

1959

American Bilateral Air Transport Agreements on the Threshold of the Jet Transport Age

Albert W. Stoffel

Recommended Citation

Albert W. Stoffel, *American Bilateral Air Transport Agreements on the Threshold of the Jet Transport Age*, 26 J. AIR L. & COM. 119 (1959)
<https://scholar.smu.edu/jalc/vol26/iss2/1>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

THE JOURNAL OF AIR LAW AND COMMERCE

Vol. 26

SPRING, 1959

No. 2

AMERICAN BILATERAL AIR TRANSPORT AGREEMENTS ON THE THRESHOLD OF THE JET TRANSPORT AGE

BY ALBERT W. STOFFEL¹

American Foreign Service Officer
(Presently assigned to the Department of State as
Supervisory Foreign Affairs Officer—Aviation)

INTRODUCTION AND SUMMARY

FOR over twelve years America's civil air transport relations with foreign countries have been conducted according to the principles of the Bermuda Agreement. This agreement, a compromise between British restrictionist policies and American liberal policies, provides standard terms for the exchange of international air transport rights. Today many governments feel that they were too generous to the United States when they made those agreements. They now seek to protect their own national airlines by stretching the liberal Bermuda principles to suit their purposes or by asking for amendment or renegotiation. At the same time our own air industry feels that their foreign competition has done too well in gaining a large share of America's international air market under the Bermuda-type agreement.

Among the problems to be solved are: equitable exchange of routes including beyond rights, definition of the Five Freedoms and agreement on statistics to be used to identify traffic as to Freedom, capacity and frequency control, multiple designation of airlines, changes of aircraft, and competitive fares. All of these problems have been with us for some time and all of them are being accentuated by the introduction of the jet transports.

Solutions are hard to find and are not likely to be clear-cut. At any rate a constant study of civil air policy is necessary with particular attention to the Bermuda principles as a suitable basis for exchange of rights in the jet age.

BACKGROUND

Pre-World War II Arrangements

Before World War II America's foreign air relations were simplified by the fact that there was only one important American international airline which operated as a chosen instrument. Pan American Airways, later called Pan American World Airways, made its own agreements with foreign governments wherever possible. Pan American began its international operations in 1927 (Key West-Havana) and together with its associate company,

¹ As the author holds an official position, it should be noted that the views expressed in this article are his personal views. Their expression does not in any way imply the concurrence of the United States Government.

Pan American-Grace Airways (Panagra), shared international air transport in the Western Hemisphere only with some of the European airlines. Arrangements were made with local governments who were anxious to have the transport service provided by Pan American. As they had no national carriers of their own capable of conducting international operations, they did not fear competition. In exchange for such rights Pan American, in many countries, participated in the establishment and development of local airlines.

Pan American's relations with a number of countries were made easier by the fact that the United States Senate on February 20, 1931 approved the Havana Convention on Commercial Aviation which had been signed on February 20, 1928. Other ratifying countries were Guatemala, Mexico, Nicaragua, Panama, the Dominican Republic, Costa Rica, Haiti, Honduras, Chile, and Ecuador. The Convention contained articles covering the taking-on and discharging of passengers and cargo (Article XXI) and the reservation of cabotage (Article XXII).² In addition, the United States had concluded a civil air agreement with Colombia effective January 23, 1929.

In the Pacific area Pan American was able to operate to Manila without benefit of foreign authorization by hopping between American-controlled islands. Introduction of Trans-Atlantic service, however, necessitated obtaining from the European governments the necessary operating rights. Great Britain had long had an active international air transport operation, primarily between London and Paris, and was therefore aware of the value of such rights. Pan American Airways and the British company, Imperial Airways, had negotiated with Portugal for landing rights at Lisbon and Horta in the Azores. The United States and the United Kingdom then negotiated through diplomatic channels to arrange for reciprocal landing rights in England, Bermuda, Newfoundland, and the United States. Other negotiations were conducted for landing rights in Canada, Eire, and France. In 1939 Pan American began trans-Atlantic service to Southampton.

Internationalization

France in 1932 proposed to the League of Nations Conference for the Reduction and Limitation of Armaments, held at Geneva, complete internationalization of civil air transport under a regime to be organized by the League. This proposal, which included an international air police force, aroused considerable interest but never got beyond the discussion stage.

Other proposals for the internationalization of air transportation were raised at the Chicago Conference in 1944. Representatives of New Zealand and Australia proposed that a single international corporation should be formed in which every nation would participate. The British made another proposal to the effect that an international board should be established to control and promote world air transportation in much the same way as the Civil Aeronautics Board performed these tasks in the United States. International carriers would be granted licenses based on an economic showing of international convenience and necessity. Some of the powers proposed for this board went beyond those available to the Civil Aeronautics Board such as regulation of the number of flights to be made by each company and of the percentage of traffic which each country's airline would carry, as well as allocation of certain routes to specific countries to the exclusion of all others.

Since the end of the Chicago Conference there has been little interest in internationalization of civil aviation and, in fact, the industry has become more and more national as it has developed since the end of World War II. One successful "international" operation, organized on a regional basis, has been that of the Scandinavian Air System, a consortium of the three national

² Brown, *Pan American Cooperation in Aeronautics*, IX, *J. Air Law*, 494 (1938).

Scandinavian airlines for the conduct of their long-range international operations.

Chicago-type Agreements

During World War II, in a memorandum issued by the Civil Aeronautics Board dated December 2, 1943, the Department of State and the Civil Aeronautics Board formally announced that the United States would follow a bilateral approach in obtaining landing rights for our airlines abroad. This meant that the Department of State would conduct negotiations with foreign governments for such rights in a manner determined to be desirable by close coordination between the Civil Aeronautics Board and the Department. This statement was necessary so that it would be clear to the airlines and to foreign governments that in the future the so-called unilateral arrangements made between Pan American Airways and foreign governments would not be used as a basis for new international air relationships. Actually the Board had been in favor of government-to-government arrangements almost since its inception.³

The discussion of a legal framework for international aviation which would be required following the war engendered interest in some form of a multilateral agreement governing international air transportation. As a minimum it was realized that a post-war international organization was needed to set up air navigation standards and practices, as well as to deal with the economic problems involved.

The United States invited most of the nations of the world to attend an international conference on civil aviation at Chicago late in 1944. Fifty-four nations attended. Argentina was not invited as it did not fall into any of the categories of countries to which invitations were sent; members of the United Nations and nations associated with the United Nations in World War II, European and Asiatic neutral nations, and the Danish and Thai Ministers in Washington in their personal capacities. The USSR did not respond to its invitation. Other major countries which did not participate were either enemy or enemy-occupied countries.

The United States went to Chicago with a liberal approach in mind aimed at free competition on rates and services. The United Kingdom held out for strict government control of rates and apportionment of routes and regulation of frequency and capacity.

The Chicago Conference produced:

1. *The Convention on International Civil Aviation* ("The Chicago Convention"). This Convention established the International Civil Aviation Organization. By June 26, 1945 enough countries had signed the interim agreement to set up the Provisional International Civil Aviation Organization (PICAO) with offices in Montreal, Canada. On April 4, 1947 this was converted into the permanent International Civil Aviation Organization (ICAO). This organization continues to function and to perform a useful service in the more technical aspects of international aviation.

2. *The International Air Services Transit Agreement* ("The Two Freedoms Agreement"). By this agreement the signatories permit aircraft of other signatories to fly over their territory and land for non-commercial purposes.

3. *The International Air Transport Agreement* ("The Five Freedoms Agreement"). This agreement described the Five Freedoms and was to serve as a multilateral agreement to regulate the economic problems of international air transport.

4. *The Standard Form of Agreement for Provisional Air Routes* (Chi-

³ Gates, *International Control of Aviation in Time of Peace*, 10 J.A.L.C. 441 (1939).

ago Standard Form). This form served as a model for bilateral transport agreements until more permanent arrangements could be made.

5. *Miscellaneous Matters and Proposals.* Various subjects of a technical, economic and legal nature, not otherwise dealt with, were incorporated in resolutions urging that international action be taken. Eventually action was taken on most of these.

Of the above, the Chicago Convention and the "Two Freedoms Agreement" were accepted by most of the major air powers of the world and many of the smaller countries as well. However, the "Five Freedoms Agreement" was not ratified by Great Britain and encountered considerable criticism in the United States. On July 25, 1946 it was denounced by the Department of State primarily because Great Britain had not ratified the agreement and a number of other countries had withdrawn. On the same day the Senate approved the Convention on International Civil Aviation.

Since that time the United States has depended upon bilateral air agreements to obtain its civil air rights abroad. Nevertheless, as late as 1954 the Air Coordinating Committee in its review of national aviation policy stated that the ultimate objective of the United States "has been and continues to be the achievement of a multilateral air transport agreement."⁴ However, it seems difficult to conceive of a multilateral air transport agreement which would be acceptable to American interests in the foreseeable future.

Bermuda-type Agreements

On February 11, 1946, at Bermuda, the United States and the United Kingdom signed an air services agreement which has become known as the Bermuda Agreement. Such an agreement was necessary between the two leading civil aviation powers of the world because of the difference in their approaches to the problem of the exchange of commercial air rights which had become evident at Chicago. The agreement constituted a compromise between the liberal American and the restrictive British concepts. For example the United States made certain concessions towards control of rates and the United Kingdom made concessions on the treatment of capacity and frequency. On September 19, 1946 the United States and the United Kingdom in a joint statement proclaimed it as the standard pattern for all agreements to be concluded by them.

Eleven similar agreements were concluded by the United States with other countries in 1946 and sixteen more in 1947. To date, in all, over fifty such agreements have been concluded by the United States. In general these agreements have functioned well and have no doubt contributed to the vast expansion of international air transport which has taken place since the end of World War II.

The Bermuda principles approach international air transportation from a basically liberal point of view. Nevertheless they provide certain safeguards for those countries which fear their more powerful competitors and would prefer to exercise considerable control over the operation of foreign airlines serving their countries.

As restated in the Air Coordinating Committee's 1954 report on *Civil Air Policy*,⁵ the United States regards the exchange of all Five Freedoms as essential to the economic operation of international air transport routes and to the fullest development of air transport services in the interests of the traveling public. Therefore the Bermuda Agreement and all subsequent agreements negotiated by the United States have been based on the exchange of all the Five Freedoms.⁶

⁴ Report of the Air Coordinating Committee on Civil Air Policy, p. 35 (1954).

⁵ *Ibid.*

⁶ First Freedom: The right to fly across the territory of a foreign country without landing.

On the important question of capacity, again paraphrasing *Civil Air Policy*, the Bermuda Agreement contains broad principles providing standards for relating capacity to traffic needs, taking into consideration the public requirements for air service and the requirements of both trunk-line operations and local or regional operations. Included are certain provisions designed as safeguards for the airlines of both contracting parties, such as the declaration that capacity shall bear a close relationship to traffic demands, that the airlines of both countries shall have a fair and equal opportunity to operate the routes for which they are designated, and that the airlines of one country shall take into consideration the interests of the airlines of the other country so as not to affect unduly the other's services.

All bilateral air agreements concluded by the United States have been executive agreements rather than treaties. This has greatly facilitated both the conclusion and amendment of air agreements. The advantages of using executive agreements rather than the more cumbersome treaty procedure were particularly evident immediately following World War II. As Lissitzyn has said:

"American air carriers . . . had incomparable opportunities for entrenching themselves in international air transportation. These opportunities could be fully utilized only through obtaining commercial operating rights in a large number of countries on a reciprocal basis. The multi-lateral air transport agreement sponsored by the United States at the Chicago conference had a cool reception and would not have sufficed to open the skies of the world to United States airlines. The bilateral air transport agreements, on the other hand, negotiated while the United States was in a superb bargaining position, have opened to American flag air carriers a majority of the European nations, as well as most of the desirable routes elsewhere. This could not have been achieved through the slow process of treaty making."⁷

The Present Status

Having briefly traced the background of the agreements used by the United States to obtain international air transport rights for its carriers, we arrive at the beginning of 1959. Our air transport relations are encompassed in a set of over fifty agreements, most of which are of the Bermuda type, which remains the basis for United States negotiating policy in the international aviation field. Turbojet transports, offering an improvement of some fifty percent in both speed and capacity over their nearest piston-engine predecessors, have begun to fly the most important international air routes, and the time seems to have come for an appraisal of the present situation to determine if technological and economic advances have outstripped the political relationships which permit international air transport to operate.

The Basis for Our Bilateral Air Agreements

Before the passage of the Civil Aeronautics Act of June 23, 1938, Section 6(C) of the Air Commerce Act of 1926⁸ was relied upon as authority for entering into such agreements as that with the United Kingdom, Ireland, and Canada. The 1938 Act transferred from the Secretary of Commerce to the newly created Civil Aeronautics Authority (later Board) the power to authorize the navigation in the United States of foreign non-military

Second Freedom: The right to land for non-traffic purposes.

Third Freedom: The right to set down in a foreign country traffic coming from United States territory.

Fourth Freedom: The right to pick up in a foreign country traffic destined for the United States.

Fifth Freedom: The right to carry traffic from a point of origin in one foreign country to a point of destination in another foreign country.

⁷ Lissitzyn, *The Legal Status of Executive Agreements on Air Transportation*, 17 J.A.L.C. 436 (1950).

⁸ Now Section 1108(b), Federal Aviation Act of 1958.

aircraft. Section 402 of Title IV (The Economic Regulation of Air Transportation) stated that a foreign air carrier was forbidden to engage in foreign air transportation to and from the United States without a permit issued by the Civil Aeronautics Board. The Board "is empowered to issue such a permit if it finds that such carrier is fit, willing and able properly to perform such air transportation and to conform with the provisions of this Act and the rules, regulations and requirements of the Board hereunder and that such transportation will be in the public interest."

The Federal Aviation Act of 1958 repealed the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938. Most sections and sub-sections of the 1938 Act with which we are concerned have retained the same numerical identification in the 1958 Act. References to sections of "the Act" in the following discussion will refer to the Federal Aviation Act of 1958 but, unless otherwise indicated, will apply equally to the Civil Aeronautics Act of 1938.

Under Section 801 of the Act, the issuance and denial of foreign air carrier permits are subject to the approval of the President. Orders of the Board which are accordingly subject to approval of the President are, by Section 1006 (a) exempted from judicial review. Section 802 directs the Secretary of State to advise the Board of, and consult with the Board concerning, the negotiation of any agreements with foreign governments for the establishment or development of air navigation, including air routes and services. Section 1102 directs the Board to, among other things, exercise and perform its powers and duties under the Act "consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries."

In practice the procedure may develop as follows: A United States air carrier may apply to the Board for a certificate of public convenience and necessity to provide service to a given foreign country. "The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."⁹

The Board may then request the Secretary of State to undertake negotiations with the foreign country concerned to permit such services. The terms of such an agreement sought are made as broad as possible to permit service by other airlines which subsequently may be certificated by the Board, or to include routes which may appear to be desirable at some time in the future. The appropriate offices of the Department of State and the Civil Aeronautics Board then enter into close informal coordination to establish exactly what is desired in the way of rights and what rights it may be possible to offer to the foreign country in exchange.

The Board simultaneously consults not only with the carriers certificated for that route but also with other carriers who may be affected by such service or who may have an interest in that service or in providing a similar service. In due course the Department of State sends instructions to its diplomatic mission in the foreign country concerned or consults with the diplomatic mission of that country in Washington, probably proposing the conclusion of an air transport agreement on the basis of the standard form air transport agreement based on the Bermuda Agreement. If the foreign government agrees in principle, a delegation of that government may come to Washington or a United States delegation may go to the foreign capital for formal negotiations. A United States delegation is normally made up

⁹ *Ibid.*, § 401(d) (1).

of one or more members of the Civil Aeronautics Board, members of the Board staff, and officials of the Department of State, as well as observers representing the Air Transport Association of America.

If agreement is reached on conclusion of a Bermuda type agreement, possibly modified to suit local conditions, and if agreement can also be reached on a schedule of routes to be appended to that agreement, approval for conclusion of the agreement is then obtained from the Secretary of State or an official designated by him. Close coordination with the Board and with the industry continues at every step of the process. When signed the agreement is published as part of the Treaties and Other International Acts Series.

Once the agreement is in force, the Board requests the Department of State to advise the foreign government of the airline or airlines designated by the United States Government to serve the route or routes in the schedule appended to the agreement. The foreign government then issues a foreign air carrier permit or an equivalent authorization for the United States airline or airlines to begin service. Likewise the foreign government may similarly designate an airline or airlines to operate its routes under the agreement. The foreign airline concerned then makes application to the Board for a foreign air carrier permit. "The Board is empowered to issue a permit if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation will be in the public interest."¹⁰

Other Forms of Intergovernmental Authorization

The above discussion on regulation of international air transportation by bilateral agreement does not mean that international air transportation is not possible between two countries not having such an agreement. For example the United States does not have air agreements with the Central American republics or Argentina and yet all of these countries are served by one or more United States airlines and their airlines operate to the United States on the basis of permits issued by the respective governments. The United States nevertheless prefers to have air agreements to provide a mutually acceptable framework for international air transport.

The Board may also grant authority for charter-type operations to airlines belonging to countries with which we do not have bilateral agreements or to airlines, belonging to countries with which we do have such agreements, but not designated by their governments to serve routes under the agreements. This latter authority is granted by the Board, on a reciprocal basis, under Section 1108(b) of the Federal Aviation Act of 1958, formerly Section 6(b) of the Air Commerce Act of 1926. The pertinent portions of that Section read as follows:

"Foreign aircraft, which are not a part of the armed forces of a foreign nation, may be navigated in the United States by airmen holding certificates or licenses issued or rendered valid by the United States or by the nation in which the aircraft is registered if such foreign nation grants a similar privilege with respect to aircraft of the United States and only if such navigation is authorized by permit, order, or regulation issued by the Board hereunder, and in accordance with the terms, conditions, and limitation thereof. The Board shall issue such permits, orders or regulations to such extent only as the Board shall find such action to be in the interests of the public: *Provided, however,* That in exercising its powers hereunder, the Board shall do so consistently with any treaty, convention, or agreement which may be in force between the United States and any foreign country or countries. . . ."

In addition to civil air transport relations with the more than fifty coun-

¹⁰ *Ibid.*, § 402(b).

tries which are covered by bilateral air agreements, reciprocal arrangements cover scheduled air transport services with about six additional countries.

This also means that the denunciation of an air agreement, such as that made by France in July 1958, does not necessarily halt air transportation between the two countries after the denunciation period (usually one year) has expired. Both countries may agree to allow their carriers to continue operating in accordance with the terms of the denounced agreement or each country may simply issue operating permits to the airlines of the other country.

Present Problems

There are a number of problems in international air transport relations which have been with us for some time. Such problems largely arise from the fact that many countries, which at the end of World War II could not conduct long-range international operations, are now in a position to do so. In many cases small countries with a long maritime tradition have projected that tradition into the air age and are conducting far-flung operations in air transportation which have little or no relationship to the size of their countries, their populations, or their economies. In addition it has become a point of national honor for almost every independent country to show its flag in the air as widely as possible. Some of these countries have discovered that this may be an expensive proposition, perhaps more expensive than they can afford. Nevertheless they have the right and the desire and they present a problem which must be considered.

Furthermore, standards now being applied are under strong attack from abroad as the following French comment will attest:

"We are, therefore, brought to the conclusion that standards now employed to evaluate the advantages to either party of a bilateral agreement are of somewhat uncertain value and on the whole unconvincing. How could it be otherwise, in the absence of any agreement as to the basis on which to proceed? Neither statistical methods, basic views on the freedoms of the air, nor operating practices correspond to any common standard, so that any attempt to make comparisons amounts almost inevitably to talking at cross purposes, while the results achieved by negotiation are the expression of compromises which are increasingly hard to achieve and precarious to maintain."¹¹

Routes

As World War II ended the United States knew that it would require vastly expanded air rights abroad after the war. In June 1944 the Civil Aeronautics Board, in consultation with the Departments of State, War, and Navy, announced the United States international air route pattern which it believed would be essential after the war.¹²

In the Atlantic Area, the United States which in 1940 had permission, either directly or by rights granted its airlines, to operate to Portugal, to France, to England, and to Ireland, in 1944 wanted routes to Iceland, Norway, Sweden, Finland, Russia, Germany, Czechoslovakia, Austria, Switzerland, Italy, Spain, Greece, Turkey, Iraq, Iran, and India.

In the Pacific in 1938 United States routes extended beyond United States territory to only one area: Hong Kong-Macao (via the Philippines). The 1944 goal required the United States to acquire additional rights to Japan, China, French Indo-China, British Malaya, Indonesia, Australia, New Zealand, the Fiji Islands, New Caledonia, and the Canton Islands.

Of all the routes deemed essential in 1944 only those in South America had been relatively well established by that time through negotiations between private operators and the South American governments.

¹¹ On What Principles Should Bilateral Advantages Be Assessed? 2 Bulletin, L'Institut du Transport Aérien (I.T.A.), Paris, France, 31 (1958).

¹² International Agreements and International Air Transportation, 22 J.A.L.C. 65 (1955).

In Africa, where in 1938 we had no operating rights, the announcement of 1944 declared it essential to have routes to French West Africa, the Belgian Congo, South Africa, Egypt, and Tripoli.

As will be seen by the areas named, the precise routes desired by the United States were often vague, as was bound to be the case until experience had been gained in actual operations under peacetime conditions. As a result the United States attempted to make its routes as general as possible so as to give its carriers leeway in setting up economically sound service patterns which would reflect the public need for air transportation.

In most cases the foreign country concerned went along with our desires largely because they were too involved with straightening out their economies at home and did not have the equipment, manpower, and other resources necessary to fly the routes which they obtained from us.

It became a standard practice, for example, for the United States to describe its own routes as being from the United States, as a whole, to specified points in the foreign country and similarly the foreign routes were described as from that country, as a whole, to specified points in the United States. Such descriptions were adequate for the airlines of both countries as long as the aircraft available were compelled by range limitations to fly from the nearest point in the United States, for example, from New York or Boston, across the North Atlantic with stops at Newfoundland, Iceland, Ireland, or the Azores in order to reach Europe carrying a good payload. Later however, as aircraft operating ranges were extended and trans-Atlantic hops could be made non-stop from several points in the United States, the value of the descriptions of the routes granted to the United States became evident.

In addition some foreign airlines since have developed rapidly into large and widespread international systems. Many of these already earn the major part of their income from their traffic rights in the United States. Nevertheless many are not satisfied with that and, believing that the United States airlines cannot operate if they have no place to go to, feel they now can obtain more liberal rights in the vast American market.

Observing the flexibility of the operations of the United States airlines, the foreign airlines are apt to say that, for the carriage of their third and fourth freedom traffic, they should be able to serve the same routes or group of routes as are served by the United States airlines. This has come to be known as "double-tracking" (to steal another expression from the railroads). The American carriers claim that such double-tracking does not give enough consideration to the size of the United States and the air travel market it offers compared to those of most or all foreign countries. Official United States policy as laid down in 1954 is that "in determining the routes to be included in bilateral air transport agreements, the United States will continue its objective of establishing, insofar as possible, an equitable exchange of economic benefits."¹³

While that policy seems fair enough, it is often questioned abroad. For example, Wassenbergh in commenting on United States policy claims that:

"... the United States of America wants to apply the principle that the traffic potential of the points granted in each country should be as well balanced as possible, i.e., the principle of *quid pro quo*! It will be clear that this concept is only an expedient for the greater powers to obtain control over international civil aviation and that it can have no value as a sound basis for the regulation of international air transport."¹⁴

The foreign airlines' desire to double-track routes flown by American carriers to inland points in the United States, if accepted, would obviously

¹³ Civil Air Policy, *op. cit. supra* note 4 at p. 36.

¹⁴ Wassenbergh, Post-War International Civil Aviation Policy and the Law of the Air, p. 111 (1957).

take from domestic United States airlines much of that traffic which previously the foreign airlines had deposited at ports of entry, as has always been the case for maritime carriers. The ability of aircraft to penetrate over the land masses of other countries has complicated not only international warfare but also international transport.

The foreign airlines are apt to emphasize our size much as Wassenbergh did in his comment quoted above and it is understandable that a number of European countries are apt to equate all of Europe or at least all of non-Soviet Europe with the United States or conversely to equate each individual state in our Union with each individual European country. For that reason they view any insistence by the United States on a port-of-entry philosophy as we would view a European-wide regional gateway proposal. However, the Europeans must be careful about pushing that concept because, if it were accepted, whereas the Europeans now have two international United States carriers competing with them on the North Atlantic, they logically might be faced with up to forty-nine American international carriers.

Actually a reasonable solution probably lies somewhere between the extremes of a single point of entry for the United States versus foreign airline penetration to each state of the Union. In some of its more recently concluded bilateral agreements, such as that with Germany, the United States has had to be more liberal in the grant of rights in the United States. This is a fact which has not been lost on those countries such as France which concluded their agreements with us in the immediate post-war period. In the opinion of many of these countries, we have again become harder to deal with subsequent to conclusion of the German agreement as is seen from this French description of the trend in international air transport policy in 1958 as, "The hardening United States attitude to foreign competition—following Congressional objection to the German agreement."¹⁵

"Beyond" Rights

"Beyond" rights are the rights granted in a bilateral air agreement for carriers of one or both parties to fly to a point in the country granting the right and beyond to points in any other country, or in its more restricted version, to a single other country or group of countries. Immediately following the war the United States was able to have broad "beyond" rights incorporated in most of its agreements with foreign countries. "Beyond" rights were necessary both to the United States carriers and to the logical development of a world-wide international air transport system. In most cases reciprocal "beyond" rights were not granted to foreign airlines. In the first place the United States appeared to be such a vast market that the then-embryonic foreign carriers gave in to our opposition to granting "beyond" rights in order to get entry into the American market. The United States contended, and still contends that it constitutes a natural terminal market rather than a natural stop-over market as do many European and other countries. Again, technological improvements and the rapid development of other countries after the war altered the attitude of foreign carriers towards "beyond" rights. European airlines flying into the northeastern United States from over the North Atlantic saw advantages to continuing to Latin America. The Latin American airlines flying into Miami, and later Washington, New York, and Chicago, saw obvious advantages to flying into Canada so as to pick up sun-seeking Canadians bound for the South. Later, as around-the-world operations became common, "beyond" rights in all directions were desired from the United States.

The development of the pattern whereby the United States obtained "beyond" rights abroad and yet did not grant similar rights to the foreign

¹⁵ The United States and Foreign Competition: Revision of Bilateral Agreements—Current Topics—Bulletin, I.T.A. No. 1—January 6, 1958, p. 1.

countries, was probably a natural outgrowth of the development of the United States as a huge hub for international civil aviation. Its airlines profited by having foreign airlines deposit their passengers at the various United States gateways where they were picked up by United States domestic carriers and carried deeper into the country or possibly on to other countries by United States international carriers.

The "beyond" rights obtained abroad by the United States carriers permitted them to carry a considerable volume of fifth freedom traffic. This traffic otherwise would have been available to local or regional foreign airlines. This touches closely on capacity problems and will be discussed below. Actually a number of foreign carriers now have "beyond" rights from the United States. For example Air France flies "beyond" New York to Mexico City, Qantas flies beyond San Francisco and New York to London, etc.

A solution to the "beyond" rights problem again touches on what constitutes an equitable exchange. If "beyond" rights are discussed separately from other issues it can be argued that the United States should give up some of its "beyond" rights abroad or grant more "beyond" rights to foreign carriers. However, the American carriers contend that to do either would distort further the exchange of economic equivalents in favor of the foreign airlines.

Capacity

Capacity determination is undoubtedly one of the most thorny problems in international civil aviation today. The Bermuda principles on capacity were an attempt to reach a compromise between the British desire for a protectionist formula for its carriers and the United States desire for a multilateral policy of relatively open competition. Mathematical formulas which would predetermine how much capacity could be offered or how much traffic could be carried were considered but finally avoided in favor of general capacity principles which attempted to relate to one another the various types of traffic which a carrier might carry. Basically they stated "that services provided by a designated airline shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such airline is a national and the countries of ultimate destination of the traffic." The right to carry fifth freedom traffic was to be related "to traffic requirements between the country of origin and the country of ultimate destination of the traffic, to the requirements of through airline operation, and to the traffic requirements of the area through which the airline passes after taking account of local and regional services." Control through bilateral consultations was to be exercised on an *ex post facto* basis if one party found that its carriers were being injured by services offered by foreign carriers.

Like many reasonable general principles these principles can work only when both sides are in general agreement on their meaning. However, as is so often the case in international affairs, geographic location, the relative development of national aviation, commercial importance, political prestige, and many other criteria are applied by each country, resulting in widely divergent views concerning the capacity principles. Furthermore, as has been the case in customs tariffs through the centuries, when local industry is hurt by foreign competition it applies for, and usually receives, protection. In the case of air transportation such protection is relatively easy to justify because of the obvious national defense aspect of transport aircraft. For that reason most countries pay subsidies to their carriers in one form or another but there comes a time when they decide that it is foolish to pay subsidies which might be reduced or eliminated by applying restrictions to the capacity offered, or the traffic carried, by the foreign competitors of the local subsidized airline.

The American international airlines interpret the Bermuda principles liberally and assert that unilateral restrictions by foreign countries on the amount of traffic carried, the type of aircraft used, or the frequency of flights, are violations of the air agreements, as they are in most cases. They maintain that if there are violations of the capacity principles on the part of the United States airlines, as there are apt to be if competition is allowed to play a role, these are more than offset by equivalent violations by foreign air carriers in connection with third country traffic carried by them to and from the United States. Furthermore they always point to the fact that approximately 70% of all international air travelers to and from the United States are American nationals. Against this figure they show that less than 50% of the travelers on the lucrative North Atlantic runs now are carried by American carriers.

The United States has not always been successful in insisting on pure Bermuda principles on capacity. In a few cases lack of adequate bargaining power has compelled acceptance of restrictions. When negotiating with the United States, other countries, even though aware of the special conditions which resulted in such non-Bermuda terms, are tempted to seek such protective measures for their own airlines. The United States, nevertheless, continues to promote the concept that predetermination of capacity is contrary to liberal development of international air transportation and that *ex post facto* review provides an adequate safeguard.

Another aspect of the capacity problem is the so-called sixth freedom problem. Sixth freedom traffic refers to "traffic between two foreign countries via the country of the airline carrying that traffic." However, the term sixth freedom can be confusing because some authorities, like Sir George Cribbitt, call cabotage the "sixth freedom."¹⁶ Furthermore sixth freedom has become a dirty word in American civil aviation where it is claimed that this traffic is part of fifth freedom. It is not even particularly well liked by some of the small countries who greatly profit from such traffic (Belgium, The Netherlands) who claim that each sixth freedom flight is, in fact, a fourth freedom flight when coming into their homeland and a third freedom flight when leaving. Such traffic does not constitute an important percentage of all traffic carried by the large countries. But, in the case of the smaller countries, such as Belgium and The Netherlands, with important airlines, this traffic looms large, since they clearly could not exist on the traffic generated in their own country or even on fifth freedom traffic generated between their own country and the United States.

It has not been possible to solve this problem since it does not seem practical to specify what traffic an airline may carry from points back of its homeland. One clarifying step would be to agree on the freedom category of such traffic.

This problem will remain with us since the Bermuda principles are deliberately vague and their application continues to be not wholly satisfactory to any party to this agreement. It is important to remember, however, that the free-world's basic interest should be to have an efficient world-wide air transport system and acceptance of control is bound to retard the natural development of this means of transportation. Some solution is called for and it may lie in the direction of a refinement and further spelling out of the Bermuda principles, since the faults in the Bermuda principles do not appear to lie in what they say but rather in what they do not say. On the basis of experience during the past ten years it should now be possible to further evolve the Bermuda principles so that they will at least be clearer to everyone, even though they may not satisfy everyone.

¹⁶ Cribbitt, *Some International Aspects of Air Transport*, Royal Aeronautical Society, p. 7 (1950).

The alternatives are worse for as Wassenbergh says:

"A system that . . . is based on the traffic offering per section—and that is any system that tries to create economic order in the air by means of regulations with respect to capacity—thereby fails to recognize the supreme importance of promoting the development of *world air transport*."¹⁷

Statistics

Statistics are used to confuse the capacity question just as they are used to confuse any question where confusion is of great practical interest to the confuser. Since the Bermuda principles state, among other things, that the services provided by a designated airline shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which that airline is a national and the countries of ultimate destination of the traffic, and that third country traffic is permitted but must be supplementary to the primary traffic, statistics obviously are needed to determine that relationship. Relatively few countries in the world have developed satisfactory statistics on any subject and particularly not on new subjects such as air transportation. Many countries have found it easier to learn to fly airplanes than to count the people getting on and off those airplanes.

Bilateral consultations based on statistics have in most cases ended in disagreement on the reliability of statistics, the designation of the categories of traffic as determined by those statistics, or the basis on which the statistics are computed. For example, should they be computed as passengers, passenger-miles, ton-miles, or on some other basis? What does a stopover do to a trip? How short can a stopover be and still be considered a stopover?

Again let us quote a French commentary on the American attitude toward Freedom statistics:

"Even in the case of countries with a large potential of direct exchange (Third and Fourth Freedom) traffic, the American principles applying to Fifth and Sixth Freedom traffic may well lead to estimates of a higher revenue from the latter (mileage being taken into consideration) than from direct exchange traffic. The United States might then conclude, according to the logic of its system, that there was a violation of the 'Bermuda principles,' which stipulate that the fundamental gauges for service on international routes shall in every case be Third and Fourth Freedom traffic. If, however, according to other criteria Fifth and Sixth Freedom traffic is defined more stringently—which is perfectly legitimate in a field open to arbitrariness—it is possible to derive different statistical results and hence quite different revenue estimates."¹⁸

Thus states not only disagree about the acceptable proportion of fifth freedom traffic to third and fourth freedom traffic but are not even in agreement on how to identify the traffic. Perhaps some day a group of international statisticians can sit down and solve the problem of airline statistics independently of other factors, after which an attempt can be made to sell an international statistical system to the aeronautical authorities of the various countries.

Multiple Designation

Multiple designation refers to the designation by a country of more than one national airline to operate on individual international routes. This has caused considerable difficulty in negotiating and implementing our bilateral air agreements.

To touch on the background, the United States early considered, and finally rejected, the chosen instrument concept in international air trans-

¹⁷ Wassenbergh, *op. cit. supra* note 14 at p. 52.

¹⁸ 2 Bulletin, I.T.A. p. 30 (1958).

portation. Before the War, Pan American World Airways was in many respects treated as a chosen instrument. Several chosen instrument bills were introduced in Congress but all were defeated. The United States determined that several carriers would be authorized to operate internationally and consequently, when our bilateral agreements were negotiated we insisted on referring throughout to "an airline or airlines designated by the Government of the United States." Similar reference was made to an airline or airlines of the foreign country involved but in most cases that phrase had, and still has, little significance. At first only one American carrier was designated for each specific route although these routes overlapped in some cases. Now at least two American carriers are authorized to operate to all major traffic points abroad. Foreign carriers are afraid of the competition of even one large American carrier. They are naturally at least twice as fearful of competition from two such carriers. Normally the foreign countries operate only one flag carrier and do not see why the United States insists on more than one carrier.

Competition between the two or more United States carriers results in extensive programs of advertising, re-equipment, service, etc., and the foreign carriers claim such programs are almost impossible to compete with. The United States on the other hand maintains that there is enough traffic for all on the routes which have more than one carrier operating on them and that, furthermore, since the majority of the traffic is of United States origin or destination, United States carriers should have a right to a majority proportion of such traffic. Foreign carriers would be happier and foreign countries perhaps would be easier to negotiate with if only one American carrier were designated for each route.

Some authorities have felt that the multiple designation policy should be restudied, since the considerations which resulted in its establishment many years ago may have changed. Nevertheless, on February 18, 1959 the President, in a letter to the Chairman of the Civil Aeronautics Board, stated, "As you are aware, this Administration is firmly committed to the view that the public interest requires competitive American flag service at the earliest feasible date on all international air routes serving major United States gateways."¹⁹

Thus the multiple designation policy is more firmly established than ever before. The terms used in the President's letter are more far-reaching than those previously used. For example, just a year ago, on February 4, 1958 in another letter to the Board Chairman on the same subject, approximately the same statement was made, but it included the conditional phrase, "wherever the traffic justifies it, . . ."²⁰

The President's new statement appears to transcend even the declaration of policy on competition in the Federal Aviation Act of 1958. Among other things listed in Section 102 which the Board shall consider as being in the public interest, and in accordance with the public convenience and necessity is:

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;"

While the President's statement was contained in a request that the Board consolidate all Pacific air route matters into a single record, it is bound to be widely studied as the most recent expression of United States policy on multiple designation.

¹⁹ Civil Aeronautics Board Press Release, February 18, 1958.

²⁰ *Ibid.*

Change of Aircraft

We have chosen here the term "change of aircraft" for what is commonly called by the railroad term, "change of gauge." Jargon is bad in general because the layman does not understand it, and jargon which is taken from one medium into another medium where, as in this case, it has no relationship whatsoever to anything concrete seems inexcusable.

Change of gauge was first defined in the 1946 Bermuda Agreement as "the onward carriage of traffic by an aircraft of different size from that employed on the earlier stage of the same route" (Article V(a) of Annex). The term "trans-shipment" was used in the 1946 agreements between France and the United States and between Belgium and the United States. It was defined as "the transportation by the same carrier of traffic beyond a certain point on a given route by different aircraft from those employed on the earlier stages of the same route" (Section VI(a) of Annex). Lissitzyn points out that trans-shipment is therefore a broader term than change of gauge since change of gauge mentions "different size" whereas trans-shipment says only "different aircraft." He thus concludes that change of gauge is only one type of trans-shipment.²¹

The 1946 United States-Brazil agreement contained practically the same change of gauge clause as the Bermuda agreement. The 1946 United States-India agreement (no longer in effect) used the term "change of aircraft" when "different aircraft are used on different sections of a specified air route, with the point of change in the territory of one of the contracting parties" (Article V).

The Bermuda and Indian agreements have conditions for change of aircraft implied by the following language: "when, for the purpose of economy of onward carriage of through traffic, different aircraft are used . . ." The agreements with Belgium and France do not have such overt restrictions but Lissitzyn concludes that such conditions are assumed.²²

Most United States agreements, other than those early ones cited above, do not have change of aircraft clauses because it was decided that they were not needed and that it was a normal part of efficient international air transport operation to change aircraft when that was required by the volume of primary traffic carried.

The United States has taken the position that change of aircraft is consistent with the Bermuda principles, particularly since the agreements do not refer in any way to the type of aircraft to be used. Since the type of aircraft does not appear, why should a *change* of type be specifically provided for? Also, since the normal change-of-aircraft operation provides less capacity as the airline moves farther from its homeland, it results in closer adherence to the Bermuda capacity principle than if the larger aircraft continued on that route, offering many more empty seats to new passengers, a large proportion of which would be Fifth Freedom.

United States carriers do change aircraft at several places such as London and Tokyo where the onward traffic from those points does not justify the use of the large intercontinental transports used on the trans-ocean portion of the route or where operational considerations, such as the condition of the airports, on the balance of the route prevent their use.

As the size of aircraft have increased, change of aircraft has become more necessary. This has created some dissatisfaction abroad on the part of local or regional carriers who can stand seeing the large American operators flying in from across the ocean, if their own aircraft can carry some of the same passengers on from that point. Having an American aircraft

²¹ Lissitzyn, *Change of Aircraft on International Air Transport Routes*, 14 J.A.L.C. 57 (1947).

²² Lissitzyn, *ibid.* p. 58.

based locally and operating on what may amount to a shuttle run in a foreign area is sometimes irksome.

Competitive Fares

The Civil Aeronautics Board has no direct control over the setting of fares in international air transportation. In general the International Air Transport Association (IATA), the carriers' association, is depended upon to stabilize international fares. As other means of restricting competition by the large carriers have failed, there has been a certain amount of price-cutting on the part of smaller airlines. Price-cutting is particularly rampant in Latin America with many non-IATA carriers charging drastically reduced prices in competition with the large trunk-line operators. In some cases such price cutting appears to be justified by the relatively old equipment in use. However, some of those carriers have now been able to obtain more modern aircraft and continue to operate on their lower than IATA fare schedules.

In 1952 Argentina, in exchange for dropping other forms of regional restrictions, required the trunklines to charge higher rates between Argentina and surrounding countries than did the local airlines.

Rate cutting could of course become dangerous in international air transportation although it seems unlikely that the various governments would allow it to deteriorate too far. It is possible that, as some of the rate-cutting foreign carriers claim, the lower fares will open up new mass markets for air transportation, something which seems to be badly needed in the near future. As a matter of fact, American carriers, and Pan American in particular, have traditionally been in favor of fare reductions. However, they believe in reducing rates on an orderly and economic basis when such reductions might increase air travel. International coach fares and North Atlantic economy fares, though not true rate reductions, since they also provide reduced service, have proved to be a success.

THE JET TRANSPORT AGE

So far we have made little reference to the jet transport age. That was purposely done so that it would be clear that the problems with which we are going to be faced in accentuated form during the next months will be recognized as having been with us for some time. They should not be blamed entirely on the jet transports. The jets have introduced a new dimension into air transportation. Their speed is so much greater that in any scale of performance and productivity of post-war transport aircraft there is a large gap between the most advanced propeller-driven piston aircraft and the pure jet transports now being introduced. It is not adequate to simply say that they are just a faster, bigger aircraft. They are so much faster and so much more productive that they require a complete review of the patterns of air transportation. One writer, L. L. Doty, goes so far as to claim that as a result, complete redrafting of most bilateral air pacts now in effect will be required during the next twelve months.²³ This is undoubtedly an exaggeration but is indicative of some of the fears inspired by the jets.

Certainly the jets will change many things. Longer runways and, in some cases, differently located airports will be necessary, as well as improved facilities for the aircraft and their numerous passengers. But these problems are largely technical and are being met. The political and economic problems may not be so easy to meet. For the time being the jets can fit into the trans-oceanic routes without great trouble but as more and more jets are put into operation and as they fly to the outposts of the world,

²³ L. L. Doty, *Bilaterals May Be Redrafted for Jet Era*, "Aviation Week," November 17, 1958, p. 39.

problems will begin to arise. The jets will not be suitable for shorter hops. Therefore certain routes may be abandoned to local carriers. Smaller national carriers may not feel able to get involved in the large investment program required for the expensive jets and may abandon some of the trans-oceanic rights which they now have. Any change along these lines may require a reconsideration of the patterns and terms of the international exchange of air rights. It will also raise the question of change of aircraft because the large trunk-line carriers will try to continue to give their present far-ranging service by more extensive use of change of aircraft. This in turn will be resisted by some governments much more strongly than it is today, since in such resistance they will see the only prospect of keeping any international business for their local non-jet carriers.

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

"Operations with large jet aircraft will call for the long-haul stops to be few and far between serving the main continental gateways. One idea advocated for some time now is for traffic to be taken from there on to its various destinations in smaller aircraft; the expression 'change of gauge' means just that. But what is to determine the capacity offered by these regional service aircraft? According to the Anglo-American Agreement, it is 'the traffic traveling in the larger aircraft normally requiring to be carried onward'; and the smaller aircraft 'will operate only in connection with the larger.' Thus if, on a New York-London-Zurich-Athens-Beirut airline, the long-haul aircraft stops only at London and Beirut, passengers going from New York to Zurich or Athens will have to be taken from London onward in an aircraft which:

- (a) offers capacity in relation to such American Third Freedom traffic;
- (b) Operates only in connection with the long-haul flight."²⁴

The seriousness of the capacity problem will soon be doubled in the same way that the jets now on order will within a very few years double the capacity that the airlines can carry. There will be a stronger competitive urge to fill that capacity and those carriers who do not get jets may insist that restrictions be imposed for their protection.

Such protection has already been sought in the field of rates. The October 1958 IATA traffic conference broke down completely on the question of surcharges (15 to 30%) for jet fares. Finally in February 1959 agreement was reached on much more reasonable jet surcharges, (4.5% first class, 5.8% economy class) thus avoiding a general open rate situation and the rate-cutting which undoubtedly would have followed.

One new element which will show itself much more prominently in the jet age is that of competition from the Soviet Bloc. The Soviets were first with a jet transport on the international routes, even though it is an inefficient conversion of a jet bomber. Now it is known that they are developing what promise to be efficient jet and jet-prop transports. It is not entirely clear what part these aircraft will play either in the competitive market of aircraft sales or in operations by Aeroflot but it is quite certain that competition is coming from that direction and there is no reason for the western carriers or aircraft manufacturers to be sanguine about the chances of the Soviets "playing the game" as to rates, terms, fair competitive means, etc.

THE OUTLOOK

In view of the problems with which we are now faced and with which we shall be more and more concerned in the near future, where do we go from here? Should we abandon the Bermuda principles? In many ways they have

²⁴ The Bermuda Capacity Clause and Tomorrow's International Operations, 3 Bulletin I.T.A. p. 62 (1958).

served us well though they now appear to be too vague and too general for the sharp competition which has developed. Many countries prefer a frank resort to predetermination of capacity using some kind of a mathematical formula. There may be some wistful attempts to return to a multilateral concept which, even as late as 1954, remained "the ultimate objective of the United States."²⁵ It seems unlikely that such a concept can work during a period when nationalism seems on the increase rather than on the decrease throughout the world.

Compromises may be possible by a further spelling-out and clarification of the Bermuda principles. A compromise may be possible between the national and the multilateral concept in the form of a type of regional concept. Perhaps the large and feared jets may be used on those longer routes where they are most efficient. One interesting idea under discussion is that for a multilateral agreement which would grant to all adherents unlimited traffic rights to regional gateways, or to ports of entry within individual countries, for all commercial aircraft coming from or going to a next stop at least a given distance away, for example 1,000 miles. Exchange of rights for shorter distances would then be covered by bilateral agreements.

There has also been some talk about putting air transport relations under the treaties of friendship, commerce, and navigation which now cover maritime relations. This idea, too, deserves more study and perhaps the possibility of consolidating the latter two ideas should be considered. At any rate there is clearly much work to be done in this field. It is a sad commentary that we have not yet been able to do more in the direction of rationalization.

One need only look at an air-route map of the United States-Canada border to see how badly we have done and how difficult the task is. There are a good number of trans-border routes in the East; there are a few in the Far West but in the middle there is a large gap with very few air routes in an area where air transportation would seem to be the natural means of communication because of the long distances involved and limited surface transportation available. Furthermore this gap is not due to any lack of interest on the part of the air carriers as is evidenced by the number of applications to perform such services before the Civil Aeronautics Board and its Canadian equivalent, the Air Transport Board. Nor are the local communities reluctant about begging for such services. These two friendly neighbors have simply not been able to reconcile the various conflicting interests and agree to an exchange of rights in addition to those already granted.

Let us close with the following French comment which indicates the problems to be faced in the near future by the United States in trying to defend and sustain the Bermuda principles:

"... Since the spirit, if not the letter, of the Bermuda Agreement is no longer respected by those who conceived it and imposed it on their partners, it is not sure that the rather platonic principles of 1946 will stand up to the hard facts and necessities of 1960. The combined application of the capacity clause of Bermuda type agreements, and of the change of gauge clause which in practice will go hand in hand with it as far as the main long-haul air routes are concerned, will inevitably give rise to clarifications and adjustments, which are likely to be all the more imperative as the wording of the clause is the vaguer (and some of the change of gauge clauses are extremely vague). However, the importance of such an adaptation of capacity provisions to the new requirements, and multiplication of problems by the very nature of the bilateral system, will probably prevent their examination before operating conditions and programs for the new flight equipment become clear. For the Bermuda principles as for many other things the critical time is likely to be 1960."²⁶

²⁵ Civil Air Policy, *op. cit. supra* note 4 at p. 35.

²⁶ 3 Bulletin, I.T.A. (1958) *op. cit. supra* note 24 at p. 63.