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Comments

BERMUDA II: THE BRITISH REVOLUTION OF 1976

HARRIET OSWALT HILL

On July 23, 1977, the United States and the United Kingdom signed a new air services agreement respecting future air transportation between the two nations and their territories. Known popularly as Bermuda II,¹ the new executive agreement² came about as a result of almost one year of heated negotiations³ and replaces the 31-year old Bermuda I Agreement of 1946.⁴ The British had formally denounced the Bermuda I Agreement on June 22, 1976, and under Article 13 of the old Agreement, the parties had twelve months in which to negotiate a new agreement or suffer the termination of the old one without a replacement.⁵

A. History of Bermuda I

Since the institution of Bermuda II, several problems and controversies have arisen as to its constitutional status and the practical application of its provisions. Some have challenged the Agreement as unconstitutional on the basis that it should have been a treaty rather than an executive agreement.⁶ In addition, there have been practical problems with regard to the details of the new Bermuda Agreement's application on a daily basis. Bermuda II

¹ Bermuda II Agreement, July 23, 1977, United States-United Kingdom, — Stat. —, T.I.A.S. No. 8641 [hereinafter cited as Bermuda II Agreement].

² An *executive agreement* is contracted between the heads of state of two or more nations to cover generally perfunctory relations in a certain area (such as aviation) between the two or more countries.

³ BUSINESS WEEK, September 13, 1976, at 37.

⁴ Bermuda I Agreement, February 11, 1946, United States-United Kingdom, 60 Stat. 1499, T.I.A.S. No. 1507 [hereinafter cited as Bermuda I Agreement]. On air services agreements, see generally Gertler, *Bilateral Air Transport Agreements: Non-Bermuda Reflections*, 42 J. AIR L. & COM. 779 (1976); 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. 249 (1964).

⁵ Bermuda I Agreement, *supra* note 4, Article 13.

⁶ AV. WEEK & SPACE TECH., August 1, 1977, at 26.

suddenly no longer appears to be the panacea to troubled United States-British aviation relations as anticipated.

The United Kingdom was, in fact, the original partner with the United States in the establishment of bilateral air services agreements.⁷ Up to the time of its renunciation by the British, Bermuda I had served as the model air services agreement after which all other such international agreements were fashioned.⁸ Bermuda I has been referred to as the Magna Charta of international aviation, emphasizing its status among international air agreements.⁹ After World War II, the British feared the United States' position of strength in commercial aviation. To keep from effectively being forced out of the competitive air market, the British desired the negotiation of a capacity agreement which would limit the number of flights and airline designations one participating country could institute.¹⁰ The air services agreement that resulted was Bermuda I, which specified points to be served by both countries' air carriers and which formally established what has come to be known as the Bermuda Capacity Principles.¹¹ These principles inculcated the "five freedoms" of the air¹² which had been previously stated at the multinational Chicago Convention of 1944.¹³

The Bermuda Capacity Principles, strongly supported throughout by the United States, state:

[T]here shall be a fair and equal opportunity for the carriers of the two nations to operate on any routes between their respective territories. [T]he interests of the air carriers of the other Government shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes. [I]t is the understanding of both Governments that services provided shall retain as their primary objective the provision of

⁷ Bilateral air services agreements are the usual diplomatic instruments whereby air transport between two nations is established and regulated.

⁸ *AV. WEEK & SPACE TECH.*, July 5, 1976, at 29.

⁹ *BUSINESS WEEK*, August 16, 1976, at 104.

¹⁰ *Id.*

¹¹ Bermuda I Agreement, *supra* note 4, §§ 4-6. See note 13 *infra*.

¹² *BUSINESS WEEK*, March 28, 1977, at 51.

¹³ Convention on Civil Aviation, *penned for signature* at Chicago, Illinois, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (1948) [hereinafter cited as Chicago Convention of 1944]. This conference was a major attempt to define the guidelines to be followed multinationally in post-World War II civil aviation. It was at this convention that the "five freedoms of the air" were enunciated and accepted in principle.

capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic.¹⁴

The five freedoms, considered so critical by the United States for over thirty years,¹⁵ consist of (1) the freedom to fly over the territory of a foreign country, (2) the freedom to stop in a foreign country for fuel, (3) the freedom to carry passengers from the home country to a foreign country, (4) the freedom to carry passengers in the reverse direction, and (5) the freedom to carry passengers from one foreign country to another.¹⁶ The United States has consistently fought to maintain both the Bermuda Capacity Principles and the five freedoms.¹⁷ On the other hand, the British, before renegotiating for the present Bermuda II Agreement, were intended on either eliminating totally or, at least reducing, the fifth of the five freedom rights,¹⁸ the freedom to carry passengers from one foreign country to another. This fifth right allowed U.S. flag carriers to pick up British passengers in Britain and its territories and fly them on to other points, thus depriving the British airlines of these passengers and revenues. The United Kingdom came to believe that, under the Bermuda principles, it was losing passengers, and the subsequent profits therefrom, to the United States carriers.¹⁹ The British government expressed the opinion that the benefits to the United States were far greater than the benefits to Great Britain.²⁰ Accordingly the United Kingdom issued its June 22, 1976 renunciation of Bermuda I and sought renegotiation of the treaty with the United States. Accord-

¹⁴ Bermuda I Agreement, *supra* note 4, §§ 4-6.

¹⁵ The U.S. considered the five freedoms critical because of their great impact on improving the economic status of U.S. airlines by permitting greater flight freedom throughout the world and allowing U.S. planes to carry more foreign passengers.

¹⁶ BUSINESS WEEK, March 28, 1977, at 51; See generally Chicago Convention of 1944, *supra* note 13.

¹⁷ AV. WEEK & SPACE TECH., July 5, 1976, at 29.

¹⁸ AV. WEEK & SPACE TECH., July 27, 1976, at 29.

¹⁹ BUSINESS WEEK, August 16, 1976, at 104.

²⁰ According to Edmund Dell, Britain's Secretary of State for Trade, the Bermuda I Agreement "... has over the years become out of date ... and no longer corresponds satisfactorily in the view of Her Majesty's government to the conditions of the 1970s. It has been evident for some time that the benefits the Bermuda Agreement confers on the United States are much in excess of the benefits to the United Kingdom." AV. WEEK & SPACE TECH., July 5, 1976, at 29.

ing to one British memorandum sent to the State Department, "[w]e shall be looking for an increase in the earnings of British carriers, and we see no practical means of achieving this except through a reduction in the earnings of United States carriers."²¹

One of the specific complaints the United Kingdom registered against the system under Bermuda I was an objection to the sudden nature of Civil Aeronautics Board (CAB) rejections of major International Air Transport Association (IATA) fare agreement provisions.²² The British believed that the CAB should be required to give notice of such dissatisfaction to foreign governments within fifteen days after the IATA package is filed with the Board, as the Bermuda I Agreement requires. This, urged the British, should be the procedure rather than the one then used by the Civil Aeronautics Board.²³ The British were also disturbed by the 1966 Amendment to Bermuda I²⁴ in which the United States gave British Airways rights in the Pacific in exchange for the rights of Pan American World Airways and Trans World Airways to fly beyond London to almost every European city of any size.²⁵ The United Kingdom wanted the new agreement to have provisions for government intervention in a carrier's decision to offer capacity levels²⁶ in any market.²⁷ However, the United States' goal of maintaining only limited government intervention in carriers' decisions directly conflicted with the British position.²⁸

The position taken by the United Kingdom was basically that the old Bermuda I Agreement was a laissez-faire approach to air services, leaving performance regulation to the airlines, and that

²¹ BUSINESS WEEK, September 13, 1976, at 37.

²² IATA Fare Agreements establish fares for air transport multilaterally for member nations.

²³ AV. WEEK & SPACE TECH., July 26, 1976, at 29.

²⁴ Agreement amending the Bermuda I Agreement, May 27, 1966, United States-United Kingdom, 17 U.S.T. 683, T.I.A.S. 6019. Amendment dealt with the deletion of several paragraphs of the 1946 agreement and the substitution of a new schedule of routes for the original one schedule which apparently allowed the British some more intermediate points on its Pacific route in exchange for the U.S. being allowed to fly to a great many more European cities.

²⁵ BUSINESS WEEK, August 16, 1976, at 104.

²⁶ Capacity levels refer to the number of flights per week between two cities or along a particular route.

²⁷ AV. WEEK & SPACE TECH., July 26, 1976, at 29.

²⁸ BUSINESS WEEK, September 13, 1976, at 37.

this model agreement was outdated and had been responsible for creating the over-capacity problem²⁹ that existed in the North Atlantic as well as in other areas.³⁰ In addition, the United Kingdom believed that the ex post facto method of review of capacity levels and problems established by Bermuda I was ineffective in practice and was seldom used in any event and, therefore, should be replaced.³¹

To remedy the situation the British believed to be so untenable, the negotiators demanded several fundamental changes in the new agreement. First, the United Kingdom wanted only one airline from each country to fly any route between the United States and Britain. Additionally, there was to be government control of the capacity of aircraft flying between the two countries. The British also demanded an end to the fifth freedom rights the United States had enjoyed by stopping much of the U.S. carriers' fifth freedom rights east of London and west of Hong Kong.³² Recognizing that U.S. carriers had been bringing in three times the revenue as British carriers on international flights originating in British territory, the British negotiators decided to try to achieve a fifty-fifty split of the two countries' airline traffic, something the United States negotiators were likely never to agree to in any event.³³ However, this "demand" was probably merely an attempt to bring the balance of earnings to a more favorable position from the British point of view.³⁴

The major British proposal regarding capacity control in the North Atlantic called for governmental establishment of a mini-

²⁹ When too many flights per week are allowed between two points or along a certain route, overcapacity results; i.e., there will never be enough passengers on such flights to economically justify continuing that scheduled flight. This is a problem that existed in the North Atlantic before Bermuda II and resulted in loss of revenue for the airlines which were flying empty seats and increased prices for the passengers flying.

³⁰ AV. WEEK & SPACE TECH., November 1, 1976, at 26.

³¹ *Id.* The British objection to ex post facto review probably stemmed from the fact that review of problems after the fact amounted to "too little, too late" from the standpoint of British aviation. The damage in effect was already done.

³² Bermuda I Agreement, *supra* note 4, Annex III(b); Bermuda II Agreement, *supra* note 1, Annex I, Section 1.

³³ BUSINESS WEEK, March 28, 1977, at 46.

³⁴ *Id.*

imum capacity base,³⁵ allowing airlines to agree among themselves on additional capacity increases. Should the airlines not agree on additional capacity, if additional capacity were needed, the allowable capacity would fall to the minimum set by the governments. The United Kingdom contended that this plan would solve the over-capacity problems without depressing the air market and would strike a medium between governmental control and laissez-faire.³⁶

Throughout the renegotiation, and despite all British arguments and demands, the United States consistently held to the position that the status quo be maintained and the old Bermuda principles be upheld.³⁷ By late March of 1977, the two negotiating teams had not come any closer to a compromise agreement than they had been when serious negotiations started in December of 1976.³⁸ As the June 22, 1977 deadline grew closer and no settlement had been reached, the governments and airlines of both countries became alarmed lest air services between the United States and the United Kingdom be interrupted for lack of a new agreement. Fully recognizing the problems that would result from such an interruption of services, the negotiators finally came to an agreement at 5:10 a.m., London time, June 22, 1977—ten minutes after the expiration of Bermuda I.³⁹

B. *Bermuda II*

Bermuda II is the compromise that arose out of this lengthy negotiation and tight timetable. Under the new agreement, the British gain the most distinct advantages compared to the few new points gained by the United States. According to Pan American World Airways, "The new agreement transfers net economic benefit from the U.S. flag systems to the British flag. That was the purpose of the British denunciation of the old agreement."⁴⁰

³⁵ The minimum capacity base idea basically called for the establishment of carrier capacity allowances at a minimum (i.e. allowing for enough flights to service the area's needs, but no more) to avoid overservicing a certain air market. *AV. WEEK & SPACE TECH.*, January 3, 1977, at 26.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *BUSINESS WEEK*, March 28, 1977, at 46; *AV. WEEK & SPACE TECH.*, April 25, 1977, at 51; *AV. WEEK & SPACE TECH.*, May 30, 1977, at 26.

³⁹ *AV. WEEK & SPACE TECH.*, June 27, 1977, at 26; *TIME*, July 4, 1977, at 64.

⁴⁰ *AV. WEEK & SPACE TECH.*, July 27, 1977, at 27.

The major advantage obtained by the United States flag carriers was the unlimited blind sector rights beyond London into Europe. Blind sector rights permit U.S. carriers to carry passengers, who originate in the United States, through London and beyond to any point in Europe.⁴¹ By way of contrast, fifth freedom rights allow passengers originating in London to travel beyond London on United States carriers.⁴² While gaining significant blind sector rights, the United States surrendered fifth freedom rights to twenty-two cities starting immediately,⁴³ and will sacrifice fifth freedom rights from Great Britain to Belgium and Austria in three years and to Holland, Sweden, and Norway in five years.⁴⁴ By surrendering these fifth freedom rights, the United States carriers lost the privilege of carrying British nationals and other passengers originating on British territory from that point beyond to other countries. The United States retains permanent fifth freedom rights to Frankfurt, Germany, for two United States carriers, and to Hamburg, Berlin, and Munich, plus eleven more cities around the world, for one United States flag carrier.⁴⁵ These routes should be compared with the twenty-nine fifth freedom points granted the United States in the Bermuda I Agreement.⁴⁶

Another major provision of the new agreement requires that each country designate only two carriers on the New York-London and Los Angeles-London routes, while all other city pairs which include London may be served by only one carrier from each country.⁴⁷ An additional carrier from each nation, however, may be designated should the traffic on that segment increase or should one previously designated carrier cease to compete sufficiently.⁴⁸ On routes other than New York-London and Los Angeles-London,

⁴¹ *Id.* at 26; Bermuda II Agreement, *supra* note 1, Annex I, Section 5.

⁴² *Id.*

⁴³ None of the 22 cities is presently served. *Id.*

⁴⁴ *Id.*; Bermuda II Agreement, *supra* note 1, Annex I, Section I, U.S. Route 1, n.2.

⁴⁵ *Id.*; See also n.3.

⁴⁶ Bermuda I Agreement, *supra* note 4, Annex III(b)(1) & (2).

⁴⁷ AV. WEEK & SPACE TECH., July 27, 1977, at 27; Bermuda II Agreement, *supra* note 1, Art. 3(2); the *one carrier limitation* is no doubt to avoid the over-capacity problem previously discussed.

⁴⁸ AV. WEEK & SPACE TECH., July 27, 1977, at 27. Bermuda II Agreement, *supra* note 1, Art. (3)(2)(b)(i) & (ii).

each contracting party to the Agreement has the right to designate a second carrier when (1) total traffic exceeds 600,000 passengers per year, (2) one carrier takes on more than 450,000 passengers per year regardless of the total carried by both carriers, or (3) one carrier decides not to compete on that route or offers only token service.⁴⁹ These provisions are intended as a limit on capacity in addition to the limitations placed on routes and flight frequencies. The new agreement specifically recognizes the problems created by overcapacity and undercapacity and seeks to more closely control the airlines which are primarily to blame for these problems.⁵⁰ Capacity controls seemed to be one of the primary objectives of the British in seeking the Bermuda II Agreement, just as it had been when they sought the first Bermuda compact. They realized that overcapacity was simply leading to loss for both passengers having to pay higher fares and for the airlines flying the empty seats. Even the U.S. Department of State recognized the excess capacity problem.⁵¹ Under Bermuda II, though neither government has an outright veto over the other country's schedules, the carriers for each country are to file their schedules and proposals for fare charges for "rescreening" by the other government.⁵² Should the other government object, it may then request consultation on the matter.⁵³

British carriers also gain four new routes under Bermuda II. They are a London-Seattle route in competition with Pan American, no intermediate point restrictions on the London-San Francisco route and a three-year exclusive route from London to Houston with an added route to Atlanta and Dallas at the end of the three-year period.⁵⁴ In addition, the United States will be permitted to compete with the British on the London-Houston route at that

⁴⁹ AV. WEEK & SPACE TECH., July 27, 1977, at 27. Token service would result where a carrier makes a basic decision to no longer fly a route and offers only one or two flights along the route per week, in essence allowing any other carrier on the route to take over service on that route with no overcapacity servicing resulting.

⁵⁰ Bermuda II Agreement, *supra* note 1, Art. 2, para. 5. "The Contracting Parties recognize that airline actions leading to excess capacity or to the under-provision of capacity can both run counter to the interests of the traveling public."

⁵¹ BUSINESS WEEK, August 16, 1976, at 108.

⁵² See generally Bermuda II Agreement, *supra* note 1, Art. 3(2) and 8(11).

⁵³ Bermuda II Agreement, *supra* note 1, Art. 11, para. 5.

⁵⁴ AV. WEEK & SPACE TECH., June 27, 1977, at 26.

time.⁵⁵ During the three-year period, the United States will service the Atlanta and Dallas-Fort Worth to London routes without British competition.⁵⁶ In the Pacific, the United States sacrificed one of its important fifth freedom rights. The United States surrendered the right to carry fifth freedom passengers from Midway, Wake, Manila, Seoul, and Taipei to Hong Kong, and beyond Hong Kong to Macao, mainland China, Indo-China, and Burma.⁵⁷ The British, on the other hand, gained in the Pacific in that they may now maintain their Hong Kong route to the United States through Guam and Honolulu and may, in addition, choose two of three West Coast cities in the United States as gateways.⁵⁸ The three cities are San Francisco, Seattle, and Los Angeles.⁵⁹ In addition to the newly negotiated routes, the British were able to implement their proposed "fall-back formula." This formula provides that in the event an agreement cannot be reached concerning frequencies between the airlines, the capacity levels will "fall back" to the established minimum while the two countries consult. The frequencies will be proposed in the future on the basis of growth forecasts predicted by each country's carriers.⁶⁰ Annex II of the Agreement also exempts the United Kingdom's Concorde aircraft operations by designated airlines from the capacity restrictions placed on North Atlantic routes. In exchange for this concession, the United States' designated carrier operating on the Washington-London route will not be required to fly less than seven roundtrips per week as required under paragraph 6 of Annex II.⁶¹

Finally, the major provisions of Bermuda II for settlement of disputes and uncertainties are the "consultation" provisions.⁶² Article 16 provides that either the U.S. or Britain may "consult"

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 27; Bermuda II Agreement, *supra* note 1, Annex I, Section 5(8).

⁵⁸ *AV. WEEK & SPACE TECH.*, July 27, 1977, at 26. Bermuda II Agreement, *supra* note 1, Art. 1(i). These gateways are the points of first arrival in the territory of the other Contracting Party and the points served by designated airlines in the territory of the other Contracting Party.

⁵⁹ *Id.*; Bermuda II Agreement, *supra* note 1, Annex I, U.K. Route 6, n.3.

⁶⁰ *Id.*

⁶¹ Bermuda II Agreement, *supra* note 1, Annex II(8).

⁶² *Id.*, Art. 3(1)(b); 3(5); 5(2); 11(5); 16.

with the other on matters concerning the interpretation, application, or amendment of the Agreement.⁶³ However, consultative processes are not to be used excessively or unduly⁶⁴ as this might lead to "detailed supervision of airline scheduling" for both countries, clearly a result the United States, which seeks limited government supervision, wishes to avoid.⁶⁵ Should consultation prove unproductive, however, Article 17 of the Agreement requires that the dispute be referred "for decision to some person or body" on the agreement of both parties.⁶⁶ If the parties fail to agree, then the request of either party will cause the dispute to be submitted to arbitration, subject to the procedures set out in Article 17, paragraphs 2(a) and (b). Under these sections, each party names an arbitrator within 30 days of the receipt of the arbitration request and, by agreement within 60 days, the parties are then to choose a third arbitrator. If either party does not select an arbitrator or the third is not agreed upon, either party may approach the President of the International Court of Justice to appoint the necessary persons within 30 days.⁶⁷

Beginnings of Dispute

No sooner had the Bermuda II Agreement been signed than outcries were raised by airline officials in the United States.⁶⁸ Several U.S. carriers, warning of "country-by-country blackmail" against the U.S. as a result of the last minute compromise agreement, argued that the threatened cessation of services would have been better than Bermuda II.⁶⁹ The Bermuda compromise, it was charged, would encourage other countries with which the U.S. had air services agreements to renounce them with hope of getting favor-

⁶³ *Id.*, Art. 16. "Either Contracting Party may at any time request consultations on the implementation, interpretation, application, or amendment of this Agreement or compliance with this Agreement. Such consultations shall begin within a period of 60 days from the date the other Contracting Party receives the request, unless otherwise agreed by the Contracting Parties."

⁶⁴ Bermuda II Agreement, *supra* note 1, Annex II(2).

⁶⁵ *Id.*

⁶⁶ *Id.*, Art. 17.

⁶⁷ *Id.*, Art. 17(1) & (2)(a) & (b). Such an arbitral system is common in international agreements of all kinds. However, the decisions which are produced by these procedures are rarely satisfactory to at least one of the parties involved, even though a formal agreement binds that party to the arbitrators' decision.

⁶⁸ AV. WEEK & SPACE TECH., July 18, 1977, at 25.

⁶⁹ *Id.*

able concessions from the U.S. as Britain had.⁷⁰ The position held by many is that the U.S. has demonstrated by its compromise with the British that it can be "blackmailed" into agreements simply by a threatened cessation of air services.⁷¹ Instead, some U.S. carrier officials urged the United States should have allowed air services to terminate rather than submit to British demands, realizing how politically and economically severe the service cut-off would have been for the British with the decrease in U.S. tourism.⁷² Now many airline and government officials fear that the United States has given the rest of the world the impression that air services agreements with the United States should be denounced to gain the U.S. governments' attention and the U.S. will be willing to concede strategic advantages in commercial services to prevent termination of air services, even for a short period of time.⁷³ Several carrier officials placed blame for the "unfavorable" agreement on President Carter, who was reportedly concerned that a cessation of United States-United Kingdom air services would force British Prime Minister James Callaghan's Labor government to resign.⁷⁴ Government officials denied there had ever been any discussion of this problem between the two men.⁷⁵ For all the outcry at the compromise's announcement, however, both the United States flag carriers and government agreed that Bermuda II is not severely damaging to most United States carriers.⁷⁶ This concurrence, however, did not assuage the feelings of many air carriers in the United States who were especially dismayed over the loss by the United States of important fifth freedom rights in Europe and the Pacific and the gain of fifth freedom rights by the British to Mexico City from Boston, Detroit, Baltimore/Washington, Philadelphia, and New York.⁷⁷ "What we gave the British was access to 90 percent

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² "We held all of the cards if we had just been willing to stand our ground. But sometimes we seem to be more concerned with the other guy's image than we are with our own." *AV. WEEK & SPACE TECH.*, July 18, 1977, at 25-26.

⁷³ *Id.* at 25.

⁷⁴ *Id.* at 26.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*; Bermuda II Agreement, *supra* note 1, Annex I, U.K. Route 3.

of the United States with very little in exchange."⁷⁸ Though disturbed by the immediate impact of Bermuda II on United Kingdom-United States air services, more carriers are concerned with the long-term impact of this new agreement on United States air services agreements around the world. Just as Bermuda I served as the "precedent-setting agreement" for all subsequent bilateral air services agreements between the United States and other countries after World War II, so Bermuda II is seen as the new model on which future bilaterals will be based.⁷⁹ In fact, the "blackmail" predicted by some has in one sense already begun. At the time of the signing of Bermuda II, the United States was already scheduled to resume bilateral negotiations with the Japanese government in October, 1977.⁸⁰ With Bermuda II as a precedent, it appeared difficult to deny to the Japanese compromises the United States had already given the British.⁸¹

Constitutional Issues

As if international calls for the denunciation and renegotiation of the old Bermuda I-style agreements were not sufficient, suddenly congressional ire in the U.S. was stirred against the new Agreement and demands for committee hearings and court challenges to Bermuda II were in the offing.⁸² As required by the Case Bill,⁸³ the Bermuda Agreement, like any other executive agreement, must be sent to Congress, only after its signing, for the information of Congress.⁸⁴ However, the Case Bill only allows the Senate to see the result of the executive agreement—a document already signed and agreed to by the President, as was the case with

⁷⁸ AV. WEEK & SPACE TECH., July 18, 1977, at 26.

⁷⁹ *Id.*

⁸⁰ AV. WEEK & SPACE TECH., August 1, 1977, at 26.

⁸¹ *Id.*; Practical difficulties with Bermuda II itself have surfaced as well. In late February and early March of 1978, the British "suddenly" refused to permit Braniff to institute its low Dallas/Fort Worth to London fares as scheduled and also refused permission to land at Heathrow Airport in London as originally planned. Due to this controversy which the British ultimately won, Dallas to London flights were delayed and passengers greatly inconvenienced.

⁸² Ellingsworth, *Bermuda Pact Sparks Opposition*, AV. WEEK & SPACE TECH., August 1, 1977, at 26.

⁸³ S. 596, 92d Cong., 1st Sess., 118 CONG. REC. 4094 (1972). *Act of August 22, 1972*, Pub. L. No. 92-403, § 1, 86 Stat. 619, amending 1 U.S.C. § 112b (1976).

⁸⁴ *Id.*

Bermuda II. When there is an agreement in existence which has the force of international law,⁸⁵ there is usually not much the Senate can do after the fact. In any event, according to staff members, the Senate Commerce Aviation Subcommittee was to hold hearings on the Bermuda II controversy in 1977 and the staff of the Aviation Subcommittee of the House Committee on Public Works and Transportation indicated hearings might be forthcoming.⁸⁶

In addition to the congressional discussion of Bermuda II, potential court challenges have begun to materialize since shortly after the Agreement was made public. A mobilization of interested parties began under the guidance of representatives of the City of Tampa, Florida.⁸⁷ Tampa had apparently been named by the CAB in its recommended decision on the transatlantic route proceeding as a gateway city, but was left out as a gateway city in Bermuda II.⁸⁸ According to interests involved, the President usurped congressional powers in this area.⁸⁹ The apparent basis for the serious challenge by these parties and others is the belief that Bermuda II violates the Federal Aviation Act of 1958.⁹⁰ They argue that Bermuda II specifies a set route structure that was agreed to by the Executive Branch alone and, in contrast, the Federal Aviation

⁸⁵ An agreement signed by the U.S. becomes part of the law of the U.S. and has international effect. 77 AM. JUR. 2d, UNITED STATES 845 (1975). Logically, to abrogate such an agreement on purely domestic constitutional grounds would weaken the entire fabric of U.S. international relations. Nations would become unsure of their positions and the validity of their bilateral agreements with the U.S.

⁸⁶ Ellingsworth, *Bermuda Pact Sparks Opposition*, AV. WEEK & SPACE TECH., August 1, 1977, at 26. This Bill was the Senate's response in 1972 to the growing number of executive agreements, several of them secret, which began proliferating after World War II. Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 3 (1972) [hereinafter cited as Berger].

⁸⁷ Ellingsworth, *Bermuda Pact Sparks Opposition*, AV. WEEK & SPACE TECH., August 1, 1977, at 26.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*; Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. §§ 1301 *et seq.* (1970), formerly Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973. The belief that agreements such as Bermuda II violate the Federal Aviation Act seems to stem from the argument that this Act vested in the CAB the sole authority to establish routes. This was the apparent intent of Congress in enacting the statute and, to allow a bilateral agreement which is not even submitted to Congress for approval to circumvent the CAB's authority, is violative of this intent and Congressional prerogatives.

Act gives the CAB sole authority to grant routes.⁹¹ Also, spokesmen for these interests note that the Federal Aviation Act is based on a requirement of competition while Bermuda II is "anticompetitive" and restricts capacity.⁹²

According to the proponents of the above-mentioned arguments, all air services agreements should be considered treaties and, as such, should be subject to Senate ratification.⁹³ The whole question of whether or not the Constitution requires air services agreements and many other kinds of agreements to be submitted to the Senate for ratification is not as simple as one might first believe. The debate has been conducted throughout U.S. history and certainly started long before the first transatlantic flight.⁹⁴ What is initially troublesome about the constitutionality of such executive agreements as Bermuda II is the practical consequence of a finding of unconstitutionality. According to attorneys for the U.S. government, should Bermuda II be ruled a treaty by the courts, all bilateral air services agreements would be unconstitutional and would fail for lack of Senate ratification.⁹⁵ Certainly, such a result would have an immediate economic effect on air services conducted by the United States throughout the world. The process for obtaining air agreements would be greatly prolonged as negotiators attempted to satisfy the demands of the other side and the demands of Congress at the same time. Then, after the negotiation and agreement would come the ratification process in the Senate, where any agreement would be subject to severe scrutiny and debate on the basis of constituent pressures of the individual members and the pressures of the economy and the public at large. These are the very dangers the executive branch officials foresee if bilateral air agreements are given treaty status.⁹⁶ Politics could also prove a major obstacle. One great

⁹¹ Ellingsworth, *Bermuda Pact Sparks Opposition*, AV. WEEK & SPACE TECH., August 1, 1977, at 26.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Berger, *supra* note 85, at 37-38.

⁹⁵ AV. WEEK & SPACE TECH., August 1, 1977, at 27.

⁹⁶ This author suggests that, perhaps, as a practical matter, were all bilaterals declared unconstitutional, the Senate, to avoid severe economic and political consequences, might summarily ratify all existing agreements. This action would certainly be the most feasible way of solving any immediate problem as to the continuation of air services between the U.S. and other countries.

fear is that many additional routes might be added at the insistence of powerful politicians in the Senate.⁹⁷ Executive Branch officials also see disruption of services as a result of any decision to make bilateral air services agreements rank as treaties for ratification purposes.⁹⁸

However, after the list of "horrors" is paraded by those who oppose any attempt to classify air services executive agreements as treaties, the essential question of the constitutionality of these agreements such as Bermuda II remains. Should bilateral air services agreements be classified as treaties, thus subject to Senate ratification, to avoid the undesired effects of such an agreement as Bermuda II?

One of the only points that seems clear in the dispute over presidential versus congressional power to authorize international agreements is the recognition that the Framers of the Constitution believed that it would be too great a danger to place the exclusive treaty-making power in the hands of the President alone.⁹⁹ Therefore, the President's power to negotiate and agree to foreign agreements was coupled with the "advice and consent of the Senate."¹⁰⁰ The Constitution mentions only "treaty" in this context with the requirement of ratification by two-thirds of the Senate; however, nowhere does the Constitution define the term "treaty."¹⁰¹ The Framers were apparently aware that other forms of international compacts were in existence, as these are mentioned as being prohibited to the States.¹⁰² In fact, the term "executive agreement" is of fairly recent vintage in international use,¹⁰³ and this adds to the consternation of constitutional scholars trying to determine if the Framers envisioned the separate negotiation of international agreements by the President without any congressional consent

⁹⁷ AV. WEEK & SPACE TECH., August 1, 1977, at 27. "I can foresee 14 cities being added to the list of points in a bilateral because some powerful senators want it that way," according to one Administration official.

⁹⁸ *Id.*

⁹⁹ Berger, *supra* note 85, at 37-38.

¹⁰⁰ U.S. CONST., art. 2, § 2.

¹⁰¹ Berger, *supra* note 85, at 33. *See generally*: United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953); Consumer's Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319 (D.C. 1973).

¹⁰² U.S. CONST., art. I, § 10.

¹⁰³ Berger, *supra* note 85, at 33.

or input. According to Senator Case, after whom the previously-noted Case Bill was named, "[i]t seems clear that the Founding Fathers intended any agreement with a foreign country on a matter of substance to be embraced within the term (treaty). Certainly they did not intend that the President must get Senate approval of perfunctory routine minor agreements. . . ."¹⁰⁴ Then the suggestion has been made that the Founders did countenance a distinction between different kinds of international compacts—some of great import requiring the consultation and perusal of the Senate and others of a minor character that the President could conclude alone under his authority as "chief negotiator" for the United States in foreign affairs.¹⁰⁵ However, if the subject matter and scope of the agreement in question be the determinative factor in holding it either an executive agreement or a treaty, the Constitution still leaves no guidelines on which to base such a decision. What is a weighty and substantive matter and what is not? Though the Constitution remains silent, the United States Supreme Court has given some insight into the problem of where the line is to be drawn.

In *United States v. Belmont*,¹⁰⁶ the Court indicated that "[A] protocol, a modus vivendi, a postal convention, and agreements like that . . . are illustrations" of the types of subject matter that could be constitutionally covered in an executive agreement not requiring Senate ratification.¹⁰⁷ Admittedly, this is not an exhaustive list, but it was one of the first times the Supreme Court or any other court had been willing to go so far as to specify some of the legal uses of executive agreements by the President. There is very little case law in this area, and the Court has been very reluctant when a case has arisen to make any definitive rulings due to the highly sensitive nature of this question. In *Belmont*,¹⁰⁸ however, the Supreme Court did rule that the President had authority to act under a federal statute to conclude an international agree-

¹⁰⁴ Ackerman, *Executive Agreements, The Treaty-Making Clause, and Strict Constructionism*, 8 LOYOLA OF LOS ANGELES L. REV. 587, 592, n.29 (1975) [hereinafter cited as LOYOLA].

¹⁰⁵ Compare the constitutional grants of power to the President and Senate contained in U.S. CONST., art. II, §§ 2 and 3.

¹⁰⁶ 301 U.S. 324 (1937).

¹⁰⁷ *Id.* at 330-31.

¹⁰⁸ *Id.*

ment involving commercial or trade matters.¹⁰⁹ It must be strongly noted, however, that this particular presidential authority derived from an explicit federal act.¹¹⁰ In *United States v. Pink*,¹¹¹ dealing with the same international agreement, the Court reiterated the ruling in *Belmont* and added that a treaty is a law of the land under the supremacy clause and such international compacts and agreements as the one involved in that case have a similar dignity.¹¹² This situation also fell under the same congressional act authorizing the President's conduct to negotiate this agreement. As a congressionally authorized pact, the executive agreement did not require Senate participation.¹¹³

In the later landmark case of *Youngstown Sheet & Tube v. Sawyer*,¹¹⁴ a concurring opinion by the Court suggested that because of the separation of powers doctrine, the President could only act by himself (i.e., without prior congressional authorization) in an area of foreign affairs in which Congress had not acted and that the President was "preempted" when congressional action conclusively covered the subject matter of the area.¹¹⁵ In other words, in this "quasi-legislative" area of presidential power, pursuant to congressional will or in the face of congressional inertia, the President may make self-executing executive agreements.¹¹⁶

Finally, in the case of *Reid v. Covert*,¹¹⁷ the Court proclaimed that executive agreements clearly may not be made in violation of federal constitutional rights—here in the rights of the criminally accused to jury trial. *Reid*, therefore, stands for the proposition that criminal rights under the Federal Constitution may not be

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; Of course, if Congress explicitly empowers the President to act in a certain area, there will be no question of Presidential encroachment into a purely legislative area.

¹¹¹ 315 U.S. 203 (1942).

¹¹² *Id.* at 230.

¹¹³ *Id.*

¹¹⁴ 343 U.S. 579 (1952).

¹¹⁵ *Id.* at 637.

¹¹⁶ Cohen, *Self-executing Executive Agreements: A Separation of Powers Problem*, 24 BUFFALO L. REV. 137 (1974); Has Congress perhaps preempted the field of commercial aviation allowing no action by any other body? Perhaps it has; however, *preemption* as a federal law question has generally applied only to areas where *states* (not the President) have attempted to act.

¹¹⁷ 354 U.S. 1 (1957).

abridged by the international agreements of the President or probably even by the Congress. However, the Court has never made such an explicit ruling in civil cases, such as a case that might arise under the Bermuda II Agreement.

Because of the Court's reluctance to deal with the problems of presidential executive agreements and conflicts between the President and Congress unless absolutely necessary, it is likely that any court action on the basis of some alleged unconstitutionality of Bermuda II would not prompt the Supreme Court to render the Agreement invalid without an extremely clear and substantial showing of unconstitutionality. The difficulties that would result from an invalidation of Bermuda II would be enormous and the Court, realizing this, would more than likely be unwilling to allow the status quo of the Agreement to be disturbed absent flagrant presidential abuses. Despite the fact that most other countries around the world treat air services bilaterals as treaties,¹¹⁸ there is little likelihood that the Executive Branch, which has always considered them best handled by executive agreements, will quickly change its position on the matter. Should Congress dispute this stand, it certainly has the power to establish precise, specific guidelines that the President will be required to follow, or it may, by statute, reserve the area of air services agreements to itself and require ratification of such agreements as treaties.¹¹⁹ It lies within the congressional prerogative to legislate away the difficulties in this area, and perhaps specific congressional action would be the fastest and most effective way of resolving the problem.

Clearly, the future of the Bermuda II forebodes problems and controversies for the major airlines of both the United States and Great Britain. The practical problems of applying the terms of the Agreement while avoiding disruption of smooth commercial services between the United States and Great Britain will undoubtedly continue as these difficulties must be worked out on a case-by-case basis. However, far more serious problems exist with regard to the constitutionality of such air services agreements in general. Whether the Federal Aviation Act "preempts" the regula-

¹¹⁸ AV. WEEK & SPACE TECH., August 1, 1977, at 26.

¹¹⁹ LOYOLA, *supra* note 104, at 613.

tion of commercial aviation and precludes the exercise of the executive power to conclude international air services agreements governing routes is highly debatable. The question has not been resolved by court rulings and awaits further clarification. Certainly, the Bermuda II agreement resolved some difficulties faced by British and American aviators in the past. However, the fairly broadly-termed language of the document allows much room for interpretation and controversy. The British accomplished a great deal in Bermuda II. Many of the new provisions put the British carriers on more of an even par with American airlines. By working for more favorable terms and getting them, the British have apparently won the aviation "revolution" of 1976, and now the United States must wait to see what the ultimate repercussions of this victory will be.

