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## BILATERAL AIR TRANSPORT AGREEMENTS: NON-BERMUDA REFLECTIONS

Z. JOSEPH GERTLER\*

### INTRODUCTION

In this article it is not proposed to retrace the familiar well-trodden grounds with respect to bilateral air transport agreements. There exists, after all, a fairly impressive, if not abundant, literature on the subject, albeit focused mostly on route exchange, capacity, traffic rights and tariffs.<sup>1</sup> On the other hand, the present widely felt dissatisfaction with the existing situation in international air transport<sup>2</sup> and the resulting re-examination of its economic and legal structure

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<sup>1</sup> See, e.g., B. CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 231-46 (1962) [hereinafter cited as CHENG]; O. LISSITZYN, *INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY* 378-82 (1942); Diamond, *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, 41 J. AIR L. & COM. 419 (1975); Lissitzyn, *Bilateral Agreements on Air Transport*, 30 J. AIR L. & COM. 248 (1964); Lowenfeld, *CAB v. KLM: Bermuda at Bay*, 1 AIR LAW 2-18 (1975).

<sup>2</sup> IATA Director General K. Hammarskjöld has called for "imagination and foresight in seeking co-operative solutions to the challenge of today's problems" and for a critical review of traditional concepts (foreword to his report to the 10th Annual General Meeting of the International Air Transport Association, IATA Review, October 1975, at 6); IATA General Counsel J.G. Thomka-Gazdik has expressed doubts about the "regulatory assumptions and practice of the Chicago System" (speech before the International Bar Association Conference, IATA Review, October 1975, at 3); Lowenfeld has observed that the existing regime, "the first major attempt to control an international industry," is in "deep trouble" and in need of some "imaginative leadership" (Lowenfeld, *A New Takeoff for International Air Transport*, 54 FOREIGN AFF. 36, 49-50 (1975)).

cannot but also involve the "vast cobweb"<sup>3</sup> or "intricate network"<sup>4</sup> of bilateral agreements linking individual pairs of states. This is not to suggest that an effort be made to resuscitate some earlier attempts of multilateral solutions to air transport problems.<sup>5</sup> As to scheduled services, such an effort would apparently be no closer to reality now than it was in 1944 when, at the Chicago Conference, the Brazilian delegate thought that "perhaps the time will never be ripe" for the internationalization of aviation.<sup>6</sup> Instead an examination will be made with a view to determining whether bilateral air transport agreements could be made to contribute more effectively to the smooth, economic and orderly operation of international air transport services in a constantly changing environment.

Several years ago, on the "threshold of the jet transport age," it was speculated that a "complete redrafting of most bilateral air pacts . . . will be required" as a consequence of the introduction of jet aircraft.<sup>7</sup> Such a complete over-haul of the existing structure of routes and traffic rights did not occur. States actively involved in international air transportation did, however, become entangled in an almost continuous process of reviewing, revising, interpreting bilateral air agreements and solving different kinds of problems which arise not only because of changes in aircraft technology but also, if not primarily, because of new trends and developments in air traffic.

As will be described later in more detail, a typical bilateral air agreement today is far more comprehensive than the standard text

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<sup>3</sup> CHENG, *supra* note 1, at 26.

<sup>4</sup> Franck, *International Law in Canadian Practice: The State of the Art and the Art of the State*, 31 INT'L J. 197 (1976).

<sup>5</sup> E.g., the draft resolution presented by Australia and New Zealand at the International Civil Aviation Conference, Chicago, 1944, calling for the "establishment of an international air transport authority which would be responsible for the operation of air services on prescribed international trunk routes and which would own the aircraft and ancillary equipment employed on these routes . . .," proceedings of the International Civil Aviation Conference, at 550 (1948). Also, note the aborted subsequent attempts to reach a multilateral agreement on commercial traffic rights at the First Interim (PICAO) Assembly in 1946, at the 1st Session of the ICAO Assembly in May 1947 and at the Geneva meeting of the Commission on Multilateral Agreement on Commercial Rights in International Civil Air Transport (November 1947).

<sup>6</sup> Proceedings of the International Civil Aviation Conference, at 544 (1948).

<sup>7</sup> L.L. Doty as quoted by Stoffel, *American Bilateral Air Transport Agreements on the Threshold of the Jet Transport Age*, 26 J. AIR L. & COM. 134 (1959).

developed at the Chicago Conference in 1944 or the 1946 Bermuda Agreement. Over the years, states have added more provisions to the basic Chicago or Bermuda scheme. The present objective of the agreements seems to be not only an exchange of routes and traffic rights, but also the establishment of a broad spectrum of administrative, legal, economic and operational conditions considered necessary for the operation of air services and for the related commercial and other activities of airlines in the territory of the other party. The evolution of this scope and content of the agreements was a logical process predicated on accumulated knowledge and experience acquired by states about what should be bilaterally negotiated and agreed upon. There are practically no considerations which would restrict the discretionary power of two negotiating sovereign states with respect to their right to include in their bilateral agreement any provisions deemed desirable. Suffice it to mention in this respect resolution LXXI-6, adopted by the ICAO Council on October 1, 1970, directing the ICAO Legal Committee to study a special clause to be incorporated into bilateral air agreements, providing for the enforcement of international legal obligations relating to unlawful interference with international civil aviation<sup>8</sup> or, in a quite different area, the U.S. efforts to put on a bilateral legal basis the operation of international charter flights or services.<sup>9</sup> There is, indeed, a great variety of provisions which states include, or may consider including in their bilateral air agreements, and this is not in contradiction to the fact that there also exists a considerable degree of uniformity of certain principles and of the language used in many of the basic provisions.<sup>10</sup> The question is now whether the manifest flexibility of bilateral air agreements can be stretched even further in order to make this instrument fully re-

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<sup>8</sup> ICAO Doc. 8936-LC/164-2 at 180 (1971). See also FitzGerald, *Recent Proposals for Concerted Action Against States in Respect of Unlawful Interference with International Civil Aviation*, 40 J. AIR L. & COM. 161 (1974).

<sup>9</sup> Here, of course, preference is given to special bilateral agreements of understandings on charters, apart from those on scheduled services. See Lichtman, *Regularization of the Legal Status of International Air Charter Services*, 38 J. AIR L. & COM. 441 (1972).

<sup>10</sup> This fact seems to have been one of the considerations which led O'Connell to the deduction that we may be witnessing first steps towards developing "positive international administrative law in the aviation field." D. O'CONNELL, *INTERNATIONAL LAW IN AUSTRALIA*, at 148 (1966) [hereinafter cited as O'CONNELL].

sponsive to possible new requirements in the last two decades of the century, and whether or not the "cobweb" of bilateral contractual links, possibly coupled with a similar international structure governing charters, will not outgrow the administrative and regulatory faculties of governments and/or the established pattern and practices of airlines' operations.

The successful or even the aborted attempts to add more provisions to the typical Chicago or Bermuda content of bilateral air agreements would seem to underline the values of bilateralism and the relevance of bilateral air agreements in present international air transport. And yet, a number of questions could be asked regarding the actual status of bilateral air agreements, both in the legal sense and as an instrument of economic control and regulation, the weight and authority enjoyed by these agreements or the concern, or lack of it, over their faithful observation. The orderly implementation of an entire agreement, that is, leaving no gaps and putting all parts of the agreement in operation to the benefit of all parties and users concerned, is not always and in fact is very rarely without complications. Characteristic is the uncertainty about the practical application of available methods for the enforcement of obligations under bilateral air agreements. In Kittrie's article on the United States' regulation of foreign airlines competition,<sup>11</sup> the writer considers it a "political question" whether the tools to be employed for the resolution of conflicts concerning aviation should be "judicial tribunals, arbitration, diplomatic negotiations or administrative controls." In his book on aviation law Lowenfeld raises, in the context of the 1972 *Aerolineas Argentinas* case, the following questions: "Should Aerolineas . . . (i) seek a hearing before the Board; (ii) seek injunction or stay from a United States district court; (iii) seek review of the (CAB) order in a circuit court; (iv) serve notice of a demand for arbitration?"<sup>12</sup> These considerations are specifically applicable to the situation in the United States but that does not mean that bilateral air agreements between other countries are immune from similar uncertainties or ambiguities affecting their role and relevance for international air transport relations.

As noted previously, bilateral air transport agreements, based

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<sup>11</sup> Kittrie, *United States Regulation of Foreign Airlines Competition*, 29 J. AIR L. & COM. 1, at 2 (1963).

<sup>12</sup> A. LOWENFELD, *AVIATION LAW*, II-104 (1972).

historically on the standard text developed at the Chicago Conference in 1944 and the Bermuda Agreement between the United States and United Kingdom of 1946, with some subsequent influence of another standard text developed by the European Civil Aviation Conference,<sup>13</sup> display a remarkable similarity in many approaches or principles and in the language used in individual provisions. This tendency towards uniformity could not but have been helped by ICAO developing and publishing its two handbooks, dealing with administrative and capacity clauses in bilateral air transport agreements.<sup>14</sup>

It might not be appropriate to speculate in this article about all the causes of these tendencies toward some degree of uniformity. Also there might be some risk of either under or overestimating the importance of such causes. It is, however, interesting to note that following ICAO Assembly resolution A21-27<sup>15</sup> the Paris-based Institut du Transport Aérien (ITA), acting as consultant for ICAO, prepared a study on "tariff clauses in bilateral agreements", concluding with a number of good reasons why, under present circumstances, the best solution might be the elaboration of a few standardized *options* (italics added), any one of which could be selected by the two countries negotiating an agreement as the most suitable clause on tariffs. One might also recall O'Connell's remarks on the standardization of the administrative and technical clauses being only "one fairly short and possibly formal step away from positive international administrative law in the aviation field".<sup>16</sup> Despite this, and while being in full sympathy with the objective of further expansion of the body of positive international administrative aviation law as incorporated primarily in the 1944 Con-

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<sup>13</sup> For the text of the "Standard form of agreement for provisional air routes" adopted at the Chicago Conference, see *Proceedings of the International Civil Aviation Conference*, at 127-29 (1948). The U.S.-U.K. Bermuda Agreement is reproduced in CHENG, *supra* note 1, Appendix D.

<sup>14</sup> Handbook on Administrative Clauses in Bilateral Air Transport Agreements, ICAO Circular 63-AT/6 (1962). Handbook on Capacity Clauses in Bilateral Air Transport Agreements, ICAO Circular 72-AT/9 (1965).

<sup>15</sup> ICAO Doc. 9118, at 81 (1975). Resolution A21-27 directed the ICAO Council to instruct the Secretary General to "undertake a study of existing bilateral tariff clauses with a view to exploring the feasibility and relative benefits of either an international ICAO standard tariff clause or an international agreement embodying such a clause."

<sup>16</sup> O'CONNELL, *supra* note 10, at 148.

vention on International Civil Aviation (Chicago Convention)<sup>17</sup> and its Annexes, one cannot but have some doubts as to whether the entire heterogeneous set of rules constituting the typical content of a bilateral air transport agreement will or can follow the same desirable path to increasing uniformity and possible codification. States may prove hesitant to endorse on a broader, international basis some of the obligations they now readily accept in a repetitive and standardized fashion, in their bilateral relations with selected partners.

Against the background set out above it is now intended to take a closer look at some of the problems relating to the present status and functioning of bilateral air transport agreements.

#### I. THE CONTENT OF BILATERAL AIR TRANSPORT AGREEMENTS: WHAT IS REALLY ESSENTIAL?

The scope of the standard bilateral air transport agreement developed at the Chicago Conference<sup>18</sup> was relatively narrow. It dealt basically with only six spheres of air relations:

1. designation of airlines for the operation of agreed services and their qualification;
2. procedure for granting the operating authorization;
3. applicability of national laws and regulations relating to the operation of aircraft and to the admission to or departure from national territory of passengers and other traffic;
4. recognition of aeronautical certificates and licenses;
5. non-discrimination in the imposition of airport and other charges;
6. customs exemptions for fuel, oils, spare parts, etc. destined for use by aircraft operated on agreed services.

Also, it was understood that there would be an annex which would include a "description of the routes and of the rights granted whether of transit only, of non-traffic stop or of commercial entry . . . and the conditions incidental to the granting of the rights. Where rights of non-traffic stop or commercial rights are granted, the Annex will include a designation of the ports of call . . ."<sup>19</sup> Thus, the Chicago model introduced a distinction between provi-

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<sup>17</sup> ICAO Doc. 7300/5 (1975).

<sup>18</sup> ICAO Doc. 2187 at 20, 21 (1960).

<sup>19</sup> *Id.* at 20.

sions of an administrative nature constituting the main body of the agreement and provisions relating to the commercial transaction itself, that is, to the exchange of routes and traffic rights, which were to be included in the annex.

As pointed out earlier, in the more than thirty year period following the Chicago Conference, states have, in their bilateral air agreements, developed and modified the standard Chicago text. New provisions have been added. Emphasis of other provisions has shifted or the phraseology has been refined. It has been a process not dissimilar to that described by Metzger in the context of United States bilateral commercial treaties: "[I]t was the desire on the part of the United States and foreign countries to increase the volume of mutually beneficial trade and investment which caused the treaty covered to be expanded to include personal rights—so called established provisions, along with the more strictly trade, investment, and navigation provisions."<sup>20</sup>

Two main objectives have been evident in the practice of states: one seeking refinement and greater accuracy of the language used in the air agreements, particularly for those parts of the agreements relating to the exchange of routes and traffic rights; the other striving to make the rules for the operation of air services as comprehensive as possible, even at the price of the reiteration of some provisions already in force by virtue of other instruments (*e.g.*, the Chicago Convention or bilateral agreements on avoidance of double taxation) and often expanding beyond the purely aeronautical orbit to such items as provisions on customs, taxation, transfer of funds and employment of personnel by airlines.<sup>21</sup>

There may be several ways for classifying the typical content of present bilateral air transport agreements. ICAO made a distinction between the "administrative" and "capacity" clauses.<sup>22</sup> Cheng re-

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<sup>20</sup> S. METZGER, *INTERNATIONAL LAW, TRADE AND FINANCE* 147 (1962).

<sup>21</sup> The Chicago Convention itself contains a number of provisions which may be called "non-aeronautical." See Article 13—Entry and clearance regulations, Article 14—Prevention of spread of disease, Article 22—Facilitation of formalities, Article 23—Custom and immigration procedures, Article 24—Customs duty, Article 27—Exemption from seizure on patent claims.

<sup>22</sup> Handbook on Administrative Clauses in Bilateral Air Transport Agreements, ICAO Circular 63-AT/6 (1962) [hereinafter Handbook], specifies the following main typical provisions of the agreements (in addition to the clauses on capacity): granting of rights, conditions imposed on the exercise of rights granted, revocation and limitation of rights, airport and facility charges, customs duty and



ferred on the one hand to provisions granting the "transit" and "traffic" rights, and on the other hand to those dealing with "ancillary" rights.<sup>23</sup> O'Connell in his analysis of Australian bilateral air agreements deals separately with the "technical and administrative clauses" and the "provisions for determining limits of capacity and for fixing routes."<sup>24</sup> For the purposes of this article it may be a worthwhile exercise not only to categorize the provisions but also to try to assess simultaneously which provisions are essential and which are only desirable for the creation of an adequate treaty for the operation of air services.

One group of provisions of bilateral air transport agreements relates to the operation of flights on scheduled services. Most of these provisions could be called "technical" and, as between ICAO States, they are clearly connected with the Chicago Convention. Their common denominator is that they do not exclusively apply to international commercial transport services but to international flights as such.

One typical provision of this kind is that concerning the applicability of air regulations. The inclusion of such a provision usually accomplishes nothing more than a reconfirmation in a bilateral context of the applicability of Article 11 of the Chicago Convention.<sup>25</sup> It is therefore no coincidence that this provision has not been included in the ECAC Standard Clauses for Bilateral Agree-

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other charges, recognition of certificates and licenses, applicability of air regulations, entry and clearance regulations, tariff provision, registration of agreement, settlement of disputes, modification of agreement, entry into force and termination of agreement. Among the "other provisions" the Manual lists facilitation of currency exchange and consultation between aeronautical authorities.

<sup>23</sup> Provisions on "ancillary" rights should include: non-discriminatory application of national air regulations, use of airports and other facilities, airport and similar charges, customs duties and transient aircraft, supplies introduced into or taken on board in the territory of the other contracting state, certificates of airworthiness and personnel licenses, facilitation, distress, emergency landing or other accidents, export of surplus earnings, commercial operations. CHENG, *supra* note 3, at 289-356.

<sup>24</sup> O'CONNELL, *supra* note 10, at 148-56.

<sup>25</sup> Article 11 of the Convention reads as follows: "Subject to the provisions of the 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." (ICAO Doc. 7300/5 at 5, 1975).

ments. If a bilateral agreement only repeats Article 11 of the Chicago Convention, such inclusion probably would be justified on the grounds that, in the judgment of contracting parties, it helped to make the agreement complete or assisted in its interpretation and implementation, or the contracting parties wished to keep certain rules in force even if the Chicago Convention should, for whatever reasons, cease to apply. There also may be exceptions when some variation in the text might justify the inclusion of such provision in a bilateral agreement.<sup>26</sup>

Another usual "technical" article provides for mutual bilateral recognition of certificates of airworthiness of aircraft and certificates of competency and licenses for personnel. This is similar to Article 33 and Article 32(b) of the Chicago Convention. Again, there might be doubts about the need to repeat, in a bilateral context, applicable and generally satisfactory provisions of the Chicago Convention. The ECAC Standard Clauses do not contain a provision of this kind. On the other hand, there have been some important expansions of this provision in the treaty practice of some states. A modified provision recognizes the possibility of differences between practices of one of the contracting parties and ICAO standards<sup>27</sup> and establishes a procedure for cases when one of the parties does not consider the non-conforming practices of the other party to be acceptable.<sup>28</sup>

Less frequent in modern bilateral air transport agreements are "technical" provisions dealing, for example, with the investigation of accidents, nationality of aircraft crew, documents to be carried

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<sup>26</sup> One such example is the Canada-Fiji agreement. Air transport agreement Canada-Fiji, [1974] Can. T.S. No. 15, article 7, paragraph 1 reads, in part, as follows:

the laws and regulations of one Contracting Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of the designated airlines of the other Contracting Party no less favourably than to aircraft of airlines of the first Contracting Party or to aircraft of other parties to the Convention . . .

<sup>27</sup> Under Article 38 of the Chicago Convention, ICAO States have the right, under certain circumstances enumerated therein, to notify ICAO of the differences between their own practices and international (ICAO) standards.

<sup>28</sup> *E.g.*, Air Transport Agreement, *as amended* Jan. 17, 1966, United States-Canada.

on board aircraft, and provision of navigational and other technical services.<sup>29</sup>

Other provisions related to the operation of flights on scheduled services are administrative in nature. They address charges for the use of airports, navigational and other facilities, procedure for the designation of airports and airways available for the operation of services, non-discrimination in the use of airports, airways, air traffic services and associated facilities, reciprocal exemption from customs duty for aircraft, fuel, spare parts, etc.

The second identifiable group of provisions of the bilateral air transport agreements is that setting forth rules and conditions for the operation of commercial air transport services. These are the "rules of the economic game" and usually include articles relating to the grant of operating rights, designation of airlines and operating authorizations, qualification of airlines and conditions imposed on the exercise of operating rights, capacity offered on the agreed services, tariffs, provision of statistics, facilitation of the transfer of funds accrued by airlines and currency exchange, airlines' exemption from taxation, establishment of airlines' agencies, sale of transportation, etc. A bilateral air transport agreement can also specify the role to be played by the designated airlines in the determination of capacity or, for that matter, other areas. Specific provisions governing the operation of extra-flights (extra sections), filing schedules, special provisions on the change of gauge in the territory of the other Party, etc., are less frequent.

Provisions of a legal nature, which establish a treaty framework for the bilateral arrangement of air transport relations between the two countries involved, can be considered as a third group. The article containing definitions, provision for the registration of the

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<sup>29</sup> The reason for a less frequent occurrence of such provisions is, of course, the wide acceptance of the Chicago Convention and its Annexes. If there is no specific reason for dealing bilaterally with a technical subject for which multi-lateral rules have been established by the Chicago Convention and its Annexes, the incorporation of a provision of this kind in a bilateral agreement brings about a risk that the language may not be entirely identical and a difference might then arise between a bilateral provision and a rule of the Chicago Convention or its Annexes with resulting possible confusion and difficulties in implementation of such a rule. This does not mean that, depending on circumstances, a repetitive or duplicative inclusion of the same material in a bilateral agreement could not serve a useful purpose such as facilitating the interpretation and application of the agreement or ensuring the continuity of certain legal basis in the event that the Chicago Convention would cease to apply.

agreement, procedure for modification, entry into force, termination and super-session of the agreement, including a quite frequent provision about the consequences of the possible entering into force in respect of both contracting parties of a general multilateral air convention covering the same ground as the bilateral agreement, belongs in this category. Also, in the majority of bilateral air transport agreements there is a provision establishing a procedure for the settlement of disputes and an article or articles concerning consultations between respective aeronautical authorities on matters of the interpretation and application of the agreement.

Finally, the remaining and in some respects most important part of a bilateral air transport agreement constitutes the exchange of routes to be operated by the designated airline or airlines of the other party<sup>30</sup> and of traffic rights to be enjoyed by such an airline or airlines, with whatever qualifications or conditions the contracting parties might wish to attach to the exercise of such rights. This part of the agreement resembles a simple commercial transaction, a deal comparable to a trade agreement fixing quotas on the volume of exports or imports or other conditions, or to any other contract between two governments concerning an exchange or provision of economic benefits.

In the light of the historical background and the typical content of modern bilateral air agreements as represented by the four categories or groups of provisions outlined above, it may be easier to attempt to determine which provisions are indispensable or essential for the operation of the network of international air transport services and which are peripheral or only occasionally useful. It has been demonstrated that bilateral administrative provisions of a technical type add very little, if anything at all, to the Chicago Convention and its Annexes. Thus, bilateral concern could possibly be confined to those situations where one of the partners in bilateral relations would have filed differences to ICAO standards not acceptable to the other party. Another possible area requiring bilateral settlement would be those matters not presently or ade-

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<sup>30</sup> Cheng calls the exchange of routes the "core of the bargain between the contracting parties." The points on the specified routes, named or otherwise referred to in the exchange, are the "counters of the game." CHENG, *supra* note 1, at 387.

quately covered by the ICAO technical law-making, such as aircraft noise and sonic boom, security, etc.

It also has been demonstrated that an agreement involving an exchange of routes and traffic rights can be, to some extent, separable from the remainder thereof. Indeed, it is not infrequent in the practice of states that the operation of international scheduled services is based not on a formal agreement between governments, but on a unilateral authorization which could, of course, also include conditions concerning the permissible volume of capacity, tariffs or other necessary matters.

There is another group of administrative provisions which regulate commercial and economic aspects of the operation of services, including, but not limited to, such matters as the procedure for the establishment of tariffs, provision of statistics, transfer of funds accrued by airlines, and taxation. It might be argued that particularly in recent years forms of international charters have been developed which are very close to scheduled services,<sup>31</sup> and yet for their operation a set of administrative rules similar to a bilateral air agreement on scheduled services was not essential since formal bilateral agreements on charters are still quite rare. There exist, of course, several bilateral and even multilateral (U.S., Canada, ECAC countries) understandings on charters which regulate certain areas of relations pertaining to charters, such as the charter-worthiness of flights, the filing of charter programs and tariffs, and the enforcement of charter rules. Apart from this, however, the administrative matters which, in the field of scheduled services, form a large part of the content of bilateral agreements between governments remain subject to national laws (mostly of the country of destination), or the matter remains unsettled, or it is tacitly assumed that the pertinent administrative provisions of the scheduled services agreement between the same governments are to be applied to non-scheduled services as well. In any event the question can be asked, why a comprehensive set of bilaterally agreed rules is necessary for scheduled services and unnecessary for the operation of programmed, schedulized international charters.

Be that as it may, it is noteworthy that typical provisions of

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<sup>31</sup> For the distinction between scheduled and non-scheduled services, see ICAO Doc. 7255. For views questioning the traditional distinction, see J.G. Thomka-Gazdik, *Viewpoint*, IATA REVIEW, Oct. 1975, at 10.

bilateral air transport agreements differ considerably when evaluated or compared with respect to their indispensability or relevance, their relation to the Chicago Convention, or their relation to some other agreements and to national laws. This might lead to some doubts, not about the practical usefulness of these agreements, which is, after all, tested in practice, and the impressive number of bilateral air agreements gives an unequivocal answer, but about the merits and values, in the legal sense and otherwise, of the present usual content and form of this particular instrument in the context of the organization of international air transport relations. Continuing with this line of thought one should not find shocking Stoffel's observation about possibly "putting air transport relations under the treaties of friendship, commerce and navigation," an idea which, in his opinion, "deserves more study."<sup>32</sup> Considering, however, this matter not in the abstract, but in the awareness of the more than one thousand bilateral air transport agreements presently existing, one can easily conclude that these agreements represent a practical and convenient conglomerate of rules already existing or customary rules already recognized by states as well as certain rules newly made by the agreement (although susceptible to being established by other instruments or by other means) with the important addition of an agreement involving certain specific traffic rights and economic benefits. The observations made by Metzger regarding commercial agreements between states, an obvious "cousin" of bilateral agreements on air transport, come immediately to mind:

The commercial treaty is primarily a contract between nations, but it also has some attributes of a constitution. It sets forth standards of conduct . . . [T]he commercial treaty as a whole represents an effort to establish and maintain an economic climate hospitable to increasing international trade and investment . . .<sup>33</sup>

The writer admits that "on some subjects the language (of agreements) will be general, not really representing either a contractual commitment in the narrow sense or the establishment of a clear-cut constitutional principle . . ."<sup>34</sup>

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<sup>32</sup> Stoffel, *supra* note 7, at 136.

<sup>33</sup> S. METZGER, *supra* note 20, at 148.

<sup>34</sup> *Id.*

The bilateral air transport agreements seem to be saddled equally, if not to a greater extent, with similar problems. As will be expanded upon later, in some cases they seem to represent no more than an "effort" to create the bare essentials, and not always the best conditions, for the operation of air services. In addition, there are certain specific factors that apparently contribute even further to difficulties in the application or interpretation of the agreements.

## II. DOOMED TO IMPERFECTION?

There are, basically, two possible approaches to the study of certain problems relating to the application and interpretation of bilateral air transport agreements. Either approach can possibly lead to ascertaining whether certain wrongs or deficiencies are curable, how serious they are and how able the "patient" is to take on possible additional burdens. One would consist of analytical studies of typical articles, tailored to easily identifiable problems, the other would be an effort to discover common denominators of such problems. I will pursue the second path and discuss briefly such matters as: (A) the concept of "aeronautical authorities" under bilateral air agreements; (B) the position of airlines in the framework of bilateral air agreements; (C) the language used in bilateral air agreements; (D) the relation between bilateral air transport agreements and national laws and regulations of States.

### (A) *Aeronautical Authorities: A Case For Their Better Utilization*

Guided by the spirit and predicated on the letter of Article 6 of the Chicago Convention, bilateral air transport agreements represent an instrument of regulation and control over the operation of air transport services by the two concerned governments. This governmental concern over the respective airlines primarily but not exclusively includes the territories of the two contracting parties. The bilateral air agreement may simultaneously constitute, to a greater or lesser extent, an instrument of promotion and stimu-

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<sup>35</sup> The bilaterally agreed regulatory regime may be extended to air transportation to or from points in third countries. Fifth Freedom rights enable an airline of one of the contracting states to take on in the territory of another contracting state, or to put down in that territory traffic destined for, or coming from the territory of a third state. The International Air Transport Agreement defined 5th Freedom in Article I, Section 1: ICAO Doc. 2187, at 71 (1960).

lation of such services, a vehicle made available by governments for the facilitation of air operations in the interest of both the users of air transportation and the airline industry.

The degree of intensity of direct involvement of governments in the actual shaping of bilateral air transport relations varies and this is only natural given the possible differences of policies leading to the conclusion of an agreement. These differences may stem from constitutional, social and economic background of the two contracting partners. On the one hand this "involvement" could be restricted to the act of the conclusion of the agreement leaving its implementation to administrative bureaucratic bodies on the lower level of governments or to the national airlines. On the other hand, it can entail a fairly detailed monitoring of all significant events or developments in the bilateral arrangements on air transport.

The bilateral air agreements constitute and define for the purposes of performing certain functions in the implementation of the agreements, special government bodies called the "aeronautical authorities."<sup>38</sup> Although these "aeronautical authorities" in the meaning of bilateral air transport agreements are government departments or other bodies which have regulatory or other responsibilities in civil aviation under respective national laws, their international position, *i.e.* the content on forms of their functions with respect to bilateral air agreements, may not be completely identical with their domestic position as shaped by national laws and regulations applicable to international air transport. Apart from the fact that the objective of bilateral air agreements requires specific bilateral understandings only on certain selected matters where the need for uniform, reciprocal or agreed upon treatment is clearly manifest, the other matters being left to national regula-

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<sup>38</sup> In international practice the "aeronautical authorities" defined in bilateral air transport agreements are those authorities which have statutory responsibilities in air transport economic, commercial, and technical matters. It may be, therefore, one single authority or two authorities with delimitation between economic and technical functions. The United States agreements, for example, define as an "aeronautical authority" the Federal Aviation Administration with respect to technical permission, safety standards and requirements. In all other matters the Civil Aeronautics Board is the "aeronautical authority." In the Canadian bilateral air transport agreements concluded after 1945 both the "Minister of Transport" and the Air Transport Board (later the Canadian Transport Commission) have been defined as the Canadian "aeronautical authorities." The Air Transport Board, and similarly now the C.T.C., has been exercising these duties in transport and economic matters.



tions, the reciprocal nature of the agreements entails a search for an identical formulation of the functions of the "aeronautical authorities." Since their domestic legal position may not be the same, such required identity of functions with respect to the bilateral agreements may lead to some kind of a redefinition of their role in international air transport, if not in a general fashion, at least in relation to air services individual air transport agreements.

More frequent functions assigned under bilateral air transport agreements to the aeronautical authorities can be summarized as follows:

1. granting of operating authorization(s) including the examination of the qualification of airlines;
2. functions relating to capacity (monitoring, remedial measures of the pre-determination of capacity, approval of capacity agreements between airlines, etc.);
3. provision of statistics or organization of exchanges of statistical data;
4. functions relating to tariffs (acceptance of filings, examination and approval, negotiations on tariffs);
5. functions relating to the interpretation, application and modification of the agreement or to the settlement of disputes, including international contacts and consultations between the aeronautical authorities on the interpretation, application or modification of agreements;
6. approval of commercial and other agreements between airlines.

Occasionally, the aeronautical authorities are given some additional, less typical responsibilities concerning, for instance, the staff stationed by a designated airline in the territory of the other party and its location, the nationality of aircraft crews, and the operation of additional scheduled flights (extra sections).

Since the implementation of the agreements is a matter to be taken care of by respective governments in conformity with their constitutions and other laws, it would appear to be the responsibility of each of the two contracting parties to ensure that the body named as the aeronautical authority in a bilateral air agreement will also possess all necessary legal powers to discharge the functions arising from the bilateral agreements. In the alternative, it is clear that a

certain redefinition of their role in international transport, for reasons referred to above, will have to exist.

There is also the question of the nature of specific functions originating in a bilateral agreement which is discernible regardless of whether these functions are performed within or supplemental to national regulations. One such feature is possible greater flexibility for case-by-case adjustments as opposed to uniformity and certain rigidity of national rules.<sup>37</sup> Further, these functions have more positive or promotional aspects than would be typical for a normal regulatory activity.<sup>38</sup> The distinction between strictly remedial and managerial functions does not seem to apply fully.<sup>39</sup> Some of the functions cannot be discharged in the national context only, but necessitate development of international relations between the aeronautical authorities concerned and their mutual cooperation.<sup>40</sup> Another important factor seems to be that in the domestic field an aeronautical regulatory body can compartmentalize its functions as desired, while a bilateral air agreement being a specific, coherent whole, would best be administered by an integrated and internally coordinated system of activities, without approaching in isolation the individual areas of the agreement.

In the meaning of bilateral air agreements, the aeronautical authorities are a creation thereof. Under the present conditions in international air transport there is no doubt about the need to have specialized government bodies constantly monitoring the implementation of agreements and taking, in direct mutual co-operation, steps as necessary toward their adequate operation in practice. It would be unfortunate if the internal constitutional or administrative system of states should limit the discharge of duties entrusted

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<sup>37</sup> Cf. observations made by McCarroll, *The Bermuda Capacity Clauses in the Jet Age*, 29 J. AIR L. & COM. at 129 (1963).

<sup>38</sup> Nerbas, *Canadian Transportation Policy, Regulation and Major Problems*, 33 J. AIR L. & COM. at 253 (1967).

<sup>39</sup> The managerial discretion of airlines can be seriously affected by measures taken by the aeronautical authorities exercising functions pursuant to a bilateral air transport agreement. Such measures would have some "managerial" aspects and influence the viability of services, as with respect to the specification of routes and exercise of traffic rights.

<sup>40</sup> Rosevear has observed that "the bilateral system, by its very nature, requires more frequent and, as a result, more intimate discussion between the states." *Scheduled International Air Transport: A Canadian Analysis*, THE FREEDOM OF THE AIR 125 (E. McWhinney and M. Bradley eds. 1968).

to the aeronautical authorities by bilateral air agreements. It would likewise be unfortunate if, for the sake of a complete optical reciprocity, such duties should be specified in a bilateral agreement in a fashion which would make it difficult to accommodate them within the domestic legal system of either of the two parties.

(B) *The Involvement and Detachment of Airlines*

The airlines presently engaged in international air transport represent a considerably mixed bag. They differ with respect to their economic strength and their share in international traffic, in terms of their ownership and control, as to their basic policy or mission, and, more recently, also in terms of their affiliation: in addition to the International Air Transport Association (IATA) there is also the International Air Carrier Association (IACA), which is a group of a number of international charter operators.

Bilateral air transport agreements employ the term "designated airlines" which are, in substance, air carriers duly designated by one party in an official communication to the other party for the operation of agreed services. The provisions of the agreement refer consistently to designated airlines although for the purpose of the implementation of the agreement the fact of designation is not sufficient: the carriers must also be authorized by the other party. To be authorized, they must be subject to a certain scrutiny established by the agreement and reflected in national rules and procedures.

I will not discuss generally the position of individuals, private or corporate, in regard to international agreements, but rather will deal with some specific problems arising for the "designated airlines" under bilateral air agreements. A bilateral air agreement as a treaty is governed by the general rule: "The binding force of a treaty concerns in principle the Contracting States only, and not their subjects."<sup>41</sup> When negotiating an air agreement, the two parties involved exercise their sovereign rights over the air space under their control, and the grant of transit or traffic rights is accomplished, as a rule, on a government-to-government basis. The language of the agreements might sometimes be confusing, but irrespective of possible inaccuracies of language it is between

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<sup>41</sup> L. OPPENHEIM, INTERNATIONAL LAW 829 (7th ed. 1948).

governments that certain rights are granted or obtained and certain administrative or other rules established. By the act of designation and authorization the selected airlines may utilize the provisions reserved for them in the treaty, taking over both rights and obligations established for such airlines. Both in theory and in practice agreements are sometimes concluded and enter into force without an immediate implementation or with only unilateral implementation. It can be deduced that airlines accept the regime established by a bilateral air agreement. This results because either the airline has expressed an interest in being designated or because they are the normal national instrument for the operation of international air services. A judgment on whether or not such a regime is satisfactory from the viewpoint of national interests would not be an exclusive prerogative of the airline industry: any other party concerned can express an opinion on the policy adopted for the negotiation, the skill of negotiators, or any other facet thereof.

There are, however, several factors which tend to complicate this possibly over-simplified picture. The extent and nature of airlines' participation in the preparation of new or revised air agreements or in the actual negotiations can cause difficulties. With respect to the United States' situation, one commentator has stated that the "U.S. carriers are not parties to the negotiations, and indeed, often have disagreements among themselves."<sup>42</sup> The industry is, of course, as a rule consulted and the representatives of its association may have observer status at negotiations. In the practice of other countries the situation as to consultations with the industry is similar with the notable difference that representatives of a national airline are usually full-fledged members of the delegation.<sup>43</sup> Remembering that a bilateral agreement is a set of mutually agreed rules and a regulatory tool governing the commercial aspects of the operation of air services, the agreement, and particularly the commercial exchange of routes and traffic rights, would seem to be very close to a joint international transaction in which both the governments and selected airline(s) participate on each side. Thus,

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<sup>42</sup> A. LOWENFELD, *supra* note 12, at II-100, note f.

<sup>43</sup> H. WASSENBERGH, *POST-WAR INTERNATIONAL CIVIL AVIATION POLICY AND THE LAW OF THE AIR* 65 (1957): "... in practice it is often the national airlines which, as directly interested parties, advise their Government on the routes and commercial rights to be granted to foreign airlines. It is very exceptional for such advice not to be followed by Governments."

the acceptance by airlines of the rights and obligations created under the agreement would appear in a slightly different light: the airlines themselves might have participated in the formulation of such rights and obligations in the process of negotiations. The plausibility of this view is not disturbed by the fact that the actual formal selection or designation of an airline or airlines for the operation of services takes place after the agreement enters into force provisionally or definitively.<sup>44</sup> It seems that only in a few countries does the procedure for the selection in the period between the entry into force of an agreement and the formal designation to the other party, have some practical meaning. In countries with only one international air carrier, or in countries with a predetermined division of spheres of influence between two or more international carriers, the act of selection or licensing and designation is hardly more than an administrative exercise. Being actively involved in the negotiations of an agreement, the airlines seem to be losing the detachment which they would otherwise possess as corporate citizens or subjects in relation to an international treaty. The net result would seem to be that the airlines' rights and obligations have the same appearance as if created directly by the agreement.

The airlines' role in the implementation of the bilateral air agreement has to be considered as a complicating factor. Such a role can be exercised in a variety of forms depending on circumstances, and can assume positive or, on other occasions, negative features. Considering the latter, there are known cases of attempts by national airlines to interfere on various grounds with the process of licensing a foreign carrier duly designated under a bilateral agreement by the other contracting party. A possibility of negative pressures of this kind certainly exists in the United States due to the legislative and judicial structure. Little can be usefully added to what has been written by others on this subject.<sup>45</sup> It would appear

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<sup>44</sup> The designation, *i.e.*, naming of selected airline or airlines, can be done in the Agreement itself or its Annex. For example, in the Civil Air Transport Agreement, Canada—People's Republic of China, the Chinese "designated" airline is named in Art. 3 [1973] Can. T.S. No. 2.

<sup>45</sup> See Hackford, *The Colonial Airlines Challenge to U.S.—Canadian Transport Agreement*, 19 J. AIR L. & COM. 1 (1952) which describes a case of what the author calls a "private sabotage of public policy." A court action initiated by Colonial Airlines resulted in delaying substantially the grant of a license to an

that if there are no doubts about the qualifications of a foreign applicant and his application remains strictly within the bilaterally agreed exchange of routes and traffic rights, objections could possibly lead to delays and thus to irritations in bilateral air relations, but not to a straight negative decision unless the CAB also became convinced about the undesirability of the application and would, in that unlikely event, propose a course of the non-observation and denunciation of the bilateral agreement.

It would be erroneous, however, to deduce that the United States' situation is entirely unique in this respect. Although perhaps less documented or commented upon in literature, difficulties in other countries can occasionally interfere with the process of licensing a duly designated foreign carrier. The differing attitudes towards the application of the principle of multiple designation of airlines embodied in the agreement or on the subject of the substantive ownership and effective control of a foreign airline applying for authorization under a bilateral agreement can give rise to such interferences. Information on the position of national airlines in such cases is mostly lacking, but it probably would be safe to surmise that competitive interests, if any, could be expressed in some form or other. Similarly, in the course of the implementation of a bilateral agreement there might arise a number of other problems when national airlines can be called upon for views or suggestions and they would do this in a fashion expressing or protecting their interests. Again, this sometimes could appear as a negative activity with respect to the smooth functioning of the agreement if its orderly application is taken in abstract and not as a result of the continuous confrontation and harmonization of conflicting interests. The principle of reciprocity would in any case usually represent a correcting factor in the formulation of a position by a national airline.

There are several areas where the designated airlines are supposed to exercise positive or even essential functions in the implementation of bilateral agreements. A case in point is the

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airline duly designated by the Canadian government in accordance with the terms of the agreement. According to Hackford, "a private corporation prevented the United States from carrying out the obligations it had assumed in negotiation with another sovereign state." This challenge to the "power of the Government to make Executive Agreements with foreign powers" was terminated by the withdrawal by Colonial Airlines of this case from the U.S. Supreme Court.

determination of tariffs. The Chicago standard text of bilateral air agreements did not contain a specific provision on tariffs and the post-war bilateral agreements usually adopted the formula of the 1946 Bermuda agreement. This agreement provided that the responsibility for fixing tariffs is given, in the first place, to the international organization of airlines (International Air Transport Association) and there is a bilaterally agreed, back-up mechanism on the governmental level should the airlines' tariff-fixing machinery fail. A certain amount of control over tariffs is reserved for the governments even if the airlines succeed in fixing tariffs by agreement among themselves. According to the study prepared for ICAO in 1975 by the Institut du Transport Aérien (ITA) a reference to the IATA machinery appears in almost three quarters of the agreements examined for the purpose of the study. The ECAC standard clause on tariffs, which seems to be typical for the present attitude of states, provides that it is, in the first place, the obligation of the designated airlines to try to achieve an agreement on tariffs (if possible, through IATA) which is then subject to approval, explicit or otherwise, by the aeronautical authorities. These authorities, in addition to exercising control over tariffs, have the responsibility to determine tariffs between themselves should the airlines' negotiations fail.

In addition to tariffs, in the bilateral agreements using the capacity predetermination formula, the designated airlines are quite frequently given the responsibility to negotiate and determine capacity offered on agreed services, subject to approval by the aeronautical authorities. In some cases, which are probably exceptional, the formula goes one step further and no approval by the aeronautical authorities, that is, no form of governmental control, is necessary under normal circumstances.<sup>46</sup>

Procedures of this type may encompass not only matters related to capacity, such as frequency of flights, type of aircraft or scheduling, but also "conditions of carriage, sales representation and

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<sup>46</sup> *E.g.*, the Air Transport Agreement, Canada—Fed. Rep. of Germany, of March 26, 1973, provides in article 9, paragraph 5 that the "capacity . . . as well as the frequency of services . . . and the type of aircraft . . . should be agreed between the designated airlines in accordance with the principles laid down in paragraphs 1-4 . . ." Only in the absence of an agreement between airlines would the aeronautical authorities be confronted with the matter.

ground handling"<sup>47</sup> or "all technical and commercial questions pertaining to the flights . . . and transportation . . . on the agreed services" and "all questions concerning commercial cooperation," in particular "schedules, frequency of flights, types of aircraft, rates, servicing of aircraft on the ground, and methods of financial accounting."<sup>48</sup> As already mentioned, the designated airlines may be given some role in the agreement on the location of agencies and on staff stationed in the territory of the other contracting party. Under some bilateral agreements, traffic rights can be exercised on certain routes operated only during the validity of a commercial arrangement, usually pooling, between the designated airlines and approved by the aeronautical authorities.<sup>49</sup>

Despite the fact that in some cases the two governments may not be willing to enter into an agreement unless there is first some understanding between their national airlines, there is still some reason for concern over such formulas which leave in the hands of the designated airlines the operation, if not the existence of the agreement, including the possibility of a complete discontinuation of services. Not quite unjustified are J. Naveau's observations about exchanges of letters between airlines which affect, in some cases, the regime established by a bilateral agreement, and which, in his opinion, should be deemed "non-existent" for the governments and belong properly to the area of commercial private law.<sup>50</sup> Such formulae, if used, cannot but contribute to transforming or deforming the character of bilateral air agreements with all the ensuing legal entanglements.

### (C) *Language of Agreements: A Factor of (Mis) Understanding*

It would be reasonable to expect that the bilateral air transport agreements, which are both a legal document and a formalized commercial transaction, would strive to achieve the greatest possible accuracy of language used in their individual provisions.

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<sup>47</sup> Air Transport Agreement, Canada—People's Rep. of China [1973] Can. T.S. No. 21, art. 7, para. 4.

<sup>48</sup> Air Transport Agreement, Canada—U.S.S.R., [1966] Can. T.S. No. 18, art. 4, para. 4.

<sup>49</sup> E.g., Air Transport Agreement, June 17, 1974, Canada—The Netherlands, Route Schedule, section I, note 2.

<sup>50</sup> Naveau, *L'évolution du droit des transports aériens*, 9 *EUROPEAN TRANSPORT LAW* 690 (1974).



There is no doubt that clear and accurate language would be of considerable assistance to both the correct interpretation of the agreements in accordance with the intent of the drafters and to the smooth implementation of these agreements in practice. On the other hand, ambiguous language lacking clarity and susceptible to different interpretations can only impair the role of the agreement in the implementation of bilateral air relations between the two parties concerned.

The question is whether the deficiencies, which are unfortunately too often evident in the texts of bilateral air agreements, have deeper reasons and cannot be, under the present circumstances, moderated or removed.

The possible criticism of the language used in bilateral air agreements can be initially directed to the generality of some provisions. For instance, in the article on airport charges, the contracting parties undertake to impose or permit to be imposed charges for the use of public airports and other facilities which would be just and reasonable.<sup>51</sup> It is a statement of a principle which is susceptible to being interpreted in many different ways. In this particular case, the vagueness of the principle is corrected by the subsequent requirement that the charges be not higher than those applicable to national aircraft (of the country whose airports or facilities are being used) engaged in "similar international services."<sup>52</sup> The question then arises how helpful is the principle of "just and reasonable" charges in the first place, not to mention the fact that the corrective supplement is not deprived entirely of a certain element of vagueness, namely in the use of the expression "similar" services. Also, the text does not deal with situations where there exists a serious disproportion in the level of charges applied by the contracting parties and thus an attempt can be made to rectify such disproportions by introducing the principle of reciprocity through national regulations.

A typical text of the article on tariffs requires that tariffs be established "at reasonable levels," due "regard being paid" to sev-

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<sup>51</sup> *E.g.*, art. 7 of the U.S. Standard "Bermuda" Agreement of February 11, 1972.

<sup>52</sup> This is the language of article 15 of the Chicago Convention on Civil Aviation, *opened for signature*, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (1948).

eral factors enumerated in the article.<sup>53</sup> Again, the vagueness of this principle is corrected by subsequent specific procedure for the establishment of tariffs by an agreement between the designated airlines of the two parties subject to approval by the aeronautical authorities. There may be, however, doubts about the need for such a principle since it cannot be uniformly understood and applied in airlines' agreements or in the decision-making process of the aeronautical authorities.

Under a typical Bermuda clause on capacity,<sup>54</sup> the designated airlines have "fair and equal opportunity" to operate air services over the specified routes. Such air services to be provided to the public should bear "a close relationship to the requirements of the public" and they should be operated in such a way as not to "affect unduly" the services of the airlines of the other contracting party. The primary objective of air services is providing capacity "adequate to the traffic demands" between the country designating the airline and the countries of ultimate destination of the traffic. I will not analyze in depth the strength and weakness of the Bermuda capacity clause in light of present conditions of international air transport.<sup>55</sup> There is no internal parallel mechanism supplementing the "deliberately vague" language or "laissez faire" approach embodied in the basic Bermuda principles. Ex post facto review can be, of course, requested by either of the two contracting parties should it believe that these standards or principles have not been

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<sup>53</sup> E.g., art. 7 para. 1 of the ECAC Clauses for Bilateral Agreements of March 1959, ICAO Circular 63-AT/6 at 118 (1962).

<sup>54</sup> E.g., Article XII of the Air Transport Agreement Canada—U.S.A. of January 1966.

<sup>55</sup> See Lissitzyn, *Bilateral Agreements on Air Transport*, 30 J. AIR L. & COM. 249 (1964). Stoffel took the view that the "Bermuda principles are deliberately vague and their application continues to be not wholly satisfactory to any party. . . ." Their faults lie, in his opinion, not in what they say but rather in what they do not say. Some solution may lie in the "refinement and further spelling out" of the Bermuda principles. (Stoffel, *supra* note 7 at 130). Against the background of United States' efforts in 1974-1975 to achieve a reduction of capacity offered on some scheduled transatlantic services, Naveau wrote about the differences between the Bermuda text and the actual practices of states. From the philosophy which inspired the Bermuda clauses "remains only the letter, not the spirit." *L'évolution du droit des transports aériens*, 9 EUROPEAN TRANSPORT LAW 685, at 690 (1974). For a recent look at some of the "Bermuda" problems see Lowenfeld, *CAB v. KLM; Bermuda at Bay*, 1 AIR LAW 2-18 (1975) and Diamond, *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, 41 J. AIR L. & COM. 419-96 (1975).

observed by the airline(s) designated by the other party, although such a right as envisaged by the Bermuda clause has been very rarely used.<sup>56</sup> In contrast to certain nebulously expressed principles in the articles on airport charges or tariffs, the vague language of a capacity clause of the Bermuda type stands practically on its own without any supplemental or corrective provisions<sup>57</sup> and remains subject to different interpretations and methods of application.

General formulations of other parts of the bilateral agreements tend to obscure the manner in which government regulatory functions should operate in practice. Provisions are often found in bilateral air agreements which stipulate that an understanding between the designated airlines on capacity, schedules, types of aircraft or possibly other matters are subject to the approval of the aeronautical authorities of both parties. It is not clear whether the role of authorization or approval by the aeronautical authorities of one of the contracting parties is contemplated only in relation to the airlines of the other party or, if the nature of the provisions can be so understood, also in relation to its own designated airline or airlines. Similarly, the typical provision concerning the substantial ownership and effective control of an airline by the state designating it or by its nationals, would be enforced, as a rule, by the other contracting party receiving the designation. It can be, however, argued that the state designating the airline(s) is not entirely deprived of some responsibilities in this respect and should be guided, when exercising its right to designate, by the rules and principles of the agreement.

In addition to the generality or vagueness of some typical formulations in the bilateral agreements, another problem arises from the fact that the text of agreements results in many instances from a compromise reached at the negotiating table and may be more of

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<sup>56</sup> Lowenfeld, *C.A.B. v. KLM: Bermuda at Bay*, 1 AIR LAW 2, 8 (1975) noted "the United States never instituted a capacity consultation under Bermuda."

<sup>57</sup> Except, of course, for cases when Bermuda language is used, but the bilateral capacity regime includes also an additional and predominant pre-determination component [e.g., to the effect that the practical application of the Bermuda principles shall be subject to an agreement between the aeronautical authorities of the two Parties "before inauguration of the agreed services" and for the subsequent changes of capacity." (article VI of the agreement, Canada—Italy, *as amended*, Can. T.S. No. 27.)] It is doubtful whether agreements based on the pre-determination of capacity in whatever form can be called Bermuda type agreements, even if some Bermuda language is still used.

an "artfully formulated disagreement"<sup>58</sup> than a clear and precise establishment of rules, rights and obligations of parties. A. F. Lowenfeld appears to be correct when observing, in the context of the Bermuda agreement, that the drafters were evidently more anxious to achieve agreement in the period allotted for the conference than they were to avoid all potential controversy in the future.<sup>59</sup> This concern over formulations which, while simulating an agreement, obscure the real disagreement and postpone possible controversies,<sup>60</sup> is not predicated only on such formulae which leave certain decisions to some subsequent negotiations. The problems may be even deeper than that. For example, the article on the exchange of statistics may establish an obligation that, upon request of one contracting party, the designated airline of the other party must provide specified statistics concerning traffic on the agreed services. Surely the negotiators must be relieved if such a formulation is found mutually acceptable. Language of this nature is, however, almost a fool-proof device for producing all kinds of disagreements and difficulties in practice. Without the specification of how, when and what precise data relating to "traffic" must be supplied, etc., and in the light of a certain reluctance to provide such sensitive information, it is most unlikely that such a provision could be satisfactorily implemented.

Finally, it is also true that certain language is repeatedly used in bilateral agreements and becomes a precedent adopted again and again without the necessary reflection regarding its place and usefulness under given specific circumstances. Bilateral air agreements provide for the issuance of an operating authorization to the airline designated by the other party upon fulfillment of all prescribed conditions. There are, of course, many instances when states incorporate such a provision in their agreements although their practice is different in that no special formal authorizations to foreign carriers are issued. Similarly, no formal approval to tariffs filed with the aeronautical authorities might be given in spite of

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<sup>58</sup> Fawcett, *The Legal Character of International Agreements*, 30 BRIT. Y.B. INT'L L. 381 (1953).

<sup>59</sup> Lowenfeld, *supra* note 1, at 5.

<sup>60</sup> Stuart Tipton, Senior Vice-President, Pan American Airways, commented, in a different but related context, on "compromise verbiage which would render a policy determination useless." (Note, 11 IATA Rev. 5 (1976) on the U.S. position with respect to present international aviation problems.)

the explicit text of the agreement providing for such an express approval. Many agreements contain a specific prohibition of cabotage traffic although it is made quite clear in other parts of the agreement that operation of services is permitted only on specified routes serving specific points and these do not include more than one point in respective national territories and hence no cabotage traffic can be available in any case. Not infrequently that portion of the Bermuda capacity clause relating to the fifth freedom traffic is unnecessarily incorporated into agreements which are, basically, only third and fourth freedom agreements.

More examples could be given of this apparent inertia and tendency to preserve certain standard formulations regardless of whether they are actually useful or needed. As aptly stated by Szablowski, law is "only good so long as it remedies real factual situations, once they change, the need for new interpretation or amendments arises."<sup>61</sup> The same applies to the choice of wording to cover individual subjects of bilateral air agreements.

International agreements may indeed be only "skeletal things, to be clothed with the flesh and blood of state practice."<sup>62</sup> The skeletal structure however, should, be as sound and open to objective examination as possible. Only if the bilateral air agreements are identified with their Bermuda form, and, to be more exact, with the Bermuda clause on capacity and its vague principles, can it be argued that vague skeletal components are adequate for the essentially "self-regulatory regime which they (the Bermuda principles) comprise" or that "some things . . . are simply understood without the necessity of words or written statements."<sup>63</sup>

From a broader standpoint, the inadequate expression of "skeletal" treaty components is not to be desired. H.D. Metzger, while rightly observing that generally worded principles are "susceptible to subjective judgment and therefore to effective nullification,"<sup>64</sup> found some advantage in the fact that such principles provide at

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<sup>61</sup> Szablowski, *Creation and Implementation of Treaties in Canada*, 34 CAN. BAR REV. 41 (1956).

<sup>62</sup> Franck, *supra* note 4, at 182.

<sup>63</sup> Cf. Diamond, *supra* note 1, at 451, 452. If the last statement is true, there may not be enough justification for the formulation of any principles in the Bermuda capacity clause at all.

<sup>64</sup> S. METZGER, *supra* note 20, at 148.

least a basis for "complaint by a company against conduct by another which appears to it to be unjust." Would not it be, however, preferable to establish the treaty framework in such a fashion that similar complaints, if any, could be put forward on less controversial grounds and with a better chance of achieving some success? *Quite definitely.*

(D) *Bilateral Agreements and National Regulations: An Uneasy Co-existence*

As has been said, the constitutional rules of the States concerned determine the procedures or specific measures necessary to effectuate a bilateral air agreement. The application and implementation of bilateral air agreements has to be exercised by the two governments in conformity with their laws and practices.<sup>65</sup> In general, it would appear that in the present practice of states, bilateral air transport agreements are only rarely subject to formal ratification by respective national legislative bodies. The texts of agreements respect the national specifics as to constitutional requirements for approval, and usually enter into force upon the notification that such requirements, whatever their nature may be, have been duly complied with. The nature of internal measures required for the entry into force of air agreements has its impact on the contents of the agreement. The two delegations negotiating an agreement may not be equally free as to the adoption of rules in the agreement. Their attitudes towards possible provisional applicability of the agreement as of the date of signature or toward adoption of flexible formulas for amendments of the agreement may differ.

No one would seriously question the validity of Bin Cheng's statement, made in the context of the United Kingdom constitutional structure, to the effect that "whenever no change in the domestic law of the state will be required, there is consequently no need to delay the acceptance of a treaty by subjecting it to subsequent ratification."<sup>66</sup> This also is the reason why, again according to Bin Cheng, the majority of the United Kingdom bilateral air

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<sup>65</sup> H. SHAWCROSS & BEAUMONT, *AIR LAW* 21, note (d) (3rd ed. 1966): "... ratification by a Government of a Convention or Treaty constitutes an undertaking to incorporate the provisions thereof in its national law, by whatever method may be necessary under its national constitutional law."

<sup>66</sup> CHENG, *supra* note 1, at 470.

agreements could have been made binding upon the contracting parties on signature.

A bilateral agreement is a product of negotiating and is to some extent a juxtaposition or confrontation not only of specific economic interests of the two negotiating parties, but also of their differing institutional, legal and economic systems and traditions. In order to avoid the need to make adjustments in domestic laws and regulations as a consequence of a bilateral treaty, either these domestic laws and regulations have to be general and flexible and/or the content of the treaty must be general and acceptable to both parties without affecting their laws and regulations. How much generality can a bilateral air agreement sustain before it loses its value as a commercial agreement and a legal instrument of the regulations of air transport activities? Is it more desirable to put emphasis on uniformly elaborated and applied national rules or on the flexibility and country-to-country adjustments characteristic of a bilateral approach through an air agreement?<sup>67</sup> The answer might be different depending on the degree an air agreement can be equated with a commercial deal. Also, the problem is compounded by the principle of reciprocity and by the fact that bilateral air agreements of the present type do not touch only upon domestic air regulations, but quite often intrude into other regulatory areas as well.

It may be worthwhile to take a closer look at some of the aspects of the parallel functioning of the bilateral air agreements and national laws, rules and regulations of states which are parties to such agreements. National aeronautical and other laws, rules and regulations are one of the means of implementation of a bilateral air agreement, but they are also complementary to such an agreement or may be considered as existing and operating independently, possibly overlapping in the treatment of the same subjects. This complementary role might attain more relevance because of the generality and incompleteness of the manner in which certain issues are being treated in bilateral air agreements for reasons described above, or because of the nature of the compromise on certain issues which made the conclusion of a bilateral air agreement possible. A bilateral air agreement may fail to settle the ques-

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<sup>67</sup> Cf. McCarroll, *supra* note 37, at 129.

tion of the exchange of traffic statistics; the provision of certain data, however, may be required by national regulations.<sup>68</sup> A bilateral air agreement may be silent on the procedure for the establishment of tariffs, on filing of schedules, performing extra-flights, and transfer of funds by airlines; national regulations may have to supply the applicable regime.

Domestic laws, rules and regulations governing international air transport develop, within the scope of their separate and independent operation, a number of points of contact with the implementation and administration of a bilateral agreement.<sup>69</sup> Typical examples are the licensing of foreign airlines, the procedure for the establishment of tariffs and for the filing of schedules. As to licensing, under a standard formula of bilateral air agreements, after one contracting party has designated, usually by a diplomatic note, an airline or airlines—depending on whether it is a single or multiple designation agreement—to operate any or all of the routes specified for such a contracting party by an agreement, it is the function of the aeronautical authorities of the other contracting party to initiate procedures for granting to the designated airline appropriate operating authorization or authorizations.<sup>70</sup> The agreement usually stipulates that such authorization(s) are to be granted “consistent with (respective) laws, regulations and procedures” and “with a minimum of delay”. The conditions and qualifications which may govern the granting of licenses under respective national regulations are apparently unaffected by such a bilateral provision since such domestic powers could most likely still be exercised without contradicting the bilateral clause. This also applies to the “public convenience and necessity” criterion in countries where it is part of regulations.<sup>71</sup> A typical clause of bilateral

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<sup>68</sup> H. SHAWCROSS & BEAUMONT, *supra* note 65, at 311.

<sup>69</sup> Cf. H. SHAWCROSS & BEAUMONT, *supra* note 65, at 310: “. . . there is power to impose licensing obligations upon United Kingdom aircraft flying . . . on international services. This power, if it exists, would, it is submitted, apply . . . also to aircraft of States which are parties to the Chicago Convention . . . and presumably to aircraft operating in pursuance of the provisions of a bilateral air transport agreement.”

<sup>70</sup> Both in the United States and Canada a difference is made, regardless of terminology, between a commercial license or permit on the one hand, and a technical authorization on the other.

<sup>71</sup> *E.g.*, The Aeronautics Act, 1970, R.S., c. 2, s. 16(3) (Can.); and subsections 7(1) and 7(2) of Canada's Air Carrier Regulations.



air transport agreements permits the withholding of the commercial operating authorization (or revoking of such an authorization if already granted, or imposing conditions thereon) in certain specified circumstances which have to do with the qualification of foreign airlines, their ownership and control, compliance by such airlines with the laws and regulations of the state granting the authorization, or with the conditions prescribed by the bilateral agreement.

According to Rosevear, when the carriers concerned are "well known for their competence in international services, there is usually a short delay only between the time the agreement takes effect and the inauguration of air services."<sup>72</sup> As to the United States' situation,

the Civil Aeronautics Board has consistently held to the view that Section 1102 requiring adherence with the provisions of treaties and other international agreements, or for that matter the bilateral agreements themselves, do not limit or supplant Section 402, which grants the Board the general power to protect the public interest.<sup>73</sup>

G. N. Calkins has stated that it begins "to look a little . . . empty to have a public hearing and the formality of making a finding of a public interest after you have made an international agreement which pretty much covers the general basic problem of the cases." The same writer, however, suggested that "evidence might persuade the Board to recommend to the President the denial of the permit and the denunciation of the agreement."<sup>74</sup> Lissitzyn concluded that the "CAB in the performance of its powers and duties . . . including Section 402, is under a statutory duty not to take action which would result in a breach of any obligation assumed by the United States."<sup>75</sup> Similarly, Gilliland, when commenting on a possible resistance to licensing a foreign designed carrier, stated that the CAB has never denied a license on public interest grounds in such a

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<sup>72</sup> *Scheduled International Air Transport: A Canadian Analysis*, in *THE FREEDOM OF THE AIR* 133 (E. McWhinney and M. Bradley eds. 1968).

<sup>73</sup> Kittrie, *supra* note 11, at 10.

<sup>74</sup> Calkins, *The Role of the Civil Aeronautics Board in the Grant of Operating Rights in Foreign Air Carriage*, 22 J. AIR L. & COM. at 268 (1955).

<sup>75</sup> Lissitzyn, *The Legal Status of Executive Agreements on Air Transportation*, Part II, 18 J. AIR L. & COM. at 32 (1951).

situation, and it is "very doubtful that it has authority to do so while a bilateral agreement remains in effect and unamended."<sup>76</sup> Lowenfeld has observed, in connection with the 1964 Lufthansa case, that "once the United States . . . has made a route grant, the role of the CAB in deciding a permit application is not much more than clerical."<sup>77</sup>

Regardless of these differing views, one aspect is the ultimate action by respective authorities, the other is the possible complexities of procedures, expenses, and particularly delays occurring before such an affirmative action is taken. J. E. Robson, the CAB Chairman, when stressing the need for changes in the handling of international proceedings, suggested in January 1976 that the issuance of permits to foreign carriers be made "less onerous and more timely, particularly where there exists a bilateral air transport agreement and the carrier has been properly designated by its governments."<sup>78</sup> One of the findings of the CAB Advisory Committee on Procedural Report set up to review CAB operations with a view to "increase the efficiency and fairness of Board procedures" was to the effect that "even the issuance of foreign air carrier permits, which are largely governed by bilateral agreements, required the passage of 246 days between filing and Board decision."<sup>79</sup>

As has been recalled above in the context of the Colonial Airlines opposition to granting the operating authority to Trans-Canada Air Lines,<sup>80</sup> the licensing procedure, which is supposed to operate smoothly and without unnecessary delays under bilateral air agreements, may lead in practice to considerable difficulties and irritations in bilateral air relations.

If in the area of tariffs the bilateral and domestic machinery for processing and, in most countries, approving tariffs is set in motion simultaneously, they would not necessarily be in conflict. This

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<sup>76</sup> *Bilateral Agreements*, in *THE FREEDOM OF THE AIR* 148 (E. McWhinney and M. Bradley eds. 1968).

<sup>77</sup> A. LOWENFELD, *supra* note 12, at IV-97.

<sup>78</sup> Speech by J. E. Robson, International Aviation Club (January 20, 1976), in *Washington (Aviation Daily, Jan. 21, 1976 at 105)*.

<sup>79</sup> It also has been reported that in April 1976 the CAB gave its approval to a request made in 1962 by Polynesian Airlines for a change of their foreign carrier permit in consequence of Western Samoa becoming an independent nation. *Aviation Daily, May 3, 1976, at 1*.

<sup>80</sup> See note 45 *supra* and accompanying text.

would allow the domestic regulatory exercise to be very well within the powers established by the respective bilateral agreements. There may be, however, a danger that in such a case the main emphasis would be put on procedure under domestic regulations. The result would be that the bilateral clause on tariffs would be implemented only to satisfy the domestic requirements and procedures, not the reverse.

In addition, there might be discrepancies in the formal procedure to follow or in other detailed aspects such as standards to be used for the consideration of tariffs, deadlines for the submission of tariffs and length of time reserved for the notification of possible dissatisfaction with tariffs filed. Also, national regulations may contain a specific definition of tariffs and yet it may not always be possible to have exactly the same definition accepted in all bilateral agreements. Such a situation, should it be permitted to develop, could cause real difficulties in the exercise of regulatory powers in this particular area. A stronger case would seem to exist for the bilateral clause to prevail even at the price of sacrificing the uniformity and uniform application of national rules.

In the majority of cases, a pragmatic solution to such possible conflicts may be found without unduly disturbing the bilateral air relations with the other country involved. Yet this is not always the case. Certain measures based on national regulations could be taken in full knowledge that they might be, if not in violation, at least controversial in relation to the applicable bilateral agreement.<sup>61</sup> In this situation, the decision is then left to the other contracting party whether to resort to the bilateral settlement of dispute (arbitration) procedure. There are, of course, cases of actual or alleged conflicts between the bilateral air agreements and national laws or regulations, or the manner in which these latter are implemented. In the disputed case of Concorde landing rights at certain points

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<sup>61</sup> In the context of the 1974 CAB-KLM controversy over filing of schedules for prior approval, CAB General Counsel T. Heye was reported to have stated the following: "There is nothing in the bilateral which precludes issuance of an order by the U.S. directing the cessation of particular schedules and, in the event such an order should be issued, it would then be incumbent upon the Dutch to seek arbitration. Whether such arbitration would be required and whether, if required, the Board's order would take effect prior to the completion of arbitration are issues which are not only pre-mature now but ones whose resolution best await the official position of the U.S. concerning these matters." *Aviation Daily*, Dec. 4, 1974, at 180.

in the United States, the French and British governments maintained that "in the event of a conflict between the requirements of a federal United States statute and a treaty ratified earlier by the United States, the rules of customary international law and international jurisprudence require that only the treaty may be applied."<sup>82</sup> They also maintained that "the international Environmental Policy Act, which is a domestic law, cannot under international law supercede or enlarge the relevant international agreements."<sup>83</sup> Curiously enough, approximately at the same time, the United States State Department felt obliged to send an official protest to the British government concerning restrictions on scheduled services unilaterally ordered by the United Kingdom authorities.<sup>84</sup> The British argument seems to have been that their order restricting capacity was not unilateral, but taken after a previous abortive attempt to settle the matter through bilateral consultations. It can perhaps be deduced that a great number of disputes in the application or interpretation of bilateral air agreements have some relation to national laws and regulations: the contracting party invoking the bilateral "settlement of disputes" mechanism would have some support in such domestic laws and regulations.

If a firm domestic policy is taken which affects the implementation of bilateral air agreements, the obvious answer is, of course, the renegotiation and modification of such agreements. In his testimony before the Aviation Subcommittee of the United States House Public Works and Transportation Committee on proposed legislation increasing minimum tariff filing period, CAB Chairman Robson indicated that the thirty days notice provision of existing bilateral agreements could be amended "over the time" to comport with the forty-five day period proposed in the bill, and therefore he did not anticipate any problems resulting from effects of the changed tariff notice period of existing United States bilaterals.<sup>85</sup> This is, however, a lengthy and cumbersome procedure and it is not always clear what rules would apply in any given bilateral air relations in the interim period before the bilateral air agreement is amended. It is no wonder, therefore, that there might be attempts

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<sup>82</sup> *Av. Wk. & Sp. Tech.*, Feb. 2, 1976, at 37.

<sup>83</sup> *Id.*

<sup>84</sup> *Aviation Daily*, Mar. 9, 1976, at 49.

<sup>85</sup> *Aviation Daily*, Nov. 13, 1975, at 65.

to look for possible short-cuts, mostly in the form of revision in practice of certain bilateral rules with the tacit concurrence of the other party, or in the expectation that this other party would hesitate to set in motion the bilateral "settlement of disputes" procedure for a matter of relatively minor significance.

In this context it does not seem inappropriate to also mention the problem of custom exemptions for certain articles necessary for the operation of international air services, in which matter not only bilateral air agreements and national regulations of States, but also the 1944 Chicago Convention may be involved. Article 24 of the Convention requires, in a mandatory fashion, that certain articles enumerated therein, like fuel, oils, spare parts, regular aircraft equipment, be exempted, under the conditions specified in the article, from customs duty, inspection fees and similar national or local duties and charges. Modern bilateral air transport agreements often not only expand the scope of Article 24, but also frequently provide for exemptions only "to the fullest extent possible under national law"<sup>86</sup> and on the "basis of reciprocity." Strictly speaking, this can, for certain items under certain circumstances, mean a lowering of Chicago standards or, from another standpoint, assertion of the predominant role of national regulation using the vehicle of bilateral air agreements.

In the final analysis, problems which may arise from the co-existence of bilateral agreements and national laws and regulations of contracting states cannot but be mitigated by the fact that both sets of rules are exposed to the same kind of pressures emanating from the changing conditions and requirements of international air transport. As observed, perhaps with a slight exaggeration, with respect to the United Kingdom's situation, the airlines are "always ahead of regulations."<sup>87</sup>

The two states entering into a bilateral air agreement also have every possibility to obtain advance knowledge as to the applicable national legal regime of the other party and of problems which could be encountered. This can enable them to seek, in the text of the bilateral agreement, necessary assurances or protection from

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<sup>86</sup> *E.g.*, art. XI, para. (a) of the Air Transport Agreement Canada—U.S.A. of 1966, *as amended*.

<sup>87</sup> *FLIGHT INT'L*, Feb. 21, 1976, at 393.

such foreseeable difficulties or to prepare grounds for possible reciprocal counter-measures. This advance knowledge might be another factor alleviating possible difficulties in the relation between bilateral air agreements and national laws and regulations of States.

### III. LET THE LAW PLAY A GREATER ROLE IN BILATERAL AIR RELATIONS

Bilateral air transport agreements belong to inter-governmental agreements, less formal than "inter-State" treaties.<sup>88</sup> Similarly, as with other inter-governmental, non "inter-State" treaties, they are a "deliberate creation of international practice" which "the constitutional texts . . . have merely recognized."<sup>89</sup> Lissitzyn has observed that "the practice of making executive agreements on air transportation is a constitutional usage . . . which has been recognized, acquiesced in, and in effect approved by Congress."<sup>90</sup> The merit of concluding agreements on air transport in the "non inter-State" treaty form lies primarily on the simplification of procedures for their negotiations and entry into force. Stoffel mentions the advantages of using executive agreements on air transport "rather than the more cumbersome treaty procedure."<sup>91</sup> In Canada, Szablowski came to the conclusion that because of the modern practice of concluding inter-governmental agreements "the creation of international obligations has been greatly simplified."<sup>92</sup> Gotlieb characterized "the informal and pragmatic approach" as the dominant feature of Canadian treaty-making and in this context referred to the use of a "variety of entirely intergovernmental agreements" which "simplified the often complex procedural re-

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<sup>88</sup> See, e.g., L. OPPENHEIM, *supra* note 41, at 811 (1948). A. MCNAIR, *THE LAW OF TREATIES* (1961); Jones, *International Agreements Other Than "Inter-State" Treaties, Modern Developments*, BRIT. Y.B. OF INT'L L., 111-22 (1944).

<sup>89</sup> Jones, *supra* note 88, at 117.

<sup>90</sup> Lissitzyn, *supra* note 75, at 32. Calkins noted that "the authority for making such Executive agreements comes from Congress," Calkins, *supra* note 74, at 262. In Lowenfeld's opinion, executive agreements on air transport are entered into "pursuant to direction of the President, and with a statutory authorization (sections 802 and 1102) that leaves something to be desired. A. LOWENFELD, *supra* note 12, at IV-97.

<sup>91</sup> Stoffel, *supra* note 7, at 123.

<sup>92</sup> Szablowski, *supra* note 61, at 35.

quirements for full powers, signature, and ratification of treaties."<sup>93</sup>

The general classification of the bilateral air transport agreements as inter-governmental agreements, although indicating an intent on the part of contracting states to achieve simplification and a greater flexibility in air transport treaty-making, has no implications for the constitutional procedure of States, or for the validity of agreements,<sup>94</sup> or for their legal effects. To that extent it is of no great relevance whether in the United States bilateral air transport agreements are concluded and designated as "executive agreements"<sup>95</sup> or whether in Canada some writers maintain that "executive agreements" do not exist under the Canadian constitutional system.<sup>96</sup> Also, the fact that bilateral air transport agreements are concluded in a less formal fashion does not detract from their importance.<sup>97</sup> It would be outside the primary area of interest of this article to dwell more on these problems which are basically ones of classification or terminology in general international law of treaties.<sup>98</sup>

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<sup>93</sup> A. E. GOTLIEB, *CANADIAN TREATY-MAKING: INFORMAL AGREEMENTS AND INTERDEPARTMENTAL ARRANGEMENTS, CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION* at 229 (1974).

<sup>94</sup> There are no doubts in the literature as to the validity of inter-governmental agreements: OPPENHEIM, *supra* note 41, at 812 stated: "the international validity of such agreements is the same as that of ordinary treaties." Justice Read, stated: "... treaties and executive agreements are alike in that both constitute equally binding obligations upon the nation." Read, *International Agreements*, 36 CAN. BAR. REV. 531 (1948).

<sup>95</sup> McNAIR, *CONCLUSION OF TREATIES* (1961) at 65, observes that the term "executive agreements" is itself a misnomer as applied to all international agreements other than treaties. Most of the "executive" agreements could be, in his opinion, designated "legislative-executive" agreements. The United States' concept of "executive agreements" is wider and not identical with the "inter-governmental" agreements.

<sup>96</sup> *Cf. also* Justice Read: "Strictly speaking, it might be suggested that there is no such thing as an executive agreement. Still, as we meet them every day in practice, we should be over-academic if we insisted too persistently upon their non-existence." *Supra* note 94, at 531. Worthwhile noting is also Castel's observation: "International obligations are entered into in many instances without reference to Parliament. The negotiation and conclusion of a treaty or other international agreement is an executive act." J. CASTEL, *INTERNATIONAL LAW* at 864 (1965).

<sup>97</sup> *Cf.* Justice Sutherland as quoted in Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 671 (1943-44).

<sup>98</sup> Inter-governmental agreements are to be distinguished from the inter-departmental agreements. The terms like "administrative agreements," "business arrangements," "functional accords," "functional contracts," etc. are not uniformly used in international practice and may denote different types of agreements in

From the legal point of view, one of the objectives of the bilateral air agreements may be construed to be a bilateral exchange of "permissions" or "authorizations" referred to in Article 6 of the Chicago Convention to enable the operation of scheduled international air services over or into the territory of the other contracting party, and also a bilateral understanding on some, if not all "the terms of such permission or authorization."<sup>99</sup> If, in the economic sense, bilateral air transport agreements represent a combination of a commercial deal and a set of regulatory measures, they could be regarded, in legal terms, also as a specific two-tier system comprising a contract authorizing the operation of certain routes by the airline(s) of one party at the price of an economically balanced contract working reciprocally in favour of the airline(s) of the other party. Moreover, rightly or wrongly, the practical operation of a bilateral air agreement hinges, in some cases, on the existence of a private law contract between the airlines of the two parties (*e.g.*, a revenue pooling agreement which may include the determination of frequency of services and type of aircraft), which, if its separation were possible, would be otherwise fully binding and probably enforceable. As to the non-commercial content of a bilateral air agreement, it could be also explained as a product of a harmonization of national rules of the two contracting parties<sup>100</sup> and again there would be probably little doubt about its legal nature and binding effect.

Irrespective of what weight is given to a bilateral air agreement as an instrument effecting an exchange of authorizations in conformity with Article 6 of the Chicago Convention, or the other legal considerations mentioned above, it seems to be clear that several important legal elements are present.

In the judgment of the Master of the Rolls delivered in the hearing of the United Kingdom Court of Appeal in the *Pan American*

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accordance with the intent of parties and agreed procedures for the signature and entry into force of agreements.

<sup>99</sup> Convention on Civil Aviation, *opened for signature*, at Chicago, Illinois, Dec. 7, 1944, art. 6, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (1948).

<sup>100</sup> Cf. H. SHAWCROSS & BEAUMONT, *supra* note 65 at 23: "International air law cannot correctly be called Private International Law. But in fact the chief object which much of it was designated to effect . . . is to put an end to the 'conflicts of laws'."



*World Airways v. Department of Trade* case,<sup>101</sup> a bilateral air agreement, in this particular case the 1946 Bermuda agreement "relating to air services between their respective territories,"<sup>102</sup> does not form part of British municipal law and is only a useful illustration as to what the Governments have agreed between themselves. The Bermuda agreement was declared to have no effect in point of law on the powers which are available to the Secretary of State. Lord Justice Scarman, sitting on the Court, delivered a concurring judgement. In our present context, suffice it to say that he likewise was of the opinion that the Bermuda agreement is no part of the law of England. He, however, added a caveat that situations might arise in which it would be proper for the Courts to take note of an international convention even if not embodied in laws enacted by Parliament. It may happen, he argued, that two courses would be reasonably open to the courts: one would lead to a decision inconsistent with Her Majesty's international obligations under the convention while the other would lead to a result consistent with those obligations. If a legal principle has to be formulated in an area of the law where Her Majesty has accepted international obligations the British Courts who, of course, take notice of the acts of Her Majesty done in the exercise of her sovereign powers, will have regard to the convention as part of the full content or background of the law. Such a convention, especially a multilateral one, should then be considered by Courts *even though no statute expressly or impliedly incorporates it into national law*.

The characterization of a bilateral air transport agreement as a "useful illustration as to what the Governments have agreed between themselves," not forming part of the British municipal law,<sup>103</sup> is hardly surprising in light of what seems to be the prevailing traditional British, and not only British, thinking on these matters. It seems, however, that it is more an expression of certain difficulties which a national court may undoubtedly experience when presented with an issue relating to a bilateral air agreement not ratified or enacted by the respective legislative body rather than an attempt to assess, in general terms, the legal merits of such or other inter-governmental agreements. Lord Justice Scarman's ob-

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<sup>101</sup> The Times (London), Jul. 30, 1975, at 6, col. 9.

<sup>102</sup> For complete text see CHENG, *supra* note 1, Appendix D.

<sup>103</sup> Similar pronouncements could be, of course, found elsewhere as well.

servations are certainly helpful, but again are formulated basically from the perspective of municipal law and practice of courts operating with the municipal law. The inquiry into the legal nature of bilateral air transport agreements must be directed elsewhere.

One view certainly could be advanced that in some countries bilateral air agreements are not ratified and enacted by respective legislative bodies, and are not then generally recognized by courts as part of the "law of the land," does not necessarily make such agreements less "legal" or less "law-making." Such agreements are governed by international law regardless of whether or not some of their legal components could be explained in such a fashion that, taking them in isolation, they could be also susceptible to being governed by municipal law and by the rules governing the conflicts of domestic laws. It is, at the same time, equally true that the mere fact that certain subjects are dealt with, or that certain content is included in a treaty (bilateral air transport agreement) does not make such content legal or create legal relations in all matters covered by the treaty. After all, according to Fawcett, international agreements "are presumed not to create legal relations unless the parties expressly or implicitly so declare."<sup>104</sup> Similarly Parry took the view that "the presumption is against an international agreement having any strictly legal content at all."<sup>105</sup> One important test to determine whether or not the creation of legal relations is intended is the provision, or the lack thereof, in the agreement "for the settlement of disputes arising from the agreement by compulsory judicial process."<sup>106</sup>

The Chicago standard text of bilateral air agreements did not contain any recommended provision(s) concerning the settlement of disputes, but clause 9 was reserved for a provision on arbitration, the "details of which will be a matter for negotiations between the parties to each agreement."<sup>107</sup> Standard clause 7, under which the operating certificate or permit to an airline of another state

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<sup>104</sup> Fawcett, *supra* note 58, at 400.

<sup>105</sup> C. PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* at 49 (1965).

<sup>106</sup> Fawcett, *supra* note 58, at 400. Interestingly enough, C. Parry, when quoting Fawcett on this subject, refers to the "settlement of disputes arising from the agreements" but omits the following words "by compulsory judicial process." C. PARRY, *supra* note 105, at 49.

<sup>107</sup> Proceedings of the International Civil Aviation Conference, at 129 (1948).

could be withheld or revoked under certain specified circumstances, would seem to put more emphasis on the self-enforcing aspect of the agreements. This is not, however, the case of most of the bilateral air transport agreements concluded in the period immediately following the Chicago Conference. As stated in the ICAO "Handbook on Administrative Clauses in Bilateral Air Transport Agreements,"<sup>108</sup> a majority of bilateral agreements provide "as the step following direct negotiation, reference to ICAO, its Council or a tribunal established within ICAO for advice or decision, while other agreements refer to ad hoc tribunals, the International Court of Justice, or some other person or authority." The ICAO Handbook then states that "with few exceptions, all existing agreements . . . provide for arbitration either as an alternative to a decision by Council or as the principal means of settling disputes." Moreover, "most of the agreements also specify the obligation of contracting parties to comply with arbitral decisions rendered."<sup>109</sup> As Buergenthal has observed,<sup>110</sup> the proportion of bilateral air agreements vesting adjudicatory functions in the ICAO Council has been declining, but many agreements still provide for an arbitration procedure or for submission of a dispute to an ICAO arbitral tribunal.

Only rarely is there no provision in a bilateral air agreement concerning the settlement of disputes. A large number of agreements, particularly those concluded between or with the Communist bloc countries, envisage the settlement of disputes only on a bilateral basis through diplomatic channels or otherwise, without providing for any other machinery. On the basis of information available, it would appear that while there is still a definite prefer-

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<sup>108</sup> Handbook, *supra* note 22, at 76. The main basis for the ICAO role in the settlement of disputes which concern bilateral air agreements seems to be Resolution A1-23 of the First ICAO Assembly held in 1947, ICAO Doc. 7670, at 20-21 (1964). This resolution authorized the ICAO Council to act as an arbitral body on any differences arising among Contracting States relating to international civil aviation matters. The Council can render an advisory report, or a decision binding upon the parties, "if the parties expressly decide to obligate themselves in advance to accept the decision of the Council as binding." In all fairness, it must be added that the ICAO Council has never been too anxious to exercise such functions with respect to bilateral air agreements and might indeed have some valid reasons for this reluctance.

<sup>109</sup> See Cheng *supra* note 1, at 460-61; T. BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION, at 174-79 (1969).

<sup>110</sup> T. BUERGENTHAL, *supra* note 109, at 178.

ence in these countries to settle possible disputes by bilateral negotiations only, the denunciation of the agreement being the ultimate means available to a party dissatisfied with the outcome of negotiations, there are a number of notable exceptions and it would be difficult to attempt to make a pronouncement on the historical trend. In the doctrine of these States, intervention of third parties in a bilateral dispute, or the settlement of such disputes by a third party (through arbitration or otherwise), is found somewhat more acceptable under circumstances when such a role assumed by a third party would have the character of technical expertise on an issue not involving any question of principle.<sup>111</sup>

In spite of the fact that most bilateral air agreements do provide a procedure for the settlement of disputes, and in many of them such a procedure could be characterized as "judicial" or "quasi-judicial," this may not be always so. Should an absence of such a provision in, say, only one or two bilateral agreements of a country which otherwise consistently includes such a provision in its agreements, indicate an exceptional "change of mind" of that particular country as to the desired legal effect of the agreement? Or in the case of a country which prefers to settle disputes through negotiations only, not accepting a compulsory judicial or arbitration procedure, would that necessarily lead to the conclusion that such a country denies the existence of any law in bilateral air agreements, including such legal rules or principles as, for example, the exemption from customs for aircraft used on international air services, for fuel and oils on board of such aircraft and other items, or, in the commercial area, the principle of reciprocity and fair and equal treatment of the designated airlines of the two parties?

After all, it cannot be disregarded that under Fawcett's formula the presence or absence in a treaty of a provision concerning the settlement of disputes through compulsory judicial process is only one of the tests of the intention of parties to create legal obligations. The other is whether the "parties have declared, or it can be deduced from the agreement as a whole, that it is to be governed by one of the three bodies of law to which the parties are capable of referring the agreements."<sup>112</sup> These three bodies are the rules of

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<sup>111</sup> This understanding is confirmed by F. I. Kozhevnikoff in his textbook on International Law: *KURS MEZHDUNARODNOVO PRAVA*, at 532 (1966).

<sup>112</sup> Fawcett, *supra* note 58, at 400.

public international law, the general principles of law recognized by civilized nations, and some specific system of municipal law.

As is evident from the preceeding, the analysis of present bilateral air transport agreements cannot possibly provide a clear-cut, black-and-white answer to all questions concerning their legal nature. Particularly in cases where these agreements are analyzed in their Bermuda form and with an emphasis on the Bermuda capacity principles, the conclusion could be that "the parties to bilateral air transport agreements are their own law" and that "power can . . . be viewed as the basis for the interpretation and enforcement of bilateral air transport agreements."<sup>113</sup> The absence of a "substantial body of law" which could "clarify many of the current uncertainties relating to the application of international aviation agreements,"<sup>114</sup> or, from the other standpoint, the traditional reluctance of states to resort to an available objective mechanism for the settlement of disputes, could be seen as another factor that might lead to somewhat skeptical conclusions as to the legal nature of bilateral air agreements. It is submitted, however, that there are no reasons for carrying this basically negative attitude too far to the possible detriment of the multifarious role of present air bilaterals and their future generation.

As has been stated, air bilateral agreements have several undoubtedly legal facets such as an exchange of authorizations pursuant to Article 6 of the Chicago Convention, a bilaterally agreed regulatory framework for the operation of services, resulting primarily from the harmonization of national rules and policies, and finally as a commercial transaction concerning the exchange of routes and traffic rights. It is true that bilateral air agreements comprise heterogenous elements, but they are simultaneously an integrated whole, and a negative reflection on the value of some of their components cannot but have some effect on the attitude towards air bilaterals as such.<sup>115</sup> This does not mean to say that

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<sup>113</sup> Diamond, *supra* note 1, at 451, 452.

<sup>114</sup> T. BUERGENTHAL, *supra* note 109, at 179. In this particular context the writer is commenting on the ICAO failure to establish adequate machinery for the arbitration of bilateral disputes.

<sup>115</sup> Cf. G. F. FitzGerald's observation that bilateral air matters are "of greater importance to aviation economists and government policy makers than they are to Main Street lawyers." INTERNATIONAL AIR LAW IN THE 1970's, CANADIAN PERSPECTIVE ON INTERNATIONAL LAW AND ORGANIZATION 320 (1970).

there is no room for improvement in the concept of bilateral air transport agreements. In fact, more should be expected from them in the future. After all, as Fawcett rightly stated, "international community life can be carried on only if . . . agreements for the solution of common administrative and technical problems are adhered to and carried out."<sup>116</sup> Efforts toward possible strengthening of the legal nature of bilateral air agreements seem to be a better prospect for the future—in spite of all appearances to the contrary—than a resigned acceptance that the bargaining strength and power is the main, or only determining factor in the economic and also in the legal sense. The elementary requirement that treaties in force, binding upon the parties, must be performed in good faith could be reconciled only with some difficulty with the assumption that a treaty might be applied one way or the other depending on the power constellation which may vary at any given moment. International law may be, to some extent, "ill adapted to the hazards of commercial activity,"<sup>117</sup> but the bilateral air agreements are more than a commercial deal. On the other hand, there may be, hypothetically speaking, vehicles other than a treaty for putting international air services in operation, if a treaty form is "too legal" for a simple self-regulatory, power-based, frequently changing regime.

Strengthening the legal character of bilateral air agreements involves a better understanding of and possibly a better approach toward several of the problems discussed in the preceding parts of this article, to wit: the creation of all necessary conditions for an improved functioning of the "aeronautical authorities," a deeper harmonization of air bilaterals and national regulations, a clearer comprehension of the role of airlines, an improvement and less ambiguity in the language used in air bilaterals, a greater consistency in providing for impartial "settlement of disputes" procedures and more frequent actual use of such mechanism.

It would undoubtedly be of a great benefit for international civil aviation if the law of bilateral air transport agreements, or, in other words, international administrative air law as embodied in bilateral air transport agreements, would continue to be steadily de-

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<sup>116</sup> Fawcett, *supra* note 58, at 399.

<sup>117</sup> O'CONNELL, *INTERNATIONAL LAW* at 976 (2d ed. 1970).

veloped, thus contributing to the establishment and maintenance of an efficient and just economic order in this important area of international economic relations. As to the role of lawyers in this endeavour, it is "both to help resolve (client's) problems and also to promote the role of law and the systematic development of collective behaviour," to borrow T. M. Franck's remarks pronounced with respect to international law in Canadian practice.