia, France, Germany, Greece, Hong Kong, Iran, India, Italy, Indonesia, Israel, Jordan, Japan, Lebanon, Maldives, Malaysia, Macao, Madagascar, Netherlands, New Zealand, Norway, Oman, Pakistan, Philippines, Poland, Russia, Saudi Arabia, South Korea, South Africa, Sweden, Switzerland, Thailand, United Kingdom, United States, United Arab Emirates, Uzbekistan, Vietnam, Yemen, Yugoslavia and Zambia.

into by Sri Lanka, which are operational and several negotiations are still proceeding. Most of the early bilateral agreements are being revised.

The nature of the bilateral air transport agreements has gradually changed with the course of time, keeping in line with the developments of the international aviation policies and strategies. Early bilateral agreements show a stricter approach in exchange of rights but during 1970s the exchange of traffic rights became liberal. However, Sri Lanka has entered into a few 'more liberal bilateral agreements with India, Qatar, U.A.E., Lebanon and Maldives and since the open skies concept was accepted as a policy, Sri Lanka has concluded open skies agreements with U.S.A, Thailand, Switzerland, Singapore and Malaysia.

3.2 Analysis of the important clauses of Bilateral Air Transport Agreements

3.2 (a) Granting of Rights.

3.2 (a) (i) Reciprocity Clause

Granting of rights is the first step of exchanging traffic rights between two states. It is accepted that such an exchange of reciprocal rights depends heavily on the bargaining power of each party. That is to say that the rights and privileges are granted to each other according to the strength of each other's civil air transport industry. Sri Lanka as a developing state with relatively young aeronautical powers could well receive fewer advantages in an agreement with a state, which has a strong air power. For an instance, in the agreement between the government of Ceylon (Sri Lanka) and the Commonwealth of Australia, Sri Lanka was permitted to exercise traffic rights from points in Sri Lanka through any intermediate point to Australia and Australia was permitted to exercise traffic

rights from points in Australia through any intermediate point to Sri Lanka and points in Maldives, India, Pakistan, the middle east, Europe and the United Kingdom as beyond points.[143]

Therefore it is evident that exchange of traffic rights does not mean that both parties get equal access to each other's markets.

The Article granting rights in bilateral agreements concluded by Sri Lanka is in most cases uniform. The Article reads as follows,

> "Each Contracting Party grants to the other Contracting Party the right to operate air services specified in the Annex to this Agreement (hereinafter referred to as 'specified air services') and the routes specified in the Annex to this Agreement. (Hereinafter referred to as the 'specified air route')."[144]

Another clause regarding the granting of rights appears in several agreements. This clause provides for facilitating international air navigation between the parties in the event of conflict and other unforeseen circumstances. Such an Article provides that,

> "If because of a armed conflict, political disturbances or developments, or special and unusual circumstances, the designated airline of the one contracting party is unable to operate a service on its normal routes, the other contracting party shall use its best efforts to facilitate the continued operation of such service through appropriate temporary rearrangements of such routes, including the temporary granting of alternative rights as mutually decided by the contracting parties."[145]

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[143] Agreement between the Government of Ceylon (Sri Lanka) and the government of Commonwealth of Australia, 12 January 1950, U.K.T.S. 789/53/295, A.T.S. No.1 (1950) (hereinafter referred to as the Agreement with Australia) Annex I.

[144] Agreement between the Government of Ceylon and the Government of India, 21 December 1948 (herein after referred to as the Agreement with India) Article 1.

[145] Agreement between the Government of Ceylon and the Government of the Republic of South Africa, 30 March 1994 (hereinafter referred to as the Agreement with South Africa) Article 2.

The writer perceives that such a clause is very important for states like Sri Lanka, which is being hit by a dragging political conflict for the past 23 years. The conflict resulted in two attacks on Katunayake Bandaranayke International Airport in 1986[146] and 2001.[147] However, the Tsunami of 2004 did not make any damage to the airport apart from the congestion.

3.2 (a) (ii) Operating Permission

The services under the agreement could not be inaugurated without the operating permission granted by the contracting parties. The operating permission is generally granted once the aeronautical authorities of the other contracting party are satisfied that the designated airline or airlines comply with all the necessary rules and regulations relating to the international navigation by air. To obtain the operating permission the aeronautical authorities of one state has to request the permission in writing from the other contracting party and vice versa. Generally this is done through diplomatic channels. And the operating authorization and technical permission will be granted once both contracting parties are satisfied with each other's compliance with the necessary requirements.

Different Ministries and authorities have been designated as the 'aeronautical authority' in Sri Lanka from time to time. In the first few bilateral agreements the aeronautical authority

[146] On 3 May 1986, a bomb went off on board an aircraft (L-1011, Tri-Star) of Air Lanka which was preparing to take off for Male killing 15 passengers and crew members. *See* "Vinashaya piriksimata vishesha Kandayamak" (Special group to investigate the destruction) *Dinamina* (6 May 1986) 1 (translated by the author).

[147] The second terrorist attack occurred in 24 May 2001 when a group of terrorists attacked the Katunayake Bandaranayake International Airport and the Air Force Base. Suicide bombers attacked three aircraft belonged to Sri Lankan airlines completely destroying three passenger aircraft (4R-ADD- A340, 4R-ALE – A330 and 4R-ALF-A330) and causing severe damages to two A320 and one A340 passenger aircraft. And several cargo aircraft too were damaged during the shooting. See the Annual Report of the Civil Aviation Authority of Sri Lanka 2003 *supra note* 71 at 35.

was the Director of Civil Aviation.[148] Later the 'Minister of Defence or body authorized to perform any function at present exercisable by the said minister of the said functions' [149]became the aeronautical authority. Later the Minister of Defense was named as the aeronautical authority with a slight change in the delegated authority.[150] At present the Minister in charge of Civil Aviation is considered to be the aeronautical authority. The definition of 'aeronautical authority' in Article I of the Agreement with Singapore read as follows,

'The Minister in Charge of Civil Aviation and any person or body authorized to perform any functions at present exercised by the said Minister relating to civil aviation or similar functions' [151]

The provision for the operating permission too is expressly provided for in the bilateral agreements. Even if the clause is not there both parties are bound to grant operating permission to the other party upon the designation of airlines and on the satisfaction of the requirements specified by the Convention. There is no specific time period mentioned within which the aeronautical authorities should grant operating permission but the wording of the clauses suggest that it should be done without delay,[152]with minimum

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[148] Agreement between the Government of Ceylon and the Government of Pakistan, 3 January 1949 (hereinafter referred to as the Agreement with Pakistan) Article XIV.

[149]Agreement between the Government of Democratic Socialist Republic of Sri Lanka and the Government of the Sultanate of Oman, 14 June 1984 (hereinafter referred to as the Agreement with Oman) Article I.

[150] There the definition read as, 'Minister of Defence and any person or body authorized to perform any function on civil aviation at present exercised by the said minister or similar functions'. See the Agreement between the Government of Japan and the Democratic Socialist Republic of Sri Lanka, 26 May 1983 (hereinafter referred to as the Agreement with Japan) Article I.

[151] Agreement between the Democratic Socialist Republic of Sri Lanka and the Government of Singapore 15 March 1969 superceded by the Agreement 16 November 2004 (hereinafter referred to as the Agreement with Singapore) Article I (a).

[152] Agreement between the Government of Democratic Socialist Republic of Sri Lanka and the Government of Malaysia, 7 September 1969 amended on 4 February 1972 (being revised) (hereinafter referred to as the Agreement with Malaysia) Article 3.

procedural delay[153] or with the least possible delay.[154] Since the operating permission is the most important step towards the establishment of international air services between the two states, such permission is generally subjected to certain conditions. Such as the requirement of substantial ownership and effective control to be vested in the party designating the airline, the nationals of that party or both, that the designated airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transportation by the party considering the application, the designated airline holds a current Air Operator's Certificate or a similar license issued by the aeronautical authority of the party designating the airline and the party designating the airline is maintaining and administering the standards set forth in the Agreement regarding aviation safety and security.[155] There are agreements, which specify one or two conditions and grant each party the right to reserve imposing conditions at any time.[156]

3.2 (a) (iii) Transit Rights

Transit rights provide the contracting parties the right of over flight without landing and the right of landing for non-traffic purposes.[157] These rights are considered as the basic rights, which a state should enjoy to carry out while running international air transport services. Before 1944, the states were free to prohibit use of their air space for transit flights. Turkey announced a total prohibition of all transit flights over its territory, and in 1939, Spain too

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[153] Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the United States of America, 11 June 2002 (hereinafter referred to as the Agreement with USA) Article 3.
[154] *Supra note* 145, Article 3.
[155] *Supra note* 153, Article 3.
[156] Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of United Arab Emirates, 6 March 2000(hereinafter referred to as the Agreement between U.A.E) Article 5.
[157] *Supra note* 20.

refused to grant the transit rights to British Airways, Air France and KLM over its air space.[158] To overcome this problem two agreements were opened for signature at the Chicago Conference, namely, the Air Transit Agreement and the Air Transport Agreement.[159] As noted earlier the Air Transport Agreement, which consists of the commercial traffic rights, failed to convince the required number of ratifications. Around 100 states have ratified the Air Transit agreement. Therefore in the bilateral agreements between these states it is not a must to incorporate a clause to grant transit rights to the other contracting party. But as the theory 'what ever not exchanged multilaterally could be exchanged bilaterally' applies for agreements between states, which are not parties to the Air Transit Agreement and also where only one contracting party has ratified the Agreement. In such an instance, express provisions could be entered to the agreement granting the two transit rights. However, the writer believes that even in such an instance absence of an express clause to grant transit rights would not hamper the application of the rights as they have become fundamental in international air transport to make them a part of the customary international law.

Article 1 of the Chicago standard form of bilateral agreement[160] too requires the contracting parties to specify the rights exchanged in an Annex.

A clause granting transit rights to the contracting parties could be seen in most of the bilateral air transport agreements entered into by Sri Lanka. It reads as follows,

> "Subject to the provisions of the present agreement, the airline designated by each party shall enjoy, while operating an agreed service specified route, the following privileges,

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[158] Goedhius, *Air Law Making* (The Hague Martinus Nijoff, 1938) 9.
[159] *Supra note* 20.
[160] *Supra note* 32.

(a) to fly without landing across the territory of the other Contracting Party;
(b) to make stops in the said territory for non traffic purposes

However there are agreements, which do not contain specific clauses granting transit rights.[161]

3.2 (a) (iv) Traffic Rights

Exchange of traffic rights is the core of any bilateral air transport agreement. Generally third, fourth and fifth freedoms are exchanged by the parties. It is a fact that the successful negotiation of the fifth freedom right is the most important factor the airlines are concerned with. The reason is that an airline cannot operate efficiently and economically unless the fifth freedom rights are granted to each other. Therefore the states depend heavily on fifth freedom traffic rights between third countries for a successful air transport industry.

Unlike transit rights, traffic rights are expressly embodied in all bilateral agreements. As most of the states have not ratified the Air Transport Agreement, it is imperative to state specifically the entitlement of each state to operate within each other's markets. Some times, the traffic rights are stated in the Annex. It could be noted that at all times reference is made to Annex regarding the exchange of traffic rights. The Annexes to the agreements become an integral part of the agreement itself. This writer believes that the exchange of traffic rights is stated in Annexes because it is always easy to amend an Annex than to amend the articles of the agreement.

As Sri Lanka is not a party to the International Air Transport Agreement, express notification of the rights exchanged is mandatory. In early bilateral agreements concluded

[161] *Supra note* 148, Article I, also *see* Article III of the Agreement with India where the phraseology is different.

by Sri Lanka, there are express provisions for the fifth freedom granted routes and also for the prohibited routes. For an example, in the air services agreement between Ceylon and Pakistan (1949), the designated airline of Ceylon could exercise the fifth freedom traffic right between Karachchi and Zurich, but prohibited from carrying fifth freedom traffic between Karachchi and Paris and between Karachchi and Rome.[162] However, in the revised Air Services Agreement between Sri Lanka and Pakistan, what is included in the provision is only the prohibition. It states that, 'for the designated carriers of Pakistan, No fifth freedom traffic rights shall be exercised with respect to the Americas, Australia, Japan, Hong Kong, Thailand, South Korea and Philippines. And for the designated carriers of Sri Lanka, no fifth freedom traffic rights shall be exercised with respect to the Americas, UK, Saudi Arabia, Bahrain, Oman, Kuwait and Qatar.[163]

Today, as the industry is moving towards a more liberal regulatory environment, the parties to agreements keep on changing the traffic rights, specially the fifth freedom traffic right from time to time. In the recently revised Air Services Agreement between Sri Lanka and United Arab Emirates, the designated airlines of UAE is granted with full fifth freedom traffic rights between Male and Colombo and also between Male, Singapore, Jakarta and Manila. And for the designated airlines of Sri Lanka, unrestricted fifth freedom rights has been granted at any three intermediate and at any three beyond points on each route and to be freely selected by the designated airlines of Sri Lanka.[164] And according to the development in the aviation relationships between India and Sri Lanka, designated airlines

[162] *Supra note* 148, Annex to the Memorandum of Understanding, 21 April 1999.
[163] *Ibid.*
[164] *Supra note* 156, Annex to the Memorandum of Understanding, 11 September 2004.

of both states are allowed to carry fifth freedom traffic between points in SAARC[165] countries.

3.2(a) (v) Cabotage

Cabotage is the carriage of traffic between two points in the same country.[166] In other words cabotage means carriage of domestic traffic by foreign carriers. The term of the word 'cabotage' has borrowed from the law of the sea. In the law of the sea it means the traveling from one port to another in the same state. If the carriage extends to two points in two states under the same flag, it is referred to as the grand cabotage. In air law, cabotage is referred to as a concept of Public Law but in Maritime law cabotage comes under private law. Cabotage had been expressly found a place in the Paris Convention of 1919.[167] Article 7 of the Chicago Convention 1944, grants every state the right to refuse permission to a foreign air carrier to exercise cabotage rights within its own territory. Dr. Michael Milde perceives that the wording of Article 7 does not prohibit cabotage but merely confers the states the discretion to grant or refuse foreign carriers the right to operate domestically.[168] And with the introduction of this provision to air law the complete and exclusive sovereignty of states over their airspace has been safeguarded.

The advantage of cabotage restrictions is for the domestic carriers to capitalize on their markets. For a country like Sri Lanka, with one international airport and no facilities to get direct transit from the airport, cabotage is less applicable. However, every bilateral agreement concluded by Sri Lanka expressly prohibits cabotage. The clause prohibiting

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[165] SAARC stands for South Asian Association of Regional Cooperation.
[166] Cheng, *Supra note* 8, at 314.
[167] *Supra note* 11, Article 16.
[168] Michael Milde, "The Chicago Convention- Are Major Amendments Necessary or Desirable 50 years later? (1994) XIX – I Ann. Air & Sp. L. 401.

cabotage is always included in the reciprocity clause in the mandatory language and is as follows,

> 'Nothing in paragraph....of this Article shall be deemed to confer on the airlines of one Contracting Party the privilege of taking up in the territory of the other Contracting Party, passengers, cargo or mail carried for remuneration or hire and destined for another point in the territory of that other Contracting Party'[169]

3.2 (b) (i) Ancillary Rights

Apart from the basic rights, which are included in a bilateral agreement after successful negotiations by the delegations, certain other rights too could be found in an agreement of air transport. These provisions give effect to the rights and privileges, which derive from the Chicago Convention 1944 and enjoyed by the air carriers in international air navigation. It could be noted that most of these provisions are related to the aircraft. Following is an analysis of the ancillary rights embodied in bilateral agreements concluded by Sri Lanka.

3.2 (b) (ii) Non- discrimination

Article 11 of the Chicago Convention specifies that 'subject to the provisions of this Convention, the laws and regulations of a contracting State 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 all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that state.' This provision is important that it enunciates the customary international law

[169] *Supra note* 149, Article 2(2).

principle of sovereign equality of states. That is to say that every state is juridicaly equal before the law irrespective of geographical or any other difference. And in air law, states are urged to treat all the states alike without discrimination as to the nationality of the aircraft and this provision prevents States treating its own airlines with favouration.

In the bilateral agreements concluded by Sri Lanka, most bilateral agreements contain the non-discrimination clause[170] while few agreements are without such a clause.[171]

The non-discrimination clause is generally formulated as follows,[172]

> (1) The laws and regulations of one party, governing entry into and departure from its territory of aircraft engaged in international air navigation or flights of such aircraft over that territory, shall apply to the designated airlines of the other party.
>
> (2) The Laws and regulations of one party governing entry into, sojourn in and departure from its territory of passengers, crew, cargo or mail, such as formalities regarding entry, exit, immigration, aviation security, currency, postal laws and regulations as well as customs and sanitary measures shall apply to passengers, crew, cargo or mail carried by the aircraft of the designated airline of the other party while they are within the said territory.
>
> (3) Each party undertakes not to grant any preferences to or its own airlines with regard to the designated airlines of the other party in the application of the laws and regulations provided for by the present Article.

However, the author believes that the absence of the non-discrimination clause does not negate the importance of the concept.

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[170] *Supra note* 149, Article 6 of the Agreement with Oman. See also *Supra note* 151, Article 6 of the Agreement with Singapore.

[171] For example see the agreement with India, *Supra note* 144.

[172] *Supra note* 151, Article 6.

3.2 (b) (iii) Use of Airports and other facilities and systems

The importance of non-discrimination between the national airline and the international airlines as to the use of airports and related facilities is emphasized here as well. Actually the right to use airports and other facilities are always implied in an agreement between two states, because the failure to provide necessary assistance to international air carriers would result in terminating the relationship with each other. The Chicago Convention by Article 28 makes the signatories obligatory to facilitate international air navigation by providing air navigation facilities and standard systems.[173] The air navigation facilities include airports, radio services, meteorological services and other air navigation facilities, which are adopted as standards and recommended practices by the International Civil Aviation Organization from time to time.[174] The Standard Systems also include communication procedures, codes, markings, signals, lighting and other operational practices and rules.[175] Today all the facilities are codified in the Annexes to the Chicago Convention therefore being a signatory to the Convention per se makes it obligatory for the contracting parties to follow them. This is the reason for the modern bilateral agreements not to have an express clause regarding airport and other facilities and systems. Early bilateral agreements concluded by Sri Lanka have a clause to this effect. And all the bilateral agreements in which such a clause appears and the wording is the same. It read as follows,[176]

> (A) The designated airline of either contracting party in maintaining and servicing its aircraft in the territory of the other contracting party when operating the specified route

[173] *Supra note* 19, Article 28.
[174] *Ibid,* Article 28 (b).
[175] *Ibid,* Article 28 (c).
[176] Agreement between the Government of Ceylon and the Government of People's Republic of China, 26 March 1959 (hereinafter referred to as the Agreement with China), Article 10.

shall be given all possible assistance and facilities by the other contracting party.

(B) Each contracting party shall undertake to make arrangements to ensure the adequate supply in its territory of aviation fuel, oils and lubricants to the designated airline of the other contracting party for the operation of the specified route.

(C) Each contracting party in its airport take all possible measures to safeguard the aircraft, aviation fuel, oils and stores of the other contracting party.

For the first time in Sri Lanka, the Katunayake airport temporarily ran out of fuel in late December 2004.[177] This shortage of fuel was a result of the heavy traffic flown from different donor countries to aid the 26/12 Tsunami victims.

Most of the bilaterals expressly negate 'the most favored nation' treatment to airlines. For an instance Article 5(4) of the Agreement with South Africa reads as follows,

> "Neither contracting party may grant any preference to its own nor any other airline over the designated airline of the other contracting party in the application of the laws and regulations provided for in this Article"

3.2 (b) (iv) Facilitation

'Facilitation' today is given a great importance by the Chicago regime. In the Article 22 of the Chicago Convention, the contracting parties have agreed to 'adopt all practicable measures, through the issuance of special regulations or otherwise, to facilitate and expedite navigation by aircraft between the territories of contracting states, and to prevent unnecessary delays to aircraft, crews, passengers and cargo, especially in the administration of the laws relating to immigration, quarantine, customs and clearance.'

[177] Paul Wiseman, "UN offers direct aid to divided Sri Lanka; people put politics aside" *USA today* (4 January 2005) (Lexis).

Annex 9 to the Convention on International Air Navigation lays down the Standards and Recommended Practices regarding facilitating international air navigation.[178]

Most of the bilateral air services agreements concluded by Sri Lanka do not include an express clause on facilitation. The writer believes the reason is that once a state ratifies the Chicago Convention that state becomes a party to the Annexes and it is not necessary to incorporate a specific clause to that effect.

Another aspect of facilitation is assistance to aircraft. This occurs specially in the cases where aircraft are in distress. Here again the contracting states are obliged to assist the aircraft in distress and if the aircraft needs assistance within the territory of another state, such other state is required to provide necessary assistance to the authorities of the state where the aircraft is registered according to the circumstances.[179] Moreover in an instance of a searching of a missing aircraft the contracting states have agreed to 'collaborate in coordinated measures' which are recommended by the Convention.

3.2 (b) (iv) User Charges (Airport and similar charges)

Article 15 of the Chicago Convention, while ensuring the equal treatment to aircraft of other states in using airports and navigational facilities including radio and meteorological services, allows the states to charge for using airports and air navigation facilities by the aircraft of another contracting state subject to certain conditions.[180] All charges are subjected to the jurisdiction of the ICAO to review and recommend the charges from time to time upon the request by a contracting party.

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[178] *Supra note* 19, Annex 9.
[179] *Supra note* 19, Article 25.
[180] *Supra note* 19, Article 15.

All the bilateral agreements concluded by Sri Lanka include user charges clauses.[181] These clauses adhere to the Article 15 of the convention and specify that what ever is charged should be just and reasonable.[182]

3.2 (b) (v) Exemption from Custom Duties and other Charges

When an aircraft of one state arrives at another state, such aircraft is representing its state of registration. Therefore the territory in which the aircraft is required to be treated with respect. Contracting parties to the Chicago Convention have agreed to grant certain exemptions from custom duties and other charges to aircraft of other contracting states while the aircraft are within the territory of such states. Article 24 of the Convention provides for granting exemptions for fuel, lubricating oils, spare parts, regular equipment and aircraft, stores retained on board aircraft.[183] These should be exempted from customs duty, inspection fees or similar national or local duties and charges.[184]

Every bilateral agreement concluded by Sri Lanka contains these important provisions. For example; In Article 9 of the Air Services Agreement between Sri Lanka and Malaysia the exemptions are granted as follows,

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[181] Article 12 of the Agreement with Malaysia reads as follows,

(1) Each party shall ensure that the user charges imposed or permitted to be imposed by its competent charging policies on the designated airline of airlines of the other party are just and reasonable. These charges shall be based on sound economic principles and shall not be higher than those paid by other airlines for such services.

(2) Neither party shall impose or permit to be imposed, on the designated airline or airlines of the other party user charges higher than those imposed on its own designated airline or airlines operating similar international air services using similar aircraft.

(3) Each party shall encourage consultations between charging authorities in its territory and the airline using the services and facilities. Each party shall also encourage the competent charging authorities to provide users with reasonable notice of any proposal for changes in user charges to enable users to express their views before changes are made.

Note that paragraph 3 is only seen in recent bilateral agreements.

[182] *Ibid.*

[183] *Supra note* 19, Article 24.

[184] *Ibid,* Article 24.

(1) On arriving in the territory of one party, aircraft operated in international air transport by the designated airlines of the other party, their regular equipment, fuel, lubricants, hydraulic fluids, consumable technical supplies, spare parts (including engines), aircraft stores (including but not limited to such items of food, beverages and liquor, tobacco and other products destined for sale to or use by passengers in limited quantities during flight), and other items intended for or used solely in connection with the operation or servicing of the aircraft engaged in international air transport shall be exempted from all import restrictions, custom duties, excise duties and similar levies, fees and charges that are (1) imposed by the national authorities and (2) not based on cost of services provided, provided that such equipment supplies remain on board the aircraft.

(2) The following shall also be exempted from the levies, 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, printed ticket stocks, airway bill, any printed material bearing insignia of a designated airline of a party and usual publicity materials distributed free of charge by that designated airline introduced into or supplied in the territory of a party or taken on board, within reasonable limits, for use on out bound aircraft of an airline of the other party engaged in an international air transport, even when these stores are to be used on a part of the journey performed over the territory of the party in which they are taken on board;

(b) Spare parts (including engines) and regular air borne equipment introduced into the territory of a party for the servicing, maintenance or repair of aircraft of an airline of the other party used in international air transport; and

(c) Fuel, lubricants, hydraulic fluids and consumable technical supplies introduced into or supplied in the territory of a party for use in an aircraft of an airline of the other party engaged in international air transport, even when these supplies are to be used on a part of the journey performed over the territory of the party in which they are taken on board.

(3) Equipments and supplies referred to in paragraph 1 and 2 of this Article may be required to be kept under the supervision or control of the appropriate authorities up to such time as they are re-exported or otherwise disposed of in accordance with custom regulations

(4) The exemptions provided by this Article shall also be available where the designated airlines of one party have contracted with another airline, which similarly enjoys such exemptions from the other party, for the loan or transfer in the territory of the other party of the items specified in paragraphs 1 and 2 of this Article.

3.2 (b) (vi) Aviation Security

Aviation security has become the most important topic in the field of aviation today. The aviation world started thinking seriously about aviation security with the increasing number of hijacking incidents. ICAO tabled several international documents regarding the prevention of unlawful acts on board aircraft and unruly passengers. The states started to include an express clause regarding aviation security in 1970s. However, the 9/11 incidents marked an unprecedented disaster in the aviation history where 4 commercial aircraft were used as guided missiles into the security base and the twin towers of USA. This incident has awakened the aviation industry, creating many problems and, as a result, no topic regarding civil aviation could be discussed without touching on security. The ICAO has strengthened its programmes on security audits throughout the world.[185] Moreover, states themselves have started security audit programmes to ensure that the airports in foreign states are safe enough for their own aircraft to operate.[186] Therefore every bilateral air services agreement concluded between any states in the world incorporate a specific clause for aviation security.

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[185] The Universal Safety Oversight Programme (USOP) was initiated by ICAO to inspect the compliance with the Standards and Recommended Practices in 1986. After the 9/11 disaster, replacing USOP with Universal Security Oversight Assessment Programme (USOAP) in 2001 accelerated the programme. The motives of these audit programmes were to assess the foreign airports of compliance with Annex 17 of the Convention.

[186] Actually USA started auditing the foreign airports and airlines operating into US airports under the Foreign Airport Security Act of 1985, to make sure that foreign carriers take necessary steps to comply with the Standards and Recommended Practices set out in Annex 17 of the Chicago Convention.

Bilateral Agreements concluded by Sri Lanka in the first few decades did not include a clause regarding aviation security.[187] Today, every agreement carries an extensive provision to ensure aircraft are not endangered in another state. The aviation security provisions in bilateral agreements are drafted identically with minor modifications.[188] Article 7 of the agreement between Sri Lanka and USA is as follows,

> (1) In accordance with the rights and obligations under international law, the parties re affirm that their obligations to each other to protect the security of civil aviation against acts of unlawful interference forms an integral part of their rights and obligations under international law, the parties shall in particular act in conformity with the provisions of the convention on Offences and Certain other Acts Committed on Board Aircraft; signed at Tokyo on September 14, 1963, The Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on December 16th 1970, The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23rd, 1971, and the Protocol for the Suppression of Unlawful Acts of Violence at Airport Security ICAO done at Montreal on February 24, 1988.
> (2) The parties shall provide upon request all necessary assistance to each other to prevent acts of unlawful seizure of civil aircraft and other unlawful acts against the safety of such aircraft of their passengers and crew, and of airport and air navigation facilities and to address any other threat to the security of civil air navigation
>
> (3) The parties shall, in their mutual relations, act in conformity with the aviation security standards and appropriate recommended practices established by the ICAO and designated as Annexes to the Convention; they shall require that the operations of aircraft of their registry, operation of aircraft who have their principle place of business or permanent residence in their territory, and the

[187] See Agreements with India *Supra note* 144, Agreement with Pakistan *Supra note* 148, and Agreement with Australia *Supra note* 143.
[188] See Agreement with Singapore, *Supra note* 151, Article 8 includes after 1988 'any other multilateral agreement governing civil aviation security binding on both parties'.

operators of aircrafts in their territory act in conformity with such aviation security provisions

(4) Each party agrees to observe the security provisions required by the other party for entry into, for departure from, and while within the territory of that other party and to adequate measures to protect aircraft and to inspect passengers, crew, and their baggages and carry-on items, as well as cargo and aircraft stores prior to and during boarding or loading. Each party shall also give positive consideration to any request from the other party for special security measures to meet a particular threat

(5) When an incident or threat of an incident of unlawful seizure of aircraft or other unlawful acts against the safety of passengers, crew, aircraft, airports and air navigation facilities occurs, the parties shall assist each other by facility communications and other appropriate measures intended to terminate rapidly and safely such incident or threat

(6) When a party has reasonable grounds to believe that the other party has departs from the aviation security provisions of this Article, the aeronautical authorities of the party may request immediate consultations with the aeronautical authorities of the other party. Failure to reach a satisfactory agreement within 15 days from the date of such request shall constitute grounds to withhold, revoke, limit or impose conditions on the operating authorization and the technical permission of airlines of that party. When requested by an emergency, a party may make interim action prior to the expiry of 15 days.

Today, the importance given to the aviation security is evident from the security clauses in bilateral agreements. It is for this reason that apart from the fully effective security clause, certain other clauses relating to security have found a place in the agreements. For instance in the Draft Agreement between Sri Lanka and Switzerland, two new provisions relating to the security of Travel documents[189] and inadmissible and undocumented passengers and deportees[190] are agreed between states.

[189] Article 9 of the ASA between SL and Swiss Federal Council reads as follows,

Not only is the security, safety also given a prominent place in the bilateral agreements today.

3.2 (b) (vii) Aviation safety

Aviation security is the protection of passengers and cargo from intentional harm [191] and safety is the protection from unintentional harm or accidental harm.[192] Owing to the technical advancement the accidents occur due to the technical problems have become less and less. Still states pay thorough attention on safety issues on aircraft. The standards and recommended practices on aviation safety are included in Annexes to the Convention and the re affirmation of these SARPs in the bilateral agreements is a second adherence to the relevant safety modes. For this reason we find detailed provisions on safety in every recent bilateral agreements concluded by Sri Lanka.[193] Compliance with the safety and security standards is the foundation of bilateral relationships between the states. And the failure to maintain the required standards could result in adverse consequences that may in turn would hamper the air relationships between the states.

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1. Each contracting party agrees to adopt measures to ensure the security of their passports and other travel documents in conformity with internationally recognized standards and in this regard agrees to take all necessary steps concerning the legitimate issuance, verification and use of passports and other travel and identity documents issued by or on behalf of that contracting party.
2. The contracting parties further agree to exchange operational information regarding forged or counterfeit travel documents with each other with a view to the prevention and combating of all forms of immigration fraud.

[190] Article 10 of the above agreement is as follows,

> Each Contracting party agrees to establish effective boarder controls with a view to combating unlawful migration including undocumented passengers. In this regard, each contracting party will adopt necessary measures having regard to the standards and recommended practices of Annex 9 of the Convention as well as to any applicable bilateral arrangements between the two countries in order to enhance cooperation to combat illegal migration.

[191] Paul Stephen Dempsey, "Compliance and Enforcement in International Law: Achieving Global Uniformity in Aviation Safety" (2004) 30 N.C.J.Int'l L. & COM. REG. 104.

[192] *Ibid.*

[193] Agreement between the Government of Democratic Socialist Republic of Sri Lanka and the Government of the Swiss Federal Council, 9 May 1966 (hereinafter referred to as the Agreement with Swiss Federal Council) Article 10.

When any one of the contracting parties can at any time call for consultations regarding aeronautical facilities, flight crews, aircraft and the operation of aircraft with the other contracting party,[194] there is a time specified within which the consultations take place. In the Agreement between Sri Lanka and Switzerland it is 30 days. Article 10(2) of the Agreement with Swiss Federal Council provides that if the requesting party learns that the requested party does not effectively maintain safety standards, firstly, the faulty party would be notified by the requesting party to conform to the minimum standards and the faulty party is obliged to take corrective measures within 15 days or longer period with consultations with the other party. If the faulty party does not conform to the requesting party's notification, the requesting party can act according to Article 5(1) of the Agreement, which specifies that non-compliance would lead to the revocation and suspension of operating authorization.[195]

The above provision also provides for a 'ramp inspection'.[196] That is to say the authorized representatives of aeronautical authorities of any contracting party can examine 'on board and around the aircraft to check the validity of the aircraft documents and those of its crew and the apparent condition of the aircraft and its equipment. This inspection should not lead to an unreasonable delay.[197] If the findings of the inspection reveals unsatisfactory compliance with the safety standards established in the Annexes of the Convention, the contracting party which carried the inspection or series of inspections is in a position to

[194] *Ibid*, Article 10(1).
[195] *Ibid*, Article 5 (1).
[196] *Ibid*, Article 10(3).
[197] *Ibid*, Article 10(3).

conclude that the requirements of Article 33 of the Convention has not been complied with and that party is free to suspend or revoke the operating permission.[198]

3.2 (b) (viii) Certificates of Airworthiness and License of Personnel

Article 31 of the Convention makes it mandatory for the states where an aircraft is registered, to issue or render valid a certificate of airworthiness to such aircraft engaged in international air navigation.[199] And Article 32 of the Convention stipulates that the pilot of every aircraft and other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competency and licenses issued or rendered valid by the state in which the aircraft is registered. At the same time, Article 32(2) of the Convention grants the states to reserve the right to refuse certificates of competency and licenses granted to the nationals of the state by another contracting state. And it is important that the contracting parties to the Convention should accept the certificates of competency and licenses granted or rendered valid to the above mentioned persons by the state where the aircraft is registered provided that the requirements under which the certificates and licenses are issued are equal or above the minimum standards specified in the Convention. This provision is a mandatory provision, which could be found in all the agreements of Sri Lanka except in the early bilateral agreements with India and Pakistan. Here again the author perceives that the absence of a clause to this effect does not relieve of both states of the responsibilities to ensure trouble free and safe operation of flights.

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[198] *Ibid,* Article 10(6).
[199] *Supra note* 19 Article 31.

Article VII of the agreement between Sri Lanka and Indonesia reads as follows,[200]

> (1) Certificates of airworthiness, certificates of competency and licenses issued or rendered valid by one of the contracting parties shall, during the period of their validity, be recognized as valid by the other contracting party
> (2) Each Contracting party reserves its rights, however not to recognize as valid for the purpose of the flights over its own territory, certificates of competency and licenses granted to its own nationals or rendered valid for them by the other contracting party or by any other state.

Today with the high awareness of security, some bilateral agreements have coupled the safety regulations with the airworthiness clause.[201]

3.2 (b) (ix) Commercial opportunities

The increasing demand by passengers to move across the globe faster has created a competition between air carriers to attract customers. As a country, which is heavily dependent on tourism, Sri Lanka is facilitating all airlines engaged in business here. To establish this legally, the provision for 'commercial opportunities' has been included extensively in the air services agreements of Sri Lanka. In the early bilateral agreements the relevant clauses merely provided for the presence of 'technical and administrative

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[200] Agreement between the Government of Ceylon and the Government Republic of Indonesia, initialed on 11 December 1971 terminated and the new Agreement entered into on 17 December 1993 (hereinafter referred to as the agreement with Indonesia) Article 6.

[201] Article 6(2) of the Agreement with USA specifies that ' either party may request consultation concerning the safety standards maintained by the other party relating to aeronautical facilities, aircrews, aircraft and operations of the designated airlines. If, following such consultations, one party finds that the other party dose not effectively maintain and administer safety standards and requirements in these areas that at lease equal the minimum standards that may be established pursuant to the Convention, the other party shall be notified of such findings and the steps considered necessary to confirm with these minimum standards, and the other party shall take appropriate corrective action. Each party reserves the right to withhold, revoke or limit the operating authorization or technical permission of an airline or airlines designated by the other party in the event the other party does not take such appropriate corrective action within a reasonable time.

personnel for operating the agreed services'.[202] But the modern clauses are much more complex and include issues such as transfer of funds, selection of ground handling services, cargo carriage and payment for local expenses etc.[203]

Code sharing is a relatively new phenomenon today. This would provide for most airlines of the world to expand their business throughout the world without having operations to many states. Although in most of the bilateral agreements a separate provision for code sharing cannot be seen but in the Agreement between Sri Lanka and Singapore, code-sharing provision too has crept into the commercial opportunity clauses.[204]

3.3 Inauguration of Services

Conclusion of a bilateral agreement per se does not give the right to parties for starting operations in each other's territories. Bilateral agreements lay down the framework within which the operations of agreed services should start. Therefore a bilateral air services agreement could be regarded as a skeleton whereas the flesh is added by the other documents such as Annexes to the agreement, memoranda of understanding and agreed minutes. The following are the 'flesh adding' clauses.

3.3 (a) Designation of an airline or airlines

The right to designate an airline or airlines to conduct agreed air services is granted to each other by the agreement. When a contracting party designates an airline or airlines such designation should be communicated to the aeronautical authorities of the other party for

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[202] Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the Republic of Philippines, 18 December 1976, (hereinafter referred to as the Agreement with Philippines) Article 6.
[203] *Supra note* 151, Article 11.
[204] *Ibid,* Article 11.

authorization. A definition of 'designated airline' could be found in several Sri Lankan bilaterals. It says that a designated airline means 'an airline which has been designated and authorized in accordance with Article.....of this Agreement.'[205]

Early bilateral agreements of Sri Lanka do not provide for any specific procedure to be followed in communicating and authorization of designated airlines. But, in the recent bilateral agreements concluded by Sri Lanka it is expressed that the notification should be done through diplomatic channels and in writing.[206]

The number of airlines a contracting party could designate has also changed with the time. Up to 1970's each party had the right to designate only one airline[207] but when the aviation policy started to liberalize the number of the designated airlines also changed. Each party could designate one or more airlines.[208] However, after the open skies policy was adopted in Sri Lanka, now the parties could designate 'as many airlines as it wishes.'[209]

As for the time limit given to each party to designate each other's respective airlines, no specific time limit is found in any of the bilateral agreements concluded by Sri Lanka, The author believes that since the agreements are based on reciprocity, designations should be done within a reasonable time and the time restrictions could be too harsh on the relationship of the parties.

The names of the designated airlines normally appear in the Annexes of the Agreement or on a separate memorandum of understanding. The reason again is that it is easier to amend the attachments than the body of the agreement. But it is interesting to note in the Air

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[205] *Supra note* 151, Article 1.
[206] *Supra note* 193, Article 4(1).
[207] *Supra note* 176, Article I of the Agreement with China, *Supra note* 144, Article II (1) of the Agreement with India, *Supra note* 202, Article 3 of the Agreement with Philippines.
[208] *Supra note* 150, Article 3(1) (a).
[209] *Supra note* 193, Article 4(1).

Transport Agreement between Sri Lanka and China the name of the designated airline appears in the main body of the agreement.[210]

The right to change the designated airline is not expressly provided for in most bilateral agreements of Sri Lanka. But in the Article 4(2) of the Air Services Agreement between the Republic of Sri Lanka and the Federal Republic of Germany re-designation clause is expressed.[211] It says that ' Each Contracting Party shall have the right by written communication to the other Contracting Party to replace subject to the provisions of Article...the airline shall have the same rights and be subject to the same obligations as the airline which replaces.'

3.3 (b) Operating Permission

Once the contracting parties complete the designating of airlines, the next step is to get operating permission from each other to initiate agreed services. The operating permission is mandatory and every bilateral agreement concluded by Sri Lanka provides for prior authorization. Generally operating permission is granted when the aeronautical authorities are satisfied that the designated airline or airlines of the requesting party has complied with 'all the conditions and regulations normally and reasonably applied to the operation of international air services by such authority in conformity with the provisions of the Convention.'[212]

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[210] In the Article 2(A) of the Agreement with China specifies that 'The government of Ceylon designates "Air Ceylon Limited" as its airline and the Government of the People's Republic of China designates the "Civil Aviation Administration of China" as its airline to operate the specified route.

[211] Agreement between the Government of Democratic Socialist Republic of Sri Lanka and the Government of Germany, 24 July 1973, (hereinafter referred to as the Agreement with Germany) Article 4(2).

[212] *Supra note* 153, Article 3.

Again, there is no time period mentioned in any of the agreements but the operating permission should be given 'without delay', 'without unreasonable delay' or 'with minimum procedural delay'.[213]

This is the crucial step to be satisfied before starting operations in each other's market.

3.3 (c) Substantial Ownership and Effective Control

Substantive ownership and effective control of airlines is one of the most discussed topics in the aviation world today. The absence of a proper definition of substantial ownership and effective control paves the way to use different tools to understand the effect of ownership and control. However the accepted procedure among the states to find out the ownership is by scrutinizing the voting shares of the company.[214] That is to say that the party holding 50 percent or more is considered to possess the substantial ownership.[215] With the privatization, liberalization and regionalization of the air transport industry it is imperative to note the fate of the requirement of substantial ownership and effective control for the reason that even if a private company which owns 45% of the national airline could be considered as holding 'substantial ownership'.[216] And as Dr. Abeyratne perceives the effective control is reflected by the issue of 'who directs corporate policy and oversees employment.'[217]

The history of ownership and control could be traced back to the Paris Convention of 1919. Article 6 of the Convention specifies that 'Aircraft posses the nationality on the state on the

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[213] *Supra note* 152, Article 3 of Agreement with Malaysia also see *Supra note* 145, Article 3 of Agreement with South Africa.
[214] Ruwantissa Abeyratne, "Economic Benefits of Civil Aviation Justify Substantial Investment in Industry" (2005) 60 No. 4 ICAO J. 11.
[215] *Ibid.*
[216] *Ibid.*
[217] *Ibid.*

register of which they are entered'. That is to say that when an aircraft is registered in a state, that aircraft bears the nationality of that particular state. Moreover Article 7 of the Paris Convention provides that 'No aircraft shall be entered on the register of one of the contracting states unless it belongs wholly to nationals of such state' this provision has been strengthened by the second paragraph of Article 7, which states that ' No incorporated company can be registered as the owner of an aircraft unless it possess the nationality of the state in which the aircraft is registered, unless the president or chairman of the company and at least two-thirds of the directors belong to such nationality, and unless the company fulfills all other conditions which may be prescribed by the laws of the said state.' This provision shows the extent of the attention paid by the states at that time for the ownership and control of aircraft. The reason is the doubts born in the minds of states that civil aircraft may be used for military purposes because the Paris Convention was discussed just after the World War I. Article 8 restricts the registration of aircraft to one state.[218]

Even though the Chicago Convention of 1944 reiterated most of the principles contained in the Paris Convention, the ownership restrictions have found a diluted presence in the Chicago Convention. Article 18 of the Convention specifies that 'An aircraft cannot be validly registered in more than one state, but its registration may be changed from one state to another'. And the laws and regulations of that state should govern such registration or transfer of registration.[219] The Chicago Convention does not expressly provide for the ownership and control restrictions. But in the Article 21 of the Chicago Convention, the states have agreed to supply to another contracting state or to the ICAO, information concerning the registration and ownership of any particular aircraft registered in that

[218] *Supra note* 11, Article 8.
[219] *Supra note* 19, Article 9.

state.[220] Therefore it is evident that the drafters of the 1944 Chicago Convention have impliedly accepted the requirement of substantial ownership and effective control.

In bilateral relationships relating to air navigation between the states, substantial ownership and effective control is a primary requirement for granting operating permission. Every state reserves the right to withhold or revoke an operating permission to the designated airlines of the other contracting party if the other party fails to prove adherence to the requirements specified by the Chicago Convention.

The reasons for strict adherence of this provision by the states are the prevention of military influence on civil aircraft and the elimination of the flag of convenience practice. But it could well be argued that the absence of an express provision would facilitate the states to register their aircraft on the basis of flag of convenience.

To overcome this stricter approach in ownership restrictions in an ever-liberalizing environment, ICAO has stepped forward to scale down the requirement of substantial ownership and the principle place of business to be agreed between the parties in place of effective control.

Sri Lanka from the beginning of the airline industry was protectionist. It was obvious for a country like Sri Lanka (Ceylon), a small state having one airline with limited operations to few destinations, to safeguard the interests of the airline. Therefore, the author hardly notices any change in the requirement of substantial ownership and effective control even if Sri Lanka has accepted the open skies policy as a principle and has entered into few fully

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[220] *Supra note* 19, Article 21 of the Chicago Convention. The Article further provides for 'furnishing reports to the International Civil Aviation Organization, under such regulations the latter may prescribe, giving such pertinent data as can be made available concerning the ownership and control of aircraft registered in that state and habitually engaged in international air navigation. The data thus obtained by the International Civil Aviation Organization shall be made available by it on request to the other contracting states.'

blown open skies agreements and several managed open skies agreements. It is interesting to see that in the Agreement with China; specifies that substantial ownership and effective control of the airlines designated by the two contracting parties shall remain vested in their respective governments. This means that in earlier times even the ownership and control of the nationals was not accepted as well.

It should be noted that the Sri Lankan bilaterals, this requirement of substantial ownership and effective control is embodied in two different ways. Several bilateral agreements merely carry the provision as a negative clause while other agreements contain both the requirement and the consequences of non-compliance.

Article 3(4) of the Agreement with Germany reads as follows,

> The aeronautical authorities of each contracting party may withhold the exercise of the rights provided for in the Article.... of the present agreement from the airline designated by the other Contracting Party if such airline is not able to prove upon request that substantial ownership and effective control of such airline are vested in the nationals or corporations of the other Contracting Party or in that Party itself.

And in Article 3(2) of the Agreement with Singapore includes both the provisions and consequences.

> On receipt of the designation, the other party shall, subject to the provisions of paragraph.... of this Article, without delay grant to the airline or airlines designated the appropriate operating authorization provided that:
>
> (b) Substantial ownership and effective control of the airline is vested in the party designating the airline, its nationals or both.

And Article 3(3) reads as follows,

> Each party shall have the right to withhold or revoke the grant to a designated airline of the privileges specified in paragraph ....of Article....of this Agreement or to impose such conditions as it may deem

necessary on the exercise by a designated airline of those privileges in any case where:

(a) Substantial ownership and effective control of that airline is not vested in the party designating the airline, its nationals or both.....

The Sri Lankan provision is almost uniform up to date and has not decided yet to adopt the new ICAO clause providing for the principal place of business.

Pursuant to the decision of the Court of Justice of the European Communities, all the European states have modified the provisions effecting ownership and control provisions. Therefore the members of the European Community have engaged in amending and up dating the provisions regarding designation, Authorization and revocation of operating permission.[221]

3.3 (d) The Regulation of Capacity and Frequency Control

The term 'Capacity' has been given two definitions in the Sri Lankan bilateral agreements. One in relation to the 'aircraft' and the other in relation to the 'agreed services'.[222] Capacity, in relation to the aircraft means that the 'payload'[223] of that aircraft available on a route or section of the route.[224] And in relation to 'agreed services' means the capacity of the aircraft used on such service, multiplied by the frequency operated by such aircraft on a given period.[225] This clause unlike most of the other clauses in a bilateral agreement does not remain static. It gets amended from time to time according to the demand. Therefore

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[221] Amendment to the Agreement between the Government of Democratic Socialist Republic of Sri Lanka and Republic of France, 18 April 1966 (hereinafter referred to as the Agreement with the France) done in 2004.

[222] Agreement between the Democratic Socialist Republic of Sri Lanka and the Government of his Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam, 14 March 1995 (hereinafter referred to as the Agreement with Brunei) Article 1.

[223] Payload has been defined as the capacity expressed in metric tons available for sale for the transportation of passengers, mail, baggage and freight. See ICAO Doc. 7200. Lexion of terms used in connection with international civil aviation (Montreal, 1952) 3.

[224] *Supra note* 222, Article 1.

[225] *Ibid,* Article 1.

there are number of Memoranda of Understanding attached to a bilateral agreement within a short period of time.

The capacity clauses of the bilateral agreements concluded by Sri Lanka could be classified into three basic categories. They are Bermuda I, pre-determined and free determined capacity clauses. It is interesting to note that several bilateral agreements consist of general provisions regarding capacity.[226] The provision merely specifies that 'the designated airlines of both contracting parties in the operation of the specified routes shall enjoy fair and equal opportunity and treatment in the carriage of air traffic and in the use of services provided.....'[227] In the bilateral agreement with India the capacity clause reads as follows,

> "In order to achieve and maintain equilibrium between the capacity of the specified air services and the requirements of the public for air transport on the specified air routes or sections thereof and in order to achieve and maintain proper relationship between the specified air services *inter se* and between these air services and other air services operating on the specified air route or sections thereof....."[228]

Apart from these general provisions, most of the agreements carry the Bermuda I type capacity clauses. For instance Article 10 of the Agreement with Japan reads as follows,

> 1. The agreed services provided by the designated airlines of the contracting parties shall bear a close relationship with the requirements of the public for such services.
>
> 2. The Agreed services provided by a designated airline shall retain as there primary objective the provision at a reasonable load factor of capacity adequate to current and reasonably anticipated requirements for the carriage of passengers, cargo and mail between the territory of the

[226] *Supra note* 176, Article 3.
[227] *Ibid,* Article 3.
[228] *Supra note* 144, Article IV.

contracting party designating the airline and the countries of ultimate destinations of the traffic.
Provision for the carriage of passengers, cargo and mail both taken on and discharged at points on the specified routes in the territories of states other than that designating the airline shall be made in accordance with the general principles that capacity shall be related to;

(a) traffic requirements between the country of origin and the country of ultimate destination of the traffic;
(b) the requirement of through airline operation;
(c) traffic requirements of the area through which the airline passengers, after taking into account of local and regional services

3. Frequency and type of aircraft in respect of the agreed services provided by the designated airlines of the contracting parties shall be determined through consultations between the aeronautical authorities of both contracting parties in accordance with the principles laid down in Article.....and paragraph.....of this Article.

In few agreements the right of the aeronautical authorities to determine the capacity has been retained.[229] There the designated airlines have little authority in determination of the capacity. For an instance Article 9 of the Agreement with Brunei reads as,

'The aeronautical authorities of the two contracting parties shall agree on the capacity of services to be operated.....'[230]

With the adoption of the Open Skies policy by Sri Lanka, the concept of fair competition was accepted in the bilateral negotiations. As a result all the new bilateral agreements carry the free determination of capacity clauses making the intervention of the governments minimal.[231] The right to determine the capacity totally depends on the market forces and this type of provision is totally keeping in line with the WTO market access concepts. Article 11 of the open skies Agreement with USA reads as follows,

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[229] *Supra note* 222, Article 9.
[230] *Ibid.*
[231] *Supra note* 153, Article 11 of the Agreement with USA, *Supra note* 151, Article 9 of the Agreement with Singapore.

1. Each Party shall allow a fair and equal opportunity for the designated airlines of both parties to compete in providing the international air transportation governed by this Agreement.
2. Each party shall allow each designated airline to determine the frequency and capacity of the international air transportation it offers based on commercial considerations in the market place. Consistent with this right, neither party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated airlines of the other party, except as may be required for customs, technical or operational or environmental reasons under uniform conditions consistent with Article 15 of the Convention
3. Neither Party shall impose on the other party's designated airlines a first refusal requirement, uplift ratio, no-objection fee or any other requirement with respect to capacity, frequency or traffic that would be in consistent with the purposes of this Agreement.
4. Neither party shall require of the filing of schedules, programmes for charter flights, or operational plans by airlines of the other party for approval, except as may be required on a non-discriminatory basis to enforce the uniform conditions foreseen by the paragraph 2 of this Article or a may be specially authorized in an Annex to this Agreement. If a party requires filings for information purposes, it shall minimize the administrative burdens of filing requirements and procedures on air transportation intermediatories and on designated airlines of the other party.

The standard phrase 'fair and equal opportunity for the designated airlines of both parties to compete in providing international air transportation' creates problems for the developing states like Sri Lanka. The objectives of the International Civil Aviation Organization are embodied in Article 44 of the Chicago Convention. One such objective is to 'Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines.'[232] Dr. Abeyratne perceives that Article 44(f) along with Article 44(a), which states that ensuring the safe and orderly growth of

[232] *Supra note* 19, Article 44(f).

international civil aviation throughout the world, and Article 44(i), which states that promoting generally the development of all aspects of international civil aeronautics, provides the underlined principle of the fair and equal opportunity clause in bilateral air services agreements.[233] However, it is questionable whether the due consideration is given to these objectives in negotiating bilateral agreements because the entire bargaining seems to be based on regulation of capacity.[234] Therefore we are at the receiving end of the favorable interpretation of the clause by most of the developed states. And it also should be noted that we have been receiving more frequencies and routes in India but we are being denied additional frequencies by Pakistan repeatedly.

In some Sri Lankan Agreements it is provided that the flight schedules are to be submitted to the aeronautical authorities of the contracting parties prior to the initiation of air services. When these flight schedules are submitted the aeronautical authorities generally approve them. And if there are any alterations to be made, airlines cannot commence services prior to the approval. In most cases time is fixed, and in the Agreement between Sri Lanka and Brunei, the approval should be given within 30 days.[235]

3.3 (e) Code Sharing

Code sharing is a cooperative marketing arrangement 'where two airlines agree that the flight will bear the code and flight number of each airline even though it is operated by only one of the participants'.[236]

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[233] R.I.R Abeyratne, "The fair and equal opportunity clause of the air services agreement and developing countries: the Sri Lankan Experience" (1987) XII- 3 Air L. 114 at 116.
[234] *Ibid.*
[235] *Supra note* 222, Article 9.
[236] M. Franklin, "Code-sharing and Passenger Liability" (1999) XXIV Air & Sp.L. 138.

This enables any airline to have commercial activities in any contracting state even where that airline is not operating in that state.

Provisions for code sharing could be seen in bilateral air services agreements entered by Sri Lanka within the last decade. Almost all the other agreements are being updated to include code sharing provisions. It should be noted that the code sharing provision is not included in the main part of the agreement. The provision always finds a place in the Annex or in the 'Agreed Minutes'. At present Sri Lanka has a model clause for code sharing which appears in all recent agreements.[237]

3.3 (f) Tariffs

Tariffs mean the prices, which the designated airlines charge for the transportation of passengers and cargo and the condition under which those prices apply but excluding remuneration and conditions for carriage of mail.[238]

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[237] 1.When operating or holding out the agreed services on the specified routes, the designated airline of one contracting party, whether as the operating or marketing airline may, subject to the laws and regulations of the contracting party designating it, enter into co-operative marketing arrangements including but not limited to code sharing with:

(a) An Airline or Airlines of the same contracting party;
(b) Any Airline/s of the other contracting party; or
(c) An Airline or Airlines of a third country.

2. The entitlement set out in paragraph 01 above may be exercised only where:
   (a) All such Airlines hold appropriate authority to operate on the routes and segments concerned; and
   (b) In respect of any tickets sold, the airline makes it clear to the purchaser at the point of sale which airline will actually operate each sector of the service and with which airline or airlines the purchaser is entering into a contractual relationship.
3. The Capacity offered by a designated airline as the marketing airline on services operated by other airlines will not be counted against the capacity entitlements of the contracting party designating the marketing airline.
4. When the designated airline being an operating airline operates services on a code share basis with a marketing airline, the capacity entitlement of the marketing airline will not create a credit of capacity for the contracting party designating the operating airline.

[238] *Supra note* 143, Article 1.

The attempt of the drafters of the Chicago Convention to regulate the rate making by the contracting parties did not become a reality due to the diverse ideas expressed by states. However, Bermuda I marked the regulation of ratemaking by agreement between the states for the first time. States started to follow the Bermuda Tariff clause as a model clause since the ICAO did not make a standard tariff clause. Tariff clauses are tailored according to the needs of the contracting parties and vary from agreement to agreement and from state to state. Like the capacity and frequency, tariff clauses too change frequently.

In the early agreements, parties thought it is safer to follow the ratemaking guidance provided by the International Air Transport Association.[239]

In the analysis of the tariff clauses in the Sri Lankan bilateral agreements, three types of clauses could be noticed. They are,

(a) Agreements with a general Tariff clause
(b) Agreements with double approval clause
(c) Agreements with dual disapproval clause

A general tariff clause has been agreed between Sri Lanka and China. It says that 'the tariff is to be charged for the carriage of passengers, baggage and cargo on the specified routes, shall be fixed at reasonable levels, due regard being paid to all relevant factors, including comparatively economical operations at reasonable profit. Such tariff shall have the same minimum level for the designated airlines of both contracting parties on common or equivalent routes or sectors.'[240] In some agreements other characteristics of services are included as the factors to be considered in fixing rates. Such as standards of speed and accommodation.[241]

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[239] Hereinafter referred to as IATA.
[240] *Supra note* 176, Article 4(A).
[241] *Supra note* 150, Article 11.

Generally, in determining the tariff to be charged, the consultations are limited to the designated airlines of the contracting parties. But in some bilateral agreements concluded by Sri Lanka, consultations are recommended with the other airlines operating on the same route. In the agreement between Sri Lanka and India, it states that 'in the first instance, rates shall, be agreed between the designated airlines in consultation with other airlines operating on the route or any section thereof...'[242] and the rates so agreed should commensurate to the rates charged by the other airlines operating on the specified air routes.[243] Expectation of an ICAO initiation of regulating tariffs is expressed in a number of early bilateral agreements. It states that 'if ICAO does not within a reasonable time, establish a means of determining rates for traffic .....'[244]

The Agreements with double approval clause is the most common type of clauses in the Sri Lankan bilaterals. 'Double Approval' means that when the tariffs have been agreed upon by the designated airlines, it should be submitted to both contracting parties for approval. Article 11(1) of the Agreement with Japan provides as follows,

> (b) The minimum level of tariffs with respect to the specified routes and each sector thereof, after being agreed upon between the designated airlines, shall be subjected to the approval of both contracting parties. In the event of disagreement between the designated airlines or in case the minimum tariff level is not approved as required under this paragraph, the contracting parties shall endeavor to reach agreement between themselves pending any new directive concerning the minimum tariff level and the prevailing minimum tariff agreed upon by both contracting parties shall remain in force.

[242] *Supra note* 144, Article VI (B).
[243] *Ibid,* Article VI (B).
[244] *Ibid,* Article VI (C).

The time limit within which the designated airlines should submit the rates to the aeronautical authorities of the contracting parties is expressed in several bilateral agreements.[245] Although most of the time agreements are silent on this issue, in the agreement between Sri Lanka and France[246] the time limit is 30 days whereas in the agreement between Sri Lanka and Brunei[247] it is 60 days. But in some cases the time period given is long as 90 days.[248] Many agreements do not include a time period for the submission of agreed rates to the contracting parties. But the writer perceives that since the airlines are keen on commencing operations as early as possible, it is beneficial for the both parties if the above submission is made within a reasonable time.

The reference to IATA ratemaking could be seen in a number of Sri Lankan bilaterals. Article 11(2) (a) of the Agreement with Japan reads as,

> "Agreement on the tariffs shall, whenever possible, be reached by the designated airlines concerned through the rate fixing machinery of the IATA. If not possible tariffs in respect of each of specified routes and sectors should be agreed between the designated airlines. In any case tariffs submitted for the approval of aeronautical authorities of both contracting parties and tariffs approved to be observed in accordance with their respective laws and regulations."

It should be noted that in most of the agreements, machinery is provided for the disapproval of the tariffs by the parties. It has been stated that the contracting parties shall endeavor to come to an agreement and failing which the matter should be solved under the

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[245] Agreement between the Democratic Socialist Republic of Sri Lanka and the Government of Mauritius,, 10 July 1980 (hereinafter referred to as the Agreement with Mauritius).
[246] *Supra note* 221, Article 7.
[247] *Supra note* 245, Article 10(4).
[248] *Supra note* 222, Article 11(2).

provisions specified for the settlement of disputes. And in the meantime the existing rates are to be applied pending approval.[249]

In the recent bilaterals concluded by Sri Lanka, the tariff clause has been renamed as 'pricing' and taken a full liberal approach.[250] These bilateral clauses include the dual disapproval clause. In those agreements again the intervention of the parties is limited to certain defined circumstances. The motive of liberalization of this particular clause is to encourage competition among the airlines and thereby serve the customers with more options at better rates. Government subsidization to airlines is also limited to prevent unfair pricing practices.

Article 12 of the Air Services Agreement between USA and Sri Lanka is as follows,

> 1. Each Party shall allow prices for air transportation to be established by each designated airline based upon commercial considerations in the market. Intervention by the Parties shall be limited to,
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> (a) Prevention of unreasonably discriminatory practices for prices;
> (b) Protection of consumers from prices that are unreasonably high or restrictive due to the abuse of a dominant position and
> (c) Protection of airlines from prices that is artificially low due to the direct government subsidy or support.
>
> 2. Each Party may require notification to or filing with its aeronautical authorities of prices to be charged to or from its territory by airlines of the other Party. Notification or filing by the airlines of both Parties may be required not more than 30 days before the proposed date of effectiveness. In individual cases, notification or filing maybe permitted on shorter notice than normally required. Neither party shall require notification or filing by airlines of the other party of prices charged by charters to the public except as may be required on a non discriminatory basis for information purposes.

[249] *Supra note* 150, Article 11(1) (d).
[250] *Supra note* 153, Article 12.

3. Neither Party shall take unilateral action to prevent the inauguration or continuation of a price proposed to be charged or charged by (a) an airline of either party for international air transportation between the territories of the parties, or (b) an airline of one party for international air transportation between the territory of the other party and any other country, including in both cases transportation on an interline or intraline basis.

And if any party believes that the prices fixed are inconsistent it could request for a consultation to solve the matter.

3.3 (g) Change of Gauge

Change of gauge has not been defined in any of the bilateral agreements of Sri Lanka. But change of gauge is permitted in several agreements basically, at most busy hubs.[251] This provision could not be seen in the main part of the agreements consistently. In some agreements the clause is included in the Annex to the Agreement[252] and in some cases it is found in the Memorandum of Understanding between the states.[253] In the agreement between Sri Lanka and Singapore the clause is in the main part of the agreement.[254] Generally states are allowed to change of gauge under certain conditions and only with justifiable reasons. The conditions are, (a) that it is justified by reason of economy of operation; (b) that the aircraft used on the section more distant from the terminal in the territory of the former contracting party are smaller in capacity than those used on the nearer section; (c) that the aircraft of smaller capacity shall operate only in connection with the aircraft of larger capacity and shall be scheduled so to do; the former shall arrive at the

[251] *Ibid*, Article 12.
[252] *Ibid, Section* 3, Annex 1.
[253] See Article 8 of the Memorandum of Understanding to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ceylon, 15 May 1969 (hereinafter referred to as the Agreement between UK and Ceylon).
[254] *Supra note* 151, Article 10.

point of change for the purpose of carrying traffic transferred from; or to be transferred into, the aircraft of larger capacity; and their capacity shall be determined with primary reference to this purpose; (d) that there is an adequate volume of through traffic; and (e) that the provision of Article... of this Agreement shall govern arrangements made with regard to change of gauge.

3.3 (h) Settlement of Disputes

International Agreements are operated on the basis of reciprocity and consensus between states. Therefore if a difference of opinion arises between states, they should be resolved through reciprocity as well. Chapter XVIII of the Chicago Convention provides for the settlement of disagreements between two or more states concerning the application and the interpretation of the Chicago Convention and its Annexes.[255] The first option of dispute resolution recommended by the Chicago Convention is Negotiation failing which the states can refer the matter to the Council of the ICAO. And if any party disagrees with the decision of the Council, it has the choice of submitting the matter to an *adhoc* arbitral tribunal or to the International Court of Justice.[256]

Article 85 of the Chicago Convention provides for the appointment and constitution of the arbitral panel in cases where one party is not a signatory to the Statute of International Court of Justice.[257]

The International Air Services Transit agreement and the International Air Transport Agreement have accepted this procedure of dispute resolution. Article II *Section II* and Article IV *Section III* of the agreements respectively specify that in an instance of

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[255] *Supra note* 19, Article 84.
[256] *Ibid.*
[257] *Supra note* 19, Article 85.

disagreement as to the application and interpretation of the two agreements, the procedure set out in the Chapter XVIII of the Chicago Convention to be applied. Therefore the accepted procedure for dispute resolution under public air law is by negotiation or by arbitration. In that mechanism, especially in arbitration, the assistance of the president of the council of the ICAO could be made available on request by the parties.

This is the procedure accepted by the states in settling differences arising between them in applying and interpreting the bilateral air transport agreements. Apart from the two mechanisms stated above, bilateral agreements also provide for consultations between the parties.

All the bilateral agreements concluded by Sri Lanka include a provision for dispute settlement. Most of the clauses carry extensive provisions regarding dispute settlement but in few agreements the provisions are very straightforward.[258] These agreements can be classified into two categories, namely, agreements with two-step procedure[259] and the agreements with three step [260]procedures. It is important to note that the language in the provision is mandatory and the writer believes that the reason for that is the dispute settlement is very important in commercial activities like international air transportation. Therefore it is a must for the contracting parties to make every attempt to solve the differences as quickly as possible.

The agreements with two-step procedure include either consultations and negotiations[261] or negotiations and arbitrations.[262] In the two-step procedure of negotiation and arbitration, if

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[258] *Supra note* 156, Article 17 (2). The Article states that the disputes arising out of interpretation or application of the agreement shall be resolved by (1) Negotiation or by (2) Method comparable with Article 85 of the Convention.

[259] *Supra note* 156, Article 17(1).

[260] *Supra note* 144, Article X.

[261] *Supra note* 253, Article 19 reads as follows,

there is a dispute between the contracting parties on application or interpretation of the agreement, then the dispute shall be submitted for negotiation in the first place.[263] And if the dispute is not settled within 3 months the dispute shall be submitted for arbitration at the request of either party.[264]

The composition and the mode of appointment of the arbitrators to the arbitral tribunal are uniform in all agreements. Each party has to appoint a member for their party and the two arbitrators shall appoint a third arbitrator, who will preside over the tribunal.[265] The mode of appointment of arbitrators is not specified in majority of agreements but in the Agreement with Seychelles, it is specified that the appointment to be done through diplomatic or appropriate channels.[266] In most of the agreements, the third member of the tribunal should be a national of a third state[267] while some bilaterals are silent[268] on that issue.

If either party fails to appoint a member for the tribunal or the third arbitrator is not agreed upon within a specified time period, the President of the Council of ICAO at the request made by the parties may appoint arbitrator or arbitrators.[269] In the Agreement with USA it has been specified that if the President of the Council of ICAO bears the nationality of one

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Any dispute relate to the interpretation or application of this agreement, schedule, protocol and notes exchanged in relation thereto shall be settled through consultations and negotiations between the contracting parties in a spirit of friendless and mutual understanding.

[262] *Supra note* 151, Article 14.

[263] *Ibid,* Article 14(1).

[264] *Ibid,* Article 14 (1).

[265] *Ibid,* Article 14(2).

[266] Agreement between the Democratic Socialist Republic of Sri Lanka and the Government of Seychelles, 28 October 1987 (hereinafter referred to as the Agreement with Seychelles) Article 18 (2).

[267] *Supra note* 151, Article 14(3).

[268] *Supra note* 221, Article 13.

[269] *Supra note*, 151, Article 14(4).

of the contracting parties, the nomination of the arbitrators could be done by the most senior Vice President of the Council of ICAO.[270]

The arbitral tribunal is granted with powers to determine a venue for the proceedings, the procedure and the limits of the jurisdiction according to the respective agreement.[271] If the tribunal makes an interim ruling the parties are required to comply with such a ruling pending the final decision.[272] And regarding costs, the parties shall bear the costs in equal proportions.[273] In the Agreement with USA, the costs include the expenses incurred by the President of the Council of ICAO in appointing arbitrators.[274]

The parties are required to comply with the decision of the tribunal. However, the agreement does not make the decision of the tribunal binding per se but states that 'each party shall to the degree of consistent with its national law, give full effect to any decision or award of the arbitral tribunal.'[275]

And the penalty for non-compliance is also set out in the agreements itself. Generally the only recourse for the aggrieved party is to 'limit, suspend or revoke any rights or privileges which it has granted under this agreement to the party in default.'[276]

The Agreement with USA contains extensive provisions for the dispute settlement with three step procedure. Article 14 (1) of the agreement specifies that the dispute shall be referred to (a) first round of formal consultations, if it doesn't succeed to a (b) person or body and to (c) arbitration as last resort.

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[270] *Supra note* 153, Article 14 (2) (b).
[271] *Supra note* 151, Article 14(6).
[272] *Ibid,* Article 14(5).
[273] *Supra note* 151, Article 14(7).
[274] *Supra note* 153, Article 14(8).
[275] *Supra note* 153, Article 14(7).
[276] *Supra note* 151, Article 14(8).

Each party would have to appoint an arbitrator within 30 days after the receipt of request and the third arbitrator needs to be appointed within 60 days of nomination of the first two arbitrators.[277]The clause also provides a time limit to determine the precise issues and specific procedures to be followed in the arbitration. This should be done within 15 days after the tribunal is fully constituted.[278]

It is important to note that within 30 days the tribunal shall make an attempt to render a written decision. And after the completion of hearing the majority decision would prevail.[279] The agreement further provides a chance for the parties to request for clarifications. Such requests should be made within 15 days of the decision and the clarifications should be issued within a further 15 days.[280] There are no recourses for the aggrieved parties specified in the Agreement with USA.

3.3 (i) Consultations, Amendments and Modifications, Entry into Force and Termination

3.3 (i) (i) Consultations

In addition to the Dispute Settlement provision, certain Sri Lankan bilateral agreements contain a provision regarding 'consultation'. The writer believes that the importance of incorporating such a clause is to provide a chance to iron out the differences to settle before they mature into disputes. And in most agreements 'regular and frequent consultations' between aeronautical authorities are recommended from time to time.[281] The objectives of

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[277] *Supra note* 153, Article 14(2).
[278] *Ibid*, Article 14(3).
[279] *Ibid*, Article 14(5).
[280] *Ibid*, Article 14(6).
[281] *Supra note* 151, Article 13.

the consultations are best explained in Article 16 of the Agreement between U.A.E and Sri Lanka. It provides that,

> "In a spirit of close cooperation, the aeronautical authorities of the contracting parties shall consult each other from time to time with a view to ensuring the implementation of and satisfactory compliance with, the provision of this Agreement and the Annexes and shall consult when necessary to provide for modifications thereof"

In several Agreements a time limitations is given to complete the consultations. For instance, Article 16 of the Agreement with South Africa, consultations are to be completed within 60 days of the receipt of the request unless otherwise mutually decided.[282]

3.3 (i) (ii) Amendment and Modification

The amendments and modifications are to be agreed through consultations or talks between the aeronautical authorities of the contracting parties. There is a difference between the amendment of a provision in the main part of the agreement and the amendment of annexes. In most of the Sri Lankan bilaterals the amendments to the provisions of the main part of the agreement are to be done by consultations and effected through exchange of notes.[283] The effective date is the date determined by the parties and the date depends on the completion of relevant constitutional requirements.[284] However, the dialogues to amend the Annexes should be carried out directly between the aeronautical authorities of the contracting parties and the effective date is the date agreed upon by the parties and entry into force depend on the conformation of the agreement through diplomatic channels.[285]

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[282] *Supra note* 145, Article 16.
[283] *Ibid*, Article 17(1).
[284] *Ibid*, Article 17(1).
[285] *Ibid*, Article 17(2).

The amendments to the Annexes are put on fast track because the most important provisions regarding the operation of services are embodied in the Annexes.

Modifications to the provisions of the agreement are being effected in the same manner. In some cases, the modifications are to be 'provisionally applied from the date of its signature and enter into force when the contracting parties will have notified to each other the fulfillment of their constitutional procedures.'[286] The modifications effecting Annexes would be on the fast track as in the case of amendments and apply provisionally from the date of agreement subject to the confirmation by the exchange of diplomatic notes.[287]

3.3 (i) (iii) Entry into Force

Every international treaty or agreement comes into force according to its own way.[288] And in the domestic plane each party has its own procedure in giving effect to international agreements. Since the bilateral air transport agreements are the results of consensus between states on derogating the sovereignty of air space, the parties are free to decide what they want and when they want them to start. The procedures for entry into force in the bilaterals concluded by Sri Lanka take four forms. They are;

(i) Entry into force on signature.[289] And from the date the agreement is signed.[290]
(ii) Agreement shall be applied provisionally from the date of its signature and the fulfillment of their constitutional formalities with regard to the conclusions and entry into force of international agreements.[291]
(iii) Agreement shall be approved according to the constitutional requirements in the country of each contracting party and shall come into force on the day of an exchange of Diplomatic notes by the contracting parties.[292]

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[286] *Supra note* 193, Article 22(1).
[287] *Ibid*, Article 22(2).
[288] See Article 24 (1) of the Vienna Convention of Law of Treaties, Ian Brownlee, ed., *Basic Documents in International Law*, 4th ed. (Oxford: Oxford press, 1995).
[289] *Supra note* 202, Article 19.
[290] *Supra note* 176, Article 20.
[291] *Supra note* 193, Article 22.
[292] *Supra note* 156, Article 23.

(iv) Ratification and such ratification shall be exchanged as soon as possible. And entry into force after 30 days after the exchange of instruments of ratification.[293]

It is surprising to note the absence of an 'entry into force' clause in the recently concluded open skies agreement with Singapore.

3.3 (i) (iv) Termination

A provision for termination of the agreements is contained in all Sri Lankan bilateral air transport agreements. But there are no time limit agreed for the operation of the agreements. The termination clause is uniform in all agreements. Accordingly, Any contracting party is at liberty to give notice of its decision to terminate the agreement to the other contracting party at any time it wishes.[294] In all cases, the termination takes effect after the lapse of twelve months[295] or one year[296] of the date of receipt of the notice by the other contracting party, unless the notice to terminate is withdrawn by agreement before the expiry of this period.[297] In almost all the cases the notice of termination shall be simultaneously communicated to ICAO.[298] In several rare instances there is no provision to notify the ICAO.[299]

In the absence of an acknowledgement of receipt of the notice by the other contracting party, notice shall be deemed to have received fourteen (14) days after the receipt of the notice by ICAO.[300]

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[293] *Supra note* 211, Article 17.
[294] *Supra note* 156, Article 21.
[295] *Supra note* 193, Article 21.
[296] *Supra note* 176, Article 20.
[297] *Supra note* 150, Article 18.
[298] *Ibid.*
[299] *Ibid.*
[300] *Ibid.*

CHAPTER FOUR

4.1 The air transport industry of Sri Lanka– Prospects for the future.

4.1 (a) Bilateral Air Services Agreements

The analysis of the currently operative bilateral agreements concluded by Sri Lanka reveals that we are trying to keep up with the changing trends in the global market. Regarding the open skies concept we have a guarded policy. As stated above there are no fully blown open skies any where in the world. Our policy regarding opening up our skies depends on the benefits that derive from such arrangements.[301] The open skies policy paper presented to the cabinet in 2003 is not finalized yet. However, during the recent negotiations of bilateral air services agreements a major shift towards this proposed open skies policy was manifested and as a result third and fourth freedom traffic rights have been made open on the basis of reciprocity.[302] Fifth freedom traffic rights too have been liberalized based on national interest and reciprocity.[303] As of 2005, we have concluded new agreements with open skies policy with Singapore, Malaysia and USA. We have no operations to USA so far but we have performed better than the other two countries with this policy.[304] Sri Lanka has benefited from whatever being opened up so far. We have managed to get more frequencies to these countries as well.[305] Therefore every step towards any trend would basically depend on the benefits that derive from such a step.

The bilateral air services agreements concluded by Sri Lanka only deals with the third, fourth and fifth freedoms. The exchange of the sixth freedom traffic rights however, is

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[301] Interview with Mr. G.S. Liyanage, Additional Secretary to the Ministry of Ports and Aviation of Sri Lanka (27 September 2005).
[302] *Supra note* 4 at 44.
[303] *Ibid.*
[304] *Supra note* 301.
[305] *Ibid.*

implicitly applicable in most of the cases. For an instance, in the agreement with Singapore, there is no need for express agreement for the sixth freedom traffic rights for Singapore as the designated carriers of Singapore start from there.

4.1 (b) Opening the market

Sri Lanka played the game with only one horse so far. That is the national carrier, Sri Lankan Airlines. We are ready to open up the market for interested local companies to engage in the business of transportation of passengers and cargo internationally. Multiple designations of airlines have finally become viable for the enhancement of the air transport industry of the country. The draft policy of 2003 clearly indicates that the market access would be given to the carriers at the right time. Accordingly, the government has granted approval for the opening up the market for international commercial passenger flights in October 2004 for locally registered airlines. The Minister is empowered to designate local airlines under the provisions of the existing bilateral air transport agreements.[306] The cabinet has appointed a committee consisting of Civil Aviation Authority of Sri Lanka, Ministry of Ports and Aviation, Ministry of Tourism, Ministry of Foreign Affairs, Attorney General's Department and the Sri Lankan Airlines to recommend designations of airlines.[307] Once the designation is complete, Civil Aviation Authority is empowered to determine suitable criteria for the routes to be assigned to the newly designated carriers through a 'systematic, equitable transparent scheme' with the concurrence of the line ministry.[308] The final decision is with the Minister and the work is still in progress in this regard. The rationale behind the multiple designations is to compete with the international

[306] *Supra note* 301.
[307] *Supra note* 4 at 44.
[308] *Supra note* 4.

carriers who operate on our market and it has been underlined that competition between the national carrier and the newly designated carriers is not envisaged under any circumstances with the opening up the market for the other local carriers.[309]

4.1 (c) The Infrastructure

Bilateral air transport agreements invite the carriers all around the world to operate between states. A proper infrastructure is mandatory to facilitate the operations. Rapid growth of the industry demands the root level facilities to be maintained reasonably well. As stated earlier, Sri Lanka has only one international airport. Katunayake Bandaranayake International Airport is situated 32 Km North of Colombo. The airport has 1 passenger terminal, 39 gates and 17 aircraft stands. The cargo facilities at the airport include a capacity of 14,145 tons; warehouse 9,500 square meters and a new cargo terminal and cargo village.[310]

When the industry is expanding the need for the expansion and construction of new airports becomes imperative. It is also necessary to have another airfield to divert airlines in an emergency.[311]The government in 1992, proposed for the construction of a new international airport at Hingurakgoda. However it did not become a reality due to political considerations and military concerns. One reason is that the proposed site was too close to the war zone and the security was a major problem. But the proposal is still remains on the cards. Similarly the attempt by the government to expand the Katunayake airport was also shelved due to social obstacles. The residents surrounding the airport were not willing to

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[309] Interview with Mr. H.M. Nimalsiri, Director General of Civil Aviation of Sri Lanka (4 October 2005).
[310]Bandaranaike Int'l Airport, online: A-Z worldairports.com <http://www.azworldairports.com> (date accessed 15 November 2005).
[311] *Supra note* 301.

surrender their lands even for a 'higher than market value' compensation schemes offered by the government.[312]

4.1(d) Domestic Air Transport Industry

Having a proper domestic aviation network is vital for the development of tourism. Tourists would prefer after landing to get to their hotels and destinations they prefer with a minimum possible delay. Up to date most of the domestic air transportation deals with the carriage of local passengers and cargo to and from few destinations, especially in the troubled areas, and Colombo. Domestic aviation was started by a private carrier (Lion Air) in 1994 between Colombo and Jaffna. The prevailing security conditions forced the government to prohibit all sorts of domestic (civil) flights in 1995. After that the carriage of passengers, specially the soldiers, was only done by the air force. The domestic carriers resumed flights after the ceasefire agreement in 2002 and as of 2005, three carriers, namely, Lion Air Ltd., Expo Aviation Ltd., Aero Lanka Ltd., have been licensed for both international and domestic carriage of passengers.[313] Apart from that Sri Lankan Airlines is now permitted to operate air taxi services by floatplanes.

The infrastructure of domestic aviation too is not at a satisfactory stage. The Ministry is preparing to upgrade parking places for both domestic and international aircraft. The Ministry has called for quotations to build new terminals and the tender committee of the Ministry is processing the tenders. The project is expected to get underway by 2006.[314]

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[312] *Ibid.*
[313] *Supra note* 4.
[314] *Supra note* 301.

4.2 Challenges faced and challenges ahead.....

4.2(a) Civil War

Twenty-year-old civil war created a great set back on the economy of the country. Sri Lanka is still struggling to get the economy back on track after the ceasefire agreement signed between the L.T.T.E and the government three years ago. As noted in chapter three, the air transport industry of Sri Lanka suffered two major blows during the past two decades in addition to be having a suffering economy in general. In 1986, a bomb went off on board aircraft belonging to Air Lanka killing 15 passengers and its crew.[315] And in 2001, the Katunayake Bandaranayake International Airport was attacked destroying three passenger aircraft and causing severe damages to two passenger aircraft.[316] Several cargo aircraft belonging to the Sri Lanka Air force were also damaged in the attack.[317] The adverse impact of these two attacks was directly felt by the economy of the country specially tourism which totally dependent on the air transport industry.

4.2 (b) Tsunami Factor

26/12 Tsunami created havoc in the country. Fortunately the tidal waves were not able to reach the airport, which is situated closer to the sea. The inflow of worldwide generosity for this unprecedented event lead the whole airport operations into chaos. However, within few days the authorities managed to control the situation with the help of the local and foreign volunteer groups.

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[315] *Supra note* 146.
[316] *Supra note* 147.
[317] *Supra note* 70.

Tsunami came at a time when the Sri Lankan Airlines was geared up for a perfect winter 2004.[318] The impact of Tsunami was felt directly on the industry as it affected the loads.[319] Tourists were keen to go home but the aid workers and locals who were returning home filled the seats of the aircraft making up the capacity. The impact, however, on the business was considerably high as the industry recorded a loss within the first five months of 2005.

4.2 (c) SARS and other communicable diseases

The Chicago Convention imputes the primary duty of prevention of communicable diseases in aircraft on states. Article 14 of the Chicago Convention specifies that 'each contracting state agrees to take effective measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague and such other communicable diseases as the contracting states shall from time to time decide to designate, and to that end contracting states will keep in close consultation with the agencies concerned with international regulations relating to sanitary measures applicable to aircraft.....' Therefore the states and the airlines have the responsibility to make sure that the passengers are carried in a clean and healthy cabin environment and to comply with the regulations imposed by the world health agencies from time to time.

In 2003 the world saw the rise of Severe Acute Respiratory Syndrome (SARS), which attracted major global awareness in the same way as bird flu in 2005. In all these cases the risk of spreading the diseases through air transportation came into the limelight. Long journeys in limited spaces and artificial ventilation provide ideal conditions for the spreading of diseases.

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[318] *Supra note* 5.
[319] *Ibid.*

SARS outbreak in 2003, lead the air transport industry into a crisis. Too many flight cancellations were reported and the states and airlines had to spend billions on the precautionary measures. The impact of the SARS in Sri Lanka, however, was not as high as the other states in the region. Therefore despite the reduction of the number of flights operated to the affected states the impact of the SARS outbreak to the air transport industry on Sri Lanka was marginal.[320]

4.2 (d) Peaking fuel prices

The fuel prices in the global market have been ballooning during the past 18 months. Every industry including the air transport industry suffered losses due to the increasing fuel costs. Air carriers had to rely on the governmental subsidies and fuel surcharges in order to make good the losses incurred. Imposing fuel surcharges are not healthy for an industry like air transport for the reason that it directly affects the competition. Sri Lanka too had to rely on those remedies and the surcharges went up several times during the last year making the airfares relatively high.[321] However, it should be noted that the national carrier has been able to carryout the operations without the government subsidies unlike most of its counterparts.

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[320] *Ibid.*
[321] *Ibid.*

Conclusions and Recommendations.

Air transport has become a very competitive industry. Major air powers are battling to ensure profitable markets with all the legal, regulatory changes and the rapidly changing market trends. Therefore a developing state like Sri Lanka needs to carry on the air transport business within a well-organized framework with a firm legal structure and on a sound infrastructural footing.

The national aviation policy of Sri Lanka favors the dual approach in liberalization of the market access. Managed liberalization is the policy used for the carriage of passengers by air and full open skies policy for the carriage of cargo by air. This is an acceptable policy for the time being as the underlined objective of having such a policy is the obtaining maximum benefits to enrich the economy of the country. The notion of open skies has been subjected to much consideration in the recent past. While open skies is being catered worldwide as desirable for the growth of the market access it is not without criticisms. 'True Open Skies' is being construed as a system free of any restrictions.[322] And if there is an attempt to open the skies preserving the freedoms of the air, which are considered as 'limitations' as opposed to 'freedoms', such a policy could be considered as 'partial or limited open skies'[323] All the bilateral, multilateral and regional agreements still control the freedoms of the air. Taking out the restrictions are not as easy as one would think. Therefore for a country like Sri Lanka the circumstances warrant that any liberalization should be limited to the needs of the existing market forces.

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[322] Roberto C.O. Lim, "Beyond Open Skies is True Open Skies" (Paper presented to the World wide Conference on Current Challenges in International Aviation, Montreal, September 2004).
[323] *Ibid.*

However the delay in approving the national aviation policy has become an obstacle for the regulators in making policy decisions for the future. The director general of civil aviation has observed the absence of a master plan to encompass at least at the 'institutional and legal framework'. The government has accepted the Director General's comments and immediate attention taken is commendable to implement the setting up a master plan.[324]

The legal framework of an industry, which has close affiliations with the international scene, should be stronger with a proper domestic legal network. And adherence to the international instruments is very important in order to keep in line with the current global legal changes and challenges. Passing of the Civil Aviation Bill of 2002 will be a crucial step towards bringing the domestic legal structure in line with the current international legal regime. Ratification of international documents including the Montreal Convention 1999, which updates the Warsaw regime and incorporates the inter carrier agreements in order to have a less complex private international air law system, is highly recommended in the near future.

Opening up the market for the local carriers to compete with the international carriers would attract more passengers specially, tourists to Sri Lanka. It is important to note that designating one or two carriers would be prudent at the beginning as the outcome could be evaluated before the expansion of the service adding more carriers.

The existing routes and frequencies obtained under bilateral agreements should be used maximally. It is understandable that with the fleet restrictions and other matters we are restricted in operating most of the destinations we have been allotted via bilateral air transport agreements. It is also understandable that with only one airline it is not easy to operate to all destinations provided by the agreements. And some routes may not be

[324] *Supra note* 4.

economically viable. The author observes that most of the operations carried out by the national carrier are limited to the regional level. Now it is the time to break into the foreign markets where we could achieve more benefits. Specially crossing the Atlantic would be very favorable. Even though we have entered into an open skies air services agreement with the USA we are yet to start operations to USA. And we still do not have an agreement with Canada, where A large number of Sri Lankan ex-patriots inhabit.

It is accepted that bargaining for the bilateral air transport is a war. Convincing our counterparts to operate in our market and obtaining more and more frequencies for the designated airlines of Sri Lanka under the fair and equal opportunity clause is very important to boost the economy of the country.

Regionalism in air transport industry seems to be a remote prospect within South Asian states. Sri Lanka in principle is prepared to support the notion of regionalism in air transport in the region,[325] but the conservative approaches and the ongoing politics between the states of the region makes it a philosopher's dream. Direct connections between at least the capitals of the SAARC nations are commendable to lay the foundation for any hope for regional cooperation in air transport.

The proper maintenance of infrastructure is very important. And building another international airport for operations or as an alternative airfield, expansion of the Katunayake Bandaranayake International Airport and upgrading the facilities at the airport according to the Standards and Recommended Practices of ICAO to enhance the air power of the country has become a challenge to be won. Establishment of a domestic air transport network connecting the BIA and major tourist and business destinations, expediting the

[325] *Supra note* 301.

building of the highways connecting the airport and the capital are also the immediate projects to be looked into.

The air transport industry in the world is being constantly threatened by various factors from time to time. Civil wars, terrorism, diseases and ever changing fuel prices add worries to the smooth operation of the industry at regular intervals. The air transport industry of Sri Lanka has faced the situations with great deal of caution. Recovery of the national carrier has been remarkable during the past few years notwithstanding the drawbacks resulted after attacks on the airport, Tsunami, SARS and the fuel prices. The air transport industry is once again on the verge of making profits and the predictions for the future are tight but bright.

The air transport industry in Sri Lanka is driving the country towards the economic growth. The real benefits of commercial aviation could be reaped only through the expansion of our operations towards more profitable routes and expanding the facilities and improving infrastructure to encourage foreign carriers to operate in our country. For this end the existing bilateral agreements provide a gateway to reach out to the world at large and if the operations are planned wisely Sri Lanka is not far away from being a hub connecting east and west.

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