

Therefore, much of Louisiana's elaborate old jurisprudence restricting trusts and prohibiting substitutions has no counterpart in Puerto Rican law. Puerto Rico's domestic civil law remained Spanish law after Puerto Rico became a territory of the United States in 1898. Since then, Puerto Rico has been a commonwealth under various organic acts of the United States Congress. Puerto Rico's people now have United States citizenship, common defense and common markets with the 50 states, and are subject only to United States federal control of customs, interstate trade, post office operations, the Coast Guard and adjudication of law suits involving federal jurisdiction.

A principal source for the choice of law and administrative provisions of Sections 8 through 12 of the proposed Trust Code is the New York Estates, Powers and Trusts Law, adopted there after years of study and analysis by the New York State Temporary Commission on the Law of Estates. The New York law is a useful model for these provisions, not only because of its comprehensiveness, but also because of the numerous business and financial relationships between New York and Puerto Rico. The Uniform Principal and Income Act, and revised Uniform Income and Principal Act of 1962, the Restatement of Trusts 2nd, the Model Spendthrift Trust Statute, and the Uniform Trusts Act are other source references for provisions of the proposed Trust Code.

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## **The New Protocol Relating to United States-Israel Air Transport Agreement of 1950\***

### **Introduction**

An Air Transport Agreement was signed by the Governments of Israel and the United States on June 13, 1950.<sup>1</sup> Israel at that time was making its very first steps in the field of civil aviation. This Agreement consisted mainly of an exchange of routes and traffic rights, and a machinery for determination and approval of tariffs. It granted El Al the right to operate between Israel and a few intermediate points in Europe and to New York.

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<sup>1</sup>Air Transport Agreement, June 13, 1950, United States-Israel, 3 U.S.T. 4582, T.I.A.S. No 2322.

On the other hand the Agreement granted TWA the right to operate from any point in the United States through points in Europe and North Africa to Israel and also to points beyond Israel.

The Agreement is based historically on the standard text developed at the Chicago Conference in 1944<sup>2</sup> and the Bermuda Agreement between the United States and the United Kingdom of 1946.<sup>3</sup> Indeed, since virtually all bilateral air transport agreements up to the inception of the present revolution by the CAB related to the basic Chicago or Bermuda scheme, the Agreement displays a remarkable similarity in many approaches to bilateral air agreements between other countries. It would therefore be useful to describe the background to these instruments for the benefit of the nonspecialized practitioner.

The Bermuda agreement was the result of a compromise between the conflicting preferences of the United States and the United Kingdom. The first for traditional antitrust considerations, the second for regulation and administrative limitations as to capacity, frequency, etc. This agreement consequently was based on the following principles, of which the object was to exclude unfair competition, and the effect to limit considerably the full "Five Freedom Rights":<sup>4</sup>

- (i) air transport facilities available to the traveling public should bear a close relationship to the requirements of the public for such transport;<sup>5</sup>

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<sup>2</sup>For the text of the Standard Form of Agreement for Provisional Air Routes adopted at the International Civil Aviation Conference, Chicago, 1944, see 1 PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE 127-29 (1948).

<sup>3</sup>The Bermuda Agreement, Feb. 11, 1946, United States-United Kingdom, 60 Stat. 1499, T.I.A.S. No. 1507, reproduced in B. Cheng, THE LAW OF INTERNATIONAL AIR TRANSPORT, app. D, note 1 (1962).

<sup>4</sup>*I.e.*, the right granted to each other by States which are parties to the 1944 Chicago "Five Freedoms Agreement." See 1 PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE, 179, app. IV (1944). The International Air Transport Agreement was intended as the vehicle whereby each adhering State would grant to each other adhering State the following freedoms of the air in respect to scheduled international air services:

- (1) The privilege to fly across its territory without landing;
- (2) The privilege to land for non-traffic purposes;
- (3) The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;
- (4) The privilege to take on passengers, mail, and cargo destined for the territory of the State whose nationality the aircraft possesses;
- (5) The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.

Very few of the world's nations and hardly any of the major air transport operating countries adhere to this particular agreement, although many have adhered to other portions of the package of civil aviation documents which were formulated at Chicago in December of 1944 for the conduct of international commercial aviation following World War II. (The United States was an early adherent but withdrew in 1946 because of the failure of other countries to adhere.) Nevertheless, other international air transport agreements are formulated, and international air transport is still conducted, with reference to these five "freedoms". Bilateral arrangements between countries for the provision of air transport services establish or withhold the freedoms to varying degrees on a case-by-case approach.

<sup>5</sup>Concretely, that the primary objective of the air agreement is to operate traffic between the territories of the contracting parties (third and fourth freedoms).

- (ii) in the operation of the trunk services provided for in the agreement, the interests of the other governments shall be taken into consideration so as not to affect unduly the services which the latter provide on all or part of the same routes;
- (iii) fair and equal opportunity to operate on any international route;
- (iv) adjustment of fifth freedom traffic<sup>6</sup> with reference (a) to traffic requirements in the country of origin and the countries of destination; (b) to the requirements of the area through which the airline passes after taking into account local and regional services; (c) to elimination of formulae to predetermine frequencies, etc.; (d) creation of machinery to obviate unfair competition by unjustifiable increases of frequency or capacity.<sup>7</sup>

Effect is given to these principles by the inclusion of provisions regarding capacity, rates or tariffs, and modification of routes.

In 1950, when the Agreement was concluded, New York City dominated international air transport to the United States. But at some later point the attractiveness of New York as either a stopover point or a connecting point diminished, and the positive increase in importance and population growth of urban centers outside New York has led to much greater interest of international carriers in serving additional points. In this situation, El Al was placed in an increasingly difficult position by being the only foreign carrier limited to serving transatlantic traffic through New York. Its vulnerability at New York was increased while flag carriers from other countries effectively diverted traffic between inland points in the United States and Israel from El Al, which could not serve these points.

Israel's quest for additional gateways to the United States therefore was consistent with the famous "equal opportunity" principle of Bermuda-type agreements. However, in several sessions of protracted negotiations, the United States was unwilling to adjust the Agreement. United States negotiating considerations at that time were purely commercial, relating mostly to allocation of economic and commercial benefits to both sides.<sup>8</sup> Under this approach, Israel's main difficulty has been its inability to offer United States airlines additional facilities for intercontinental traffic. Since geographical realities did not drastically change, Israel's request seemed futile as long as the United States did not affect a major change in its negotiating policy. The United States therefore agreed to change the Agreement only

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<sup>6</sup>The privilege to take on from the territory of the other party passengers, mail and cargo destined for the territory of a third country and the privilege to put down in the territory of the other party passengers, mail and cargo coming from such territory.

<sup>7</sup>See C. Shawcross & K. Geaumont, *ON AIR LAW* 281 (3d ed. 1966).

<sup>8</sup>During the last ten years El Al carried about 75 to 80% of the total traffic between the United States and Israel. This fact underlay the basic argument of the United States in refusing the grant of additional gateways to El Al.

upon the advent of a basic reversal of its policy in the field of international air transportation.

The main prop of this new policy is concern with greater competitive opportunities for United States and foreign airlines and promotion of new low-cost transportation options for travelers and shippers. The guiding line is to trade competitive opportunities, rather than restrictions, with the respective negotiating parties.<sup>9</sup> It appears that considerations as to relative potential value of rights exchanged by countries, primary under the prior Bermuda system, have now become peripheral.

This stated policy stands in clear contradiction to both the spirit and content of Bermuda-type agreements and mandates their complete redrafting. Accordingly, the United States on March 10, 1978 concluded an Air Transport Agreement with the Netherlands geared towards liberalization and limitation of government intervention to traditional antitrust considerations. The subject Protocol, signed between the United States and Israel at Washington, D.C. on July 18, 1978, is designed to achieve the same end. It certainly breaks new ground and justifies the following endeavor to clarify its structure, specific provisions, and bearing upon the future aviation relations between the two countries.

### **Overview of the Protocol**

The objective of the Protocol apparently is not only an exchange of routes and traffic rights, but establishment of a novel administrative, legal, economic and operational regime considered necessary for achievement of the declared goal of both governments, namely,

(T)o expand air services through elimination of restrictions and to promote an international aviation system based on competition among airlines in the market place with minimum government regulation, and . . .

To make it possible for airlines to offer the traveling and shipping public low fare competitive services and increased opportunities for charter air services between the two countries (The Preamble to the Protocol.)

The 1950 Agreement dealt basically with nine spheres of air relations:

1. Designation of airlines for the operation of agreed services;
2. Procedure for granting the operating authorization;
3. Applicability of national laws and regulations relating to the operation of aircraft and to admission to or departure from national territory of passengers and traffic;
4. Acceptance of IATA rate-fixing machinery and procedure relating to discussions on tariffs;
5. Recognition of aeronautical certificates and licenses;
6. Nondiscrimination in the imposition of airport and other charges;

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<sup>9</sup>See statement issued in March, 1978, entitled *United States Policy for Conduct of International Air Transportation Negotiations*.

7. Customs exemptions for fuel, oils, spare parts, etc., destined for use by aircraft providing service agreed on under the treaty provisions;
8. Amendment and termination of the Agreement;
9. Settlement of disputes.

In addition, the Annex to the Agreement sets forth the exchange of routes and traffic rights.

The Agreement relates only to scheduled international air transport, not charter traffic. The Protocol, on the other hand, clearly applies to both forms of air transportation. Indeed, it structurally bifurcates the provisions relating to scheduled air services and the provisions relating to charter air services. And to each category of services, different stipulations apply regarding traffic rights, procedure for establishment of tariffs, and applicability of national legislation relating to the operation of aircraft and to admission to or departure from national territory of passengers and traffic.

Since the Protocol thus relates to both scheduled and charter air services, the notion of "designated airlines" has a completely different meaning in the Protocol as compared with that in the Agreement. Bermuda-type air transportation agreements employ the term "designated airlines" meaning, in substance, air carrier or carriers duly designated by one party to exercise the traffic rights specified in the Agreement. These are invariably scheduled-service airlines, usually the national carrier of the designating country. However, the Protocol states that "(e)ach party shall be free to determine the type or types of services which its designated airlines may operate." Article 2(b) and (c) of the Protocol, read in conjunction with Articles 3 and 4 thereof, respectively, makes it clear that the term "designated airline" means practically any airline designated by each party to carry scheduled or non-scheduled (charter) traffic; and to remove any possible doubt, Article 2(e) explicitly derogates from the Bermuda-type definition of this term in the 1950 Agreement.<sup>10</sup>

Having clarified the scope and general structure of the subject Protocol, we now intend to take a closer look at some of its provisions in an effort to make the rules for the operation of air services under the Protocol as comprehensible as possible.

## **Scheduled Air Services**

### *Traffic Rights*

Each party to the Protocol has the right to designate an airline or airlines for the purpose of exercising scheduled air service rights.

This provision allows stimulation of competition between airlines belonging to the same party. The 1950 Agreement also allowed multiple designation, specifically in the Annex. But under the Agreement for the purpose of the implementation of its provisions, the fact of designation was not suffi-

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<sup>10</sup>Air Transport Agreement, *supra* note 1, art. 1(c).

cient; the carriers had also to be authorized by the other party.<sup>11</sup> In contrast, the Protocol stipulates that upon designation by one party of an airline as engaged in scheduled air services, such airline shall be permitted to exercise these rights. The other party cannot intervene to limit the number of airlines operating such services on the routes between the territory of the first party and its own territory.

By the terms of Article 3 to the Protocol, routes to be used by an airline or airlines to be designated by the United States are stated in fairly general terms, namely: "The United States via intermediate points to Tel-Aviv and beyond." In the schedule to the 1950 Agreement, the intermediate points were specified.

On the other hand, such routes to be used by an airline designated by Israel are stated with particularity. Intermediate points are specifically mentioned and four additional gateways in the United States granted, to be selected by Israel, only two of which may be served until August 1, 1979.

The memorandum of consultations made between the respective delegations concurrent with the Protocol in Section 3 records that "it was understood that Israel could request consultations in the future to consider its request for traffic rights between United States points and points in South America and Asia." Pending such consultations, the Protocol stipulates that Israel does not have traffic rights between Montreal and points in the United States or between points in and points beyond the United States.<sup>12</sup>

#### *Procedure for Establishment of Fares, Rates and Prices*

The pricing machinery set up in section IX of the Annex to the 1950 Agreement has been completely revised by Article 6 of the present Protocol. Under the prior system both governments could in effect veto any price proposal filed by an airline of the other party, but under the new system intervention possibilities are substantially curtailed, being limited to "prevention of predatory or discriminatory practices, protection of consumers from the abuse of monopoly position, and protection of airlines from prices that are artificially low because of direct or indirect governmental subsidy or support." Moreover, under the new system, effective as of August 1, 1979, although each party may still require scheduled airlines of the other party to file their fares, rates and prices, neither party can take unilateral action to prevent the inauguration or continuation of such prices. Concretely, while under the prior system the party objecting to the tariff filed with it could effectively dispose of the tariff by unilateral action, under the new system prices only can be disapproved *ex post facto* by both parties' agreement. Practically speaking, this means that airlines of one party are free from ready interference by the other party in their pricing.

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<sup>11</sup>*Id.* art. 3.

<sup>12</sup>*Id.* art. 3(2).

The Protocol also contains some new provisions regarding third parties that tend to extend the liberal impact of the Protocol as far as possible. By the terms of Article 6(E)(ii), the new pricing system shall extend to transportation between the two parties via the territory of any third country which has concluded pricing agreements similar to the Protocol with both parties. And under subparagraph (2) thereof, the parties agree to permit any airlines, including airlines of third countries, to match tariffs for service via third countries, conditional upon reciprocity as to ability to match tariffs. Note that in addition to the two conditions precedent stated in the Article, as a prior implied condition to these provisions becoming operative regarding third countries, such countries must possess so-called sixth freedom rights as to a party, i.e. in order to exercise these rights relating to tariffs the third country must have appropriate rights to operate under these circumstances.

### *Applicability of National Legislation*

The 1950 Agreement contains provisions applying the domestic laws, rules and regulations of one party to aircraft of the other party. A typical clause of a Bermuda-type agreement, Article 7 permits the withholding of the commercial operating authorization (or revoking of such authorization if already given, or imposing conditions thereon) in certain specified circumstances involving the qualifications of foreign airlines, their ownership and control, compliance with the laws and regulations of the country granting the authorization, or with the conditions prescribed by the Agreement.

One aspect of this situation is the possible procedural complexity, expense and delay occurring before the respective competent authorities take affirmative action to permit smooth operation of international traffic.

The Protocol<sup>13</sup> in general makes it an obligation upon each party to minimize the administrative burdens of filing requirements and procedures on airlines of the other party. In addition, the scope of information that each party may require of airlines of the other party has been substantially reduced in the Protocol. Under Article 7(f) only such advance information with regard to flights as is essential for customs, airports, air traffic control and airport slotting may now be required. Neither party is allowed to limit the volume or frequency of traffic or the type of aircraft operated by airlines of the other party, except as may be required for technical, operational or environmental reasons under uniform conditions<sup>14</sup> This very important provision reverses the Bermuda-type system of the 1950 Agreement under which all of these could be limited.

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<sup>13</sup>Art. 7(a).

<sup>14</sup>Art. 5(c)

## **Charter Air Services**

### *Traffic Rights*

Succinctly stated, Article 4(a) of the Protocol grants complete rights and unrestricted freedom of international traffic in passengers and cargo for charter air services covered by the Protocol.

This provision apparently makes it an obligation of both parties to open their territory to charter flights coming from the territory of the other party, and also the other way around, i.e., each party agrees to permit airlines of the other party to carry charter traffic in passengers and cargo to the other party. Since bilateral air transport agreements in Israel become operative upon government decision, the import of the subject clause is that upon such decision charter flights of Israelis to the United States will be permitted. The Protocol does not cover charter traffic originating outside the territory of both parties or traffic carried by an airline of one party between the territory of the other party and a third party.

### *Fares, Rates, and Prices*

*Filing.* This may be required by each party from the following two categories of airlines:

- (a) Airlines designated by that party;
- (b) Airlines designated by the other party, as to traffic originating in the territory of the first party.

But a party may not require price filing from an airline of the other party when traffic originates in the territory of that other party.

*Price Disapproval.* Even in cases where filing may be required, such as when traffic of one party's airline originates in the territory of the other party, the ban on unilateral action to prevent the inauguration or continuation of fares, rates and prices so filed still applies. The Protocol sets up a procedure for notification, consultation and concerted action by both parties, during which the prices in question immediately go into effect, or continue in effect.

### *Applicability of National Legislation*

A party's domestic rules regulate the conduct of all airlines designated by it. As to airlines designated by the other party:

- (a) They must abide by the applicable rules of the party in whose territory the traffic originates.
- (b) The first party can only request a declaration of the airline's conformity to the rules of the other party or a waiver of such rules when the traffic originates in the other party's territory.

The combined effect of these stipulations is that United States airlines carrying charter traffic to Israel are no longer required to abide by the Israel Licensing of Aviation Services (Charter Flights) Regulations, 5736-1976.

Likewise, Israeli airlines carrying charter traffic to the United States are not subject to similar CAB regulation.

### **General Provisions**

The Protocol contains various provisions relating to enforcement, security and commercial operations.

Article 8 relates to enforcement of the Protocol. It is an unusual provision in bilateral air agreements, necessary because the Protocol in form and substance practically derogates from Article 11 of the Chicago Convention<sup>15</sup> insofar as incoming traffic is concerned.

Thus, while each party may still take such steps as it considers necessary to regulate the conduct of domestic institutions offering or organizing services covered by the Protocol (Art. 8(c)), jurisdiction for enforcement of aeronautical rules and regulations is exclusive with the party in whose territory the traffic originates (Art. 8(a)). The stated aim of this stipulation is to put an end to the practice where the country of destination interferes with flights originating abroad (Art. 8(b)).

Article 9 relates to aviation security. Besides expressing the obvious concern of both parties for increased security, it adds a paragraph to Article V of the Agreement, tending to assure concerted action in these matters. Underlining the importance the parties attach to security, the provision permits each party to intervene in or interrupt traffic originating in the territory of the other party if it does not within a reasonable time heed the first party's requests to take affirmative action to enhance security.

Article 10 of the Protocol sets forth some rules of the economic game relating to sale of transportation, establishment of airlines' agencies, airlines' exemption from taxation, facilitation of transfer of funds accrued by airlines and currency exchange, etc. Note that the 1950 Agreement did not include an exemption from taxes on aircraft. In the United States, the commerce clause<sup>16</sup> gives Congress the exclusive power to regulate foreign commerce. This clause inherently limits a state's power to tax such commerce. However, by analogy to the situation regarding state taxation on instrumentalities used to convey cargo and passengers interstate, foreign airlines conceivably might face state taxation. In interstate commerce, the validity of taxation of airlines by a state depends on whether the airline has acquired the taxable situs in the taxing state required by the due process

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<sup>15</sup>Art. 11 of the Convention reads as follows:

Subject to the provisions of the Convention, the laws and regulations of a contracting state relating to the admission to or departure from its territory of aircraft engaged in international air navigation, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering to or departing from or while within the territory to that State.

Convention on International Civil Aviation, 61 Stat. 1180, T.I.A.S. No. 1591, ICAO Doc. 7300/5 at 5 (1975).

<sup>16</sup>U.S. CONST., Amendment 14.

clause<sup>17</sup> to establish the state's power to tax. If such situs exists within the particular state, an apportionment is required by the commerce clause to prevent the intolerable burden on interstate commerce which could result from multi-state taxation of the same carrier.

Against this background, the foreign practitioner should better understand the bearing of Article 10(g) to the Protocol. This provides for exemption on a reciprocal basis from taxes, charges and fees imposed by state, regional and local authorities on the aircraft and regular equipment, etc.

## **Conclusion**

The immediate effect of the Protocol is already felt at the time of this writing. It is inducing airlines to offer the traveling and shipping public low-fare competitive services and increased opportunities for charter air services between the two countries.

Practically speaking, the main impact of the Protocol will be twofold. On the one hand, designated airlines of one party would no longer be subject to unilateral intervention by the other party as to tariffs, even if they have traffic originating in its territory. On the other hand, designated carriers of one party having charter traffic originating in the territory of that party are no longer within the penumbra of the domestic legislation of the other party as to such traffic.

As a necessary corollary to this deregulation in pricing and control, the subject Protocol takes a substantial step towards liberalization in traffic rights by extending to Israeli airlines four additional gateways in the United States. This will offer a wider choice to the traveling and shipping public, further stimulate fair competition, and, one hopes, alleviate the grievances of Israel regarding the basic unfairness of the original Agreement in terms of commercial and economic opportunities.

From the historic viewpoint the Protocol constitutes a major breakthrough in the field of international civil aviation, in respect to the following matters:

(1) For the first time, after many rounds of negotiations, Israel obtained four more landing points in the United States. Until this, the national carrier of Israel served only New York. The importance of this achievement is somewhat obscured by the fact that the problem of "beyond" rights, *i.e.*, take-off in the United States of traffic destined for a third country, is still unresolved. According to the new Protocol Israel still has no beyond rights from the United States.

(2) For the first time in the history of their aeronautical relations, the two contracting parties have drastically changed the rate-fixing machinery and established a new system which marks the beginning of an entirely new era in the field of fares, rates and prices. At the same time one can assume

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<sup>17</sup>U.S. CONST., Amendment 14.

almost with certainty that for the International Air Transport Association (IATA) this agreement together with the agreement concluded by the United States with the Netherlands marks the beginning of the end of an era which lasted for three decades.

(3) For the first time, instead of controlled competition the parties agreed to operate on a basis of almost free competition with minimum intervention from governments. Accordingly the parties agreed not to interfere with capacity of aircraft, frequencies of flights and the relationship between national and other traffic.

(4) For the first time, the parties agreed on principles and rules governing nonscheduled charter flights.

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