

INTERNATIONAL ECONOMIC REGULATION OF AIR TRANSPORT I*

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I. INTRODUCTION

At the outset it may be stated that there is no international regulation of scheduled air transport in the economic realm comparable to those economic principles incorporated in the Civil Aeronautics Act of 1938 which are applicable to American air transport companies as well as to foreign airlines flying to the United States. There are no uniform international economic controls regulating the number of international air transport companies flying the world air routes designed to forestall the establishment of unwarranted air service and duplication of routes, thus preventing cutthroat competition. International rules requiring the fixing of reasonable rates to eliminate ruinous rate wars by international carriers are nonexistent. International controls to prohibit those close combinations or interrelationships of the airlines companies which lead to consolidations of economic power resulting in monopoly have not been authorized, and, furthermore, there is nothing to prevent the nations themselves from fostering combinations which would result in international air cartels. No international body has been created with powers similar to the United States Civil Aeronautics Board to license international air services, prescribe routes, fix rates, and regulate unfair competitive practices in order to eliminate wasteful competition, uneconomic rates and subsidies, and monopolies.

It is not meant to convey the impression that international air transport flies unregulated. The nations unilaterally regulate in the economic field the operations of those airlines touching their territory. Such control is exemplified by the regulatory provisions authorized by the United States Civil Aeronautics Act which not only co-ordinates American carriers operating abroad, but also promulgates economic controls

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for foreign air carriers operating to the United States, its territories and possessions. Moreover, certain regulations of an economic nature have been embodied in air transport agreements entered into by two nations affecting the air carriers of each nation flying to the other. These are called bilateral agreements. But neither unilateral action nor bilateral action of nations necessarily establish rules of international law. There has been no general multilateral agreement assented to by the members of the community of nations which would create a body of international law formulating international economic control of world air transport.

A basic principle of international law has had far-reaching implications of paramount economic importance to international air transport. The concept of sovereignty permits each nation to exercise exclusive jurisdiction within its own territory and thereby control the transit and landing of foreign air transport within its boundaries. Before an airline of one state may operate over and into the territory of another, the latter must assent thereto either by multilateral or bilateral treaty or by a direct agreement with a particular airline company of a foreign state. Therefore, sovereignty, a legal principle, restricts and impedes the development of world air transport. The establishment of world air routes and operations are subjected to the whim of each nation over and through which the route passes.

II. SOVEREIGNTY OF THE AIR

The concept of sovereignty of nations and the reasons for its being have tended to frustrate world cooperative endeavor in all international spheres—political, economic and social—and in the field of world air transport its effects have created a specialized problem. It is a fundamental principle of international law that each state is possessed of supreme sovereignty over its national domain, and national domain is defined to include land, territorial waters and superjacent airspace.¹ Each

1. The following statements are set forth in 1 OPPENHEIM, INTERNATIONAL LAW (7th ed. 1948):

State territory is that definite portion of the surface of the globe which is subjected to the sovereignty of the State. § 169, p. 407.

The importance of State territory lies in the fact that it is the space within which the State exercises its supreme authority. § 170, p. 408.

The territory of a State consists in the first place of the land within

nation therefore has complete and exclusive control over the airspace above its territory. Due to this immutable, though debatable, rule of the law of nations, each nation of the world may admit or exclude foreign air transport as it, in its discretion, sees fit. Each state not only controls the right for air carriers to land and the right to trade within its borders, but in controlling the air column above it, a state may effectively prevent the establishment of a world air route through its airspace.

Prior to the first World War there was heated dispute with respect to the juridical nature of the airspace.² Legal authorities were in accord upon one point alone, namely, that the airspace over the sea and over unoccupied territory is completely free.³ But with reference to the superjacent airspace of states there was hopeless disagreement. Experts of international law advanced the following theories on the subject of airspace over occupied land and territorial waters of states:

(1). On an analogy to the doctrine of freedom of the seas, the airspace was said to be entirely free.

(2). On an analogy of the relation between the maritime belt and the open sea, a theory was put forward that the territorial state has sovereign rights in a lower zone of the airspace, but a higher zone is free and ownerless.

(3). The airspace above the state is within the jurisdiction of that state's exercise of sovereignty as a part of its territory, but that such sovereignty is subject to a servitude of innocent passage for foreign civil aircraft, but not foreign military aircraft.

(4). Applying the private law theory of *cujus est solum ejus est usque ad coelum et ad infernos*, it was rationalized that the

its boundaries. To this must be added, in the case of a State with a sea coast, certain waters which are within or adjacent to its land boundaries, and these waters are of two kinds—national and territorial. . . . § 172, p. 415.

The practice of States seems to accord with the theory of the sovereignty of the subjacent State in the air space above its territory and waters, both national and territorial. . . . § 197e, p. 475.

See also STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 100-123 (1947); ZOLLMAN, LAW OF THE AIR 3 (1927).

2. 1 OPPENHEIM, *op. cit. supra* note 1, § 197a; COLEGROVE, INTERNATIONAL CONTROL OF AVIATION 40-52 (Stud. ed. 1930); TOMBS, INTERNATIONAL ORGANIZATION IN EUROPEAN AIR TRANSPORT 4-5 (1936); Kuhn, *The Beginning of an Aerial Law*, 4 AM. J. INT'L. LAW 109 (1910).

3. 1 OPPENHEIM, *op. cit. supra* note 1, § 197a.

state was possessed of complete and absolute sovereignty to an unlimited height over the airspace above its territory.⁴

With the advent of the war in 1914 the argument was ended because air and land frontiers were closed for security reasons and the principle of sole and absolute sovereignty and ownership of the airspace by the subjacent state emerged triumphant, accepted by contesting states and neutrals alike.⁵

At the war's end an Aeronautical Commission of the Peace Conference was set up to study problems of air control and to draft an air navigation convention. The United States, an active member of the Commission, failed to ratify the Convention which followed, although many of the Allied Powers and some neutrals adhered thereto.⁶ The Convention Relating to the Regulation of Aerial Navigation 1919 of Paris was of tremendous importance since it formulated uniform international rules for air navigation.⁷ The Convention also admitted the validity of the theory of sovereignty in airspace by Article 1, wherein it was stated:

The high contracting parties recognize that every power has complete and exclusive sovereignty over the air space above its territory.⁸

4. *Ibid.*; SHAWCROSS AND BEAUMONT, *AIR LAW*, 85; ZOLLMAN, *op. cit. supra* note 1, 1-4; English, *Air Freedom: The Second Battle of the Books*, 2 J. AIR L. 356 (1931).

5. ZOLLMAN, *op. cit. supra* note 1, at 3:

At the outbreak of the war all air frontiers closed with a Janus-like clang. Physical safety, military necessity, and sanitary convenience forced belligerents and non-belligerents alike to take the position that each state has exclusive dominion over the airspace above its territory.

6. Thirty-three nations adhered to the Paris Convention. They were: Argentina, Australia, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Estonia, Finland, France, Great Britain, Greece, India, Iraq, Ireland, Italy, Japan, Latvia, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Roumania, Spain, Sweden, Switzerland, Thailand, Uruguay, Union of South Africa, Yugoslavia. Rhyne, *Legal Rules for International Aviation*, 31 VA. L. REV. 267, 271 n. 14 (1945).

7. THE CONVENTION FOR THE REGULATION OF AERIAL NAVIGATION, Paris 1919, No. 2143 (U.S. Dep't State 1944). In addition to its recognition of airspace sovereignty the Convention set forth principles with respect to the nationality of aircraft, admission to air navigation above foreign territory, rules as to air worthiness of aircraft, certification and licensing of pilots and measures to insure safety of peoples of underlying nations. Moreover, the International Commission for Air Navigation was created to administer the Convention. For discussions pertaining to this Convention see Bouve, *Regulation of International Air Navigation under the Paris Convention*, 6 J. AIR L. 299 (1935); Rhyne, *supra* note 6, at 270; COLGROVE, *op. cit. supra* note 2, at Chapter IV, 53-65.

8. Article 1 further stated: "... the territory of a state shall be under-

Two later international conventions, the Ibero-American at Madrid in 1926⁹ and the Pan-American Convention of Commercial Aviation at Havana in 1928,¹⁰ also accepted the sovereignty principle¹¹ and this concept remained unimpaired as the rule of international air law during the time elapsing between the two World Wars.

The International Civil Aviation Conference of 1944¹² held at Chicago was heralded with great fanfare; its purpose: to

stood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto."

9. This agreement is set out in 8 J. AIR L. 3 (1937). This Convention had little effect and became inactive prior to the Chicago Convention. See Rhyne, *supra*, note 6, at 273; TOMBS, *op. cit. supra* note 2, at 50-52, COLEGROVE, *op. cit. supra* note 2, at 88-90.

10. 4 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS 4729 (1938). Costa Rica, Chile, Ecuador, the United States, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Dominican Republic. See TOMBS, *op. cit. supra* note 2, at 50-51; COLGROVE, *op. cit. supra* note 2, at 88-94; Rhyne, *supra* note 6, at 274; Warner, *The International Convention for Air Navigation and the Pan American Convention for Air Navigation: A Comparative and Critical Analysis*, 3 AIR L. REV. 221 (1932); Latchford, *Habana Convention on Commercial Aviation*, 2 J. AIR L. 207 (1931).

11. Article 1 of the Ibero-American Convention states:

The High Contracting Parties recognize that each possesses the complete and exclusive sovereignty of the air space corresponding to its territory.

Article 1 of the Pan American Convention states:

The high contracting parties recognize that every state has complete and exclusive sovereignty over the air space above its territory and territorial waters.

12. CONFERENCE SERIES No. 2282 at 64 (U.S. Dep't State 1945). Some 54 nations were represented at the Chicago Conference. Some 51 nations have adhered to the Convention as of April, 1949. Five documents were drawn up at the Conference to be signed. 1. *The Final Act*—a document listing the representatives present, the matters that the conference did not consider or upon which agreement could not be reached, and a recommended standard form agreement to be used by nations negotiating bilaterally for air routes. 2. *The Interim Agreement on International Civil Aviation*—this agreement was to be effective until the permanent Convention became effective, which would be thirty days after twenty-six nations had formally ratified or adhered. A provisional international organization of a technical and advisory nature was set up to coördinate and guide international aviation until the permanent Convention became effective. 3. *The Convention of International Civil Aviation*—Broadly this document set forth the theory of sovereignty, set out provisions as to flight over territory of contracting states, provided rules for the nationality of aircraft, measures to facilitate navigation, required certificates of airworthiness and licensing of airmen, called for uniform technical standards, created the International Civil Aviation Organization, required the denunciation of other Conventions and the abrogation of inconsistent agreements, required the registration of aeronautical agreements and provided for disagreements and disputes. 4. *The International Air Transit Agreement*. 5. *The International Air Transport Agreement*.

open the sky, to gain some measure of airspace freedom.¹³ During World War II world air transport came into its own and, with the technical developments of the war years, proved that global flight was a reality, a necessity, and a practicality. Thus international air transport found itself poised on the threshold of a brilliant future only to be halted by the stumbling block of airspace sovereignty. In order to overcome this impediment, the conference was called at Chicago to conclude world-wide agreement concerning commercial air rights and to set forth rules governing international technical and navigational matters. In spite of its practical *raison d'être* not a dent was made in the old concept of sovereignty, and in the following words the doctrine was once again affirmed and placed before the world:

The contracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory.¹⁴

Since international conventions establish rules of international law as well as delineate international custom, and since there is unquestionably a concerted attitude evidenced by the nations through international conventions and practices, it may be safely asserted that the principle of airspace sovereignty is an established corner-stone of international law.¹⁵

III. FREEDOM OF THE AIR

Freedom of the air insofar as air commerce is concerned, and in its widest sense, can be said to include the privilege to fly over the high seas; the privilege to fly across the territory of a foreign state; the privilege to land; and the privilege to trade, that is, to put down traffic in a foreign state taken on in an air carrier's state of origin, to take on traffic in a foreign state destined for an air carrier's state of origin, to take on traffic in a foreign state destined for any other foreign state, to discharge traffic in a foreign state coming from any other foreign state, and to carry traffic between two points within the same foreign state.

13. See Invitation of the United States of America to the Conference and Message from President Roosevelt as set out in Dept. of State Publication 2282, Conference Series 64 (1945); Bowen, *The Chicago International Civil Aviation Conference*, 13 GEO. WASH. L. REV. 308 (1945).

14. Article 1, CONVENTION ON INTERNATIONAL CIVIL AVIATION.

15. OPPENHEIM, *op. cit. supra* note 1, § 197e; see §§ 16, 17, 18, 19 with respect to the sources of international law.

In the absence of treaty, international customary law is applicable, and since, as has been shown, international customary law as well as multilateral treaties recognize only the concept of complete sovereignty of a state over its superjacent airspace, the sole freedom of which air commerce may now boast is that freedom to fly in the airspace above the high seas. The airspace over the territory and territorial waters is subjected to absolute, exclusive jurisdiction of each nation restricted by no right of innocent passage. The rights of transit, landing and trading are subservient to the consent of each sovereign state and to obtain such consent is often a matter of difficult and devious bargaining, states being unwilling to accommodate each other without each exacting its pound of flesh and making the best possible bargain for itself.

With heavy and restrictive principles hampering world air transport, it is obvious that some opening of the sky was necessary or air commerce was stymied from the beginning. Thus the representatives of nations have assembled at various times in international conferences attempting to solve the problem. It is disheartening to note that as yet they have made little progress.

The first notable conference concerning itself with freedoms of the air was that called in Paris, from which sprang the Convention Relating to the Régulation of Aerial Navigation.¹⁶ A provision was inserted in this document to the effect that each contracting state undertook to accord in time of peace, freedom of innocent passage above its territory to the aircraft of the contracting states.¹⁷ This freedom of innocent passage was granted not as a matter of natural right but as a mere privilege to the aircraft of other states provided certain conditions were observed.¹⁸ Furthermore, the provision was not applicable to foreign international scheduled air transport nor to the establishment of international airways, for it was qualified and limited by Article 15 of the Convention. Though this article bearing upon navigation stated in paragraph one

16. See note 7 *supra*.

17. Article 2 reads: "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."

18. TOMBS, *op. cit. supra* note 2, at 53.

that "every aircraft of a contracting state has the right to cross the airspace of another state without landing," yet the third paragraph of the same article, somewhat unintelligibly in view of the quoted passage, declared that "the establishment of international airways shall be subject to the consent of the state flown over." There was a great deal of academic discussion as to the meaning of these paragraphs, some authorities advancing the theory that the freedom of innocent passage article and the right to cross the airspace of another state without landing gave the right of establishing and operating international airlines and airways. Nonetheless in practice the contrary was true for any right or privilege of innocent passage was confined to private aircraft and the consent of the state, as indicated by the third paragraph of Article 15, was inevitably necessary for an establishment of international airways over that state's territory.¹⁹ Moreover, any conflicts of opinion as to the interpretation of these articles were completely dispelled at an extraordinary session of the International Commission for Air Navigation of 1929, where it was most clearly stated:

Every contracting state may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory.²⁰

This provision subjected regular commercial air transport services to the will of each and every nation, permitting each nation to determine unilaterally whether or not world airways and international airlines might cross its territory.

The Paris Convention also established rules for trade, that is, the picking up and discharging of passengers and cargo. Article 16 reads:

Each contracting state shall have the right to establish reservations and restrictions in favor of its national aircraft in connection with the carriage of persons and goods for hire between two points on its territory.

This section relates to air cabotage. Cabotage may be defined as the carriage of persons and goods between two points of a state's territory. In maritime law, cabotage is inclusive of trade only along the coast line of a nation²¹ but in its

19. *Id.* at 61-62; LISSITZYN, INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY, 366-370 (1942).

20. TOMBS, *op. cit. supra* note 2, at 60.

21. OPPENHEIM, *op. cit. supra* note 1, § 187.

relation to air transport the cabotage concept becomes broader. As stated above, a state was permitted to restrict carriage between two points on its territory in favor of its own aircraft. Territory was then defined as the mother country, colonies, territorial waters adjacent thereto, and the territories of protectorates.²² For example, cabotage was applicable not only between points of the mother country but also between the mother country and colonies as well.²³

The Ibero-American Convention (Madrid) also adopted the principles of the Paris Convention as to the so-called freedom of the air, making international air services subject to the consent of the nation flown over.²⁴ However, the later Pan-American Convention was, insofar as the language used, less restrictive when compared to the previous conventions. The Havana Convention by its terms indicated a relaxing of the rule requiring the necessity of each nation's consent. Article 21 of the latter Convention declared:

The aircraft of a contracting state engaged in international air commerce shall be permitted to discharge passengers and a part of its cargo at one of the airports designated as a port of entry of any other contracting state, and to proceed to any other airport or airports in such state for the purpose of discharging the remaining passengers and portions of such cargo and in like manner to take on passengers and load cargo destined for a foreign state or states, provided that they comply with the legal requirements of the country over which they fly, which legal requirements shall be the same for native and foreign aircraft engaged in international traffic and shall be communicated in due course to the contracting states and to the Pan-American Union.

Although this article appeared to make consent unnecessary, nevertheless its meaning was unclear and practically speaking authorization was always obtained by an airline beginning operations to another country, even though the airline possessed the nationality of a contracting nation and was operating to another contracting nation.²⁵

The cabotage provision was similar to that of the Paris

22. Paris Convention, *supra* note 7, art. 1 and art. 40.

23. TOMBS, *op. cit. supra* note 2, at 69.

24. See note 9 *supra*.

25. LISSITZYN, *op. cit. supra* note 19, at 370-373, Rhyne, *supra* note 6, at 275. Rhyne gives a short comparison of the three Conventions at 270-273.

Convention, permitting restrictions in favor of a state's own carriers as to commercial transportation of passengers and cargo between two or more points in its territory.²⁶

It can be discerned that the nations prior to World War II seemed content to impede world air transport. Since no right to establish airways over a nation or operate airlines over or to a nation existed without consent of that nation, bargaining by bilateral agreement was the order of the day; and states were quick to seize upon this weakness of international law to better their positions by limiting severely in many instances, or refusing outright to grant any privileges of transit in others.²⁷

The issue in its entirety was once again brought to world attention at the Chicago Conference.²⁸ Once again the right of each state to control the transit of scheduled international transport was acknowledged to be within the exclusive jurisdiction of the sovereign state.

No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of the State, and in accordance with the terms of such permission or authorization.²⁹

Not only was the complete sovereignty of the air principle reasserted by the Chicago Convention, but it also affirmed the old entrenched doctrine of individual nation control of the air routes and air operations in the strongest possible language.

26. Pan American Convention, *supra* note 10, art. 22.

27. See Berle, *Freedoms of the Air, Blueprint for World Civil Aviation, Conference Series No. 2348* at 70 (U.S. Dep't State 1945). Berle here gives a clear statement of air privileges which the United States and United States carriers had obtained from other nations prior to 1944. See pp. 7-8.

28. For articles discussing the Chicago Conference and Convention see Berle, *Freedoms of the Air*; Morgan, *The International Civil Aviation Conference at Chicago: What it Means to the Americas*; Burden, *Opening the Sky: American Proposals at Chicago*; Warner, *The Chicago Air Conference: Accomplishments and Unfinished Business*. These articles are all contained in *Blueprint for World Civil Aviation, op. cit. supra* note 27. Also see Osterhout, *A Review of the Recent Chicago International Air Conference*, 31 VA. L. REV. 376 (1945); Rhyne, *supra* note 6; Bowen, *supra* note 13.

29. The Chicago Convention, *supra* note 12, art. 6. Art. 5 granted non-scheduled services the right of non-stop flight across nations and the right to land for non-traffic purposes without prior authorization. Non-scheduled air carriers were permitted the right to trade also subject to art. 7. Art. 7 permitted each contracting state to reserve cabotage rights.

Since the contracting nations could not agree to grant multilaterally rights of transit and traffic rights for international air services, two separate and optional agreements were promulgated and offered for signature. It was hoped by these agreements to bring about some multilateral exchange of operating rights. They were called the International Air Service Transit Agreement (the two freedoms agreement) and the International Air Transport Agreement (the five freedoms agreement).³⁰ As mentioned, their purpose was to grant freedom of commercial transit and traffic rights to scheduled air transport.

The two freedoms agreement provided that each contracting state would grant to another contracting state:

- (1). The privilege to fly across its territory without landing;
- (2). The privilege to land for non-traffic purposes (refueling and repairs).³¹

In addition it was stipulated that a contracting state could designate the route to be followed and the airports to be used within its territory by international airlines.³² An air carrier of another nation to which the privilege of non-traffic stops has been granted may be required to provide commercial airline service from those stops.³³

The five freedoms agreement reiterated numbers 1 and 2 of the Air Transit Agreement. The other freedoms granted were:

- (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.³⁴

The Air Transport Agreement requires air carriers to follow reasonably direct routes out of and back to the homeland of

30. *Id.*, Appendix III, p. 87 and Appendix IV, p. 91.

31. Air Transit Agreement, *id.*, art. 1, § 1.

32. *Id.*, § 4(1).

33. *Id.*, § 3.

34. Air Transport Agreement, *id.*, art. 1, § 1.

the state whose nationality the airline possesses,³⁵ and, as in the Air Transit Agreement, a contracting state may require an air carrier stopping for non-traffic purposes to offer reasonable commercial services at the points at which such stops are made.³⁶ Routes and airports within a state may be designated by that state.³⁷ As to through traffic (fifth-freedom traffic) consideration must be given to the interests of other contracting states so as not to interfere in a prejudicial manner with their regional services or the development of their through services.³⁸ Contracting states may refuse to accord the fifth-freedom privilege if they so desire.³⁹ Cabotage rights are reserved to each contracting nation.⁴⁰ However, no economic regulation of rates, unfair practices, limitation of routes, schedules or operating capacity is designated.

These five freedoms have been analyzed as follows:

1. Freedom for peaceful commercial aircraft to fly through the air of another country. This would mean that an American plane, for example, could travel freely over England, although it might be required to follow certain lanes for reasons of safety or military security. British planes, of course, would have similar rights of flight over the United States.

2. Freedom for such aircraft to land in other countries at agreed ports solely for the purpose of refuelling and overhaul, but not to take on or discharge commerce. In other words, an American plane bound for Paris might land at the great British air base near Prestwick, Scotland, for gasoline and repairs; but it could not leave passengers and freight there, nor could it pick up in Prestwick passengers who wanted to go on to Paris.

3. Freedom to carry traffic from the plane's country of origin to any other country. This simply would mean that a Pan-American or American Export Lines plane could fly passengers and freight from any United States airport to designated ports in all other countries.

4. Freedom to pick up in other countries traffic destined for the plane's homeland. Under this freedom, an American plane returning from Paris to New York could accept passengers *bound for the United States only* at Le Bourget field and Prestwick or any other base it might touch on

35. *Ibid.*

36. *Id.*, § 3.

37. *Id.*, § 5 (1).

38. *Id.*, art 3.

39. *Id.*, art. 4, § 1.

40. *Id.*, art. 1, § 4.

the homeward journey. But it could *not* (unless the fifth freedom were agreed upon) carry a passenger who wanted to go only from Paris to Prestwick.

5. Freedom for a foreign plane to carry traffic between countries outside its own. Thus, the American plane homeward bound from Paris could take on and drop off passengers and cargo moving between Paris and Prestwick, or between any other two countries along its route.⁴¹

At the Chicago Conference Canada suggested that a multilateral agreement should be signed containing only the first four freedoms,⁴² and the real dispute came over whether the fifth-freedom privilege should be granted. The United States delegation felt it would be most serious and disadvantageous to long distance trunk-lines to omit the fifth-freedom privilege, that is, the privilege of intermediate or pick-up traffic. To omit this latter privilege would mean that,

[a]n airline operating a long route under this Canadian formula would fly with a constantly growing number of empty seats. For example, a plane from New York to Cairo via London, Paris, Geneva, and Rome would drop off at each city the passengers booked to that point and take on none, thus probably arriving at Cairo with perhaps two or three seats occupied. Between New York and Buenos Aires, for instance, only 15 per cent of the traffic is through traffic, and therefore we should be able to operate only about one plane a week on that trade route . . . through lines could not live or develop on terminal traffic alone as provided under the Canadian formula.⁴³

The Air Transit or two freedoms agreement then grants the privilege of flight or transit, and thus seeks to prevent an individual state from prohibiting the establishment of world airways or trade routes across its territory. The five freedoms document not only grants the right of transit but also the right to trade, that is, an international airline would be enabled to operate along an international direct route from its home nation picking up cargo, passengers and mail and discharging the same at nations along the route. The five freedoms agreement if accepted multilaterally on an extensive scale would eliminate the legal obstacle placed in the path of transit and operational privileges of international air services.

41. Berle, *supra* note 27, at 6.

42. Morgan, *supra* note 28, at 12.

43. *Id.* at 12-13.

What can be said to be the status of transit and trade rights since the Chicago Conference, and the adoption of the Convention? Surprisingly, the legal position is essentially the same. The Transit Agreement has been accepted rather widely by the nations adhering to the Convention, but it has not been accepted by many nations which lie across some of the world's air trade routes.⁴⁴ Furthermore, the Transit Agreement may be terminated by any contracting nation upon the giving of one year's notice.⁴⁵ Since this is true the agreement can hardly be considered to possess a sufficiently enduring quality on which to rest a system of permanent air routes.

The five freedoms agreement has been ratified by only a small number of nations.⁴⁶ The United States adhered to this document, but has since renounced it.⁴⁷ As acceptance has been so meager and as it, too, may be terminated by the giving of a year's notice,⁴⁸ it cannot be said to be of importance to international air services at this time.

Hence the legal position of scheduled international air services is still comparable to that existing prior to the Conference. Except for the time when a nation is bound by the Air Transit Agreement, the Air Transport Agreement or some bilateral agreement, it is free to choose and bargain as it sees fit, taking every advantage of its geographical and political position to exclude or permit commercial air service transit and trade through and within its territory.

This assent by the community of nations to restrict air commerce seems to be contrary to the freedom of the seas which Grotius proclaimed and fostered in the 17th century,⁴⁹ and it is often said that commercial air transport should be entitled to identical rights or freedoms possessed by ocean shipping. Freedom of the seas simply means that by rule of international law there is a right to navigate on the high seas. No state possesses sovereignty over the high seas; therefore, the ships of every nation enjoy the right to navigate upon the high seas

44. As of today, for example, the U.S.S.R. with wide and expansive territory is not a party to the Air Transit Agreement.

45. Air Transit Agreement, *supra* note 30, art. 3.

46. As of 1948 some seventeen nations had signed this Agreement.

47. The United States signed but withdrew when it ratified the Convention.

48. Air Transport Agreement, *supra* note 30, art. 5.

49. GROTIUS, *THE FREEDOM OF THE SEAS* (Magoffin's trans. 1916).

free from interference by other nations.⁵⁰ Air transport also possesses this same freedom; that is, there is absolute freedom to navigate through the airspace above the high seas. By rule of international law each state possesses sovereignty over its territorial waters; still, this sovereignty is limited by a right of innocent passage. Thus, a vessel may pass through a foreign state's territorial waters without obtaining the permission of that state.⁵¹ Air transport has not been accorded this privilege. No such right of innocent passage exists in the airspace above the territorial waters of a state insofar as commercial air transport is concerned; consequently, when a foreign commercial aircraft passes through the airspace above territorial waters it must obtain authorization from the subjacent state. Moreover, license is generally given ocean shipping to enter and trade in foreign ports. Although each nation is possessed of sovereignty over its ports and may open or close its ports, in the absence of treaty, as it desires, nevertheless, in practice and by international custom or treaty each nation extends to shipping the privilege to enter its ports for purposes of refuelling or to discharge and pickup cargo.⁵² Again air transport does not possess this privilege.⁵³ The freedom granted to ocean shipping would appear to be a distinctive characteristic of that form of communication, accorded largely as a matter of tradition. Acceptance of the Air Transport Agreement would give essentially the same rights to air transport.

Many causes have influenced the nations of the world to limit the transit and landing rights of international airlines, to restrict freedom of the air. A prime motivation was that of national security in a military sense, for it was early realized that the airplane could be used as an instrument of war; there-

50. OPPENHEIM, *op. cit. supra* note 1, §§ 243-254; FENWICK, INTERNATIONAL LAW 291-293 (1924); STARKE, *op. cit. supra* note 1, at 153-155.

51. OPPENHEIM, *op. cit. supra* note 1, §§ 172, 188, 203; FENWICK, *id.* at 270.

52. 1 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 187 (1922); LISSITZYN, *op. cit. supra* note 19, at 403-405; Cooper, *Air Transport and World Organization*, 55 YALE L. J. 1191, 1196-1200 (1946).

53. Air transport as used herein means scheduled air transport operations. Under the Chicago Convention, art. 5 grants a privilege to non-scheduled air services to enter a foreign nation and take on traffic (excepting cabotage) subject to the right of that nation to impose conditions or regulations as it deems desirable.

fore, each nation desired international law to recognize its right to close its airspace to aircraft of another nation.⁵⁴ Moreover, states have sought in every conceivable manner to protect the secrecy of their military fortifications, and therefore there entered the element of fear that freedom of the air would permit future enemies to fly over the country, observe and photograph military bases and operations. Air transport pilots of a foreign schedule service quickly learn conditions of terrain and weather of the nation over which they fly. This experience is readily utilized by the military forces in time of war.⁵⁵ The United States was acting for reasons of security when, prior to World War II, it refused permits to foreign air transport's flight through Alaska, Hawaii, Midway, Wake and Guam. Permission to land in Hawaii, sought by the British and Netherlands airlines companies, was refused because the United States Government feared the Hawaiian defenses would be open to view from foreign aircraft.⁵⁶

Aside from direct military considerations, an obstacle to freedom of the air for commercial services has been the pure and simple selfish interests of nations. States possessing a fortunate geographic position, lying within the orbit of the great trade routes of the world, have been permitted to benefit greatly by the concept of airspace sovereignty. Since this principle blocks flight through the airspace of a sovereign nation, it has been possible for the subjacent state to bargain on its own terms and to exact onerous concessions before granting any privileges of landing or transit. For example, Portugal required that Lisbon, its capital, be made the first and last port of call in Europe when the Azores were used in trans-Atlantic service. This was a stiff price to pay, but for a permit to land at the Azores on the great north Atlantic route the airlines were forced to accede.⁵⁷

The greatest restraining factor to freedom of the air is the fact that air transport is not and never has been just another commercial enterprise. The air routes are the scene of political

54. Cooper, *supra* note 52, at 1192.

55. COLEGROVE, *op. cit. supra* note 2, at 8; LISSITZYN, *op. cit. supra* note 19, at 408.

56. LISSITZYN, *id.* at 407.

57. *Id.* at 406; *Logic of the Air*, Fortune Vol. 27, p. 72, April, 1943, as compiled in WORTHINGTON, INTERNATIONAL AIRWAYS 35, 39-41 (1945).

development, and the issue of their control is a primary aim of national external policy. Air transport and control of the air routes are a portion of national power—economic and military—and as such are inseparable from national and international politics. The drive to foster and develop air transport is a national incentive inasmuch as this form of transportation is a vital influence, an element of power contributing to the strength and wealth of nations. This is true for many and varied reasons. Civil air transport, though often stated to be separate and distinct, is in reality so closely connected to military aviation as to be considered part and parcel thereof. Commercial aircraft can be utilized most effectively by military air transport operations as well illustrated by the war-time operations of the Air Transport Command which were carried on in large degree by an integration of private airlines companies with that military organization.⁵⁸ Moreover, in peacetime civil air transport calls for the construction of planes and experimentation with new and different types of aircraft which tend to maintain and keep alive aircraft factories in interims between wars; these can quickly be converted to the production of military aircraft when the need arises. Pilots of private airlines may always be considered as a reserve peacetime force capable of taking over in time of war.⁵⁹

It is manifestly in the self-interest of states to extend themselves to other nations for purposes of trade and commerce by developing air transport services. Undeniably air transport occupies a more important position in this respect than other forms of transportation, for it is able to disregard surface obstacles, thus making possible the opening up for trade of many heretofore inaccessible portions of the globe.⁶⁰ Too, air services have contributed not inconsiderably to the task of binding empires together, and this factor has not been completely ignored by nations like Britain and France who have sought to expand their services to all parts of their respective realms.⁶¹ In addition, nations have utilized air transport for the purposes of spreading political and ideological doctrines as

58. LISSITZYN, *id.* at 71-74; Burke, *Influences Affecting International Aviation Policy*, 11 LAW & CONTEMP. PROB. 598, 601 (1946).

59. LISSITZYN, *id.* at 74-75; COLGROVE, *op. cit. supra* note 2, at 8.

60. LISSITZYN, *id.* at 49-53.

61. *Id.* at 64-67; COLEGROVE, *op. cit. supra* note 2, at 8.

evidenced by the pre-war air expansion of Germany in South America and Japan in Asia.⁶²

Since air transport occupies such an important role in modern domestic policy, states have felt compelled to promote and develop airlines systems to operate both nationally and internationally. It has only been in rare instances that airlines companies could pay their own way. Revenues have failed to equal operating costs. Therefore, direct governmental assistance has been required and has been forthcoming in the form of subsidies by governments.⁶³ Air transport companies have been subsidized freely by frequent drains on national treasuries. Freedom of the air as envisaged by the five freedoms agreement would lead to old-fashioned, and apparently today outmoded, *laissez faire* competition between the airlines of the world in order to acquire the air passenger, freight and express business of the world. Such competition conjures up pictures of a race for air routes, rate wars and uncontrolled expansion with possible unequal division of existing traffic. Hence, the airlines of a country might well go deeper in the red, their revenues dropping sharply, which in turn would call for ever increasing governmental subsidy payments to maintain operations. The result: the services of weaker nations would be forced to discontinue.

For reasons of national policy outlined above, states are too interested, have too much at stake in retaining their own air transport systems to risk a jeopardizing of their position by placing them in a perilous situation endangered by international rivalry and competition which might be the consequence of a grant of the five freedoms.⁶⁴ However, freedom of the air might be conferred if at the same time certain international economic controls could be adopted in order to protect the economic position of a state's international air carriers. Hence, efforts have been made to conclude agreement along such lines.

IV. PROPOSED INTERNATIONAL ECONOMIC CONTROLS

A. *The Chicago Conference.* The Chicago Conference was called in order to open up the air and to provide rights for

62. LISSITZYN, *id.* at 57-59; Cooper, *supra* note 52, at 1204.

63. On the subject of subsidies to air transport see LISSITZYN, *id.* at Chapter 8, 137-220; TOMBS, *op. cit. supra* note 2, at 31-35.

64. LISSITZYN, *id.* at 409-410.

air transport to travel and to carry international commerce. Further, and of utmost importance, international economic collaboration was sought to end or alleviate trade rivalries between nations over air routes and air transport services. The Conference had two basic objectives: (1) to draw up a new set of uniform safety and technical standards on an international scale to replace the outmoded ones which had been promulgated years before at the Paris and Havana Conventions and (2) to determine if and to what extent international air transport could be regulated by international economic control.⁶⁵

If the skies are to be free, then there would seem to be a definite need for international control of air transport in the economic sphere, for there is close connection between freedom of the air and such regulation. It is argued that economic regulation is an absolute necessity to protect the interests of nations granting freedom of the air in order to do away with wasteful competition, rate wars and those monopolistic practices of the airlines and of the nations themselves which tend to stifle competition. Therefore, the economic regulation possibly envisioned would call for the granting of international routes only in the public convenience and necessity, the regulation of airline rates and business practices and, further, the control or prohibition of uneconomic subsidies. Moreover, it has been contended that on international routes there should be regulation by international agreement providing for number of schedules, frequencies or capacity to be operated over routes by air transport operations.⁶⁶

The Conference was notably successful in the promulgation of new safety and technical standards, but in the economic sphere agreement could not be reached.⁶⁷ During the course of the Conference three varied plans were presented by the United States, Australia and New Zealand, and Britain and Canada relative to the economic control of world air transport.

The United States took its stand and called for an opening of the skyways to world air transport which would signify freedom of operations, equality of opportunity and competition

65. Van Zandt, *The Chicago Conference*, Foreign Policy Reports, Vol. 20, p. 290, Feb. 15, 1945 as compiled in WORTHINGTON, *op. cit. supra* note 57.

66. Berle, *supra* note 27, at 6-7.

67. Leiding, *Technical Fields*, Air Transport, Vol. 2, p. 87 as compiled in WORTHINGTON, *op. cit. supra* note 57; Morgan, *supra* note 28, at 11-12.

in the air.⁶⁸ This country opposed, for the most part, any international regulatory controls of an economic nature. The American delegates stood for free enterprise, free competition. This position is somewhat anomalous when one considers that the United States by the Civil Aeronautics Act of 1938 and through the Civil Aeronautics Board has drastically regulated its own airlines companies economically, and has curbed competition by an allotment of air routes to certain specified carriers only, and further, has subjected air rates and business practices of the airlines to administrative control.⁶⁹ Nevertheless, in the international regulatory field the United States petitioned for a policy of hands off, *laissez faire*. In desiring freedom of the air, the United States was propelled by motives both selfish and idealistic. Selfishly, the United States was undeniably possessed of leadership in the air with the most highly developed aircraft and air transport industries. Therefore, the United States delegates believed that the United States could more than hold its own in any competitive race. The opening of the skyways would permit American air transport companies freedom to increase their operations without hindrance and further strengthen American air transport. Idealistically, the belief was present that the air transport of all countries would reap an advantage through competition, and that it was much too early to allocate routes to certain nations and limit schedules to be flown on routes, since with respect to the former some nations were not yet prepared to enter air transport, though they might so desire later; and as to the latter such limitation of frequencies was thought not feasible because world air transport stood on the threshold of great

68. Berle, *supra* note 27, at 1:

The Government of the United States has taken and maintained the view that:

Worldwide development of civil aviation is a powerful force for world unity and world peace;

A general system of rights for planes to travel and to carry international commerce should be set up, becoming the established custom of commerce by air, as similar arrangements have become the settled law of commerce by sea;

These rights of transit and commerce should be available to all nations, permitting equal opportunity and reasonable competition; and All nations should join in a world organization designed both to prevent competitive excesses and exploitation, and to maintain technical facilities and standards.

69. See Burden, *supra* note 28, at 19.

expansion which could not be accurately prognosticated and limitations might hinder more than aid.⁷⁰ The United States delegation was apparently ready to accept some control by an international air regulatory body which might be empowered to intervene in case of dispute and certain cases of dangerous and unfair competition such as rate wars and unfair practices.⁷¹

Australia and New Zealand announced a novel and exciting plan calling for the establishing of a single international corporation or authority to own and operate all international air transport. Only local domestic airlines could be operated by a single nation or the private airlines of such nation. In other words the plan visualized a complete elimination of competition on the air routes which would mean an elimination of competitive rivalries of nations in the air, and thus remove evil conditions, possibly war, to which such national struggles lead. Such a plan would end contention between nations in at least one field of endeavor—civil aviation. The nations were not yet ready to pool their interests, to accommodate each other, or to limit to this extent the exercise of state sovereignty, and until such occurs the plan must fail.⁷²

Britain and Canada stressed the need for order in the air and advocated an international Civil Aeronautics Board with economic powers over routes, fares, frequencies and capacity allowable of air transport operations. They feared that without economic control international air services would be operated for purposes of national prestige even though planes flew almost empty. Therefore, rate and subsidy wars would result. They desired to assure to each nation by economic regulation a fair share of the traffic. Probably they were haunted by an abiding fear that without control the United States with its superiority in the air and its near monopoly of suitable air transport aircraft would dominate the field. The United Kingdom proposed that the International Commission be empowered to grant or refuse operating licenses on international routes on a basis of public convenience and necessity. It was suggested

70. *Air: The U. S. Position*, Fortune Vol. 30, p. 1154, Oct., 1944 as compiled in WORTHINGTON, *op. cit. supra* note 57. Berle *supra* note 27, at 7; Morgan, *supra* note 28, at 11.

71. Berle, *id.* at 7.

72. Sullivan, *International Ownership of Air Transport*, Free World, Vol. 8, p. 503, Dec., 1944 as compiled in WORTHINGTON, *op. cit. supra* note 57; Berle, *id.* at 5-6.

that this body should possibly determine the number of flights or schedules or capacity that the airlines of the various countries might operate on given international routes, and it was also advocated that there should be a regulation of fares charged by international air transport companies.⁷³

A *propos* operating rights on international routes, the debate narrowed during the course of the Conference. There was a semblance of support for a universal authorization of international routes as proclaimed by the five freedoms agreement. The real obstacle to agreement was a dispute over whether there should be a limitation on capacity that could be operated by the air carriers of each nation over each route.⁷⁴ The United Kingdom apparently wished to limit capacity by reference to the jurisdiction of an international body with power to determine what capacity would be allowed over a route. The United States would not agree to control by an international commission, but did indicate possible willingness to agree to some manner of automatic formula which a commission could apply. An advocated formula was one based on the idea that an airline could fly more trips only by showing that for a considerable time more than two-thirds of its total capacity had been occupied by a revenue paying commercial load.⁷⁵ However, the United States refused to give any further consideration to such a proposal when the British rejected the fifth-freedom as set out in the Air Transport Agreement; that is, Britain asserted that only the traffic carried direct from the airline's home country should "count in establishing the initial frequency of service and in increasing the frequency."⁷⁶ The traffic picked up en route should not be counted. The United

73. Berle, *id.* at 6; Morgan, *supra* note 28, at 10; Burden, *supra* note 28 at 19. A British plan for a new convention proposed that the international air routes should be defined; that uneconomic competition should be eliminated by the determination and distribution of frequencies between countries concerned as well as the fixing of rates; that international air operators should be licensed; and that facilities be denied unlicensed operators. See OPPENHEIM, *op. cit. supra* note 1, at 480, n. 6.

74. Warner, *supra* note 28, at 28 and 32.

75. Canada put forward a compromise plan which would have granted the first four freedoms and also would have placed the control of airline frequencies in the hands of an international commission. A formula for frequencies was outlined. See OPPENHEIM, *op. cit. supra* note 1, at 479-480, n. 6; see also Morgan *supra* note 28, at 12; Burden, *supra* note 28, at 20; Warner, *supra* note 28, at 30.

76. Burden, *id.* at 20.

States was basically opposed to restrictions on intermediate traffic (fifth-freedom traffic).⁷⁷ It believed such traffic to be necessary for the economic operation of long distance through airlines. On the other hand countries possessing mainly local international airlines feared that unless some obstacle were placed in the way of through air carriers to carry fifth-freedom traffic, that such local or regional airlines would be unable to compete with through airlines and thus would be unable to survive.⁷⁸

With such fundamental disagreement over possible economic controls further insistence was futile. Therefore, regulation of air transport routes, frequencies or operating capacity was omitted from the Convention. This was also true as to rate regulation, since the United States was opposed to placing rate control in the hands of an international commission. Therefore, the Air Transit Agreement and the Air Transport Agreement were submitted separately in order to provide as much freedom of the air as possible.⁷⁹

The Chicago Convention specifically permits pooling arrangements and joint operating organizations. Articles 77 and 79 declare:

Nothing in this Convention shall prevent two or more contracting States from constituting joint air transport organizations and from pooling their air services on any routes or in any regions.

A State may participate in joint operating organizations or in pooling arrangements, either through its government or through an airline company or companies designated by its government. The companies may, at the sole discretion of the State concerned, be state-owned or partly state-owned or privately owned.

Close combinations between carriers of two or more countries which lead to consolidations of economic power and the elimination of the advantages of competition are authorized, even encouraged, though provision is made for registration of such agreements with the Council of the International Civil Aviation Organization.⁸⁰ This is a distinct improvement over

77. *Ibid.*

78. Ryan, *Policy Issues in International Air Transportation*, 16 *Geo. Wash. L. Rev.* 443, 457 (1948).

79. Burden, *supra* note 28, at 21.

80. Chicago Convention, *supra* note 12, art. 77.

the past practice of not making them public. These arrangements in the past were often made by two or more airlines companies to operate a common line whereby the number of flights which each company could make would be regulated and provision would be made for joint and mutual administrative and technical staffs and publicity arrangements. The revenues of both companies would be pooled and divided proportionately. These agreements were common in Europe prior to World War II and there is an increasing trend in this direction at present.⁸¹ Great Britain, Australia and New Zealand operate British Commonwealth Pacific Airlines jointly across the Pacific. A combined operating company has been formed by Norway, Sweden and Denmark, the Scandinavian Airlines System, to operate the trans-Atlantic route to the United States and South America.

This type of organization does away with competition between the carriers of those nations forming the one joint operating company and places the resultant carrier in a stronger competitive position, thus affecting the other carriers conducting air transport operations over the same route. It must be borne in mind that a further possible danger might arise in that if countries A, B and C pool their services in one carrier such countries might then prevent the carriage of traffic moving between countries A, B and C by the carrier or carriers of any other state.⁸² Pooling arrangements and joint operating agreements are justifiable in the public interest. This might be true where a route traversed is a thinly populated one generating little traffic, but if competitive conditions are thought to be at all desirable, the consequences of such combinations should be considered. To date little discussion has been accorded this subject at international gatherings.

The Chicago Convention did create the International Civil Aviation Organization known as ICAO.⁸³ This body is composed of an assembly with representatives of each member state and a Council which is elected by the Assembly. An interim

81. TOMBS, *op. cit. supra* note 2, at 35-41; LISSITZYN, *op. cit. supra* note 19, at 395-396.

82. Ryan, *supra* note 78, at 465-468.

83. Chapters VII, VIII, and IX of the Convention on International Civil Aviation, *supra* note 12. See Colclaser, *The New International Civil Aviation Organization*, 31 VA. L. REV. 457 (1945).

Agreement also was drawn up at Chicago which was to be effective until the Convention came into being. By this Interim Agreement a Provisional Civil Aviation Organization (PICAO) was set up which functioned for a time.⁸⁴ Both PICAO and ICAO were authorized to take those necessary measures for unification of technical and safety procedures. However, in the economic field only powers of an advisory and administrative nature were granted. No power was given to the organizations to allocate routes, control frequencies or capacity of international airlines, fix rates or regulate competitive practices.

PICAO and later ICAO were charged by the Convention to study those problems which affect international air transport. Recognizing that the problem of economic controls and the exchange of operating rights in international air transport were closely related, the Air Transport Committee of PICAO prepared a draft multilateral convention on the exchange of such commercial rights and embodying economic principles. This draft was presented to the permanent Assembly of ICAO for consideration.⁸⁵ The draft, insofar as economic controls are concerned, contained provisions regarding freedom of the air and air transport operations and routes, capacity, rates, subsidies and disagreements.

B. Multilateral Agreement on Commercial Rights in International Civil Air Transport—Proceedings of the Committee on Air Transport.

1. *Freedom of the Air.* The preamble of this proposed agreement set forth a new phrase in the field of international air transport, "regulated freedom of the air." A "regulated freedom of the air" was called for as the only means by which the development of international air transport could be secured

84. Interim Agreement on International Civil Aviation, Appendix I to the International Civil Aviation Conference, *supra* note 12. The provisional organization became defunct in 1947 when the permanent organization ICAO came into being.

85. Multilateral Agreement on Commercial Rights in International Civil Air Transport—Proceedings of the Committee on Air Transport (Submitted through the Interim Council) to the First Assembly of the International Civil Aviation Organization. PICAO Docket 2866 AT/169, 26/2/47. This draft is set out in 14 J. AIR L. 235 (1947). For an excellent discussion on this proposed agreement see Cooper, *The Proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport*, 14 J. AIR L. 125 (1947).

in accordance with the aims of the Convention. The Agreement envisaged apparently, and this is borne out by later chapters of the draft, a situation wherein scheduled world carriers would be permitted to travel to any country and trade therein subject to economic regulation. The wording was seemingly an assault on the old citadel of airspace sovereignty. The terms "freedom of the air" and "airspace sovereignty" do not jibe, for if there is freedom of the air as a right, then there is no sovereignty and vice versa. To base the Convention on freedom of the air, even though regulated, nullifies the doctrine of sovereignty of the air as set out in all Conventions beginning with that at Paris and ending with that at Chicago. If such was not the intention, the language should have been more carefully drafted recognizing that the transit of aircraft through a nation's airspace is not a right but only a privilege.⁸⁶

Chapter II was concerned with air transport operations and routes. It was stated in Article 6:

Subject to the provisions of this agreement, each contracting state shall have the right that its duly authorized airlines shall be entitled to fly their aircraft across the territory of any other contracting state without landing and to make in such territory, stops for non-traffic purposes and for the purpose of putting down and taking on passengers, mail and cargo.

Further provisions of Chapter II required each contracting state to designate a reasonable number of airports to be used as international airports.⁸⁷ Contracting states would be prohibited from denying the use of its airports in respect of stops for non-traffic purposes to any international airline of a contracting state if such airports were open to use by its own international air services.⁸⁸

Chapter II, as can be seen, was a multilateral grant of the five freedoms of the air stated in simplified language as promulgated by the Air Transport Agreement. Included within Article 6 is the privilege to fly across the territory of a state without landing (first freedom); the privilege to land for non-traffic purposes (second freedom); the privilege to put down traffic taken on in the territory of the state whose nationality

86. Cooper *id.* at 129-134, criticizes this wording.

87. Multilateral Agreement, *supra* note 85, art. 7 (a).

88. *Id.*, art. 7 (c).

the aircraft possesses (third freedom); the privilege to take on passengers, mail and cargo destined for the territory of the state whose nationality the aircraft possesses (fourth freedom); and 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 (fifth freedom). This provision would do away completely with bilateral bargaining over international routes. The right to fly thus conferred would not be confined to particular routes but a general right available to any airline duly authorized by its own government.⁸⁹

This proposed multilateral agreement is broader than the Air Transport Agreement, for by the terms of that agreement relating to the third, fourth and fifth freedoms the rights of transit and trade pertained only to an undertaking operating "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."⁹⁰ In addition under the latter agreement each state was permitted to "designate the route to be followed within its territory by an international air service and the airports which any such service may use."⁹¹

Under the proposed draft state A, a contracting state, would be forced to permit the authorized scheduled air transport services of other contracting states to fly through the airspace of state A; to land for non-traffic purposes at any airport in state A, provided the airport was used by A's international air services and provided further that the airport's physical accommodation and traffic capacity would permit. Thus state A would be almost powerless to designate routes for international air transit.

The minority of the Air Transport Committee opposed a grant of general rights to fly and trade by multilateral agreement.⁹² They desired a system of "regulated bilateralism," that is, route arrangements should be the subject of negotiation between two states, and a multilateral agreement should only set forth principles for contracting states to follow in the exchange and

89. Commentary on Chapter II—Appendix B, 14 J. AIR L. 235, 247 (1947).

90. Multilateral Agreement, *supra* note 85, art. 1, sec. 1.

91. *Id.*, art. 1, sec. 5(1).

92. Appendix C. Statement of Minority Views, *supra* note 89.

operation of routes bilaterally. The minority of opinion was prevalent inasmuch as it was realistically believed that states would not enter into a multilateral agreement exchanging five freedom rights with all airlines of every contracting state. It was said:

. . . countries . . . have the problem of protecting their international airlines from an undue number of other international airlines seeking business over the same routes into the homeland. The easiest way for any country to limit the amount of competition on the routes entering its territory is obviously to limit the number of other countries with which it will exchange rights for any particular connecting route.⁹³

2. *Capacity.* Chapter III of the proposed multilateral draft dealt with the amount of capacity⁹⁴ which international carriers would be permitted to offer over a route, that is, the number of passenger seats and the amount of mail and cargo space the carrier would be permitted to fly on its international route. A proposed limitation on capacity was offered to prevent destructive competition for otherwise there arose the possibility of near empty aircraft flying the world air routes. A capacity restriction would prevent excessive capacity offerings. Too, such limitation would remove the necessity for designating routes or "to fix the route pattern in terms of reasonably direct routes out from and back to the territory of the state in question, for the traffic flow itself should normally eliminate unnecessary meanderings."⁹⁵

Article 10(a) set forth regulatory provisions dealing with the amount of capacity as follows:

The amount of capacity which a contracting State shall be entitled to permit any of its airlines to provide from time to time over various stages of each route shall be that required for the carriage, at a reasonable load factor, of both:

93. Multilateral Agreement on Commercial Rights in International Civil Air Transport: Statement by the Delegate of the U. S., Mr. Paul T. David, made at the Air Transport Committee Meeting held Feb. 10, 1947. PICAO Docket 2766 — AT/165.

94. Capacity has been defined as: ". . . the total capacity to transport commercial load over a given route in some convenient unit of time. It may be expressed, for example, as the product of the number of schedules operated per week multiplied by the average commercial carrying capacity of one of the aircraft of the type used." Warner, *supra* note 28, at 28.

95. Commentary on Chapter III — Capacity, *supra* note 89, at 248.

- (i) passengers, mail and cargo taken on or to be put down by such airline in the territory of such state; and
- (ii) passengers, mail and cargo moving by such airline between points in the territories of other States which the route touches, insofar as capacity for such traffic is not being provided by airlines of the States in which the traffic is taken on or put down.

Thus according to Article 10(a) there were two factors upon which capacity allowable was to be based: 10(a) (i), third and fourth-freedom traffic, and 10(a) (ii), fifth-freedom traffic. With reference to third and fourth-freedom traffic this simply meant that an airline of state A could carry traffic taken on in state A to state B and disembark this traffic there, and further take on traffic in state B for return to state A subject to a capacity allowable on the route measured by a reasonable load factor. Third and fourth-freedom traffic was recognized as a fundamental element. In the Commentary to the proposed agreement, it was said:

. . . the right to provide the capacity required for one's own traffic is . . . inherent and not subject to reduction as long as the load factor is reasonable.⁹⁶

Free competition was envisaged by Article 10(a) (i) as to third and fourth-freedom traffic. Consider the situation of two nations, A and B, each possessed of an international airline operating to the other. These two airlines would be permitted to compete for the traffic, passenger, mail and cargo, moving between A and B. If the airline of A obtained a larger amount of traffic than that of B, then, as the load condition changed, the amount of capacity that could be carried by each airline would be recalculated at some future time to meet a reasonable load factor, with the result that if the airline of A captured a larger share of the business through offering better service it could offer more capacity. The airline of B as a consequence would lose traffic possibly to a point where its load factor would no longer be reasonable and would be forced to reduce capacity offered. It would be conceivable that the airline of B might be forced to discontinue operations in such case. Under Article 11(a) a state could permit its airlines reasonable discretion as regards the amount of capacity offered on the establish-

⁹⁶ *Ibid.*

ment of a new international service. Therefore, upon beginning a new service on a route the airline could operate to the capacity that its government believed reasonable. However, if this new service were competing with other established airlines on the route, it would be compelled to obtain sufficient traffic by some date in the future to bring its load factor up to the norm of the route concerned. Otherwise the amount of capacity it could carry would be reduced to an amount conforming to the amount of traffic it was capable of carrying at the route load factor.

As opposed to the competition permitted with respect to third and fourth-freedom traffic, it was severely restricted in the case of fifth-freedom traffic. The fifth-freedom privilege permits the taking on and putting down of international traffic by a trunk line operating along a route passing through several nations. Article 10(a)(ii) would allow the capacity offering of traffic moving between points in the territories of other states which the route touched to be measured by a reasonable load factor insofar as capacity for such traffic was not being provided by airlines of the states in which such traffic was taken on or put down.

This has been said to signify the following:

On all routes from country A to countries B, C, and D, airlines of country A can put on all the traffic desired to carry available traffic at a reasonable load factor. If any substantial amount of the traffic is disembarked at B, then B is a point at which capacity must be recalculated. No aircraft of A can be operated beyond B except at a load factor based on the through traffic from A to C and beyond if local services of countries B or C provide capacity for traffic beyond B. In such case, the only fifth freedom traffic which an airline of A could pick up at B would be the amount which would fill up the seats still available after the new capacity is determined.⁹⁷

It can readily be seen that such a scheme would impose drastic limitations on trunk lines in order to protect local international airlines, that is, in the example set forth above such would protect the local airlines of B operating to C and those of C operating to B from the through services of the airline of A. Such an arrangement would do injury to inter-

97. Cooper *supra* note 85, at 141-142.

national trunk lines by curtailing in large degree the amount of intermediate traffic which they could carry. Fifth-freedom traffic would be limited seriously. Thus, at the Chicago Conference the United States refused to accept an agreement curtailing such traffic for such was thought to be essential to the economic operations of long distance routes. Curtailment of this traffic could well have disastrous results to airlines of such nations as Great Britain, the United States, the Netherlands and France, who operate routes to far distant portions of the globe. The framers, however, of this proposed agreement believed that fifth-freedom traffic was not fundamental. They stated:

. . . the right to provide capacity for this purpose is not inherent but exists only so long as the airlines of the other States concerned cannot accommodate such traffic.⁹⁸

3. *Rates—Subsidies—Disagreements.* Article 14 was a very broad and general rate provision to the effect that each contracting state should require its airlines to charge reasonable rates. The setting of these rates could be done by the airlines or by the states. Such a broad provision based merely on reasonability can be criticized, for a rate might be reasonable to one country under its cost conditions but unreasonable to another. It was provided that in case of rate disagreement an arbitral tribunal should decide the question, but such tribunal would find it difficult to come to a decision as to the reasonability without guides to follow in so determining.

Article 15 related to subsidies though the term was not mentioned. It provided:

Each contracting State shall refrain from granting to any airlines any form of assistance which fosters competitive practices destructive to other airlines.

No definition was given to the phrase "competitive practices

98. Commentary on Chapter III, *supra* note 89, at 248. See this Commentary for full discussion of these capacity provisions and also Cooper, *supra* note 85, at 139-146. A previous draft multilateral agreement submitted to the First Interim Assembly of PICAQ in 1946 proposed to protect local international airlines against competing trunk lines by permitting nations to require the through airlines of other nations to charge higher fares on through routes competing with local regional lines. This was rejected. Discussion on the Development of a Multilateral Agreement on Commercial Rights in International Civil Air Transport, PICAQ Docket 2089-EC/57 Oct., 1946. See in this respect Ryan, *supra* note 78, at 458 and Little, *Control of International Air Transport*, 3 INTERNATIONAL ORGANIZATION 29, 34 (1949).

destructive to other airlines"; however, it would seem that a practice of granting a subsidy to an airline resulting in great loss of business by a competitive airline might be considered a destructive practice within the purview of the provision and which the arbitral tribunal could order discontinued.

Article 16 stated:

Each contracting State shall prevent its airlines from engaging in unfair competitive practices and from participating in any arrangements which result in defeating the aims of this agreement.

Although once again unfair competitive practices and arrangements were undefined, this provision, it is submitted, aimed at those monopolistic practices and close combinations of the airlines companies themselves which would tend to do away with the regulated freedom of the air incorporated into the proposed draft.

In the event of disagreement it was provided that when disputes arose over the interpretation or application of the agreement, such disputes were to be resolved by an arbitral tribunal.⁹⁹ Conformity to the decisions of this tribunal was necessary, for in the event of nonconformity the other contracting states were to refuse to permit operations of the airline through their superjacent airspace.¹⁰⁰

In summary, this proposed agreement provided for a general exchange of transit privileges inclusive of all five freedoms of the air. It limited capacity with respect to third and fourth-freedom traffic only to a reasonable load factor, but capacity as concerned in fifth-freedom traffic was further restricted, for in computing the reasonable load factor it would have been necessary to consider capacity as provided by airlines of other states in which traffic was taken on or put down. The agreement called for reasonable rates and sought to prohibit destructive competitive practices by states and by the airlines. Arbitral machinery was set up to settle disputes arising from these economic provisions in case negotiations failed between the disputing parties.

General agreement could not be reached by the Assembly of ICAO upon the provisions of this proposed agreement on

99. Multilateral Agreement, *supra* note 85, art. 17(a).

100. *Id.*, art. 17(c).

commercial rights in international civil air transport; therefore, it was never submitted for ratification as a treaty. In the main there was disagreement as to whether an automatic exchange of routes should be included or whether the right to exchange routes by bilateral negotiations should be reserved. Also, the fifth-freedom capacity restriction was thought by many to be unduly prejudicial to the economic operation of long distance trunk lines. However, the Assembly did realize a need for a multilateral treaty dealing with exchange of routes and economic problems. Hence, a commission of all member states was called at Geneva in 1947 to develop and submit for consideration of member states an agreement with regard to the exchange of commercial rights in civil air transport. Here again the problems of route exchange, capacity, rates and unfair practices were considered. Once again there was failure to reach an agreement to be submitted to member states although a draft was drawn and incorporated in the final report of the conference which is here set forth for discussion.¹⁰¹

C. Multilateral Agreement on Commercial Rights in International Civil Air Transport—Final Report of ICAO Commission.

1. *Routes and Arrangements for Operation of International Air Services.* In drafting this proposed agreement at Geneva the exponents of regulated bilateralism triumphed. A minority believed as formerly that a multilateral agreement should eliminate making of bilateral agreements but the completed draft incorporated the view that a multilateral agreement should not “. . . convey the right to operate air services over the territory of another State. . . .”¹⁰²

Article 8 stated:

The privilege granted to a contracting State of taking on and putting down international air traffic in the territory of another contracting State under the provisions of the present Agreement shall be granted only by a separate

101. Multilateral Agreement on Commercial Rights in International Civil Air Transport—Final Report of ICAO Commission (Geneva Conference, Nov. 4-27, 1947). The draft agreement is set out in Annex III and incorporated in 15 J. AIR L. 92-105 (1948). For discussion see McClurkin, *The Geneva Commission on a Multilateral Air Transport Agreement*, 15 J. AIR L. 39 (1948).

102. Multilateral Agreement Geneva, 15 J. AIR L. 92, 94 (1948).

arrangement (hereinafter called a Route Agreement) between such contracting States. No contracting State shall be required to enter into a Route Agreement.

By this provision all exchanges of routes between nations would be left to bilateral agreement. Obligations were not imposed upon a nation to grant routes to any other nation. It was contended that the multilateral agreement should grant the third, fourth and fifth-freedoms, but ". . . that authority to operate over specific routes should be subject to separate bilateral negotiation, without obligation to grant any such authorization."¹⁰³ In other words a route authorization did not have to be granted, but, if it were granted, it must permit the privilege of the five freedoms of the air. Once again those nations wishing to protect local international services defeated any inclusion of such a provision. They specifically objected when the draft was drawn to include no limitation on capacity allowable with respect to fifth-freedom traffic other than a reasonable load factor. Therefore, there was inserted Article 9 which reads as follows:

Nothing in the present Agreement shall prevent a contracting State from entering into a Route Agreement which will grant to another contracting State only the privilege of taking on and putting down international air traffic originating in or destined for the territory of the other party to the Route Agreement, and not the privilege of carrying international air traffic both originating in and destined for points on the agreed routes in the territories of States other than the parties to the Route Agreement.

This permits a nation to enter into a bilateral agreement with another, granting third and fourth-freedom rights only, omitting to grant the fifth-freedom. Those nations possessing long distance route operations were in the minority and could not persuade the majority of the validity of their viewpoint that local operations would be protected since each nation would have the privilege to grant routes. This should assure sufficient protection to local services. On the other hand the minority believed that evil results would follow by inserting a definite provision allowing nations to eliminate fifth-freedom traffic from their agreements since operations of trunk lines would be deprived of economic operation by fifth-freedom restriction.

103. *Id.* at 93.

As stated, the minority desired to include a definite provision to the effect that if a bilateral agreement were made it must embrace fifth-freedom traffic. These incompatible views as to fifth-freedom traffic once again prevented general agreement.

2. *Capacity.* Article 15 dealt with the capacity that could be offered. It provided:

(a) The capacity provided by the designated air lines of a party to a Route Agreement, together with the capacity provided by the designated air lines of the other party, shall be maintained in reasonable relationship to the requirements of the public for air transportation on the agreed routes.

(b) In the application of the principle stated in paragraph (a) above,

(i) the air services provided by a designated air line under a Route Agreement shall have as their primary objective the provision at a reasonable load factor, of capacity adequate to the current and reasonably anticipated requirements of that air line for the carriage of international air traffic originating in or destined for the territory of the party designating the air line;

(ii) the capacity provided under sub-paragraph (i) may be augmented by complementary capacity adequate for the carriage of international air traffic both originating at and destined for points on the agreed routes in the territories of States other than that designating the air line. Such additional complementary capacity shall be related to the traffic requirements of the areas through which the air line operates, after taking account of the special position of other air services established by air lines of the States referred to above in so far as they are carrying, on the whole or part of the agreed routes, international air traffic originating in or destined for their territories.

This provision would require the maintenance of a total capacity over a route at a reasonable relationship to the requirements of the public for air transportation at a reasonable load figure. Here there is no limitation on fifth-freedom traffic capacity allowable other than a statement that the capacity offered must bear a reasonable relationship to the requirement of the public for air service plus a taking into account of

the special position of local and regional air services so as not to prejudice them unduly. Thus, no real restriction was placed upon capacity of fifth-freedom traffic as in the former proposed multilateral agreement. This led to the insertion of Article 9 by those fighting the battle of local and regional airlines which permitted a state to contract out fifth-freedom by bilateral agreement.

The term capacity was defined by Article 17 to mean:

. . . pay load expressed in metric tons-kilometers offered on the route concerned during a specified period of time.

3. *Rates—Prohibited Practices—Settlement of Disputes.* It was provided that rates to be charged should be fixed at a reasonable level. However, as opposed to the former proposed draft certain guides were promulgated. It was stated:

Due regard shall be paid to all relevant factors including costs of operation, reasonable profit and the rates charged by other airlines on any part of the route.¹⁰⁴

Rates were to be agreed upon, if possible, by the airlines through resolutions adopted by an organization representative of the airlines. If such organization were not available, rates should be fixed between the airlines of contracting states operating on a route.¹⁰⁵ A procedure was adopted for prompt consultation among governments, or prompt submission to adjudication where there was disagreement over rates in order to do away with cases of long delay in introduction of a rate. Provision was made for the establishment of initial rates for new services. If a contracting state did not believe existing rates were fixed at reasonable levels, such state could call for consultation among the governments and also for adjudication if necessary.¹⁰⁶

This draft made no mention of state assistance to airlines as being an unfair competitive practice. A simple provision was inserted that a contracting state should refrain from engaging in unfair or deceptive practices affecting competition and should prevent its airlines from so doing.¹⁰⁷ Apparently unfair competitive practices could have been construed in a

104. Multilateral Agreement Geneva, *supra* note 101, art. 18 (a).

105. *Id.*, art. 18 (b).

106. *Id.*, art. 18 (c) (d) (e) (f) (g).

107. *Id.*, art. 19.

proper case to include subsidies by a state to its international airlines.

Disputes were to be settled if possible by the nations through negotiation. However, if negotiation should fail the dispute could be submitted to the International Court of Justice or, in the alternative, to an arbitral tribunal.¹⁰⁸

To make a summation, this draft recognized the principle of bilateral bargaining by nations regarding the exchange of routes and operating services. A definite provision was inserted permitting nations so bargaining to contract out of such bilateral agreement the fifth-freedom privilege. However, where routes were granted, then capacity restrictions at a reasonable load factor based on both third and fourth-freedom traffic as well as fifth-freedom traffic were required. Moreover, a regulation of rates was called for and unfair practices were enjoined. Elaborate settlement of dispute provisions were inserted. Accord by the Commission, as stated, could not be reached. Thus the draft agreement was never presented as a multilateral treaty.

The *bête noire* of this proposed agreement, as formerly, was the dispute over fifth-freedom traffic and whether or not restrictions should be placed thereon. There now seems to be general agreement that third and fourth-freedom traffic should not be limited other than possibly by a reasonable load factor; that each country has a right to as much traffic as it generates. On the other hand the opinion is prevalent that a broad grant to fifth-freedom operations would be disastrous to local and regional services. The opponents of this line of thought feel just as strongly that to restrict fifth-freedom traffic would cause uneconomic operation of trunk lines. Consequently, agreement is blocked.¹⁰⁹

Thus all exchange of routes between nations and economic controls, if any, must be provided through the medium of bilateral agreement without benefit of a multilateral treaty laying down principles relating to exchange of routes and economic regulations to be observed by all contracting states. The net result is that there are no uniform international economic regulations.

108. *Id.*, art. 21.

109. Ryan, *supra* note 78, at 457-459; Little, *supra* note 98, at 36.