

# **An Aspect of Air Law, Some Observations on The Conduct of International Air Transportation, Including Air Service Agreements and Traffic Rights.**

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## **1. THE RIGHT TO TRANSPORT PASSENGERS AND FREIGHT BY AIR BETWEEN DIFFERENT STATES.**

1.1. The main objective of civil aircraft operations is to convey passengers and freight from place to place, and this activity is called “air transport”. If the two places lie within the same State it is “domestic air transport”, but if the two places are in different States then it is “international air transport”. The regulation of domestic air transport is exclusively the prerogative of the State within which it takes place, providing that the flight does not involve passage over the territory of another State. Nevertheless because a passenger may purchase an airline ticket in a different State to that within which the journey takes place all States have a moral obligation to see that both domestic and international flights are conducted to the same standards of safety.

1.2. Air Transport may consist of either *scheduled* or *non-scheduled services*, the latter are often referred to as *charter flights*. This paper is primarily concerned with *international scheduled services*, which make up the bulk of civil aviation activity. Ostensibly non scheduled services are freely allowed between contracting States to the “Chicago Convention on International Civil Aviation” (Montreal, 1944), by Article 5. However as a flight may be subject to any conditions and limitations which may be imposed by the States concerned this privilege is often severely restricted. At the end of the year 2003 the number of States who had adhered to the Chicago Convention was 188, only a few very small ones had not done so.

1.3. In considering all treaties and conventions it should be clearly understood that they are only binding on the signatories who ratify them, and any other contracting parties who later adhere to them. The provisions of a Convention do not apply to non contracting States.

1.4. An aircraft, like a sea going vessel but unlike a railway train or motor vehicle, has a “legal personality” in international law. An aircraft possess the nationality and carries the appropriate marks of the state within which it is registered.

## **2. HISTORICAL BACKGROUND AND BASIC CONCEPTS**

2.1. Quite early in their development, and certainly by the second decade of the 20th century, aircraft, like ships, had been accepted as having both a legal personality and nationality (or “flag”). Whilst on board an aircraft a person is in the first instance subject to the laws of the State of registry, although ultimately the commander of an aircraft may also have to comply with any local laws where it is flying which are applicable to aviation. In this respect ships and aircraft differ from automobiles, buses, trains and horse drawn vehicles which are always completely subject to the jurisdiction applicable to the place where they are operating.

2.2. For many years it was widely accepted that a State's maritime jurisdiction only extended up to three nautical miles from its coast line and that no particular country's law applied over the High Seas. In more recent years many States have extended their jurisdiction beyond these original limits, either by unilateral declaration, often not recognised by all other States, or by multilateral agreement. On the High Seas the law of the State of registry applies on board a ship, and the ship's

Captain is its administrator.

2.3. At least since the sixteenth century the widely accepted principle of the "Freedom of the Seas" has meant that any ship may ply for hire to carry passengers and cargo between any two or more places regardless of its nationality (i.e. flag). Such voyages generally require neither permits nor international agreements between States. On the other hand "coastal trade" between two ports in the same State, which is called "Cabotage", was reserved exclusively for vessels registered in that State.

2.4. When aviation began to develop at the start of the 20th century it was soon realised that aircraft could become an important instrument of warfare. A flight by an aircraft crewed by the nationals of one State which flew over the territory of another was generally considered to be a hostile act. The use of aircraft for commercial purposes was foreseen by many people early in the 20<sup>th</sup> century but their performance did not at first make this a practical proposition.

### **3. EARLY INTERNATIONAL AGREEMENTS**

3.1. An International Air Navigation Conference was held in Paris in 1910 to discuss the regulation of flight but it reached no agreement, did not reconvene and was a diplomatic failure. Nevertheless many basic principles and concepts were discussed at length and in 1913 France and Germany signed a bilateral agreement on the control of flights over their respective territories. Many basic principles were widely accepted by all the States participating in the Paris conference including the maxim contained in Roman Law, which had been incorporated into the law of most States, that "Cujus est solum, ejus est usque ad coelum" ( *He who owns the land owns it even to the skies*). This led to States arguing that they had the right to control the airspace over their country and territorial waters. As a result it was widely accepted that the sovereignty of States extended into the air above them and their territorial waters. The right of a State to licence or control air services flying through its airspace stems from this concept. The need to examine and licence operating crew and aircraft was also generally accepted as mandatory for reasons of safety.

3.2. On the other hand as early as 1906 some members of the Institute of International Law had expressed the view that international aerial circulation was free to all peoples and nations, saving that a subjacent State had the right to take measures to ensure the security of the persons and property of their inhabitants, and that there could be no sovereignty over air space. However this view does not appear to have received much, if any, support from governments.

### **4. THE INTERNATIONAL CONVENTION FOR THE REGULATION OF AERIAL NAVIGATION, (1919 PARIS).**

4.1. The rapid development made during the 1914-18 War in aircraft, both aeroplanes and airships, indicated that they might soon be widely used for the transport of both passengers and cargo. Consequently the States attending the Paris Peace Conference in 1919 agreed to set up an *Aeronautical Commission* with the object of drawing up a Convention on international civil aviation, and to establish uniform rules and standards for inter alia aircraft registration, airworthiness, personnel licensing, maps and charts, rules of the air and procedures for flying. As an outcome of the conference an "[International Commission on Aerial Navigation](#)" (ICAN) was established with its headquarters in Paris. Although the USA took an active part in the Paris Conference it never signed, nor adhered to the subsequent Convention. Eventually thirty eight States, mainly in Europe & Asia, adhered to or ratified the Paris Convention (1919).

4.2. Article 1 of the Convention stated "The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the airspace above its territory." Article 2 stated "Each contracting State undertakes in time of peace to accord freedom of innocent passage above its

territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed." However as States were free to impose quite onerous conditions on overflight in practice the intended universal freedom of innocent passage never materialised.

4.3. Although the Paris meeting discussed the commercial control and regulation of air services, and various other social and economic aspects of air transportation, no agreement was reached on them, and no solutions to the problems raised were incorporated in the subsequent Convention.

4.4. Following the growth of aviation activity in the Americas and as a result of the failure by the USA and most Central and South American States to adhere to the Paris Convention, a *Pan American Convention* was signed in 1928 in Havana, containing clauses which largely enabled USA owned airlines to freely operate services within North and South America.

## **5. INTERNATIONAL AIR SERVICES BETWEEN 1919 & 1939**

In the years following the Paris Convention airlines wishing to carry passengers or cargo either between, or across, different territories generally did so by obtaining a permit directly from each of the foreign governments concerned. Some *Air Service Agreements* (ASA) were entered in to between governments but these varied considerably in scope, format and restrictions. It was universally recognised that no air service could either land in, take off from, or transit a State without the permission of its government. Some States were very restrictive and did not permit any foreign aircraft to enter their airspace. The sovereignty of a State over the airspace above its territory was fully acknowledged and there was no freedom of the skies comparable with the "Freedom of the Seas". Nevertheless in spite of these restrictions a world wide pattern of international air services developed, particularly over the non oceanic intercontinental routes. The setting up of a lot of the services was facilitated by being routed through a State's colonies and dependent territories. The prime purpose of many services was the carriage of mail and the small number of passengers and cargo carried had little economic impact.

## **6. THE FORMATION OF THE INTERNATIONAL CIVIL AVIATION ORGANISATION**

6.1. During the Second World War immense strides were made in the development of transport aeroplanes and by 1943 it became apparent to the major allied powers that air transportation was now capable of playing a significant role in world social and economic development after what appeared to be the inevitable defeat of Germany and Japan. The range and load carrying capacity of transport aircraft had increased significantly and viable trans oceanic crossings with a significant commercial payload were now practicable. It was obvious that a new basis for international air transport had to be established. Differences in rules, procedures and aviation practices between States, even amongst the United Nations themselves, indicated that some form of standardisation was needed to achieve safe and efficient global air services. On the other hand the aviation industries of Britain, the Soviet Union, Germany, France and Japan, although highly developed, had concentrated on the design and production of military aircraft during the war. Only in the USA had the large scale production of aircraft suitable for civil transport been continued to any significant degree. The USA manufacturing companies were already planning to play a major role in providing suitable civil transport aircraft after the war. In the pre-war days aviation had been looked upon as relatively dangerous form of transport in comparison to surface travel, and it was obvious that air travel had to be made safe and reliable if it was going to become popular. It is therefore not surprising that as early as 1944 the USA proposed that representatives of both allied and friendly governments should meet in Chicago in November of that year to discuss post war world civil aviation. Although supporting the spirit of the proposal the Soviet Union indicated that it would not be able to send a delegation due to the demands of the war.

6.2. The main aims of the conference were to draw up a Convention on Civil Aviation, to replace

those of Paris (1919) and Havana (1928), and to establish a world body as an Agency of the United Nations Organisation to oversee civil aviation, to be called the "International Civil Aviation Organisation" (ICAO), and to establish a framework for the technical standards to be developed.

6.3. The 54 States represented at the Chicago Conference, which did not include the USSR and the Axis powers, whilst agreeing on the technical matters, which were largely based on the Annexes to ICAN(1919) blended with US Federal Air Regulations, split into two conflicting groups when it came to the policy to be adopted with regard to the economic aspects of air transportation. Whilst indicating that it agreed with the aims of the conference the USSR stated that it was unable to attend due to military reasons. The United States favoured the freedom of airlines to provide international commercial air services in a relatively uncontrolled manner, similar to maritime practice, whereas the European States, supported by Australia and New Zealand, favoured the establishment of an International Air Authority to operate aircraft, rather than individual national airlines providing services between States. The USA point of view was strongly supported by the Central and South American States, most of which attended the conference. After a considerable amount of argument a compromise was reached and Article 78 of the Convention was drafted to permit the Council of the ICAO to suggest to States the formation of joint air service operating agencies, and two optional agreements were proposed in addition to the Convention; an "International Air Services Transit Agreement" and an "International Air Transport Agreement", both of which would be open for States to sign separately from the Convention.

6.3.1. Article 1 of the Chicago Convention (1944) confirmed that "contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory".

6.3.2. Article 2 establishes that for the purpose of the Convention the territory of a State includes the land areas and adjacent territorial waters "under the sovereignty, suzerainty, protection or mandate of such State".

Article 5 recognises the right of one contracting State to operate non scheduled air services between or over the territory of another contracting State without prior permission, although conditions and limitations could be imposed. It should however be noted that most States have exercised such severe constraints as to almost destroy the apparent intent of this Article.

6.3.3. Article 6 states that no international scheduled service may be operated over or into the territory of another contracting State except with its special permission or authorisation. The Conference suggested that authorisation should be in the form of a bilateral air service agreement between the governments the two States concerned, based on the assumption that the aircraft would be registered in one of them.

6.3.4. Article 7 dealt with Cabotage, i.e. carriage between two places in the same State. It reserved the right of aircraft doing so only to those registered in that State. A State was also precluded from specifically granting exclusive cabotage privileges to another State. This definition is somewhat more rigorous than the original maritime meaning which only referred to "coastal trade". *De facto* it recognised that non contiguous territories could form part of a sovereign state.

## **7. THE FIVE "FREEDOMS" OF THE AIR**

7.1. "The International Air Transport Agreement" (1944) contained five "freedoms of the air", originally defined by Canada, which largely met the US concepts for unfettered international scheduled air transport. It would however only apply between the States which signed it. Although commonly referred to as "freedoms" more correctly, because a States exclusive sovereignty over its airspace was recognised, **what was granted by a state to an aircraft** were "**privileges**" rather than "freedoms", these were :-

### **(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.

7.2. With respect to the privileges specified as 3, 4 and 5, the undertaking of each contracting State relates only to through services on a route constituting a reasonably direct line out from and back to the homeland of the State whose nationality the aircraft possesses.

7.3. Subsequent to the Chicago Conference air transport experts have developed the concept of three more freedoms arising from combinations of the first five:-.

(6) **Sixth freedom**, the privilege of an airline of one country to carry traffic between two other countries via its own country. A sixth freedom is effectively a combination of two sets of third and fourth freedoms,

(7) **Seventh freedom**, the privilege of an airline of one country to operate flights between two other countries without the flight originating or terminating in its own country,

(8) **Eighth Freedom**, the privilege of an airline of one country to carry traffic between two points which are parts of another country, this freedom is also known as Cabotage.

7.4. Article 78 of the Convention, stating that "the Council may suggest to contracting States concerned that they form joint organisations to operate air services.....", has in fact never been invoked by the council of ICAO, and consequently can be considered to have been a complete failure. Although 20 States signed the Air Transport agreement, these were mainly in the Americas, and the most important signatory, the USA, soon denounced it as unworkable.

7.5. The Air Transit Agreement only consisted of the first two "freedoms" and it was widely, but not universally, accepted and signed by the majority of States. Nevertheless in 1988 Canada denounced this agreement, as a political gesture, following its failure to reach a bilateral agreement with another State. In practice the privileges contained in the Transit Agreement are often confirmed in the text of a bilateral air service agreement.

## **8. BILATERAL AIR SERVICE AGREEMENTS MADE UNDER THE TERMS OF THE CHICAGO CONVENTION**

8.1 Because of the failure to reach any universally acceptable multilateral agreement the Chicago Conference recognised that post war international scheduled air services would have to be agreed and regulated through a number of separate bilateral agreements between States. It was agreed that there should be "as great a measure of uniformity as possible in any agreements that may be made between States" and to do this a "**Form of Standard Agreement**" was recommended and produced in the Final Act of the Conference. Subsequently, up to the end of the century, over 3,000 bilateral air service agreements between states have been registered with the ICAO.

8.2. Air service agreements, made under the Convention, are not confidential documents and they are generally published by the contracting parties, nevertheless they are usually accompanied by a "Confidential Memorandum of Understanding" (CMU) which contains confidential matters which the States wish to conceal from other parties. A CMU is considered to be as binding on the

contracting parties as the formal agreement.

8.3. Whilst most air services are covered by formal "Bilateral Air Service Agreements" there is nothing to prevent a State and an airline entering in to informal arrangements, a "gentlemen's agreement". At one time in the Pacific region "Air Nauru" arranged many of its services in this manner.

8.4. The most famous air service agreement was that reached between the USA and UK at Bermuda in February 1946, because it laid down many principles which were subsequently adopted by other States in negotiating agreements. These were, that :

(1) the services available to the travelling public should bear a close relationship to the requirements of the public for such transport, excessive capacity or number of services should not be offered by one of the airlines,

(2) the airlines of the two States should have fair and equal opportunity to operate on any international route,

(3) in the operation of "trunk" services the interests of the airline of the other State shall be taken in to consideration so as not to affect unduly the services which the latter provide on all or part of the same route,

(4) 'fifth freedom' traffic permitted should be adjusted with reference to the traffic requirements both in the country of origin and the country of destination.

## 9. CONCEPT OF SOVEREIGNTY

In dealing with Air Service Agreements it is helpful to consider the different types of States which exist in the world today ;

### 9.1 SOVEREIGN STATES

A State is a politically organised aggregate of individuals, living as a community under one government and occupying a defined but not necessarily contiguous territory. The people who make up a State may belong to different races or creeds. The government of a State may consist of one or more persons, who represent the people according to established laws. To be a perfect State its Government must be a sovereign one, supreme in its territory and independent of the authority of any other State. **Membership of the United Nations Organisation, and the International Civil Aviation Organisation, is confined to sovereign, independent States.**

### 9.2. FEDERAL STATES

Several sovereign States may form themselves into a permanent union, or Federal State, which has an overall government organisation in addition to the separate ones of its member States. Its people are subject to the laws of both the individual States and those of the federation. A Federal State may adhere to the Chicago Convention as if it were a single sovereign State. Examples of such sovereign federal States are the "United States of America" , The "Federal Republic of Germany", the "Swiss Confederation" and "the Commonwealth of Australia".. For the purpose of the Chicago Convention air transport between places within a federal State is considered to be **domestic**, not international. In the USA in 1926 the "Air Commerce Act", stipulated that airspace should be a matter for Federal rather than State ( meaning members of the USA) jurisdiction. For example carriage between Honolulu, American Samoa, Guam or Alaska, and the contiguous States of the USA. is consequently **deemed to be Cabotage and not international carriage, and is therefore reserved for aircraft operated by US carriers and aircraft registered in the US.** The former USSR was not a federal State and the Ukraine, Byelo-Russia and the Russian Federal Republic were all independent

members of the United Nations and ICAO. It should be noted than in American usage that the word "State " is usually used in the sense of applying to a member State of the "United States of America", not a sovereign State. Because of this difference in meaning misunderstandings can occur in negotiations with US officials.

### 9.3. DEPENDENT TERRITORIES

9.3.1. Territories which are not sovereign States; for example colonies, mandated territories and protectorates; are considered for international legal purpose to be an integral part of the territory of the State on which they are dependent. The degree of dependence varies, and for all domestic purposes the territory may be self-governing. Examples of the few remaining "British" dependent territories of this type are the Falkland Islands, Bermuda and Gibraltar, all of which are treated for the purpose of international civil aviation as being an integral part of the United Kingdom. Both the USA and France have incorporated territories, which are not geographically part of their principal land area, but forming a political community integral with them. The territories of both American Samoa and French Polynesia are in this category, as for the purpose of civil aviation they are respectively considered to be integral parts of the USA. and France, although for some other purposes they have been considered to be self governing. Carriage between a sovereign State and its dependent territories is deemed to be *Cabotage* not *international carriage*.

9.3.2. For Example before Fiji independence in 1970, carriage between Hong Kong, Bermuda, the United Kingdom and Fiji was considered to be Cabotage. Even today carriage between New Caledonia, French Polynesia and France is Cabotage, as all three are part of the Republic of France.

9.3.3. At the present time (2001) the regulation of an international air transport service between Bermuda and American Samoa (Pago Pago airport) would be a matter for negotiation between the governments of the United Kingdom and the USA., as they are the concerned sovereign States.

### 9.4. 'COMMONWEALTHS' OF NATIONS

9.4.1. It should be appreciated that the 'Commonwealth of Nations', which is often wrongly referred to as the "British Commonwealth", is not a Federal State neither are its members dependent territories of the United Kingdom, it is a free association of sovereign states with its headquarters in London.. Although some of its members may have the British Queen as their de jure Head of State, they are in respect of international law fully independent and separate sovereign States. Several member states are sovereign Republics. Membership is not restricted to former British dependencies, and in fact one member, *the Republic of Mozambique*, was a former colony of Portugal. The *Republic of Ireland*, "Eire", although part of the "British Isles", is a separate sovereign state and it is not a member of the 'Commonwealth of Nations'. Air transport between members of the "Commonwealth of Nations" is considered to be *international*.

9.4.2. The "Commonwealth of Independent States" ( CIS), which was formed by the States which made up most of the territories constituting the former Union of Socialist Soviet Republics (USSR) would seem to be a body of a similar nature as the "Commonwealth of Nations".

9.4.3 .With regard to the United States of America it should be noted that some of the member States of the USA are traditionally called "Commonwealths", for example Virginia and Massachusetts. But they are in fact just member states of a federal state, the "United States of America".

9.4.4. Australia is traditionally called the 'the Commonwealth of Australia 'and internally it is often referred to just as 'the Commonwealth'. In fact it is a federal sovereign state which is a member of the ' Commonwealth of Nations'.

## 9.5. EUROPEAN UNION

Although the member States of the European Union enjoy "freedom of the skies" between their various territories this is as a result of a multilateral agreement rather than their specific membership of the Union.. From the position of international aviation law each member of the Union is a separate sovereign State and countries outside the Union have to negotiate separate air service agreements with each member State. Traffic carried out by States from outside the Union between States which are members of the Union is international air transport not Cabotage. In 2003 the Commissioner (=Minister) for Transport for the Union, Neil Kinnoch, favoured the members States being considered as one, i.e. like a federation, for the purpose of negotiating air traffic rights, but up to 2005 members of the Union were still considered to be separate sovereign states. Consequent to such a move services between members might be considered to be Cabotage.

## 10. PROVISIONS CONTAINED IN AIR SERVICE AGREEMENTS

10.1. The existing bilateral system has some advantages over other approaches to the negotiation of international air services through regional or multilateral agreements as bilateral agreements can be tailored to meet the specific needs of the two countries concerned. Multilateral agreements are difficult to draft so as to meet the needs of all concerned and consequently have to be more of a compromise than bilateral ones.

10.2. Bilateral negotiations can also enable a country to exert pressure on restrictive countries to liberalise their arrangements by withholding access to its own market. They also permit pairs of countries to experiment with liberalisation of air services and to demonstrate to other countries any benefits of more liberal arrangements. The fundamental principle of the bilateral system is that of bilateral reciprocity whereby countries exchange rights on the basis of 'equality of opportunity'. This essentially means that countries agree to exchange rights which will enable their carriers to obtain access to foreign markets to the same extent as foreign carriers are able to gain access to their markets.

10.3. Agreements generally contain provisions that restrict the services allowed by international carriers between sets of countries. These provisions relate to market access (including freedoms granted and route specification), capacity and frequency, and a method for determining or approving tariffs. There has been an increasing trend to remove some of these restrictions.

10.4. Most agreements also require airlines designated by each party to be 'substantially owned and effectively controlled' by the country or the nationals of that country. There is no internationally accepted definition of what constitutes "substantial ownership and effective control" but most countries have legislation that defines their own criteria. The criteria must be acceptable to both parties to a bilateral agreement. In conjunction with this provision, the agreement can be tailored to permit bilateral partners to refuse, revoke, suspend or impose conditions on the authorisation of air services by carriers owned and controlled by other countries, not party to the bilateral agreement. They prevent these carriers from using and benefiting from the rights established under those arrangements. They also restrict the ability for carriers from one country to provide services on behalf of another country.

10.5. The ownership and control provisions effectively strengthens the bilateral system of negotiation by restricting the ability of airlines to merge across national boundaries. The bilateral system in turn stabilises the ownership and control provisions as a change in the requirements by one party has to be acceptable generally to all its bilateral partners. On the other hand the present trend for an airline to lease rather than purchase aircraft can conceal *de facto* control, and substantial economic benefit, by the citizens of other States.

10.6. Bilateral agreements often include commercial provisions such as the right for an airline to

repatriate revenue, be exempt from customs and excise duties, and gain access to terminals and ground handling services. These provisions generally facilitate the operation of international air services between States.

## **11. NONSCHEDULED AIR SERVICES**

11.1. Whilst Article 5 of the Chicago Convention (1944) gives the right to conduct non-scheduled flights between contracting States, subject to the other terms of the Convention being complied with, in practice the conduct of such flights is far from being unrestricted. States are allowed to require prior permission to be obtained and prescribed routes to be followed. The putting down and picking up of both passengers and cargo may also be subject to "regulations, conditions and limitations." As a result some States have laid down onerous restrictions which make such flights almost impracticable. A group of non scheduled flights are not supposed to follow any set pattern of operation or sale.

11.2. Charter flights are one form of non-scheduled services. The terms 'non-scheduled' and 'charter' often mean the same type of flight. In some parts of the world, such as Europe, charter flights provide significant competition to scheduled international services.

11.3. Charters in Europe and across the Atlantic account for a significant portion of the overall market for travel. They have developed mainly as a response to market factors such as the seasonality of holiday traffic and high fares on scheduled services, they are generally offered to the public as a complete holiday package, consisting of flights, accommodation and food, with set dates of departure and return.

11.4. In the Australasian area passenger charters are rare, but non-scheduled services play an important role in meeting increased demand for export freight capacity where scheduled services are unable to meet exporters' requirements, particularly during seasonal peaks. They have also enabled carriers to develop new markets, particularly to places not served by scheduled international services. They have not played much of a role in tourism and passenger generation.

11.5. The regulation of non-scheduled services is generally outside the bilateral system which tends to cover scheduled passenger and freight services only. However, some arrangements such as the US 'open skies' agreements contain provisions relating to non-scheduled services.

11.6. A few regional agreements also cover non-scheduled services. These include the "Multilateral Agreement on Commercial Rights of Non-scheduled Air Services in Europe" and the 1971 "Multilateral Agreement on Commercial Rights of Non-scheduled Air Services Among the Association of South-East Asian Nations (ASEAN)"

11.7. In practice the authorisation of charter services generally remains at the discretion of individual countries. Thus, proposed charter services must generally satisfy the charter requirements of both countries independently before they can commence operations. The national regulation of charter services varies among countries, they are very liberal within Europe and constitute de facto "open skies" there.

11.8. Whilst many countries, particularly tourist destinations, readily authorise incoming charter flights, others have adopted a more restrictive approach. In Australia the "Department of Transport and Regional Development" (DTRD) is responsible for approving the operation of charter services. In the past, Australia's charter policy has been criticised for being very restrictive. However, the Commonwealth Government liberalised its charter guidelines in June 1996 to enable certain categories of charter flights to obtain automatic approval.

## **12. LIBERALISATION OF AIR SERVICE POLICY**

12.1. There has been an increasing trend since the late 1970's towards the liberalisation of bilateral

arrangements. Following deregulation of the US domestic market in 1978, the United States commenced in the 1992 to negotiate more liberal ASA with many countries to promote competition and to reduce the extent of government involvement. These arrangements sought to promote free determination of capacity without government interference, reduce route restrictions, establish multiple designation of airlines, remove the system of double governmental approval of tariffs, facilitate the operation of charter flights, and promote fair and competitive practices by airlines.

12.2. In 1992 the US Department of Transport laid down a policy of "**Open Skies**" which included:

- (1) Open entry on all routes
- (2) Unrestricted capacity and frequency on all routes.
- (3) The right to operate between any point in the US and any point in the other country without restriction, including service to intermediate and beyond points, and the right to transfer passengers to an unlimited number of smaller aircraft at the international gateway. (Nevertheless excluding Cabotage.)
- (4) Flexibility in setting fares
- (5) Liberal charter arrangements
- (6) Liberal cargo arrangements
- (7) The ability of carriers to convert earnings into hard currency and return those earnings to their homelands promptly and without restriction.
- (8) Open code-sharing opportunities
- (9) The right of a carrier to perform its own ground handling in the other country.
- (10) The ability of carriers to freely enter into commercial transactions related to their flight operations.
- (11) A commitment for non discriminatory operation of and access to computer reservation systems.

12.3. Many other countries have since sought to negotiate similar provisions in their bilateral arrangements. However, there are still many countries that remain relatively restrictive in their approach to bilateral negotiation.

### **13. THE USA v. UK CONFLICT OVER "OPEN SKIES"**

13.1. Although negotiations have been going on for five years by the end of 2004 the USA and UK had failed to reach any agreement on 'open skies'. Extracts from the evidence given to a US Congressional Committee in 1999 give some idea of the conflicting views held by these two States :-

*(quoted from US evidence)*

*"The United Kingdom is the United States' second largest international passenger market with 17.2 million passengers in the 12 months ending May 1999 and is the second largest international cargo market for the US*

*"Prior to 1976, the bilateral agreement between the US and the UK was a relatively open one. However, in that year, the British renounced the bilateral. When a new one (known as Bermuda II) was negotiated a few years later, it was much more restrictive. Bermuda II is the most restrictive agreement negotiated with a developed aviation partner. For passenger services, the Agreement restricts access to Heathrow, London's preferred airport, to two US airlines. Bermuda II also limits US cities eligible for nonstop service to London; and caps entry in most markets at one US and one UK airline.*

*"Prior to Bermuda II, US airlines carried 59% of the passengers between the US and UK. Since Bermuda II, US airline passenger market share has dropped dramatically and now stands at 37%. Currently, British Airways alone carries a higher percentage of passengers (41%) than all the US*

airlines combined. British carriers combined control over 59% of this market. For the 12 months preceding June 1999, British carriers flew 10.5 million passengers in the US-UK market, while US carriers only flew 6.5 million passengers. This is consistent with the 123,000 seats offered weekly in this market by British carriers compared to the less than 90,000 seats offered by US carriers.

"Under Bermuda II, service to London is restricted in that US carriers can only operate to London from a limited number of specified US gateways. British Airways alone serves 21 US airports nonstop to and from London. All US carriers combined serve only 19 US airports nonstop to and from London. In addition, British Airways operates 9 monopoly routes to and from London.

"The major point of contention between the US and the UK involves access to Heathrow Airport. There are two airports that can be flown into when flying to London: Heathrow and Gatwick. In the US-UK market, approximately 66% of the passengers use Heathrow as their primary gateway. Currently only 2 U.S. carriers (United and American) can fly into Heathrow."

### **13.2. In reply to the US government the UK Statement contained the following rebuttal :**

( quoted from the evidence)

" The UK Government is firmly committed to liberalising air services between the United Kingdom and the United States. Throughout recent negotiations on the revision of the Bermuda II agreement we have made it clear that we are willing to envisage a wide-ranging liberalisation that would open up the market to more carriers from both sides and increase competition to the benefit of consumers – but only on a balanced basis that will provide equal opportunities for UK carriers as well as US ones. We are not willing to accept proposals that would put UK carriers at a competitive disadvantage with others.

"The domestic market for UK carriers is effectively the whole of the European Economic Area (the 15 Member States of the European Union and Iceland, Liechtenstein and Norway). The US Government's "Open Skies" proposals would give US carriers access to that domestic market while denying access to the US domestic market to UK carriers. On transatlantic routes US carriers have the advantage of access to feed traffic from a large domestic market, while UK carriers are at a competitive disadvantage at US hub airports where a very large proportion of traffic is carried by a single US carrier (a larger proportion in many cases than any UK carrier has at any UK airport).".....

..... "If US carriers are to get unrestricted entry into the UK's international and intra-European market, UK carriers need effective access to the US domestic market to provide a fair competitive balance. In negotiations throughout the 1990s the UK Government has put forward a number of options for achieving this and thereby allowing a wide-ranging, balanced, liberalisation of UK-US air services to the benefit of both consumers and carriers:

- (a) alliances, such as that proposed between British Airways and American Airlines;
- (b) a liberalised inward investment regime, which would allow UK carriers to buy a controlling interest in a US carrier (foreign ownership is currently limited to 25%);
- (c) a grant of cabotage rights . "

## **14. THE U.S. USE OF "CABOTAGE" TO PREVENT FOREIGN ACCESS TO ITS VAST INTERNAL MARKET**

14.1. About 75% of the US airline industry 's revenue comes from passengers and about 15% from freight, of which the largest contributor is the US Postal Service; and 10% from other sources. Of the passenger revenue nearly 80% is currently derived from domestic traffic and only 20% from international traffic. Retention of this vast domestic 'cabotage' market exclusively to US operators

is jealously guarded by the US government.

14.2. Whilst the US wishes to freely operate between European States on the basis of unfettered fifth freedom rights through "Open Skies" type bilaterals it appears so far that it has not been prepared to relinquish its own "Cabotage" rights, in respect of the USA, gained from the Chicago Convention. In respect of the component States of the USA, Air Pacific (a Fiji carrier), under this policy, when operating a route such as Nadi - Honolulu - Los Angeles - New York would be unlikely to be given the privilege to pick up passengers originating in Honolulu for either Los Angeles or New York. Hardly "open skies". Some States which have negotiated "open sky" type agreements at the present time either have no or insignificant services into the USA.

14.3. So far most 'open skies' agreements have generally incorporated unrestricted rights for both US and bilateral partner carriers to operate between the two countries, including to intermediate and beyond points. However, they have not included cabotage rights, have not relaxed the limits on foreign ownership of US carriers and have not provided the right of the establishment of services by foreign airlines within the United States. Nor have they removed the advantages conferred on US carriers by virtue of the 'Fly America' policy, one which generally requires persons travelling on US government related journeys to fly on US airlines.

## **15. MULTILATERALISM**

15.1. Many governments in recent years have moved to deregulate domestic aviation markets through privatisation and to eliminate government subsidies to airlines. A number of countries have also sought to liberalise various aspects of their bilateral arrangements — for example, the United States has pursued so called 'open skies' arrangements on a bilateral basis. Countries in the European Union, South America, APEC and ASEAN have also pursued liberalisation on a regional basis to various degrees. On a multilateral basis, the General Agreement on Trade in Services (GATS) has some very limited application to air transport.

15.2. Unilateral liberalisation of domestic aviation markets has been pursued by many countries. Domestic deregulation occurred in the United States in 1978 and commenced in Europe in the late 1980s. More recently, other countries including Australia have also sought to reduce restrictions on competition under domestic legislation.

15.3. Privatisation of government-owned airlines has been a significant unilateral initiative by many countries. The trend towards privatisation of airlines began in the 1980s), and evidence suggests that privatisation has led to greater efficiency and competitiveness of airlines. Improvements in productivity for British Airways, Air Canada and Qantas were reported in anticipation of privatisation and after it was implemented.

15.4. Following privatisation, many governments continued to support their airlines by funding commercial losses. However, some governments have also sought to reduce or eliminate government subsidies to airlines so as to reduce distortions to competition. As noted earlier, the EC introduced strict rules in 1993 to cover the provision of State aid to airlines. The current ( 2000) Asian financial crisis has placed the governments of Malaysia, Indonesia, the Republic of Korea and Thailand under considerable pressure to undertake reform of their air services industries. The terms of the International Monetary Fund adjustment packages introduced for some of these countries require privatisation of a certain number of State-owned enterprises (which may include airlines) and other reforms to reduce their reliance on government funds

15.5. The crisis and subsequent International Monetary Fund packages may create additional pressures on traditionally restrictive Asian economies to liberalise their aviation markets.

## **16. NEW ZEALAND POLICY**

16.1. New Zealand has also adopted a bilateral 'open skies' policy, agreeing on liberal arrangements

with Brunei, Chile, Singapore, Malaysia, the United Arab Emirates and the United States. The New Zealand External Policy Advisory Committee Stated that the New Zealand open skies model uses the US model as a basis and incorporates additional elements of liberalisation which it sees as desirable (for example, New Zealand is prepared to negotiate seventh freedom passenger and cabotage opportunities. These rights are included in the New Zealand–Brunei open skies agreement).

16.2. The New Zealand–Singapore agreement permits greater flexibility in foreign ownership. It removes the requirement for majority national ownership of carriers, although it still retains the requirement for national control (Air New Zealand ). New Zealand also has a very liberal arrangement with Australia under the Single Aviation Market which provides for unrestricted capacity to and from and within each country (including cabotage). However, restrictions on fifth freedom (beyond) rights for carriers remain.

## **17. US POLICY**

17.1. As noted above, the US ‘open skies’ agreements have not granted cabotage —the right for foreign carriers to fly domestically within the United States. Nor has the policy been accompanied by the right of foreign carriers to increase their ownership of US airlines beyond a maximum of 25 per cent of airline voting stock (Subcommittee on Aviation 1997).

17.2. In 1995, the US Department of Transportation (DOT) established its strategy for pursuing these more liberal ‘open skies’ arrangements (DOT 1995). It extended invitations to enter into open aviation agreements to a number of countries that it believed shared its vision of liberalisation, offering important traffic flow potential for its carriers. By the year 2000, the United States had signed over 35 ‘open skies’ agreements with a range of countries in Europe, Central America and South America and the Asia–Pacific region. Australia is not a signatory to a US open skies agreement..

17.3. US aviation policy appears to have recognised the importance of having unrestricted market access as a competitive safeguard against the potentially adverse competitive effects of airline alliances. Indeed, the negotiation of ‘open skies’ agreements has often been linked to the granting of antitrust immunity for alliances.; for example, in January 1993, the DOT granted antitrust immunity to Northwest and KLM to enable them to form an alliance. A major factor influencing the decision to grant the airlines immunity was the existence of the US–Netherlands ‘open skies’ accord which allowed airlines from both countries unrestricted entry and capacity rights between and beyond both countries. Since then, DOT has approved other alliances between its carriers and the carriers of other countries which have signed ‘open skies’ agreements with the United States.

17.4. Concern has been expressed in the US practice of granting antitrust immunity for alliances in exchange for agreement to an open skies policy. It stated that ‘US open skies packages include an exemption from its antitrust laws’ This view would seem to find support in that open skies agreements between the United States and a number of Central and South American countries appear to have created an expectation of DOT's automatic approval of international alliances between carriers. The chief executive officer of TACA group of Central American airlines was reported as urging South American countries not to sign any more open skies agreements with the United States and putting pressure on Central American governments to rescind their open skies bilaterals following a two year delay in obtaining regulatory approval for the TACA/American Airlines alliance.. The Chilean Government has also been reported as stating that its acceptance of an open skies deal with the United States is conditional on the approval of an immunised alliance between LanChile and American Airlines..

17.5. Alliances and Airline Code sharing agreements would seem to be a backdoor means of allowing foreign airlines some of the advantages of Cabotage privileges.

17.6. The United States strongly defends the retention of its cabotage rights. In October 2002 the Department of Transport fined the South Korean airline *Asiana* the sum of USD 750,000 for infringement of US cabotage rights. Between 1998 and 2002 the airline had carried a substantial number of passengers between Guam and Saipan, both *de jure* United States territories, and a number of cities in the mainland USA.

### **18. Footnote – November 2004**

By the end of 2003 it appeared that the European Union might reach accord during 2004 with the USA on an “Open Skies” type of agreement which would largely replace the existing framework of bilateral Air Service Agreements. Nevertheless there was little sign of the USA giving up its Cabotage rights. Negotiations were still continuing in November 2004 without any indication as to the probable outcome.

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*based on a gratuitous “Note” written in 2000 for a Minister in a developing country, slight revisions made 20-10-02, 16-01-04, & 07-05-04, 17-11-04, 16-03-05, 05-11-05.*

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