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BILATERAL AGREEMENTS ON AIR TRANSPORT

BY O. J. LISSITZYN†

THERE is no widely accepted multilateral treaty which provides for the granting of traffic rights to foreign airlines. Article 6 of the Chicago Convention of 1944¹ states:

No scheduled international service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

Consequently, the operation of international scheduled airlines depends on the consent of the states to or through the territory of which they fly. The privilege to fly across a state's territory without landing, and the privilege to land for non-traffic purposes, are mutually granted for scheduled international air services by the parties to the International Air Services Transit Agreement formulated at the Chicago Conference of 1944,² to which the United States and some sixty-five other nations are parties. These two privileges, which facilitate transit, are commonly called the First and Second Freedoms respectively. Distinct from these, are the so-called Third, Fourth and Fifth Freedoms, which make international air commerce possible. These Freedoms may be roughly defined, respectively, as the privilege to put down passengers and cargo taken on in territory of the state whose nationality the airline possesses; the privilege to take on passengers and cargo destined for the territory of the state whose nationality the airline possesses; and the privilege of carrying traffic, on a route to and from the state whose nationality the airline possesses, between two other states. The possession of these privileges by a foreign airline depends either on a unilateral grant by a state, or on a bilateral agreement between the state of the airline and the other state. Since World War II, close to a thousand bilateral agreements concerning these privileges have been made between the states of the world.

Before World War II, the United States government generally permitted its airlines to obtain operating rights abroad through their own arrangements with the foreign governments concerned. In that period, few governments outside North America desired reciprocal rights in the United States for their airlines. During the war, however, the policy of the United States was changed in favor of operating rights abroad being obtained by

† Oliver J. Lissitzyn, an Associate Editor of this Journal, is Professor of Public Law at Columbia University. An earlier version of this article appears in *The Record*, Association of the Bar of the City of New York, Volume 19, pages 185-202. It was prepared by Professor Lissitzyn as a project under the auspices of the Committee on Aeronautics of The Association of the Bar of the City of New York of which Richard B. Smith is chairman. Professor Lissitzyn is a member of the Committee and chairman of its Subcommittee on Bilateral Agreements, International Conventions and International Rate Regulation. The article was prepared for informational purposes only. It does not purport to take positions or make recommendations, and is not intended to serve as a basis for any recommendations.

¹ 61 Stat. 1180 (1947).

² 59 Stat. 1693 (1945).

inter-governmental agreements, whenever feasible, and today the United States has bilateral air transport agreements with some fifty nations. Such agreements are concluded as "executive agreements" rather than "treaties," and are negotiated by teams composed of officials of the Department of State and Civil Aeronautics Board, with the Department of State having the primary responsibility. Section 802 of the Federal Aviation Act of 1958 provides:

The Secretary of State shall advise the Administrator, the Board and the Secretary of Commerce, and consult with the Administrator, Board, or Secretary, as appropriate, concerning the negotiations of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services.

A representative of the United States air carriers sits in during the negotiations as an observer. Many of the agreements have been amended, some more than once.

By Section 1102, the Civil Aeronautics Board and the Administrator of FAA are directed to exercise and perform "their powers and duties under this 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. . . ." This provision is normally cited by the Board in issuing, under Section 402, foreign air carrier permits to airlines of countries which have air transport agreements with the United States, although its precise legal effect is not free from doubt. The Board's actions with respect to foreign air carrier permits under Section 402 are by Section 801 subject to the approval of the President, and by Section 1006 are exempt from judicial review. The President's power is not merely that of a veto; he can disapprove the *denial* as well as the *issuance* of a permit, and also the terms and conditions attached to it. It has been uniformly treated as a power to direct the Board's action. It is the President, therefore, who decides with final effect whether or not a permit should be issued to a foreign airline, whether or not such issuance is required by a bilateral agreement, and what terms and conditions should be attached to the permit. The Board's function is recommendatory.

A typical bilateral air transport agreement of the United States contains numerous provisions, many of which are standard and noncontroversial. The provisions which have given rise to most of the difficulties and criticisms have been of two related categories: (1) Route descriptions; (2) Standards designed to govern the types of traffic carried and the capacity operated. Provisions concerning rates may also give rise to some problems.

The route descriptions, which are usually set forth in special annexes or schedules, are designed to limit the access of the airlines of one party to the traffic to or from the territory of the other party. They specify, in terms of greater or lesser generality, not only the traffic points in territories of the two contracting parties, but also the points in third states which may be served under the agreement. For example, the route schedule annexed to the 1957 agreement between the United States and the Netherlands³ reads as follows:

³ Air Transport Agreement with the Government of the Kingdom of the Netherlands, April 3, 1957, 12 U.S.T. & O.I.A. 837, T.I.A.S. No. 4782.

1. An airline or airlines designated by the Government of the United States shall be entitled to operate air services on each of the air routes specified via intermediate points, in both directions, to make scheduled landings in the Kingdom of The Netherlands at the points specified in this paragraph:
 - a. From the United States via intermediate points to Amsterdam and beyond.
 - b. From the United States and/or an airport serving the Canal Zone via intermediate points to Aruba, Curacao, St. Maartens, and Paramaribo and beyond.
2. An airline or airlines designated by the Government of the Kingdom of The Netherlands shall be entitled to operate air services on each of the air routes specified via intermediate points, in both directions, and to make scheduled landings in the United States at the points specified in this paragraph:
 - a. The Netherlands via intermediate points in the UK, Ireland, Newfoundland and the Azores to New York.
 - b. The Netherlands via intermediate points in the UK, Ireland, Iceland, Greenland, Newfoundland, Azores and Montreal to Houston.
 - c. The Netherlands Antilles via the intermediate points Ciudad Trujillo, Port au Prince, Kingston, Montego Bay, Camaguey, Havana, to Miami.
 - d. The Netherlands Antilles to New York.
3. Points on any of the specified routes may at the option of the designated airlines be omitted on any or all flights.

Frequently, the possession of "beyond" rights is very important. For example, the omission of the words "and beyond" in the description of the Netherlands route *b* above means that KLM has no right to take on traffic in Houston for carriage to Mexico City or to discharge at Houston traffic taken on at Mexico City. It should be further noted that the exercise of the rights granted in a bilateral agreement often depend on the possession by the airline concerned of traffic rights in third states. On the Netherlands—Houston route, for example, KLM is not authorized by the Canadian Government to carry Montreal-Houston traffic.

The purpose of restricting the opportunities of a foreign airline to compete for traffic is further served by provisions setting forth certain standards with respect to the type of traffic (especially so-called Fifth Freedom traffic) permitted to be carried and the capacity permitted to be operated by the foreign airline. In the bilateral agreements of the United States made immediately after the Chicago Conference of 1944, no such restrictive standards were set forth. The airlines designated under these agreements were to be permitted to carry international traffic, including so-called Fifth Freedom traffic, on the specific routes, and no restrictions on capacity were mentioned. At that time, the United States was in favor of maximum freedom of operation for international airlines. Since foreign airlines were then too weak to offer effective competition, many foreign governments, including that of the United Kingdom, were unwilling to grant such unrestricted freedom. In a compromise achieved at Bermuda in February 1946, the United States and the United Kingdom agreed to include in the bilateral agreement they signed the so-called Bermuda formula governing traffic and capacity.⁴ As conveniently rearranged in some subsequent agreements, this formula reads as follows:

⁴ 60 Stat. 1499 (1946).

- a. The air transport facilities available hereunder to the travelling public shall bear a close relationship to the requirements of the public for such transport.
- b. There shall be a fair and equal opportunity for the airlines of the contracting parties to operate on any route between their respective territories (as defined in the Agreement) covered by this Agreement and Annex.
- c. In the operation by the airlines of either contracting party of the trunk services described in the present Annex, the interest of the airlines of the other contracting party shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes.
- d. It is the understanding of both contracting parties that services provided by a designated airline under the present Agreement and Annex 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 country of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in the present Annex shall be applied in accordance with the general principles of orderly development to which both contracting parties subscribe and shall be subject to the general principle that capacity should be related:
 1. To traffic requirements between the country of origin and the countries of destination;
 2. to the requirements of through airline operation; and
 3. to the traffic requirements of the area through which the airline passes after taking account of local and regional services.⁵

This formula avoided the "predetermination" of capacity which had been favored by the British but opposed by the United States. Yet it imposed restrictions, though in very general terms. Probably the most significant element in the formula is the "understanding" that "the primary objective" of a service is to provide "capacity adequate to the traffic demands between the country of which such airline is a national and the country of ultimate destination of the traffic," that is, Third and Fourth Freedom traffic, which has consequently come to be called "primary justification" or "primary entitlement" traffic. If either government felt that an airline of the other party was not conforming to these restrictions, there was to be consultation between the aeronautical authorities of the two parties—or what came to be known as *ex post facto* review. Provision was thus made for a flexible administration of the capacity standards, which are evidently open to more than one interpretation in practice. Subject to these standards, the Fifth Freedom was mutually accorded.

The Bermuda Agreement became a model for all subsequent United States agreements, and the capacity formula was incorporated, in some cases with minor changes, not only in such agreements, but also, with the consent of the other parties, in many of the agreements previously made. The only agreement of the United States which contains, in effect, a supplementary "predetermination" provision is that concluded with India in 1956.⁶

Many consultations under the Bermuda formula have been held between

⁵ United States and Venezuela, August 14, 1953, Annex, Sec. IV, 4 UST 1493 (1953) Part 2.

⁶ Air Transport Agreement with the Government of India, February 3, 1956, 7 U.S.T. & O.I.A. 275, T.I.A.S. No. 1591.

the United States and foreign governments. Most of these consultations were initiated by foreign governments and some resulted in reductions of frequencies operated by United States-flag carriers on certain segments of their routes. These reductions were designed primarily to prevent the carriage of what the foreign governments concerned alleged to be excessive volumes of Fifth Freedom traffic. The details and results of such consultations are usually not made public.

Bilateral air transport agreements and their implementation have from time to time been criticized in the United States with respect both to the route exchanges and the capacity clauses. Such criticism has been most acute in two recent periods—1955 to 1957, and 1960 to 1962. During the first of these periods, criticism was focussed on the route exchanges embodied in the agreements between the United States and certain foreign countries, especially Germany, the Netherlands and Australia. Certain United States air carriers and their supporters charged that the United States received less than it “gave away,” and that considerations extraneous to the exchange of traffic rights entered into the agreement-making process.

The conclusion of the agreement with Germany⁷ coincided with a visit of Chancellor Adenauer to Washington, lending strength to the suspicion that high policy considerations contributed to the decision to grant to the German airline what appeared to be rather liberal treatment with respect to the route exchange. In particular, the German airline obtained operating rights on a route from Germany via intermediate points in the United States (including New York) to the Caribbean area and South America. (By the end of 1963, the German airline had not begun flying the segments of this route south of New York.) The critics of the agreement, notably National Airlines and the Air Transport Association, charged that it gave to the German airline access to the traffic between New York and South America which was, for Germany, Fifth Freedom traffic, to the detriment of certain United States domestic and international air carriers, and that the routes via Germany granted to the United States were not of equivalent value. At the behest of the critics, the Senate Committee on Interstate and Foreign Commerce held hearings on “International Air Agreements” and issued a report highly critical of governmental policy and procedures in the matter.⁸ Figures submitted by the CAB and printed in the report showed that according to United States government estimates the German airline would earn 1,809,000 dollars by the carriage of Fifth-Freedom traffic to and from the United States, not including traffic between the United States and points beyond Germany, while United States-flag carriers would earn only 1,021,000 dollars by the carriage of Fifth-Freedom traffic to and from Germany, not including traffic between Germany and points beyond the United States. In further support of its criticism, the Committee gave the following estimates:

⁷ Air Transport Agreement with the Federal Republic of Germany, July 7, 1955, [1956] 7 U.S.T. & O.I.A. 527, T.I.A.S. No. 3536.

⁸ International Air Agreements, Rep. of Comm. on Interstate and Foreign Commerce, U.S. Senate, S. Rep. No. 1875, 84th Cong., 2d Sess. (1956).

COMPARISON OF ESTIMATED THIRD-COUNTRY PASSENGER TRAFFIC CARRIED
BY SELECTED FOREIGN-FLAG AND UNITED STATES-FLAG CARRIERS
OVER THE NORTH ATLANTIC, 1953

Carrier	Secured by foreign carriers from the United States	Secured by United States carriers from homeland of foreign carrier indicated
KLM	\$9,273,000	\$53,000
SAS	7,839,000	105,000
Sabena	5,150,000	100,000
BOAC	3,408,000	2,892,000
Air France	4,826,000*	3,911,000
Swissair	2,526,000	753,000

* Includes New York-Mexico 1954 figures.

The Committee admitted, however, that complete traffic data for the operations of foreign-flag airlines were not available, and presented no estimates of the over-all balance of Fifth-Freedom traffic earnings.

In its conclusions and recommendations, the Committee found no occasion to criticize the Bermuda principles, noting that the United States airlines endorsed them, but urged their enforcement. It opposed the granting of routes to foreign carriers which could not be economically operated without violating the Bermuda capacity principles. It favored closer participation by representatives of the air transport industry in the negotiation of the agreements, and, to that end, recommended that a representative of the industry be made a duly accredited member of any United States delegation appointed to negotiate any agreement. Subsequently, the Committee proposed legislation to carry out the latter recommendation and also to restrict Presidential review of the decisions of the Board concerning certificates for foreign air transportation and foreign air carrier permits.⁹ Such legislation was not enacted by Congress. A bill proposing to write into the Civil Aeronautics Act the gist of the Bermuda formula (S. 2540, introduced on July 12, 1957) also failed of passage.

The Department of State asserted that the United States government representatives in international negotiations "are charged with the responsibility for taking into consideration the interests and well-being of all segments of the United States," that in connection with air transport negotiations "these interests include the interests of the traveling public, the interests of the areas served by air transport operations, and the interests of the air transport industry," and that "the government makes every effort to balance conscientiously all of these interests so that the welfare of the United States as a whole will be served."¹⁰

The agreements concluded with the Netherlands¹¹ and Australia¹² in 1957 gave rise to further criticism of the "route give-aways" in the indus-

⁹ See Improvement of Procedures for the Development of Foreign Air Commerce, S. Rep. No. 2586, 84th Cong., 2d Sess. (1956); also Improvement of Procedures for the Development of Foreign Air Commerce, S. Rep. No. 119, 85th Cong., 1st Sess. (1957).

¹⁰ *Id.*, at 10.

¹¹ Air Transport Agreement with the Government of the Kingdom of the Netherlands, April 3, 1957, 12 U.S.T. & O.I.A. 837, T.I.A.S. No. 4782.

¹² Air Transport Services Agreement with Australia, August 12, 1957, 8 U.S.T. & O.I.A. 1334, T.I.A.S. No. 3880.

try and in Congress. The Netherlands agreement was concluded after the Dutch government had raised the issue at the highest levels—in a speech from the throne to Parliament and in a special appeal by the Prime Minister to the President of the United States. The agreement, however, did not wholly satisfy the Netherlands. The latter nation received operating rights for its airline on the routes Amsterdam-New York-Curacao and Amsterdam-Montreal-Houston, but failed to get the Amsterdam-Montreal-Los Angeles route for which it also strongly pressed. The Netherlands had little to offer as a *quid pro quo* in the way of air transport privileges, but good relations with a NATO ally seemed to be at stake. A Department of State official described the situation in these words:

. . . This negotiation was peculiarly illustrative of the conflict of interests that may develop in aviation relations. Both countries had for some time operated reciprocal routes under temporary arrangements. Since the United States airlines felt that the Netherlands did not have much to offer beyond the rights already enjoyed, they were firmly opposed to the granting of additional routes to the Dutch.

This view was shared by the pertinent committees of the Congress. In contrast, the United States communities to which the Dutch proposed services were eager to have the routes granted and besieged the Department with letters, telegrams, and personal calls in support of the Dutch requests. In addition, the views of American aircraft manufacturers had to be noted. The Dutch airline, KLM, is the largest foreign purchaser of United States civil aeronautical equipment and now has over \$100 million worth on order. The Dutch wanted extensive additions to their operating rights to the United States.

The Dutch contention was that KLM is one of the Netherlands' biggest industries, that it provides necessary foreign exchange to the Netherlands, and that it is a symbol of Dutch internationalism and initiative. KLM must be able to expand to enhance the Dutch economy and to assist the nation to maintain its position in international affairs.

It was up to the Executive to determine what decision would be in the best overall national interest. Whatever decision was made would have its critics. Finally it was decided the Dutch should have some of their request but not all. This enabled the United States to obtain the type of agreement it desired and air rights beyond Amsterdam. But the Dutch were not fully satisfied. The United States airlines called the agreement a "give away" and claimed that they were being made to pay for interests outside the aviation field. Bills have been introduced in Congress designed to limit the Department's negotiating powers in aviation agreements. The community to which a route was not granted to the Dutch, on the other hand, complained vigorously and one of its newspapers carried an editorial attacking the State Department for the omission.¹³

Australia obtained operating rights on a route to London via San Francisco and New York. The rights granted to the United States in return, including those on a route through the Antarctic, were not regarded by the American air transport industry as constituting an adequate *quid pro quo*. The Australians, however, were reported to have produced statistics indicating that a substantial volume of through traffic from Australia to Europe would be available on the route across the United States. The State Department felt that refusal to grant the route would set an undesirable

¹³ Kalijarvi, *The Paradox of Foreign Economic Policy*, 36 Dep't State Bull. 1009, 1013 (1957).

precedent. "The bargain was a fair one. . . . The Australian negotiations showed justification for the route through the United States. Refusal to grant it would have set an example damaging to our own international airlines, which need similar rights for their continued well-being."¹⁴

Since 1957, perhaps as a result of the views expressed by the United States air carriers to Congress and elsewhere, no additional agreements provoking criticism as "route give-aways" have been made by the United States. Belgium, the Netherlands and Italy all failed in their efforts to obtain routes from Europe to the West Coast. An agreement with the U.S.S.R. though negotiated, has not been signed, and the contents of the draft have not been made public.

In the last four or five years, the brunt of the criticism of the bilateral-agreement system has been directed at the alleged violations or abuse of the Bermuda capacity standards by certain foreign air carriers, and at restrictions placed on the operations of United States-flag air carriers abroad under similar agreements with certain other countries. In this connection, as also in connection with the "route give-aways" of the 1955-1957 period, the charge is often heard that the Department of State is "weak" in protecting the interests of the United States-flag carriers. Furthermore, the adequacy of Bermuda-type agreements—which were endorsed by the airlines in 1955-1957—has begun to be questioned.

The peak of dissatisfaction in industry and governmental circles with the operation of the existing system appears to have been reached in 1961, when it was manifested in the "Project Horizon" Report of the Task Force on National Aviation Goals,¹⁵ a hearing held before the Aviation Subcommittee of the Senate Committee on Commerce,¹⁶ speeches by high officials,¹⁷ and a proposal by the CAB that foreign air carriers permits be amended to enable the Board to require their holders to furnish the Board with traffic data and to file their schedules with the Board for approval.¹⁸ The latter proposal was designed to control the operation by foreign air carriers of capacity in excess of that regarded by the Board as permissible under the bilateral agreements. It evoked strong protests by a number of foreign governments and airlines, who challenged the right of the United States under the agreements to take such measures.

The more specific causes of dissatisfaction or concern have been principally the following:

1. In order to protect their relatively weak airlines, certain nations impose restrictions on the carriage of traffic by United States-flag air carriers which the latter regard as excessive and arbitrary. Some of these restrictions are based on interpretations of the Bermuda capacity formula which are not accepted by the United States.
2. At the other extreme, certain foreign airlines, mostly European, carry allegedly excessive volumes of what is regarded by the United States as

¹⁴ Dillon, *International Air Transportation Policy: The Mutual Security Program*, 37 Dep't State Bull. 877, 879 (1957).

¹⁵ Federal Aviation Agency, Report of the Task Force on National Aviation Goals—Project Horizon, 106-129 (Sept. 1961).

¹⁶ Hearings on International Air Transportation Problems before the Aviation Subcommittee of the Committee on Commerce, U.S. Senate, 87th Cong., 1st Sess. (1961).

¹⁷ See, e.g., address by Alan S. Boyd, Chairman, CAB, before the Commonwealth Club of California, San Francisco, July 14, 1961 (mimeographed).

¹⁸ CAB, Orders, No. E-16288 (Jan. 18, 1961).

Fifth Freedom traffic, in violation of the American interpretation of the Bermuda capacity formula. The foreign airlines most frequently mentioned in this connection are KLM, SAS and Sabena. According to the American view, most of the capacity operated by these airlines across the North Atlantic is used not for "primary justification" (Third and Fourth Freedom) traffic between the United States and the nation of the carrier, but for traffic between the United States and third countries *via* the homeland of the carrier. Most of the European countries concerned have refused to accept the American view of what Fifth Freedom traffic means. These countries regard traffic carried via the homeland of the carrier (sometimes called "Sixth Freedom" traffic) as merely a combination of Third and Fourth Freedom traffic with respect to the carrier's nation, and therefore as not covered by the restrictive Bermuda standards. The "Sixth Freedom" problem does not appear to have been anticipated at Bermuda. At a consultation initiated by the United States and held in September 1960 with the Scandinavian nations, the latter refused to accept the American view, and the consultation ended in complete disagreement.¹⁹ It is understood that in 1961 the United States also made an unsuccessful effort to obtain Dutch concurrence in its interpretation of the formula in return for a KLM route to the West Coast.

3. The number of foreign airlines operating to the United States continues to increase. Many of the newcomers may be unprofitable and subsidized for prestige reasons, but every newcomer takes some traffic away from United States-flag carriers. Yet the United States is not in a position to refuse operating rights to many new foreign airlines, since it needs reciprocal rights for its own carriers.

4. Many foreign airlines have shown a tendency to form pools and other combinations (such as the Air Union, a proposed combine of French, Belgian, German and Italian airlines, and the Commonwealth pool of British, Australian, Indian and Canadian airlines), with the effect of strengthening the competition they offer to United States-flag carriers. A related danger is the possibility that the governments of the countries concerned will attempt to exclude United States-flag carriers from the carriage of traffic between them ("regional cabotage").

5. Some foreign airlines, mostly Latin American, attempt to take traffic away from United States-flag carriers by charging fares below those established by International Air Transport Association (IATA) traffic conferences. (These airlines are not members of IATA.)

Underlying the more specific causes of concern has been the downward trend in the share of United States-flag air carriers in international passenger traffic, particularly as measured by percentages of numbers of passengers arriving in and departing from the United States and of passengers carried across the North Atlantic by IATA members. The concern with this trend has been accentuated in governmental circles by the unfavorable United States balance of international payments. Sometimes, it is also asserted that the percentage of passengers carried by United States-flag airlines should correspond to the percentage of United States citizens (or residents) among the passengers.

¹⁹ See International Air Transportation Problems, *supra* n. 16, at 24.

The two sets of statistics just mentioned show the following trends:

<i>Fiscal Year</i> (ending June 30)	<i>Proportions of U.S. Citizens to Total Number of Passengers Arriving and Departing by Air</i> (per cent)	<i>Proportions of Arrivals and Departures of Passengers by U.S.-Flag Air Carriers to Total Arrivals and Departures by Air</i> (per cent)
1950	62.7%	74.7%
1955	68.1	68.3
1960	63.0	54.7
1961	61.2	49.6
1962	61.4	50.0

SOURCE: U.S. Immigration and Naturalization Service, Reports of Passenger Travel between the United States and Foreign Countries. Percentages calculated.

<i>Calendar Year</i>	<i>Share of U.S.-Flag Air Carriers in the Number of Revenue Passengers Traveling by Scheduled Services of IATA Members over the North Atlantic to and from the United States</i> (per cent)
1950	59.5%
1955	53.8
1960	39.8
1961	36.9
1962	36.6

SOURCE: Annual Air Transport Progress Issues of *American Aviation and Air-lift*. Percentages calculated.

Preliminary reports indicate that 1963 will show a significant *increase* over 1962 in the shares of United States-flag air carriers in international passenger traffic to and from the United States and over the North Atlantic.

The use of these two sets of statistics as a yardstick for measuring the participation of the United States in world air transport has been criticized by some observers.²⁰ The *number* of passengers traveling to and from the United States by air does not show traffic in passenger-miles and thus ignores variations in the distances traveled and paid for. These statistics, furthermore, distort the relationship between the total traffic of United States-flag air carriers and foreign air carriers by excluding Fifth Freedom traffic carried by the former but including the traffic between the United States and a third country carried by the latter. (Estimates of Fifth Freedom traffic and revenues of United States-flag and foreign carriers, understood to be regularly made by the CAB, are not made public.) And they do not take into account cargo and mail traffic.

For the foregoing reasons, these observers say, more significant statistics are those of the share of United States-flag air carriers in the total international traffic, as measured in ton-miles, of the airlines of the world. ICAO publishes statistics of the traffic of all its members' airlines, but unfortunately in these statistics "international" traffic in the strict sense is lumped with much of the traffic between a nation and its overseas territories and possessions. The share of the United States-flag carriers in the

²⁰ See, e.g., Lissitzyn, *The Participation of the United States in World Air Transport: Statistics and the National Interest*, 28 J. of Air L. & Com. 1 (1961-62).

total "international and territorial" traffic of airlines of ICAO members has fluctuated as follows:

Calendar Year	Share of U.S.-Flag Air Carriers in Revenue Ton-Miles, Scheduled International Services, ICAO Members
	(per cent)
1951	37.2%
1955	38.9
1960	33.4
1961	31.4
1962	31.9

SOURCE: ICAO, *Digests of Statistics*. Percentages calculated.

The United States still remains far ahead of any other ICAO member in this respect. The share of the United States in 1960—33.4%—was greater than the combined shares of four runners-up—the United Kingdom (14.1%), the Netherlands (6.9%), France (6.4%) and Scandinavia (4.5%). In 1962, the United States with its 31.9% had almost as large a share as the five runners-up—the United Kingdom (12.3%), France (8.2%), the Netherlands (5.6%), Germany (3.8%) and Scandinavia (3.7%)—combined. It is noteworthy that the shares of the airlines most frequently accused of "Sixth Freedom" abuse (KLM and SAS) in world air traffic, as well as in the numbers of passengers carried across the North Atlantic, have been declining in recent years. The growing traffic of Aeroflot, the Soviet airline, is not included in ICAO figures.

The most basic criticism, however, is directed at the very concept that the success or failure of United States air transport policy is measurable primarily by the share of United States-flag air carriers in international traffic. In this connection, it is pointed out that the United States cannot expect to maintain the very high share of such traffic that its airlines carried in the immediate postwar period, since foreign airlines were then very weak, but are now becoming both more numerous and stronger. Statistics show that the recent inroads on the United States share have been made not by the "older" foreign airlines, such as BOAC, Air France, KLM and SAS, but by "younger" airlines such as the German, the Italian, and the Japanese. Attention is also called to the fact that the United States rate of general economic growth, as indicated by increases in the gross national product and in foreign trade, has been slower in the last ten years than that of most other industrialized countries.

The health of the United States air transport industry, these observers say, should be rather measured by the rate of growth of the United States-flag carriers and their financial position. By these criteria, the United States-flag carriers, as a group, have been doing as follows:

UNITED STATES "INTERNATIONAL AND TERRITORIAL" OPERATIONS

Calendar Year	Increase over Previous Year, Revenue Ton-Miles, All Services (per cent)	Rate of Return on Total Investment (per cent)
1956	26.0%	7.76%
1957	6.3	7.48
1958	5.9	3.23
1959	15.9	3.76
1960	11.3	4.07
1961	15.8	2.93
1962	20.2	8.70
1963*	15.4	9.52

* 12 months ended June 30.

SOURCE: CAB, *Handbook of Airline Statistics*, 1962 ed.; CAB, *Air Carrier Traffic Statistics*, and *Air Carrier Financial Statistics*.

These figures must be viewed in light of the heavy financial losses sustained by most of the major European air carriers, including BOAC, Air France, KLM, SAS and Deutsche Lufthansa, in the period of 1960 to 1962. The United States-flag carriers, however, derived considerable traffic and revenues during the same period from increased volumes of military traffic, including military mail, allocated to them by MATS pursuant to a policy decision made early in 1960. All of the carriers, American and foreign, suffered during this period from the large growth in capacity consequent upon the introduction of jet transports.

The rising traffic and revenues of United States-flag carriers in 1962 and 1963 have served to moderate the concern with their position in world air transport. A CAB examiner recommended in 1962 that the CAB not adopt its proposal to require foreign air carriers to file their traffic data and schedules,²¹ and a proposal in Congress for legislation of similar character made little headway.²² In the meantime, pursuant to a recommendation made by the "Project Horizon" Task Force, the President in 1961 directed that a thorough study be made of United States policy with respect to international air transport by a special high-level Steering Committee headed by FAA Administrator N. E. Halaby and composed of representatives of other agencies, including the Bureau of the Budget, the CAB, the Department of State, the Agency for International Development, the Department of Commerce, and the Department of Defense, with the participation also of representatives of the Council of Economic Advisers. The Steering Committee was assisted in its task by two private research firms which jointly prepared a basic study. The latter has not been published, but on April 23, 1963, the White House announced that the President had approved a Statement on International Air Transport Policy submitted to him by the Steering Committee.²³ This Statement is only fifteen pages long. The following excerpts contain the gist of the Statement with respect to bilateral agreements and related matters:

²¹ CAB, Docket No. 12063, Recommended Decision (June 21, 1962).

²² Hearing on Foreign Air Transportation before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 87th Cong., 2d Sess., on H.R. 7309, H.R. 10655, H.R. 10657 (1962).

²³ White House press release, April 23, 1963; also in 2 Av. L. Rep. ¶ 23,066.

The size of the United States aviation market tends to give our aviation policies much weight in the world air transport system. This influence must be placed on the side of expansion not restriction. Within the legal and regulatory framework in which the system operates, it must be as free from restrictions as possible, whether these be imposed by government or through intercarrier arrangements. Any policy of arbitrarily restricting capacity, dividing markets by carrier agreements, encouraging high rates or curtailing service for which a demand exists, would be harmful to our national interests. . . .

. . . Traffic carried by United States carriers has grown on the average more than fifteen percent per year over the last fifteen years, a rate greatly in excess not only of the general growth rate of the United States economy, but also greater than the rate of growth of our domestic air carriers. Foreign carriers, as a whole, have grown ever more rapidly. Particularly important elements in this latter growth are the entry during the last decade, and subsequent growth, of carriers representing Germany, Italy and Japan; the growing economic strength of other countries and their carriers; and the birth of international air carriers representing a number of countries which ten years ago or less did not need to mount a major international airline operation. This growth of foreign carriers is, in large measure, the natural consequence of the growing strength of our friends and allies around the world.

The result of these and other influences is that while the United States remains by far the leading international air transport nation, and while the absolute growth of traffic carried by United States carriers has been healthy, its share of international air traffic has declined. A realistic view of the future suggests that the same forces may result in some further decline in the relative share. The same look into the future tells us that, in any event United States international air carriers should continue to grow at an impressive rate, one considerably greater than the growth rate of our economy as a whole. We are dealing with a United States industry growing in size and maturity; not one which is sick and declining and can be expected to fade away to obscurity or death.

The United States policy for air transport includes the following principles:

1. *Basic Framework.* The United States will maintain the present framework of bilateral agreements by which air routes are exchanged among nations and the rights to carry traffic on them are determined according to certain broad principles. The substitution of a multilateral agreement seems even less feasible or acceptable today than when first attempted at the Chicago Conference of 1944.

This framework of agreements rejects the extreme positions considered both at the Chicago Conference and subsequently. On the one hand it rejects as completely impractical unregulated freedom of the skies, and recognizes that the exchange of routes is a useful tool in building sound and economic growth of air transport. On the other hand, this framework rejects the concept that agreements should divide the market or allocate to the carriers of a particular country a certain share of the traffic. The latter concept would surely restrict the growth of international aviation and would result in endless bickering among nations as to their proper share of traffic. . . .

2. *Air Routes and Services.* Our policy is to provide air service where a substantial need therefor develops. The present network of international air routes is, however, rather fully developed. Consequently, an expansion of the present route structures must be approached with caution.

In negotiations for the exchange of routes and rights particularly where traffic can be expected to be heavy, the United States shall (i) seek such

exchange whenever it would contribute significantly to the development or improvement of a service network, and (ii) seek to assure United States carriers the opportunity to gain as much benefit in this over-all exchange as the foreign country's carriers. In instances where traffic is thin, our effort must be to provide service without unduly proliferating the number of carriers, and the resulting capacity they would offer. . . .

The problem of the number of carriers on a particular route or in a market extends to markets having dense traffic—such as the North Atlantic, which is now served by nineteen carriers. It must be our over-all policy not to accentuate this situation which, on its face, cannot be sound.

3. *Capacity Principles.* The United States supports the "Bermuda" capacity principles which flexibly govern the amount of service individual carriers may offer to the world travelling and shipping public. . . . They prohibit predetermined limits on capacity, but permit capacity restrictions on certain categories of traffic, known as secondary justification traffic, on the basis of *ex post facto* review of traffic carried. Generally, the result has been to provide the traveller and the shipper with an increasing range of efficient air services.

We believe that the "Bermuda" principles accommodate, to the general good, the legitimate economic interests of all nations engaged in international air transport. Our policy, then, will be to oppose both arbitrary capacity restrictions and the stretching of those principles to the point of abuse. We shall continue to take the initiative in resisting predetermined capacity levels. We shall also take the initiative to seek agreement to a reasonable and fair interpretation of what constitutes secondary justification traffic under "Bermuda" capacity principles.

Past efforts to resolve the latter problem have not been successful. We must seek a new approach. Our position will take into account the legitimate interests of other countries and their carriers as well as our own interests and those of our carriers. We anticipate general agreement on a reasonable interpretation of the Bermuda capacity principles.

If despite our best efforts we were to be confronted with serious abuses of the capacity principles, recourse will be had to the procedures available under our bilateral agreements. These including consultation, arbitration, and in the last analysis, denunciation and renegotiation of such agreements.

The generality of this statement leaves considerable room for interpretation and application in particular situations by the various agencies participating in the decision-making process. Nevertheless, it indicates that the United States government, after a thorough study, continues to regard Bermuda-type agreements as generally satisfactory.

Shortly after the publication of this statement, the President asked the Secretary of State "to provide . . . a focus of leadership" for "international aviation policies," which he termed a "vital area of foreign policy," and directed the establishment of "a high-level interagency Committee on International Aviation Policy, to be chaired by the Secretary of State or his representative," with the Departments of Defense and Commerce, FAA, CAB, and the Agency for International Development being also represented.²⁴ The Department of State also established a special Office of International Aviation within its Bureau of Economic Affairs.

A problem related to bilateral agreements is that of rate regulation in international air transport. Many foreign governments possess the legal

²⁴ 49 Dep't State Bull. 160 (1963).

power to approve or disapprove the rates and fares charged by foreign as well as their own carriers in services to and from their territories. Under the Federal Aviation Act, however, the power of the CAB is limited to removal of unjust discrimination in rates and fares in foreign air transportation (Section 1002(f)). Despite repeated recommendations by the CAB, Congress has failed to confer upon it a power to prescribe just and reasonable rates and fares in foreign air transportation similar to that which it has with respect to domestic air transportation. The Board, however, has exerted considerable influence over rates and fares in foreign air transportation through the exercise of its power under Section 412 to approve or disapprove the rate resolutions of IATA traffic conferences. Without the Board's approval, the adoption and implementation of such resolutions might constitute a violation of antitrust laws (*cf.* Section 414).

The Bermuda-type bilateral agreements contain provisions on rates which somewhat vary in content. They generally take cognizance of the IATA rate-agreement function, but also provide for the contingency of no IATA agreement being applicable. A considerable number of them, like the Bermuda agreement, specify that in the latter case, if the two governments disagree as to whether a rate proposed to be charged by one of their carriers between their respective territories is fair and economic, the question will be submitted to ICAO for an advisory report at the request of either government; but that pending the settlement of the dispute, one of two alternatives may be applied depending on whether or not power has been conferred upon the CAB to fix fair and economic rates and to suspend proposed rates in a manner comparable to that in which the Board is empowered to act with respect to domestic air transportation:

1. If such power has been conferred on the Board, the proposed rate may go into effect provisionally;
2. If such power has not been conferred, the objecting government may prevent "the inauguration or continuation of the service in question at the rate complained of."

The practical effect of these provisions became evident in the spring of 1963, when the United Kingdom, following the disapproval of the CAB of certain IATA rate resolutions, threatened to prevent the operation of United States-flag services to United Kingdom at rates below those regarded by the British government as fair and economic. The threatened British action would not have been in violation of the Bermuda agreement, since the second of the alternatives outlined above would have been applicable.

In 1963, the President and the CAB recommended to Congress the enactment of a bill (S. 1540) which "would give to the Civil Aeronautics Board discretionary authority, subject to approval by the President, to prescribe rates and practices and to suspend tariffs in international air transportation to and from the United States under the same standards now applicable to interstate transportation."²⁵ This bill was favorably re-

²⁵ International Air Transportation Rates, Sen. Report No. 473, 88th Cong., 1st Sess., Aug. 28, 1963, at 1. Such legislation was also favored in the Statement on International Air Transport Policy, *supra* n. 23, at 10-11. See, further Hearings on International Air Transportation Rates before the Committee on Commerce, U.S. Senate, 88th Cong., 1st Sess. (1963).

ported on August 28, 1963, by the Senate Committee on Commerce.²⁶ An alternative proposal supported by United States-flag air carriers, to give the Board merely the power to suspend objectionable rates for 365 days, was regarded by the Committee as inadequate. On November 21, 1963, the Committee modified the bill by eliminating the requirement of Presidential approval of the Board's decisions.²⁷ The bill as so amended was passed by the Senate on November 26, 1963.

The Senate Committee stated, *inter alia*:

The prime need for rate control is not the protection of U.S.-flag carriers from the low rates of foreign competitors, but rather the protection of the American public from excessive and unreasonable rates charged by IATA carriers with the active assistance of their governments. The problem of rate cutting in international air transportation is negligible and has been confined primarily to a few non-IATA carriers. Carriers accounting for the vast preponderance of international air traffic belong to IATA. As noted earlier in this report, foreign carriers and their governments have pursued a high-rate policy which arises from higher costs and a desire to offset losses on uneconomic routes. This policy, from all indications, will continue. The U.S.-flag carriers are the most efficient in the world and can afford, and have publicly declared on many occasions that they wish, to charge lower rates than their foreign competitors. It is the committee's firm belief that the additional powers contained in the bill as reported will most effectively enable the Board to pursue its, as well as U.S.-flag carriers', announced policy of pressing for lower international air fares.²⁸

The Committee's report thus appears to refute the contentions, which has been made from time to time by some United States-flag air carriers, that the latter need protection from foreign competition because of lower labor costs of foreign airlines.²⁹

New problems of policy, diplomacy and law, including those of application of bilateral agreements and rate regulation, are likely to arise with the advent of supersonic transports.

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²⁶ International Air Transportation Rates, Sen. Rep. No. 473, *supra* n. 25.

²⁷ *Id.*, Part 2, Nov. 21, 1963, at 1-3.

²⁸ *Id.* at 14-15.

²⁹ Cf. Lissitzyn, *supra* n. 20, at 11-13.