

The Activities of International Economic Organizations

ICAO Development

A. Special Air Transport Conference

Ninety-seven member states, two non-member states and eleven non-governmental organizations were represented at this conference in Montreal in April, the first of its kind ever called by the International Civil Aviation Organization. Out of the birth throes of ICAO in 1946 at Chicago, no viable multilateral agreement was forthcoming on the exchange of economic rights. Thereafter, ICAO concentrated on navigation and other technical issues, leaving economic matters mostly to bilateral agreements. This Conference was called to meet the demands of developing countries and was resisted to a greater or lesser degree by the major air transport powers. While it remains to be seen what will happen to the Conference recommendations in the ICAO Council and at the ICAO Triennial Assembly in Montreal next September, the Conference was an important step toward establishing in ICAO a sounding board for the views of the developing countries on international air transport problems.

The theme which ran through the Conference was the effort of the less industrialized countries to develop expertise in ICAO on economic questions as a counterweight to the International Air Transport Association (IATA), which they feel is dominated by the large air carriers. To achieve this, the Council was asked to undertake several economic/legal studies. However, at a later date the organization will be faced with the alternative, on the one hand, of securing finances to carry out independent studies (which will require increased contributions from major air transport powers such as the United States and Western Europe), or, on the other hand, of depending on expertise contributed by the member countries directly through questionnaires, or panels of experts.

There were four agenda items. One was addressed to the role of non-scheduled operators. The Conference recommended that the Council undertake studies aimed at establishing international guidelines for the regulation of non-scheduled traffic and at revising the Council's 1952 definition of

“scheduled international air service” (never accepted by the United States and many other countries), including possible amendment of those sections of the Convention on International Civil Aviation referring to scheduled and non-scheduled services (Articles 5, 6 and 96A). Pending conclusion of these studies, member states were invited “to cooperate in setting up stable, harmonized regimes for scheduled and non-scheduled international air transport operation and to provide reasonable opportunities for the travelling public to take advantage of non-scheduled flights without undermining the economic viability of scheduled services.”

Capacity regulation was another agenda item. The Council was asked to study criteria and alternative methods for regulating capacity on both scheduled and non-scheduled services, including the development of a model clause or clauses to be used for this purpose in bilateral agreements. While it was not indicated on the Conference record, one might speculate that this study will be influenced by the outcome of current U.S./U.K. negotiations on revision of the Bermuda concepts, which to some degree have guided capacity provisions in bilateral agreements since 1946.

The Conference also considered mechanisms for the establishment of international tariffs and for their enforcement. It adopted most of the recommendations of the Panel of Experts on the Machinery for the Establishment of International Fares and Rates which met in Montreal in December, 1976.* It did not go along with several suggestions which would have brought governments directly into IATA traffic conferences and limited the number of such sessions. However, a role as observer at IATA conferences was given to ICAO.

The Conference recommended that the Panel of Experts on the Machinery for the Establishment of International Fares and Rates continue to work on determining “the known means by which tariffs including retail seat prices on non-scheduled services are established, so that measures aimed at harmonizing the diverse means by which both scheduled and non-scheduled airlines arrive at their tariffs may be proposed.” The Council was asked to conduct a joint legal, economic and technical study of possible new intergovernmental machinery for the establishment of fares and rates, without excluding the possibility of maintaining existing machinery justified by the study. To aid these projects the ICAO secretariat would expand its work on airline costs and revenues with particular attention to regional differences in fares and costs. Also, ICAO was asked to look into such devices as Regional Workshops and ICAO manuals to aid governments with fare and rate problems.

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With respect to the matter of tariff enforcement, it was noted by the Conference that while a majority of states had provisions requiring the filing and approval of tariffs, only a few states had reported, in response to an ICAO questionnaire, actual investigations, legal proceedings or penalties imposed. States were urged to do more to investigate and enforce tariff violations and to participate in "greater cooperation and the exchange of information between governments and various carrier enforcement agencies." Specifically, the Secretariat was asked to collect "all information available from states concerning tariff violations."

Finally, the Conference recommended that a Second Air Transport Conference be convened no later than three years hence.

B. Lease Charter and Interchange of Aircraft

The Convention on International Civil Aviation (Chicago Convention 1946) requires every aircraft engaged in international navigation to have a single certificate of registration. The state issuing the certificate of registration is responsible for the licensing of the pilot (Article 32(a)), and for the airworthiness of the aircraft (Article 31). Further, the state of registration undertakes to insure that "every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force" (Article 12).

To achieve more utilization of costly aircraft and for other reasons, it is often advantageous today for airlines to lease aircraft to each other with or without crew, sometimes for short periods, or on an interchange whereby one carrier operates the aircraft to a point from which another carrier takes over. United States carriers have been inhibited in this type of exchange by a prohibition in United States law against operating foreign registered aircraft in services between points in the United States. Legislation has been proposed which would change this situation. However, even absent this legislation, both United States carriers and private owners of United States general aviation aircraft can and do frequently lease United States registered aircraft to foreign operators. The Chicago Convention requires the United States Government in such cases to assure proper standards with respect to the foreign operator's maintenance of the aircraft. With these lease and interchange operations on the increase a way has been sought to place the responsibility on the country of the operator and to release the country of registry from responsibility.

This problem has been high on the list of concerns of the Legal Committee of ICAO for some years, and at the last Assembly it was given top priority. Accordingly, a special legal subcommittee met in Montreal in March and April of this year and approved a text which would be added to Article 83 of the Chicago Convention. It would place all or part of the responsibility of the state of registry under Articles 12, 31 and 32a upon the state of the operator, where

there was an agreement between the state of registry and the state of the operator to this effect. The conclusion of such an agreement would be optional and its terms were not prescribed. Once registered with ICAO and published, the agreement would be recognized by other members of ICAO.

The British and French delegations sought to insert phraseology into the proposed instrument which would have barred the United States from its benefits until United States law was changed to permit domestic use by United States carriers of foreign registered aircraft. A majority of the other delegations, including the United States, rejected this suggestion, noting that the problem under consideration was one of safety and not of a commercial character. Texts were also recommended for amending the 1952 Rome Convention on liability for surface damage by foreign aircraft, to provide more precisely for this situation. The United States, however, is not a party to the Rome Convention.

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Asian Development Bank¹

Background

The Asian Development Bank (ADB, or the Bank) has now completed over ten years of operations as a "world bank" for Asia. The ADB began operations in 1966 and was the first regional development bank to permit countries from outside the region to join as full members, contribute capital, and acquire representation on the board of directors and professional staff.

As of December 31, 1976, the ADB had forty-two members. Fourteen of the Bank's developed member countries are located outside the Asian and Pacific

¹This paper is based in part on the article on the Asian Development Bank written by Graeme F. Rea, General Counsel of the Bank, and Daud Ilyas, Assistant General Counsel of the Bank, which will be included in the forthcoming *A LAWYERS GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS*, WALTER S. SURREY and DON WALLACE, JR., editors; being published by ALI-ABA with the assistance of the Institute for International and Foreign Trade Law, Georgetown University Law Center. See generally HUANG, *THE ASIAN DEVELOPMENT BANK—DIPLOMACY AND DEVELOPMENT IN ASIA* (1976).

region—the United States, Canada and twelve Western European countries. Although all twenty-five of the ADB's developing member countries (DMCs) are located in the Asian and Pacific region, only three of the Bank's developed member countries are located in that area (Japan, Australia and New Zealand). Japan and the United States, with equal capital stock subscriptions, are the two largest shareholders of the Bank.

The ADB, which has its headquarters in Manila, is similar in structure to the Inter-American Development Bank (IDB), and its operating policies closely resemble those of the World Bank Group. The ADB makes conventional or "hard" loans to its DMCs from its ordinary capital window, and concessional or "soft" loans and technical assistance grants from its special funds.

Financial Structure

The ADB has a two-tier financial structure, somewhat similar to that of the IDB. The Bank's ordinary capital resources, drawn primarily from member subscriptions to capital stock and from borrowings in world markets, are used to furnish funds for the Bank's ordinary loan operations. The ADB's special funds are generated mainly from voluntary member country contributions and are used to provide concessional loans and technical assistance grants. The Bank may supplement member contributions to special funds by setting aside up to ten percent of its paid-in capital for special funds. Apart from this ten percent rule, however, the Charter requires funds in each resource pool to be held, used, and invested separately.

Ordinary Capital

As of December 31, 1976, the ADB's member countries had subscribed \$3.69 billion of the Bank's authorized ordinary capital. Of this total subscribed capital, \$1.07 billion (29 percent) has been paid in by the member countries, and \$2.51 billion (71 percent) is subject to call if necessary to make principal and interest payments on ADB obligations. This capital is the sum of the Bank's original capitalization, the first general increase agreed to in 1971, and special capital increases subscribed by various member governments during 1973-76. The United States and Japan each have subscribed to \$603 million of ordinary capital.

The Board of Governors of the ADB decided in November 1976 to increase the authorized ordinary capital of the Bank from \$3.71 billion to \$8.71 billion—an increase of 135 percent. The increase is to become effective before the end of 1977 in order to enable the Bank to continue its ordinary lending operations at an appropriate level in 1977 and in future years.²

²ADB O. REV., Jan. 1977, at 20.

The Bank's subscribed ordinary capital has been supplemented by borrowings totaling \$1.14 billion as of December 31, 1976 in the capital markets of Western Europe, the United States, Japan and the Middle East. These borrowings consist mainly of public bond issues, with occasional private placements and loans from governments or central banks. The Charter states that no borrowing may take place in the territory of a member or in the currency of a member without the prior approval of that member. To give greater security to its borrowings, the ADB has adopted a policy of limiting the amount of its borrowings to the amount of callable capital subscribed by members whose currencies are convertible. It may be noted that the ADB has consistently received an AAA rating for its bond issues from Moody's and Standard & Poor's.

Special Funds

The ADB currently administers three special funds. The Multi-Purpose Special Fund, established in 1968, and the Asian Development Fund (ADF), which came into operation in 1974, are used for making loans on concessional terms to the ADB's poorest DMCs. The ADF was created to replace in due course the Multi-Purpose Special Fund and to serve as a single, consolidated special fund operating on standard terms and conditions.

As of December 31, 1976, the aggregate resources of the ADF totaled \$914 million, consisting of \$842 million contributed or committed by member countries, \$57.5 million set aside by the Board of Governors from ordinary resources, and \$14.5 million in income. Resources remaining in the Multi-Purpose Special Fund totaled \$18 million.

The ADB may make, or participate in, direct loans to the governments of its DMCs, to any of their agencies or political subdivisions, and to public and private entities and enterprises operating within such countries, as well as to international or regional agencies concerned with economic development in the region. The ADB has also become involved in a number of joint financing or co-financing projects in certain countries.

As noted, the Bank is authorized to make direct loans to private enterprises, and in fact has made such a loan for a transport and stevedoring development project. Such direct loans ordinarily must be guaranteed by the member government in whose territory the project is to be carried out, or by an acceptable agency or instrumentality of the member. The ADB, subject to specific authorization by the Board of Governors, can undertake equity investment or guarantee private loans. But no such investment or guaranty has yet been made.

Management

The ADB management structure is similar to those of the International Bank for Reconstruction and Development (the World Bank) and the IDB. Supreme

power is vested in a Board of Governors. An intermediate full-time executive body—the Board of Directors—oversees and directs Bank management. The day-to-day management of the ADB is assigned to the president and the Bank's staff of international civil servants. The president of the ADB, who must be a national of a regional member country, is elected by the Board of Governors for a five-year term and may be re-elected.

United States Membership

The United States became a member of the ADB by Act of Congress in 1966.³ As of December 31, 1976, the ADB capital stock subscribed by the United States totaled \$603 million, comprising \$193 million of paid-in capital and \$410 million of callable capital. In fiscal years 1972 and 1975, the Congress authorized United States contributions to the ADB special funds in the amount of \$150 million, of which \$125 million has already been appropriated and paid to the Bank. The final United States contribution to the initial special funds mobilization has been included in the Administration's fiscal year 1977 supplemental appropriation request.⁴

For fiscal year 1978, the Administration is seeking \$203.6 million for the ordinary capital resources of the Bank. This amount consists of \$20.4 million in paid-in capital and \$183.2 million in callable capital.⁵ It represents the first of four annual U.S. subscriptions to the general increase in the Bank's capital stock approved by the Board of Governors in 1976. The Administration is also requesting \$60 million for fiscal year 1978 as the first of three equal U.S. payments to a 1976-1978 replenishment of the Bank's ADF special funds resources.⁶

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³Asian Development Bank Act, P.L. 89-369, 22 U.S.C. §§ 285-285h.

⁴Statement of C. Fred Bergsten, Assistant Secretary of the Treasury-Designate for International Affairs, regarding the Asian Development Bank, before the Subcommittee on Foreign Operations of the House Appropriations Committee, Feb. 17, 1977, at 10.

⁵*Id.* at 8.

⁶*Id.* at 12-13.

The Council for Mutual Economic Assistance (CMEA)

At the time of writing for the winter issue, with regard to the proposed economic cooperation agreement between CMEA and the European Economic Community (EEC), the EEC Council had not yet replied to the February, 1976, CMEA proposal. In November, 1976, the EEC did respond, indicating a willingness to cooperate in areas where the competencies of the two organizations are the same; i.e., in areas where CMEA (like EEC) is able to speak on behalf of its members. Such areas presumably would not encompass cooperation in trade matters (?), but could include such matters as environmental policy. In April of this year the president of the Executive Committee of CMEA transmitted a letter to the EEC, indicating a willingness to meet with the Council to continue the mutual dialogue regarding possible areas of cooperation.

Probably the major CMEA development to occur since the winter issue has been in the banking area. In February, 1977, the syndication of a \$200 million loan for the International Bank for Economic Cooperation (IBEC) did not materialize because of uncertainties with the application of British law, upon which the documentation for the loan was based. The lead Western banks receiving conflicting advice from British counsel on the issue of whether IBEC was a juridical person under British law, in order to conclude the loan agreement and in order subsequently to sue or be sued.

This issue had not previously been raised in earlier hard currency loans taken out either by IBEC (which had amounted to approximately \$200 million) or by the other CMEA bank, the International Investment Bank (IIB). But because of the legal uncertainties on this IBEC loan in Britain, the West German Dresdner Bank AG is currently syndicating a loan for the IIB with documentation based on West German rather than British law. Dresdner Bank has been assured by West German counsel that under West German law the IIB is a juridical person. In spite of this, at least in Britain and possibly in other countries, the question of the juridical personality of the two CMEA banks (and especially of IBEC) remains a lingering concern.

In passing, section 4 of a British statute, the International Organizations Act, 1968, establishes a procedure through which the United Kingdom recognizes the legal capacity of an international organization. However, in order to come within the terms of this section the organization must maintain an "establishment" in the United Kingdom, which neither IBEC nor IIB does. And apparently neither bank is inclined to obtain such an establishment in order to clarify its status under British law.

A number of provisions in both the IBEC and IIB statutes grant a legal personality to that particular bank. For instance, article XIII(1) of IIB's Articles of Agreement states that "The Bank (IIB) shall possess full juridical personality." Paragraph (4) of the same article further states that "The Bank shall not be responsible under obligations of member countries and member countries shall not be responsible under obligations of the Bank." Article 3 of the Statutes of IIB contains corresponding provisions, as does article 2(1), (2)(c) and (3) of the Statutes of IBEC.

The question then becomes one of how much weight a British or other Western court would give to these CMEA bank statutory provisions. In this regard, the court could decide that the law governing either bank's status would be the law of that bank's or of CMEA's domicile (i.e., the USSR).

Even if a court decided that either IBEC or IIB was a juridical personality for purposes of entering into a loan agreement, in case of default and subsequent suit against IBEC or IIB the question of sovereign immunity would arise. Contrariwise, if the court decided that the juridical person was in fact the member CMEA states collectively, the defense of sovereign immunity could presumably be raised by the states themselves. IBEC at least may be estopped from raising sovereign immunity as a defense because of article 2(2)(c) of its Statutes, which states that "The Bank has the right to . . . be sued in courts." In contrast, article XV(1) of IIB's Articles of Agreement states that "The property of the Bank . . . shall be immune from any form of juridical process, except when the Bank waives its immunity." Further, article 2(a) of IIB's Statutes merely states that "The Bank shall have power to . . . appear in legal . . . bodies." The proper interpretation to be given these two IIB provisions is certainly not clear, but at the very least they do not constitute a definitive consent to be sued.

In spite of this recent legal uncertainty, at least in Great Britain, about IBEC's legal status, there has been substantial growth in IBEC's operations in convertible currency as opposed to transferable roubles (TRs). TRs have been IBEC's accounting unit since 1964. It has been reported that IBEC's hard currency dealings in the past five years have tripled to 63.1 billion TRs, or \$83.4 billion at the official exchange rate. Further, article III of IBEC's basic agreement permits the bank's capital to be either in the form of TRs or convertible currency (or gold). Convertible currency has grown to represent half of IBEC's paid-in capital. This convertible currency is used not only to cover CMEA member countries' trade deficits with the West, but also (officially as of the March, 1975, CMEA meeting) to settle intra-CMEA deliveries above the level of deliveries agreed to annually by bilateral trade agreements.

IBEC, moreover, accepts convertible currency deposits, which have also grown markedly in recent years. IBEC loan placements of these funds go both to

CMEA member state banks and to outside banks. Recent outside recipients of IBEC loans have been two Algerian banks and the African Development Bank.

A final recent development regarding IBEC was a Procedure announced in October, 1976, by the bank's highest authority, the Council (see article 26 of IBEC's Statutes), regarding settlements in TRs between CMEA and Western countries. To a certain extent, this Procedure merely reiterated existing practice. Article IX of IBEC's Agreement already permitted IBEC to make payments in TRs to non-CMEA countries. The October, 1976, Procedure specifies that Banks in non-CMEA countries can use TRs to pay for CMEA imports and to repay IBEC credits. The Procedure adds desired flexibility for a country with a non-planned economy by eliminating obligatory annual bilateral settlements of TR accounts. In spite of this Procedure, no trade has yet been reported to have been negotiated in TRs.

At the most recent meeting of IBEC and IIB Councils (April, 1977), Vietnam applied for membership in both banks. That application is now under consideration. However, this does not mean that Vietnam has applied for membership in CMEA itself. In fact, Cuba first became a member of the banks before it was a member of CMEA, so Vietnam may be following this pattern.

Finally, the 79th meeting of the CMEA Executive Committee was held in Havana in January of this year. In addition to the CMEA member countries and observer Yugoslavia, the meeting was attended by representatives of Vietnam, North Korea and Guyana. According to the CMEA Communique of this meeting, the primary topics of discussion were procedures and projects through which the coordination of Cuba's economic development with CMEA could be strengthened.

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