

# Liberal Bilateral Air Transport Services Agreements and Sixth Freedom Traffic Carriage and Pricing\*

The new United States policy in the field of international air transportation envisages a system of aggressive price competition by carriers designated by the United States and its respective treaty partners.<sup>1</sup>

The innovative agreements made between the United States and Holland, Belgium, Germany and Israel probably place pressure upon other countries with a predominantly European background to permit the emergence of a multilaterally competitive market environment. But whereas the United States strives to export its domestic deregulation policy worldwide, evidence suggests that as a method of generating treaty partners' enthusiasm for worldwide deregulation, the new bilaterals have been less than successful. Indeed, it seems that most United States partners to the new bilaterals have found it in their interest to adapt to the prevailing views in Washington primarily because of the potential value to their respective designated carriers of the extension of new traffic points in the United States. The proliferation worldwide of a system whereby governments give up their authority over price control was not directly a concern of these United States' negotiating partners, irrespective of the merits they might have thought the new system held for themselves.<sup>2</sup>

Seen in this light, this article will take a close look at third party provisions in subject bilaterals in an effort to clarify their scope, content, and bearing on the multilateral proliferation of a regime of route and pricing freedom for airlines.

## I. Traffic Rights

Bilateral air transport agreements are comprehensive in character and fully responsive to bilateral concerns at the time of their making. They express the entire agreement of the parties. Since there are practically no considerations which would restrict the power of two negotiating sovereign States to include in their bilateral agreement any provisions deemed desirable, the agreed upon

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\*The views expressed in this article are the personal views of the author and do not have any official standing whatsoever.

<sup>1</sup>See Presidential Statement, United States Policy for the Conduct of International Air Transportation Negotiations (Aug. 21, 1978).

<sup>2</sup>But note, for example, that the Preamble to the 1978 Protocol to the United States-Israel Air Transport Agreement of 1950, 3 U.S.T. 4582, T.I.A.S. No. 2322 states the desire of both governments "to expand air services through elimination of restrictions and to promote an international aviation system based on competition among airlines in the marketplace with minimum governmental regulation, . . ." See Bernstein & Fodor, *The New Protocol Relative to United States-Israel Air Transport Agreement of 1950*, 13 INT'L LAW. 356, 359 (1979).

exchange of routes and traffic rights is mutually exclusive of any rights not specified therein. Therefore, only those bilateral air agreements which specifically authorize sixth freedom traffic carriage<sup>3</sup> bestow the right to carry such traffic.

The subject bilaterals consistently and repeatedly refer to the need to provide for traffic between the territories of the two parties by the airlines of both countries.

The concerns for low fare competitive services are provided for by the inception of a regime of multiple designation. This means that a party has the right to designate any number of carriers which conform to certain conditions to exercise traffic rights granted to that party. Designation of more carriers than the specific market can bear may be predatory.

Whether or not third party airlines have sixth freedom rights for transportation via their countries is a question the answer to which is to be found in their respective bilaterals with the United States and the party affected.

## II. Tariffs

Under article 6(E)(ii) of the United States-Israel Protocol,<sup>4</sup> any United States and Israeli airline may match prices offered by United States or Israeli designated airlines on flights between the United States and Israel if the transportation takes place via a third country on an intra-line (on-line)<sup>5</sup> or inter-line<sup>6</sup> basis. Airlines of a third country may match such prices if that third country allows United States and Israeli airlines to match the prices offered by its airlines for transportation between the third country and Israel or the United States.

The position of Israel is that this provision does not create traffic rights in sixth freedom in and by itself. Where the airline concerned is possessed with sixth freedom rights between the United States and Israel, it can match the fares offered by United States and Israel designated airlines if the proviso is satisfied.

Thus, for example, under the Israel-France Bilateral Agreement of 1952, Air France is granted the right to carry traffic between the United States and Israel in sixth freedom. Air France should be permitted to match Israel-United States prices via Paris if France permits United States *v-à-v* Israeli carriers to match France-Israel *v-à-v* France-United States prices in fifth freedom.

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<sup>3</sup>Traffic carried from a point of origin in one foreign country to a point of destination in another foreign country via the country of nationality of the airline.

<sup>4</sup>Bernstein & Fodor, *supra* note 2, at 362.

<sup>5</sup>Intra-line or on-line basis involves a single air carrier only.

<sup>6</sup>Inter-line basis, on the other hand, involves two or more air carriers.

The implementation of this provision in Israel encountered some practical difficulties, mainly because applicants for price matching tended to misconceive the issue as arising with regard to International Air Transport Association (IATA) fares.

IATA fares are established by the unanimous approval of all airlines participating at IATA conferences, and are approved by all governments concerned. Any airline can use these fares (that is, sell transportation, issue tickets) on the services of other airlines, pursuant to IATA Resolution 850 and the multilateral interline agreement effective between airlines.

Even under the IATA system, Israel's position is that no airline has the right to use an established schedule fare on its own services, unless such airline has rights on the route for which the fare is established. But because of the multilateral nature of tariff matching and interlining arrangements within IATA, it is difficult as a practical matter to ensure that use of fares does not become operation of routes in sixth freedom.

The IATA pricing system does not apply under the subject agreements. Instead, tariffs are established unilaterally by designated carriers of the parties. This by definition denotes that no scheduled fare can be established except where the airline establishing such fare has the rights to the routes for which such fare is being established. As under the IATA system, Israel's position under the new system is that airlines of third countries can only match the fares offered by the designated airlines for United States-Israel traffic if they have the rights on the routes for which such fares are being matched.

However, under the new system the Israeli argument is carried one step further, thus eliminating the practical difficulty mentioned above. Since the new system practically terminated the IATA multilateral agreement between airlines, no airline under the new system can use a unilateral fare (sell transportation, issue tickets) on services of other airlines, except upon such terms and conditions as might be agreed upon between the airlines concerned and as approved by the respective governments.

In order to accommodate stopover<sup>7</sup> passengers, it became important for El Al to make interlining agreements with various third-country airlines. Israel's position has been that these agreements by themselves do not grant sixth freedom tariff participation (matching of tariffs of the third<sup>8</sup> and fourth<sup>9</sup> freedom carriers) because they relate only to transfer of passengers and part execution of the package that passengers buy exclusively from El Al on the return leg.<sup>10</sup>

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<sup>7</sup>A stopover is defined as a deliberate and intentional interruption of a journey by the passenger, scheduled to exceed twenty-four hours, at a point between the place of departure and the place of destination.

<sup>8</sup>The right to deplane in the foreign country traffic that was enplaned in the home country of the carrier.

<sup>9</sup>The right to enplane traffic in the foreign country that is bound for the home country of the carrier.

<sup>10</sup>Carriage of traffic on one leg (outboard or inbound) by one carrier would still be interlining when carriage on the other leg is done by another carrier.

The combined effect of these positions is that Israel does not allow the matching of a fare, or the sale thereof, to be used as a means for establishing traffic rights which do not exist.

### **III. Point-to-Point Traffic**

Under the above explained interpretation of the pertinent provisions of its liberal bilateral agreement with the United States, Israel combines the consumer welfare, requiring the lowest possible prices for air transportation, and the airline interests, requiring the highest possible average load factors<sup>11</sup> and overall efficiency in the production and distribution of air travel. The government has practically no say over air fares, but it still can restrict entry to the low fare air traffic market as far as sixth freedom traffic carriers are concerned.

The results achieved as far as market entry by sixth freedom carriers is concerned closely resemble the regime envisaged under the new Australian Air Policy released in October 1978. This policy makes sixth freedom traffic carriage impossible at through fares<sup>12</sup> at the level of direct, point to point fares approved for third and fourth freedom traffic carriers. The policy effectively combines the advantages of charter and scheduled transportation stemming from the limitation of end-to-end traffic carriage to third and fourth freedom traffic carriage.

As regards traffic to or from Israel, these results can be changed, bringing third, fourth, fifth<sup>13</sup> and sixth freedom carriage under the same tariff regime, through the vehicle of article 6(E)(1) of the United States-Israel Protocol. This refers to a situation where both the United States and Israel have concluded agreements with a third-country embodying the system whereby the governments give up their authority over unilateral price control.

### **IV. Dispute Potential**

Transit countries which consider sixth freedom traffic as a combination of third and fourth freedom traffic should find fully consistent with their views a system where, as a practical matter, sixth freedom traffic carriage is no longer possible at through fares but instead obliges the airlines transporting traffic effectively between two foreign countries to quote the applicable third and fourth freedom fares on the sectors to and from their home country.

The effect of this situation on Israel's air relationship with other countries has varied. Most European countries went along. The opposition came from those countries whose airlines' sixth freedom traffic is substantial for the operation of the Israel route, and who could not get the requisite approval of the Israel aeronautical authorities who were seeking to prevent excess capac-

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<sup>11</sup>Average load factor is the percentage of total capacity available for passengers, freight and mail which is actually sold and utilized.

<sup>12</sup>Through fares is the total fare from point of origin to destination.

<sup>13</sup>The right to enplane traffic in the foreign country of a party to the bilateral agreement and deplane it in another foreign country.

ity. The opposition focused on the described fare scenario, which effectively prevented these airlines from competing in the Israel-United States low fare traffic market.

### **Conclusion**

In practice, the new regime established in liberal bilateral air transport agreements underlines the importance of end-to-end, point-to-point air traffic carriage, which is available mainly to third and fourth freedom traffic carriers.

Price leadership, that is, the right to inaugurate prices, belongs under the subject agreements to the carriers designated by the parties. Such price leadership can be enjoyed by third-country carriers only if that country concludes similar agreements with both parties to the bilateral agreement, thus promoting a system of multilateral pricing freedom in international air transportation. A lesser concession granted to third country airlines possessed with sixth freedom traffic rights as to the parties is the right to match prices, that is, to follow price leadership.

Third country airlines which do not have the requisite traffic rights can neither follow prices for use on their own services, nor can they under the new system sell, without further agreement, transportation or issue tickets for use on the services of airlines who do have the requisite traffic rights.

A year's experience in the described method in Israel tentatively shows the following:

1. Airlines faced with little threat of entry from sixth freedom carriers would nevertheless engage in vigorous price competition due to the system of unilateral pricing.
2. The tariff mechanism retained in the subject agreements will prevent sudden or hidden price reductions and allow other carriers entitled to operate the routes to signal their responses to any tariff which is filed proposing fare cuts.
3. Passenger travel between the United States and Israel under the new system increased by 41.6 percent despite the much stronger limitation of sixth freedom traffic. Indeed, Israel almost tops the list of the top fifty countries ranked by total number of passengers for January to June 1979 as compared to same period in 1978.<sup>14</sup> Israel is surpassed only by Belgium (with 68.4 percent increase) and Australia (with 42.1 percent increase).

Israel is closely followed by the Netherlands (with 31.9 percent increase). Note that all these countries are mentioned in this article as leaders in the liberalization drive. From a traffic increase point of view the new methods thus seem to be highly commendable.

I. BERNSTEIN

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<sup>14</sup>See U.S. DEP'T OF TRANSPORTATION NEWS, Table 4, at 6 (Aug. 23, 1979).