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The Use of Arbitration in the Settlement of Bilateral Air Rights Disputes

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Ross T. Dicker

I. THE NATURE OF INTERNATIONAL CIVIL AVIATION

A. General Organization

In the field of aviation, world transportation is bound together by a highly complex and sophisticated arrangement in which each country designates a single carrier to carry its flag to foreign countries. The United States has not followed this practice of designating one line as the nation's flag carrier and has twenty "international" carriers which transport passengers, cargo, and mail to foreign countries. Each one of these carriers is a private business concern, competing in most cases with another American carrier covering the same route, and in all cases with the air carrier of the country to which it flies. In some cases it also competes with a carrier of a third country.¹

The competition between the United States carriers, both domestic trunk and international,² for foreign air routes is keen, as evidenced by the number of major air carriers who submitted applications for the routes that were recently granted over the Pacific.³ The competition between American and foreign international carriers is also keen. In 1963, some nineteen air carriers were serving the North Atlantic market, which is basically the New York to London-Paris route.⁴

Almost every foreign country with its own flag carrier eagerly seeks to obtain permission to fly to the United States and to carry passengers over the North Atlantic route.⁵

¹For example, Air India and Quantas fly the London to New York route. London is an intermediary stop between the United States and India and Australia respectively.

²A domestic trunk line is a major air carrier flying solely within the U.S., while an international carrier flies between the U.S. and a foreign country.

³See 1969 CIVIL AERONAUTICS BOARD ANNUAL REPORT 15.

⁴See Pan Am, BOAC Reach Fare Compromise, AVIA. WK. & SP. TECH., Dec. 9, 1963, at 38.

⁵United States citizens make up a major share of international air passengers. The most lucrative routes are those which traverse the Atlantic. Lissitzyn, Bilateral Agreements on Air Transport, 30 J. AIR L. & COM. 248, 257, 261 (1964); New York Times, May 15, 1963, at 11, col. 1.

These same carriers constantly seek to gain permission to land at more American cities and, in many cases, to carry strictly domestic traffic. At the same time, they seek to have their governments take away routes and rights previously granted to the United States carriers.

In recent years, American carriers have been complaining that our government has been too generous to foreign carriers in granting them such a great share of America's international air market. United States carrier participation in total carriage declined from 74 per cent in fiscal 1950 to 54 per cent in fiscal 1960.⁶ American carriers have also complained that several foreign countries have failed to afford equal and fair treatment to American carriers by subjecting them to schedule supervision and thereby limiting their ability to compete.

Consequently the governments of many nations are striving for a more equitable exchange of economic benefits in the areas of routes, capacity, and frequency controls for their countries' carriers.

In 1952 two noted international experts prophesied that economic controversies would arise concerning such matters as the regulation of international air transportation. They stated that the mere settlement of an existing controversy would not be sufficient to avert future controversies. To accomplish that task, the parties needed to establish controls at the time the contracts were made which could operate automatically to check the growth of the controversy.⁷ The authors stated that international aviation was an area in which controversies might be the proper subject of settlement by arbitration.⁸

Given the fact that each country seeks as much economic benefit as possible for its own carrier and conversely seeks to restrict the benefits given to others, disputes will naturally occur. These disputes can be legal, economic, or political in nature. It shall be the object of this note to determine whether international aviation controversies lend themselves to adjustment by arbitration as opposed to the methods of diplomatic negotiation, conciliation, mediation,

⁶Hearing before the Aviation Subcomm. of the (Senate) Comm. on Commerce, 87th Cong., 1st Sess. 22 (1961).

⁷F. KELLOR & M. DOMKE, ARBITRATION IN INTERNATIONAL CONTROVERSY 4-5 (1952).

⁸Id. at 22.

and inquiry, which generally comprise the means employed in international dispute settlement.

B. History and Regulation

In 1944 the United States called an international conference on aviation in Chicago to prepare rules and create institutions for the anticipated expansionist era of international aviation which the war had made possible. Some fifty nations attended. At Chicago the nations formulated general principles of world-wide application to replace the regional concepts and individual agreements then in existence.⁹

At that time, the United States was in a unique position. It had the greatest stock of air transportation equipment in the world, the largest reserve of skilled personnel, substantial world-wide experience in the operation of long-haul trans-oceanic routes and the economic potential to weld these characteristics into an aggressively expanding economy. Most foreign countries were at a low level of economic development or were so weakened by the war that they were unable to mobilize sufficient resources to develop an air transportation fleet to compete with the United States.¹⁰

Five agreements came out of the Chicago conference, but only two deserve special mention. One agreement established the Provisional International Civil Aviation Organization which was to coordinate and guide aviation.¹¹ The PICA0 was empowered to settle disputes between its contracting member-states by arbitration but the parties first had to attempt a settlement by negotiation.¹² At this time, "arbitration won its first major entrance into the field of inter-governmental conventions when it was adopted."¹³ The second agreement, the International Air

⁹See Rhyne, Legal Rules For International Aviation, 31 VA. L. REV. 267, 306 (1945).

¹⁰Hearing, supra note 6, at 4.

¹¹Rhyne, supra note 9, at 307.

¹²Hingorani, Dispute Settlement in International Aviation, 14 ARB. J. (n.s.) 14, 20 (1959); Sand, Historical Survey of International Air Law Since 1944, 7 MCGILL L.J. 125, 133 (1960).

¹³Cooper, New Problems in International Civil Aviation Arbitration Procedure, 2 ARB. J. (n.s.) 119 (1947).

Transport Agreement or the "Five Freedoms" document, established the framework of commercial aviation which the world has come to recognize.¹⁴

The United States never supported the final product of the Chicago Convention because of basic differences of opinion with Britain, the other major international air power. Britain and her European neighbors had favored, and the Convention had established, an international regulatory scheme to control international aviation. The United States had consistently refused to accept the idea of giving an international public authority compulsory jurisdiction over aviation problems, because it was inconsistent with the philosophy of government regulation espoused in the United States. An international organization, it was felt, would run the risk of losing detachment when significant national interests were involved.¹⁵

Given the magnitude of American participation in international aviation, no international conference could succeed in its goal of regulating aviation without her support. Since multilateral attempts failed to produce much needed regulation, the United States and Britain met in Bermuda, two years later, to attempt to compromise their widely divergent views.

The Bermuda Agreement which resulted was a compromise between the United States and the British philosophy, yet its principles were essentially those favored by the United States. Its prime achievement was the granting of capacity rights adequate for traffic demands between the country of the air carrier's nationality and the country of ultimate destination of the traffic.¹⁶ Capacity was to

¹⁴Rhynne, supra note 9, at 308. The five freedoms are: (1) the right to fly across a state's territory without landing; (2) the right to land in a state's territory for non-traffic purposes; (3) the right to put down passengers and cargo taken on in the territory of the state whose nationality the carrier possesses; (4) the right to take on passengers and cargo destined for the state of the carrier; (5) the right of carrying traffic on a route to and from the state whose nationality the carrier possesses, between two other states. Lissitzyn, supra note 5, at 248.

¹⁵Warner, Chicago Air Conference: Accomplishments and Unfinished Business, 23 FOR. AFF. 406, 413, 415 (1944).

¹⁶Kittrie, United States Regulation of Foreign Airlines Competition, 29 J. AIR L. & COM. 1, 3 (1963).

bear a close relationship to traffic demands and both countries were to have a fair and equal opportunity to operate their designated routes. As a result, the air carrier of one country was to take into consideration the interests of the air carrier of the other, so as not to unduly affect the other's service.

The capacity formula was enumerated in the form of "the Five Freedoms" which had been developed at Chicago. The Bermuda Agreement also contained route descriptions which were designed to limit access of one party to the traffic of the other. The description would specify traffic points in the territories of the two contracting countries and points in other states which could be served under the agreement. The latter rights have been called "beyond rights."¹⁷ The Bermuda Agreement contained other less controversial and quite standard provisions.

It is in the area of route description that problems have arisen because the wording used was too general. Both countries attempted to make the route descriptions as general as possible in order to give their carriers leeway in establishing economically sound service reflecting the public need. They also desired their carriers to gain experience in actual operation under peaceful conditions and to be able to later change the routes.¹⁸

The major problems in international civil aviation grew out of the framework of the Bermuda Agreement. The Agreement became the model for some sixty bilaterals which the United States subsequently executed with other countries and for some nine hundred and forty bilaterals executed between other foreign countries. The Bermuda principles never proved very satisfactory. Present problems have arisen because small countries conduct far-flung air operations which have little or no relationship to the size of their country, their population, or their economy. Such actions either repudiate the Bermuda principles or represent interpretations of these principles inconsistent with the traditional American view.

To complicate the problem further, foreign governments are integrating international air transportation objectives into their over-all foreign relations posture. Besides

¹⁷Lissitzyn, supra note 5, at 249.

¹⁸Stoffel, American Bilateral Air Transport Agreements On The Threshold Of The Jet Transport Age, 26 J. AIR L. & COM. 119, 127 (1959).

being an instrument of commerce, airplanes are now considered instruments of national prestige because they "show the flag." For this reason, governments support their national airlines to the extent of relating their aviation objectives to nonaviation matters. To other countries, international air services can represent a substantial economic asset with the ability to earn foreign exchange which is considered essential to the national economy. KLM is one such carrier.¹⁹ Many countries are now seeking to exploit landing rights previously negotiated although never utilized, and they are progressively pursuing a policy of expanding these rights. The United States is a particularly attractive target to them. The wish to have the flag "seen" has proven to be an enormously expensive proposition. Many carriers cannot meet this expense with the revenue they produce from the carriage of traffic, because there are too many air carriers competing for a fairly stable amount of traffic.

Traditionally the United States has espoused the belief that freedom in international aviation was the most beneficial and stimulating principle for the development of the industry. Conversely it was felt that artificial national restraints on the operation of the air lines was contrary to American interests and that the scope of air line operations should be determined by the law of supply and demand.²⁰ Consequently the American government pushes for lower air fares while foreign nations push for higher air fares.

Foreign governments need the higher fares. They realize that they cannot compete with the larger, more efficient United States carriers. They do not attempt to make a profit as the United States carriers do. Foreign carriers are directly or indirectly an arm of their governments and the governments realize that any deficit the carrier incurs will be made up by government subsidies.²¹ Consequently the success of an air carrier--its very existence--becomes an important matter of policy for many governments, with policy considerations superseding economic considerations.²²

¹⁹Hearing, supra note 6, at 5.

²⁰Kittrie, supra note 16, at 2.

²¹Note, Economic Regulation of Foreign Air Carriers By The C.A.B.: Its Legality and Reviewability, 51 GEO. L.J. 593 (1963).

²²Id. at 596.

Foreign carriers have made repeated efforts to gain more rights in their bargaining with the United States. Both the newly independent countries who are negotiating air rights with the United States for the first time and the countries that signed bilateral agreements with the United States twenty years ago and are now seeking to renegotiate those agreements on more favorable terms constantly seek to expand their air rights.

The hard bargaining position assumed by the newly independent countries has won from the United States very extensive air privileges to serve the United States, as compared to those obtained by the United States in return. These victories have not been lost on those foreign countries who gained air privileges from the United States when aviation was in its infancy. There are also instances where foreign governments have cut back rights previously granted to the United States which they considered too lucrative.

Foreign countries have been able to restrict closely the ability of the United States carriers to compete through the International Air Transport Association (IATA). The IATA is actually an international trade association. Included among its 116 members are all major international carriers.²³ The IATA controls members by a cartel-like group, and it enjoys immunity from the municipal laws of most of the individual nations whose carriers are its members.²⁴ In the United States, the strict control enjoyed by the Civil Aeronautics Board (C.A.B.) over domestic carriers is not so absolute in the international area. Since any decision affecting a foreign carrier could have ramifications on other areas of foreign policy with the particular nation involved, the President makes the final determination in any international aviation matter.²⁵ His determination normally coincides with the IATA policy in order to avoid disputes.

The IATA meets periodically to solve common problems and promote the standardization of practices and procedures. It operates on two levels, the first dealing with interline traffic, as the airlines themselves work to standardize tickets, baggage checks, cargo bills, meals, and legroom

²³ Bebchick, International Air Transportation Association And The C.A.B., 25 J. AIR L. & COM. 8, 9 (1958).

²⁴ Koffler, IATA: Its Legal Structure--A Critical Review, 32 J. AIR L. & COM. 222 (1966).

²⁵ Supra note 21, at 596.

between seats. The second level deals with fares and rates to be charged for international air transportation. The IATA really has no authoritative voice in this area, and though the carriers are directly involved, they are by no means free agents. The carriers initially work out fare agreements because governments realize that carriers must have some voice in their establishment. An air carrier negotiates with the knowledge of its government's position. Since the conference acts only by unanimous agreement, each carrier retains a veto to protect itself from being forced to act against its interests.

Resolutions which emerge from the conference meetings are then submitted to the individual governments which also have the right to veto any unfavorable resolution. Any resolution which is vetoed returns to the conference where it goes through the same negotiation process again.

As long as the nations identify the policies and interests of their flag carrier with their own national interest, any resolution of a dispute will entail a compromise with no drastic consequences for any party involved.²⁶ It will also insure the maintenance of high fares. Such action tends to restrict expansion and inhibit the development of a mass market. This forces the carriers into nonprice competition.

Since foreign carriers are usually government instruments, their representatives must be looked upon as government agents. American carriers on the other hand are private corporations whose representatives are employees of the corporation. The United States government is not allowed to send official representatives to the conference meetings, so American policy is supposed to be presented by the carriers which have been briefed beforehand.²⁷ As will be seen later, American carriers do not always advocate the official United States position.

II. INTERNATIONAL CIVIL AVIATION DISPUTES

Having examined the tripartite structure of international civil aviation, it is now appropriate to examine the disputes that have occurred in each of the three areas and the manner in which they have been settled.

²⁶Keyes, Making Of International Air Rates And The Prospect Of Their Control, 30 J. AIR L. & COM. 173, 188 (1965).

²⁷Hearing Before The Subcomm. On Transportation And Aeronautics Of The House Comm. On Interstate And Foreign Commerce, 89th Cong., 1st Sess. 16 (1965).

A. The ICAO and Arbitration

The Interim Agreement of the Chicago Convention gave the PICAO an expressly arbitral function "when expressly requested by all the parties concerned."²⁸ But the disputants first had to attempt a settlement by negotiation before submitting it to the Council.

In 1952, the Council of the ICAO was faced for the first time with a dispute between two contracting members, India and Pakistan. India claimed that Pakistan was denying her the right to fly over certain parts of Pakistan in violation of the International Air Services Transit Agreement and Article 5 of the Chicago Convention.²⁹ The area which Pakistan had declared prohibited lay under an air route from India to Afghanistan. India contended that the large area, which by declaration was set aside as prohibited, was an unreasonable, unnecessary, and non-uniformly supervised prohibition. India asserted that an Iranian air carrier was being permitted to conduct regularly scheduled international service over the area in question.

The Council invited both parties to enter into direct negotiations.³⁰ On January 19, 1953, representatives of the two countries announced that the dispute had been settled by agreement. They stated that the problem had been solved "amicably" in an "atmosphere of extreme cordiality," and that the decision was a "triumph of reason and the good will to see another's point of view."³¹

The India-Pakistan dispute was the first disagreement to come before the Council of the ICAO. As a dispute settling mechanism, the Council would seem to have to consider itself an international judicial organ and act in accord with the rules of international law governing judicial proceedings.³²

²⁸Warner, PICAO And The Development of Air Law, 14 J. AIR L. & COM. 1, 4 (1947).

²⁹Prohibited Areas In International Civil Aviation: Notes On Article 9 Of The Chicago Convention Of 1944 And The Dispute Between India And Pakistan, 1953 U.S. & CAN. AVIA. REP. 109, 110-11.

³⁰BIN CHENG, LAW OF INTERNATIONAL AIR TRANSPORT 101 (1962).

³¹Amicable Settlement Of India-Pakistan Air Dispute, ICAO BULL., Jan./Feb. 1953, at 26.

³²BIN CHENG, supra note 30, at 100.

Yet all the Council did was to invite the parties to enter into further direct negotiations.

It is impossible to state with assurance why the Council of the ICAO did not handle this dispute as an international judicial organ should. Lack of confidence in the process could certainly be one reason and arbitration had never been used before in this area.

But more than lack of confidence, it would seem that the nature and character of the relationship between India and Pakistan dictated that a formal legal process not be used. If one could look behind the reason given by Pakistan for the prohibition--that the lives of passengers and crew were in danger--the religious and political antipathies between the two peoples are plainly evident. History has demonstrated that such emotional topics are not the proper subjects for formal legal resolution.

Certainly the "cordial atmosphere" evidenced by both parties could be explained by Pakistan's realization that her discriminatory policy would not be supported by an international legal tribunal. Consequently her wisest course would be to compromise, instead of being ordered by an international body to remove the prohibition completely. Such an order would be an embarrassing turn of events.

The Council avoided its dispute-settling function at that time, because it was essentially a political organization seemingly empowered with a judicial function.³³ It was composed of twenty-one members who represented their respective states. It could not function as a judicial tribunal because its members were versed primarily in the technological and economic aspects of civil aviation rather than the legal aspects.³⁴ Also, Article 84 of the Convention stressed that disputants should first try to settle the conflict by negotiation.³⁵

B. The IATA and Negotiation

The following disputes are more typical of the type which occur in international civil aviation. Although they are multilateral--taking place among the IATA members--as distinguished from the bilateral ones to be studied later, the method of settlement is significant.

³³Hingorani, supra note 12, at 15.

³⁴BIN CHENG, supra note 30, at 104.

³⁵SHAWCROSS & BEAUMONT, AIR LAW 80 (1951).

In 1958, there occurred what is familiarly called "The Battle of the Sandwiches." The members of the IATA had decided that on international flights, economy-fare passengers would be served only "open sandwiches." European carriers began serving "open sandwiches" which American carriers contended amounted to serving a "meal on a piece of bread."³⁶

According to an IATA regulation, the carriers were to serve "simple, inexpensive, cold sandwiches," but Pan American Airways (PAA) and Trans World Airways (TWA) maintained that Air France, SAS, Swissair, and KLM were serving a sandwich which was too fancy.³⁷ The dispute was submitted to the Breached Committee of the IATA which ultimately issued a decision, stating that the sandwich could be open or closed, but bread had to be a substantial portion of it. Additionally, the sandwich had to be cold, simple, and inexpensive.

The conflict is all the more striking when one considers the estimated cost of the sandwiches. An economy class sandwich at that time cost about \$.32, and about eight sandwiches were issued to each passenger on one crossing. The total comes to above \$2.56, plus a few cents more for a beverage. International carriers spent no more than this per passenger on a one-way flight.³⁸

The dispute which took place in 1962 and 1963 must be one of the most dramatic the IATA has witnessed. In late 1962, the C.A.B. advised United States carriers that it would not approve any fare increases proposed at the upcoming IATA conference. The present fare structure was due to expire on March 31, 1963, and the IATA was to meet in Chandler, Arizona, to establish a new one. The new schedule, to become effective April 1, 1963, reflected an increase in fares by lowering the discount given on round-trip tickets. The C.A.B. advised the United States carriers not to sign the resolution.³⁹ This would mean that an open (unregulated and thoroughly competitive) fare situation would exist after

³⁶Note, C.A.B. Regulation Of International Aviation, 75 HARV. L. REV. 575, 578 (1962).

³⁷New York Times, Apr. 27, 1958, pt. II, at 1, col. 4.

³⁸Id. at 6.

³⁹Goodwin, The Role Of The U.S. In The 1963 Transatlantic Air Fare Crisis, 30 J. AIR L. & COM. 82-83 (1965).

March 31, a situation foreign carriers had always dreaded.

Informal diplomatic discussions were held between the United States and Britain. As the American lines were maintaining the former lower fares, Britain, backed by other European governments, accused the United States of violating international law by such action. They consequently threatened to revoke United States landing rights and to confiscate her planes.⁴⁰

By July 16, 1963, a compromise had been reached, approving the "Chandler increase" which cut the former discount on a round-trip ticket from 10 per cent to 5 per cent, but only for a period of one year. One of the main reasons the C.A.B. compromised was because the State Department requested it to do so.⁴¹

To understand the dispute and the reason for the compromise settlement, the authority of the C.A.B. in international aviation must be examined. As has been mentioned, the strict control enjoyed by the C.A.B. over domestic carriers is absent in the international area. The bilateral air agreements with foreign countries are executive agreements and not treaties. Bilaterals come into being with the signature of the President alone; the Senate plays no part. In a hearing before the House Committee on Interstate and Foreign Commerce in June, 1962, it was stated during an examination of foreign air transportation that the C.A.B. had no summary power to stop any carrier in foreign air transportation from placing into effect any rate, frequency, or practice it had elected. The C.A.B. is limited to removing discriminatory practices under Section 1002(f) of the Federal Aviation Act.⁴² Thus the C.A.B. cannot regulate even United States carriers by setting just and reasonable rates or by requiring certain practices. The C.A.B. may make recommendations to the President, but he has the ultimate authority as to the official American position.

Abram Chayes, Legal Adviser to the Department of State during this period, in a hearing before the Senate Committee

⁴⁰ Id. at 83.

⁴¹ Id. at 90.

⁴² 1 A. CHAYES, T. EHRLICH, A. LOWENFELD, INTERNATIONAL LEGAL PROCESS 495 (1968); Hearing Before the Subcomm. Of The House Comm. On Interstate and Foreign Commerce, 87th Cong., 2nd Sess. 2 (1962).

on Commerce, stated that the Executive Branch felt it did not possess the legislative authority required to deal with problems of this kind. While acknowledging that the Executive had the right under executive agreements so to act, he observed that there was simply no power to exercise many treaty rights.⁴³ Chayes stated that the Executive would only have the power when Congress, in accord with constitutional processes, granted the necessary authority.⁴⁴ He noted, however, that foreign countries have the right to prevent United States carriers from operating in their territory at any rate which they deem to be unfair and unreasonable.⁴⁵

The seriousness of the 1963 fare crisis can be partially understood from the fact that the previous four years had been financially rough ones, particularly for the less efficient foreign carriers. The projected fare increase would add 300 million dollars to the cost American tourists would pay, and European carriers wanted to obtain as much of that as possible.⁴⁶

As to why the State Department advised the C.A.B. to withdraw its objection, Abram Chayes said:

Since May 12, . . . the status of United States carriers over the Atlantic was likely to be seriously jeopardized. Threats to those operations in the form of legal actions or of suspensions of service were real. . . Continuation of the controversy would redound to the long-term detriment of the United States interests and international aviation interests.⁴⁷

In 1962, it was publicly acknowledged at a House Hearing that the United States government desired the IATA to be the primary instrument for the establishment and maintenance of a sound and fair rate structure for international air service.⁴⁸ In 1963, the government,

⁴³Hearings Before The Senate Comm. On Commerce, 88th Cong., 1st Sess. 31-32 (1963).

⁴⁴Id. at 32.

⁴⁵Hearings, supra note 42, at 3.

⁴⁶New York Times, May 15, 1963, at 1.

⁴⁷Hearings, supra note 43, at 34.

⁴⁸Hearing Before Subcommittee, supra note 42, at 3.

through Mr. Chayes' statement, supported its decision by action.

A third dispute occurred in 1965. In that year TWA inaugurated a new passenger service on its international flights--in-flight motion pictures. The foreign international carriers found that they could not offer a similar attraction, so they decided to force TWA to abandon its use. At an IATA conference held in Athens, Greece, they pressured TWA into removing the movies. This move was linked to an over-all fare package, together with the threat that any C.A.B. attempt to protect TWA would lead to an open-rate situation. The C.A.B. disapproved the agreement, finding it inconsistent with the public interest.⁴⁹

At a subsequent IATA meeting, it was decided that each passenger desiring to see in-flight movies would be charged \$2.50 extra. The C.A.B. desired a lower rate but finally approved the higher one. At present there are many such resolutions, all approved by the C.A.B., which curtail competition in passenger service.⁵⁰

It is unfortunate that the means of dispute settlement within the IATA is basically unknown, and available knowledge is based completely on secondary sources. This conforms with official IATA policy that "some things are best done behind closed doors."⁵¹

C. The IATA Process

The IATA members meet periodically to establish uniform rate structures and capacity allowances. This is accomplished by dividing the world into geographical subdivisions and allowing the carriers which serve those areas to establish the rate and capacity allowances. Once established by the "regional conference," the IATA membership as a whole perfunctorily accepts them.

⁴⁹Edles, IATA, The Bilaterals And International Aviation Policy, 27 FED.B.J. 291, 301 (1967).

⁵⁰Id. at 293.

⁵¹IATA Delegates Seek End To Fare Battle, AVIA. WK. & SP. TECH., Oct. 7, 1963, at 28.

As previously stated, our government is not allowed to send officials to conference meetings, so American policy is presented by the individual carriers which have been briefed beforehand. The carriers do not always cooperate. Alan S. Boyd, former Director of the C.A.B., stated in 1965 that the Board had directed United States carriers to propose substantial reductions in trans-Pacific economy-class fares at the Athens Conference. However, the carriers made no effort whatsoever to achieve the objective sought by the Board.⁵²

Conference meetings are conducted in secret where technicians "swap and bargain"--each government negotiating the rate or capacity allowance. After negotiation, if the resulting resolution is beyond the range that each government will accept, it simply exercises its veto.⁵³

Small carriers often complain that the real work is done in hotel rooms from which they are excluded.⁵⁴ Nonetheless, rate setting by unanimous consent leads to a rate set at the level of the least efficient operators, usually the smaller ones. This forces carriers into non-price competition.⁵⁵

Many governments feel IATA decisions to be a compromise, the result of much arms-length bargaining. Given the difficulty which would result if governments tried to handle these problems in a bilateral manner, the multilateral approach should be considered a rather successful method of avoiding rate wars and an excellent framework for coordinating the industry's operations. With comparatively few exceptions, international fares are interrelated and bear a relationship to fares on parallel, overlapping, or matching routes. The sheer magnitude--60,000 pairs of points on the air network for which there must be agreement--dictates that multilateral negotiation take place.⁵⁶

⁵²Hearing, supra note 27, at 16.

⁵³Koffler, supra note 24, at 230.

⁵⁴World's Airlines Feud On Fares, BUS. WK., Jan. 2, 1960, at 37.

⁵⁵Bebchick, supra note 23, at 16.

⁵⁶1 CHAYES, EHRLICH, LOWENFELD, supra note 42, at 507.

Despite the fact that IATA resolutions destroy the ability of airlines to compete in passenger services, the result may not be completely harmful. It has been said that an endless fight over wasteful frills could perpetuate deficits and cause airlines to neglect earnings, thus leading them down the same path the railroads traveled.⁵⁷

The philosophy of regulation is based on the premise that chaos and destructive competition will result if no agreed-upon organization exists. Such drastic events have failed to materialize when an open-rate situation exists. The old rates are maintained until a new agreement is reached.⁵⁸ The system seems to resolve its problems because the "will to reach a compromise is present."⁵⁹ The "will" is a natural reaction to the threat of chaos if the carriers do not agree. It is evident that the motivating force behind the ultimate resolution is never concern for the public's comfort, economy, or convenience.⁶⁰

III. BILATERALS AND THE USE OF ARBITRATION

A. The Use of Arbitration

It was recognized in the 1950's that negotiation provided little help in settling bilateral disputes because unresolved issues were backlogged. President John Kennedy directed the Secretary of State in 1963 to establish a committee to devise a new policy, giving attention to a vital area of foreign policy--international aviation.⁶¹

On April 24, 1964, the President made this new policy public. The "new policy" continued to maintain the old framework of bilateral agreements and advocated continued support of the Bermuda capacity principles. It also stated that in an effort to settle future disputes, the government would resort to consultation, arbitration, and if necessary, renegotiation and denunciation of the agreement in question.

⁵⁷Harding, Mergers Might Save The Airlines, ATLANTIC, Sept. 1962, at 48.

⁵⁸Koffler, supra note 24, at 234.

⁵⁹Sckrey, Overcapacity In The U.S. International Air Transport Industry, 32 J. AIR L. & COM. 24, 92 (1966).

⁶⁰Id. at 40.

⁶¹Letter From President Kennedy to Secretary of State Rusk, June 22, 1963, in 49 DEP'T STATE BULL. 160 (1963).

While arbitration was mentioned in the first bilateral, its reiteration by the President in 1964 seemed to indicate a new attitude and willingness to use it.

There is evidence that in multilateral disputes governments often allowed disputed points to remain unresolved, accepting an uneasy and precarious truce in the place of final settlement. By contrast, in the bilateral area, two disputes have gained a great deal of attention in which an effort was made to seek a final solution to the problems involved.

B. The French Dispute

On March 27, 1946, the United States and France signed an agreement respecting air transportation service. This was a bilateral similar to that formed with the British. Article X of the United States-French Bilateral stated that disputes not settled by consultation would be referred to the Interim Council of the PICA0 for an advisory report.⁶²

The dispute between the United States and France concerned which cities in certain foreign countries would properly be included in the term "Near East." The schedule of routes in the Bilateral listed three separate routes from France to the Near East over which American carriers could travel. This type of traffic involved is called "Fifth Freedom" traffic.

The description of "Route One" stated that a United States carrier could proceed "over the North Atlantic to Paris and beyond via intermediary points in Switzerland, Italy, Greece, Egypt and the Near East . . . and beyond."⁶³

⁶²Agreement with the Provisional Government of the French Republic Relating to Air Services Between their Respective Territories, March 27, 1946, art. X, 61 Stat. 3445, 3452. This directs the reader to art. III, § 6(8), Interim Agreement on International Civil Aviation, 59 Stat. 1521, which states that, when expressly requested, the PICA0 shall act as an arbitral body.

⁶³Id. at 3466.

Section VII of the Annex to the Bilateral stated that changes in the route could be made by either party and that they would not be considered as a modification of the Annex. However, the aeronautical authority of the country making the change had to notify without delay the aeronautical body of the other contracting party.⁶⁴

The dispute which arose in 1963 may only be understood from briefly examining the history of U.S.-French air relations after 1946. In 1950, the C.A.B. granted Pan American permission to compete with TWA on Route One serving Paris and beyond. Pan American informed France that its service would go from Paris to Rome and Beirut. Since Beirut was not specifically mentioned in Route One, France objected to its inclusion on Route One service out of Paris.⁶⁵ Despite its reservation, France ultimately allowed that airline to serve Beirut.

In 1955, Pan American notified France that it intended to extend its service from Beirut to Tehran, Iran. France objected, claiming that the city was not within the "Near East" as stated in Route One, but within the Middle East. Under a "temporary" permit, France subsequently allowed an extension of service to Tehran.

In the same year, Pan American extended its service to Istanbul and Ankara, but only after France stipulated that no passengers could be embarked in Paris and disembarked in the two Turkish cities, or embarked in Turkey and disembarked in Paris. France claimed that Turkey was not explicitly part of Route One and therefore not included in "beyond" rights from Paris. France maintained that Turkey was within "Route Two." Thus, the airline operated between Paris and Istanbul--later Ankara also--without embarkation rights to or from Paris.

In 1961, Pan American notified the French that it was going to substitute Tehran for Bagdad on some Paris-Istanbul-Bagdad flights. France declared that Pan American had no

⁶⁴Id. at 3462.

⁶⁵Larsen, Arbitration of the United States-France Air Traffic Rights Dispute, 30 J. AIR L. & COM. 231 (1964). It is also stated that old political and cultural French ties with Lebanon were influential in France's desire to keep PAA (U.S.) out of Beirut.

rights to fly beyond Istanbul. At the same time, the "temporary" permission to fly between Paris and Tehran via Istanbul expired. Negotiations between the two governments ensued but soon deadlocked. On October 12, 1962, the United States notified France that it desired arbitration under Article X.

The problems involved in this dispute were to some degree influenced by the policies of the IATA. The association had divided the world into three regions, called Traffic Conferences. The Second Traffic Conference encompassed Europe, Africa, and the Middle East, including Iran. The regional concept was embodied in the ultimate routes drawn up in 1946. The schedule described air routes generally within a region, so that specific points could be changed as the demands of traffic changed. The general wording was ill-suited to a situation in which there would ultimately be competition. The need for city-by-city designation of air routes in the "Near East" was not realized because the commercial value of traffic rights had not been recognized; global air transportation was young.

In 1963, France and the United States drew up a document outlining the manner in which the issues would be arbitrated. Its object was to insure a more orderly basis for arbitration and, since it does not supersede Article X of the 1946 Agreement, it must be read in conjunction with it.

Before the Tribunal, both parties orally agreed that the Arbitration Agreement should be given a broad interpretation.⁶⁶ The case was argued by the governments of both carriers although the airlines were the real parties. The United States government, since 1943, has conducted the negotiation of all our bilaterals. Before then the airlines secured their own transportation rights. Larsen states that because of the strong private interests involved, the proceedings still assume the character of commercial arbitration between

⁶⁶Prof. Paul Reuter--French designee; Prof. Milton Katz--U.S. designee (later succeeded by Prof. Henry de Vries); Prof. Roberto Ago--selected by the President of the ICJ when designees of the two countries could not decide on the third member. This is an ad hoc tribunal and not the institutional type that was envisioned in the original bilateral.

two airlines. Thus the scope of the arbitration was to include the words describing Route One, all formal and informal understandings which the parties had later entered, and their respective practices. This liberal scope of jurisdiction would allow the Tribunal to incorporate equitable considerations into its decision.

Although Article X only called for an advisory opinion, both parties explicitly bound themselves to accept any decision from the Tribunal as final and binding.

The exact issues before the Tribunal were:

Under the . . . Air Transportation Service Agreement . . . and in . . . Route One . . . , does a United States airline have the right to provide international aviation services between the United States and Turkey via Paris and does it have the right to carry traffic (between Paris and Istanbul or Ankara in Turkey)?

Under the . . . Air Transportation Service Agreement . . . and in . . . Route One . . . , does a United States airline have the right to provide international aviation services between the United States and Iran via Paris and does it have the right to carry traffic (between Paris and points in Iran)?⁶⁷

As mentioned, the dispute concerned the geographical area to be included in the term "Near East." It was to be the Tribunal's task to draw from the Agreement the contractual meaning given to the term and to find the common intention of the parties. France claimed and the Tribunal agreed, that "Near East" has no generally agreed-upon meaning in geography, history, diplomatic language, or aviation usage. Any meaning would have to come from the context of the bilateral. Adhering to that belief, the Tribunal construed the sequence in which "Near East" appeared in the route description to indicate what the negotiators meant by the term. The

⁶⁷Bishop, Decision of the Arbitration Tribunal Established Pursuant to the Arbitration Agreement Signed at Paris January 22, 1963, Between the United States of America and France, 58 AM. J. INT'L L. 1016, 1017 (1964).

Tribunal decided that "Near East" encompassed an area between Egypt and Pakistan-India. This was a general description which followed a more or less uniform direction from east to west. "Near East" signified a general geographical region in which a point or series of points ought to be situated, but all were to be equally characterized because they were intermediate points between the countries mentioned. The resulting configuration resembled a vast air corridor which was the general path of the route. The route constituted a series of points and not states or regions. It is the points which are to be served by the air carriers.

This general path, being flexible, comprised a number of possible service patterns whose choice was left to the state whose carrier had the right to service the route. As the region involved had boundaries which were not well defined, service was to be limited to intermediary points along the fundamental direction of the route.

The Tribunal concluded that the area between Turkey and India was not within the general description of Route One. The schedule in the Bilateral had described Route Two as a path over the North Atlantic to Marseille, Milan, Budapest, "to Turkey and thence via intermediate points to a connection with Route Eight."⁶⁸ The Tribunal found no intention to merge Route One with Route Two because it had not been expressly provided for. It did find expressly stated a provision for the merger of Route One with Route Three. The Tribunal assumed, then, that the intention must have been to separate the two areas described in Route One and in Route Two.⁶⁹

Section VII permitted the parties to make route changes only if within the general path of a route. Thus the three cities in question could not be added because they were outside the general path of the route. In determining what "changes" meant, the Tribunal followed the French

⁶⁸Agreement with the Provisional Government of the French Republic, supra note 62, at 3466.

⁶⁹Bishop, supra note 67, at 1021.

version and interpreted modification to mean small alterations.⁷⁰

In examining the subsequent practice of the parties, the Tribunal found support for its interpretation because France had never agreed to the American position including the three cities within Route One nor had she consented to the change under Section VII. But the French failed to persist in their refusal to recognize Pan American's right to serve Beirut and Tehran. By failing to persist, the Tribunal found French consent to the legality of the service. Thus, independent of the 1946 Agreement, France gave Pan American permission to serve Tehran. Although the 1955 permit had been termed temporary, the long service enjoyed by Pan American and the responsibility involved in initially granting permission created a vested right.

Thus Pan American could serve Turkey via Paris because of the 1955 Agreement. It could also serve Iran via Paris because of the 1955 Agreement. It could also serve Iran via Paris because these rights accrued from French consent and subsequent practice. The Tribunal found that Pan American could enjoy no commercial traffic rights between Paris and Turkey because permission to serve Turkey did not include such rights. Pan American did have commercial rights to serve Tehran by French consent and subsequent practice. Once these rights had vested, they could not be contested until they were violated.

The Tribunal also decided that Pan American had the right to serve Beirut. Although this had not been one of the questions submitted for determination, it was closely related to Tehran service, and the Tribunal incorporated this in the comprehensive decision because the parties had been liberal in the scope of jurisdiction granted.

C. The Italian Dispute

The Air Transportation Agreement between the governments of the United States and Italy was signed on February 6, 1948, establishing aviation service between the two countries. Article 12 of the Agreement dealt with dispute settlement and stated:

⁷⁰Larsen, supra note 65, at 241.

Any dispute relative to the interpretation or application of the present Agreement or Annex, which cannot be settled through consultation, shall be submitted for an advisory report to a tribunal of three arbitrators. . . .⁷¹

The basis of the dispute with Italy concerned the meaning of Section III of the Annex to the Bilateral. That section stated that the designated carriers were to enjoy the rights of commercial entry and departure for international traffic in passengers, cargo, and mail.⁷² The final settlement of the dispute could have had an important effect on all the other bilaterals which the United States had entered since they were similarly worded. The interpretation given would influence their interpretation should any future dispute arise.

As with France, the history of air relations with Italy since 1946 must be examined. Trans World Airways had started to serve Italy in that year under a temporary permit. In 1947 it initiated all-cargo service. It had previously offered only a combination of passenger, cargo, and mail service. Under the 1948 Agreement, TWA continued to serve Italy. In 1950, the C.A.B. authorized Pan American to fly to Italy, and Italy authorized Alitalia to fly to the United States.

Trans World ceased its all-cargo flights in 1950 and did not resume them until 1958. In 1959 it increased its flights from one to four a week. Pan American initiated all-cargo service in 1960 and, by 1963, had two flights a week. In 1961 Alitalia began all-cargo flights and, by 1963, it had three flights a week.

To meet the increasing traffic, Pan American decided to increase the number of weekly flights to four and it, as well as TWA, planned to use jet transports on the flights.⁷³ The Italian government was notified of the impending changes

⁷¹Air Transport Agreement with the Government of Italy, Feb. 6, 1948, art. 12, 62 Stat. 3729, 3726.

⁷²Annex to the United States-Italian Agreement, § III, 62 Stat. 3740.

⁷³Larsen, United States-Italy Air Transport Arbitration: Problems of Treaty Interpretation and Enforcement, 61 AM. J. INT'L L. 496, 499. This still had the effect of doubling cargo capacity.

in July, 1963, Alitalia could not meet this increase in service because it lacked the equipment. Italy then refused to allow these changes, claiming that all-cargo service was unauthorized by the 1948 Agreement which only allowed service combining passengers, cargo, and mail.

The dispute came to a head when on December 3, 1963, TWA announced that it was going to implement exclusively jet flights on its all-cargo runs, but that it would not increase the number of weekly flights.⁷⁴ Italy stated that there could be no increase in capacity either by increasing the number of flights or by using the newer and larger equipment, thus still contending that all-cargo service was outside the 1948 Agreement.

After fruitless consultation, both parties agreed to seek arbitration of the dispute under Article 12. This took place on March 23, 1964. The Arbitral Tribunal formed only received a narrow grant of jurisdiction, being asked to decide the dispute solely on the basis of the 1948 Agreement.

The issue to be resolved was:

Does the Air Transport Agreement between the United States and Italy . . . grant the right to a designated airline of either party to operate scheduled flights carrying cargo only.⁷⁵

As in the French dispute, the parties met beforehand to agree on arbitration terms. Those terms were incorporated in a Compromis signed on June 30, 1964, which must be read in conjunction with the arbitral clause.⁷⁶

The Tribunal began its examination with Section III of the Bilateral, which contained the phrase "passengers, cargo, and mail" service, but it had to widen its scope to include Sections I and II. This was done because "the context is constituted by the body of the provisions of the Agreement with which the text is logically related," and

⁷⁴Id. at 500. The 1948 Agreement did not permit pre-determination of traffic capacity. Annex, supra note 72 §§ VII & IX.

⁷⁵Bradley, International Air Cargo Services: The Italy-United States Air Transport Agreement Arbitration, 12 MCGILL L.J. 312, 316 (1966).

⁷⁶Larsen, supra note 73, at 501.

Sections I and II grant rights to conduct air transportation services.⁷⁷ Article I of the Bilateral stated that Article 96 of the Chicago Convention would supply any definitions not found in the Bilateral. In examining Article 96, the Tribunal discovered the phrase "passengers, cargo, or mail." After comparing "or" and "and" in the two versions, the Tribunal discarded the former because its formula was different from the 1948 formula. The Tribunal was at first content to base its interpretation on only the wording involved. With the aid of expert language advice, the Tribunal decided that "and" was a conjunction having a cumulative meaning, not an alternative one. This would mean that grammatically, all-cargo service was not allowed, but the Tribunal decided that the text granted a right and did not impose an obligation to conduct such service.

Considering the general nature of air services, the Tribunal stated that the exclusion of all-cargo service would be absurd. The Italian contention would mean that if planes did not have all three commodities on board, they could not disembark persons or property in Italy. Since the service was not excluded, it must be included.⁷⁸

In looking at the legislative history of the 1948 Bilateral, the Tribunal had to look at the 1946 Bermuda Agreement which was designed to regulate all scheduled air transportation. Since all-cargo service was neither specifically included nor excluded, it was considered to be implicitly included.⁷⁹ The Tribunal found support for this position in a 1948 news release from the Italian Ministry of Foreign Affairs, stating that the Bermuda Agreement was the basis of the 1948 Italian Agreement.

The Tribunal then stated that in 1949 Italy had had an obligation to expressly exclude all-cargo service, if that was her intention, in order not to deceive the United States.

In looking at the subsequent conduct of the parties, the Tribunal observed American all-cargo service from 1948

⁷⁷Italy-U.S. Air Transport Arbitration: Advisory Opinion of Tribunal, July 17, 1965, 4 INT'L LEGAL MATER. 974, 979.

⁷⁸Larsen, supra note 73, at 507.

⁷⁹Id. at 508.

to 1963, with a break between 1950 and 1958, and Italian cargo service come into existence in 1961. As neither party had sought special permission to initiate this service, the Tribunal had to conclude that the 1948 Agreement was designed to cover all-cargo service.⁸⁰

Unlike the decision handed down by the Tribunal in 1963, this was not a unanimous decision. The arbitrator selected by the Italians wrote a dissenting opinion, finding permission to handle all-cargo service outside the scope of the 1948 Agreement.

Also unlike the 1962 instance, the losing party chose not to accept the adverse decision. Italy denounced the Agreement when a United States carrier attempted to implement all-cargo service.⁸¹

D. Politics and Arbitration

The new International Air Transportation Policy called for the use of arbitration to settle disputes. It can be discerned, however, that arbitration would not be used across the board in all disputes. By affirming continued support, subject only to United States "pressure" and "influence," the United States recommitted itself to a policy it had basically followed for twenty years.⁸²

The arbitration with France was a direct result of a change in the United States attitude concerning one small area. The arbitration with Italy was a reflection of the confidence gained in a procedure shown to be successful only a year before.

In a multiparty situation the use of negotiation will continue and the number of multiparty situations may increase. G. Griffith Johnson, Assistant Secretary for Economic Affairs, stated recently that the new policy

⁸⁰Id. at 510. The majority decision was written by Metzger and Riese. Larsen states that the presence of these two on the Tribunal characterizes it as one possessing specialized knowledge. Monaco wrote the minority decision. Id. at 503.

⁸¹Id. at 516.

⁸²Sckrey, supra note 59, at 50.

statement accepts the reality that international aviation will not be able to operate in a wholly unregulated environment.⁸³ If this is so, it means that governments will enter the arbitration arena more frequently.

In the same policy statement, the United States government said that it would try to obtain a "realistic division" of the market between the United States and foreign carriers, so long as United States residents predominate among air travelers. However, what is realistic to the United States will not automatically be realistic to a foreign government trying to enhance the position of its own airline. In multiparty situations governments are already present, given the IATA procedure. Even in more limited party situations, governments will be present in order to gain better routes for their lines. Given the fact that the United States carriers are constantly seeking to expand their service, the United States has been and will continue to be forced to surrender more than its carriers receive, simply because the American market is more lucrative than those in which American carriers seek entry rights.

The presence of foreign governments places politics in the middle of what should essentially be business considerations. Given the status of foreign carriers as governmental instruments, the resolution of business problems must be guided by governmental policy. In some cases foreign governments can force concessions from the United States by restricting the capacity or frequency status of American air carriers, since their aeronautical authorities have the necessary power.⁸⁴

The United States cannot always employ arbitration because it does not have the legal power to match the economic power its carriers generate in international aviation.

If it is true that, by its nature, international aviation is bound up with fundamental issues of national sovereignty and with international relations generally,⁸⁵ then the President will continue to make final determinations in matters of foreign air transportation to protect the

⁸³Johnson, International Aviation Policy of the United States, 49 DEP'T STATE BULL. 509 (1963).

⁸⁴Letter from Mr. Elihu Schott to Ross T. Dicker, Feb. 25, 1969.

⁸⁵Johnson, supra note 83, at 508.

delicate matters of foreign relations involved.

The use of arbitration in a large multilateral situation is unlikely. The two instances of such arbitration demonstrate that when it has been used, a small number of parties were involved. There can be no unilateral or bilateral control of air fares because the interests of more than one nation are always involved and many carriers often travel the same route.⁸⁶

In a limited party situation, arbitration is more likely to be used and used successfully. Bermuda Agreements state that each signator has the exclusive power to determine the port of entry into its own state and the routes to and from its shores. A third country cannot influence this type of decision and theoretically has no interest in the determination.

A Bermuda Agreement grants rights which declare what the relationship between the parties shall be. Although a conflict may contain political and economic considerations, any final decision will probably conform to the written agreement which defines the relationship. If arbitration is employed, the arbitrator will be confined to the subject in dispute. To reach a decision he will look to the written agreement, previous conduct, and to legislative history. In all probability, he will not be concerned with the inability of one party to compete because of a lack of comparable equipment or the inability to compete at a lower fare. He will try to determine what the words of the agreement mean and what the parties intended them to mean.

A Bermuda Agreement does not control rates. In a rate situation, a dispute would not be based on a previous understanding, but on a government's national interest and policy. These are not appropriate factors to submit to an "objective" third-party decision-maker.

Price-fixing within the IATA will continue to be successful as long as it continues to hold its membership. In a geographical sense, it is successful only when the governments of a particular area give strong support to IATA resolutions and machinery. For that reason, Europe with its ardent and enthusiastic governmental supporters of

⁸⁶Sckrey, supra note 59, at 87.

IATA, is a tightly controlled area in all phases of international aviation. The Western Hemisphere, especially South America, has not unanimously backed the IATA. As a result, air fares in that area are much lower than corresponding IATA fares over similar distances.⁸⁷

An international aviation authority currently employed by Pan American has stated that most of the disputes which have arisen have involved more than isolated matters of interpretation of agreements. Consequently, while arbitration can be used to settle some issues, he feels that there are many issues which will still require the use of negotiation.⁸⁸ The failure of arbitration in the Italian dispute shows that the issues are often inseparable, and thus arbitration will not always be a final, definitive answer.

The failure of the Italian arbitration deserves attention. There are numerous possible explanations as to why arbitration with France was successful but not with Italy. The arbitration with France was settled by a unanimous decision; that with Italy was not unanimous, but two to one in favor of the United States position. It has been stated that the unanimity of the French decision demonstrates that the arbitrators probably worked among themselves to convince each other of the proper solution.⁸⁹ In the Italian case, it has been stated that the decision was entirely free of compromise.⁹⁰ This failure to compromise may have forced the Italian member to dissent and the Italian government to reject the decision. If the arbitrators had been able to integrate non-legal factors into their decision-making process, the outcome might have been different. Italy could not abide by the decision because she could not ultimately compete with the United States.

In examining the Italian situation, Larsen has stated that a unanimous award may have a stronger effect than one with a dissenting opinion. This seems to be true, but possibly for reasons that are not readily apparent.

In examining the French example, Larsen stated that private arbitration in which an ad hoc instead of an institutional tribunal is used is quite close to negotiation.

⁸⁷Keyes, supra note 26, at 175-76.

⁸⁸Letter, supra note 84.

⁸⁹Larsen, supra note 65, at 244.

⁹⁰Larsen, supra note 73, at 514.

This is especially true when a unanimous award is presented. Larsen believes that the French decision reflects favorably upon the effectiveness of arbitration in such agreements. This is questionable if, as he states, it is so similar to negotiation. Negotiation is as political as arbitration is legal. The French decision does not appear to be such a success for the arbitration process if what was ultimately used was a form of negotiation. If arbitration cannot work, it should not be inserted in an agreement as a possible alternative to negotiation.

E. Law and the Function of Arbitration

Conflicts between states can be economic or political, but either can be treated in a legal manner. The role that law plays in international affairs is neither greater nor lesser than the part which it plays in national affairs.

International legal disputes involve claims based upon positive international law. In solely political disputes, claims are based on non-legal principles or no principles whatsoever. The legal or political character of a conflict depends exclusively upon the discretion of the parties.

If the conflict is legal in nature, an objective examination and unbiased resolution of the question of whether or not the law has been violated is the most essential stage in the legal procedure.⁹¹

Arbitration is a quasi-judicial process even in the international area, because the tribunal acts similarly to a court of law. When parties employ arbitration, they refer the controversy to impartial persons for a decision which the parties beforehand agree to accept as final and binding, though in the area of international aviation the decision sought is most often advisory. The arbitrators judge the merits of the controversy by gathering evidence at hearings. What is most noteworthy is that the process cannot be instituted without the prior voluntary consent of the parties. No state can be forced to arbitration without its consent.⁹²

⁹¹Kelsen, Compulsory Adjudication of International Disputes, 37 AM. J. INT'L L. 397-404 (1943).

⁹²F. KELLOR & M. DOMKE, supra note 7, at 37-38.

As can be discerned from the existence of arbitration in international aviation agreements for twenty years, there is a great difference between having agreed to settle future disputes by arbitration and actually deciding to invoke its use. The invocation requires a positive attitude, confidence in its fairness, and a definite act.⁹³

Previous conflicts in the area of international air fares resulted from negative attitudes and desires to insulate one's own air carrier as much as possible from the strains of competition. A change in the dispute-settling machinery without a change in attitude would gain nothing.⁹⁴ Previous instances in which the United States has disapproved of IATA recommendations have met with negligible success and will so continue, until attitudes change. IATA disagreements are fraught with emotional issues, because reduced fares and expensive passenger services could terminate the existence of carriers of young, developing countries. It is difficult to balance their special interests with the United States' desire for competition. In international aviation disputes thus far the parties have based their claims on political factors.

1. Advantages to the Use of Arbitration. There are numerous advantages to the use of arbitration, making it an attractive means of dispute settlement. Today, informed sources seem to think that impartial international arbitration is the most feasible means of solving some foreign disputes.⁹⁵ Is it also feasible in international aviation disputes? International law is not so rich in the machinery of settlement that it can afford to neglect any new means that may have some prospect of success.⁹⁶

Arbitration is less cumbersome and speedier than judicial settlement. It is more concerned with common sense and justice, and less concerned with political nuances than diplomacy, mediation, or conciliation.⁹⁷

⁹³Larsen, supra note 65, at 245.

⁹⁴Keyes, supra note 26, at 174.

⁹⁵Snyder, Foreign Investment Protection: Is Institutional Arbitration The Answer?, 40 U.N.C. L. REV. 665, 667 (1962).

⁹⁶Johnson, The Constitution Of An Arbitral Tribunal, 30 BRIT Y.B. INT'L L. 152, 174 (1953).

⁹⁷Snyder, supra note 95, at 669.

The arbitration procedure certainly seems quite simple. There have been only two parties before the Tribunal as opposed to some one hundred sixteen carriers involved in IATA Conferences. For each nation at a Conference there are varied interests, policies, and legal practices which will play some part in the final resolution.

Arbitration insures flexibility in the choice of the arbitrators and an assurance that the men chosen will have some expertise in the subject.⁹⁸ Because of the balanced composition of the tribunal, objectivity can be obtained to a greater extent than is possible in an IATA Conference. At these Conferences, most carriers are represented by government agents who act as both advocates and decision-makers, and whose interest in commerce is secondary to their interest in governmental policy.

Arbitration is characterized by an air of informality. This is also a result of the small number of interested parties involved and the practice of the parties in determining the procedure to be followed, which appears in a separate agreement drawn up prior to the actual arbitration. IATA Conferences lack informality because of the large number of interested parties and the great influence held by the major carriers.

Privacy can also be achieved through arbitration.⁹⁹ IATA Conferences can achieve a type of privacy, because it seems to be IATA policy to conduct meetings in secret. Indeed, the C.A.B. has long complained that it is unable to gain any specific information from either domestic or foreign carriers about the nature of IATA business. It is claimed that the 1963 fare dispute started because neither Pan American nor TWA would give the C.A.B. justification for their fare increases.¹⁰⁰

Arbitration is known for its low cost. Each side merely pays for its expenses and one-half the cost of the Tribunal. Costs of IATA conferences are much higher because the conferences are held in resort hotels, in a convention atmosphere, with the attendant high prices.

⁹⁸Larsen, supra note 73, at 519.

⁹⁹Sand, International Unification of Air Law, 30 LAW & CONTEMP. PROB. 400, 402 (1965).

¹⁰⁰Sckrey, supra note 59, at 42

An important aspect of arbitration is the fact that the parties are before the Tribunal voluntarily. Arbitration is said to connote cooperation. As noted earlier, negative attitudes shackle the IATA. Since one vote can defeat a resolution, cooperation and acquiescence are difficult to obtain unless the least efficient carrier is satisfied.

Arbitral tribunals may also have a wider area of jurisdiction. Traditionally in international law, the tribunal has been able to determine the limits of its own jurisdiction as well as its own procedure.¹⁰¹ The French Tribunal was given wide powers of discretion by the disputants, while the Italian Tribunal was given narrow ones. The Italian Tribunal was forced to go beyond the area granted it in order to make its ultimate decision. The IATA will not consider either the public needs or desires or what the airlines can reasonably accomplish.

Arbitration is not inflexibly bound by law. It allows the parties to tell their story in their own way, unhindered by rules of evidence.¹⁰² Yet, arbitration awards should not fly in the face of traditional legal principles, because such action will destroy the confidence which arbitration must instill in order to win adherents. An element of equity, in the Western sense of the word, seems to allow the arbitrators to consider non-legal factors. Such non-legal factors may play a very important part in regular commercial arbitration between private parties. The part that they play in aviation arbitration is unknown, unless they are manifested in the form of international custom, as evidence of general practice, and of certain general principles of law recognized by most civilized nations. The latter two factors constitute forms of law utilized in the International Court of Justice,¹⁰³ and are also similar to Western principles of equity. Even with these non-legal considerations, there is no indication that the arbitrators do not feel bound by precedent.¹⁰⁴ In fact,

¹⁰¹Larsen, supra note 73, at 504.

¹⁰²Kellor, The Science of Arbitration--A Speedy Way to Peace and Security, 1 ARB. J. (n.s.) 18,20 (1946).

¹⁰³I.C.J. STAT. art. 38(b), (c).

¹⁰⁴Crane, Arbitral Freedom From Substantive Law, 14 ARB. J. (n.s.) 163, 171-72 (1959).

both the Italian and French experience demonstrate that the tribunals will frequently refer to other arbitrations to show that their interpretive methods were based on international law.

2. Disadvantages of Arbitration. It is claimed that partiality is common to private arbitration because each side selects one of the arbitrators. The Italian experience seems to support this claim since the Italian appointee supported the Italian argument. Yet, arbitration will function because of the third member. He seems to be the key to its success. It should also work because of the expertise of the members, which should counterbalance any contention that the individual appointments are representatives of their state. The French experience would seem to show that a national can be impartial. Complete impartiality could be gained from institutional arbitration, but that form does not seem popular. Complete impartiality may not, however, always be sought.¹⁰⁵

One of the major disadvantages of arbitration is the lack of any enforcement machinery once the award has been given. In the IATA process, recalcitrant members can be denied landing rights at the airports of each member state. That Italy ultimately denounced the Agreement and implicitly the arbitrator's decision casts grave doubt on the dispute-settling capacity of the arbitration process. Italy just could not compete with United States carriers.¹⁰⁶ A private observer has stated that "without a ready means of enforcing . . . [an] arbitral decision, the United States has no recourse but negotiation."¹⁰⁷

What is the record of compliance with arbitral decisions, considering this lack of enforcement machinery? It has been stated that few disputes get to arbitration unless the parties are prepared in advance to abide by any foreseeable decision which the tribunal may render. Consequently, certain important conflicts which really matter are not automatically submitted to arbitration,

¹⁰⁵Larsen, supra note 73, at 518.

¹⁰⁶Letter, supra note 84.

¹⁰⁷Id.

because each party would have to be reconciled to the possibility of losing the case.¹⁰⁸

The record of compliance with international decisions is not a good one. A survey of international arbitration between 1794 and 1938 shows that almost 15 per cent of the arbitrations noted were not complied with.¹⁰⁹

Such a history is certain to have an impact on tribunals and is very likely to influence the content of the ultimate decisions. Enforcement is a problem which must be recognized, as it was in the Italian situation. There, the majority of the Tribunal realized that the decision might not be fair and equitable. This ultimately brought about a renegotiation of the 1948 Agreement.¹¹⁰

Why did Italy submit to arbitration? By the terms of the Agreement, she was bound by good faith to submit, once the United States invoked its use. Italy may have been buying time until she could acquire planes. There is, however, a more fundamental problem.

[T]he question of the distinction between legal and political disputes, especially between arbitral and non-arbitral disputes, is one which, until resolved to the satisfaction of a majority of governments, must necessarily reduce the efficiency of international arbitration, judicial or otherwise. [It will] greatly enhance the difficulty of securing agreement on a settlement of international disputes according to law.¹¹¹

In determining why arbitration failed to solve the Italian dispute, Larsen may have touched upon the problem when he noticed that in the French situation, the arbitrators

¹⁰⁸Reisman, The Role of the Economic Agencies in the Enforcement of International Judgments and Awards: A Functional Approach, 19 INT'L ORG. 929; Sloan, Enforcement of Arbitral Awards in International Agencies, 3 ARB. J. (n.s.) 134, 135 (1948).

¹⁰⁹Reisman, supra note 108, at 930.

¹¹⁰Italy-U.S. Air Transport Arbitration, supra note 77, at 984.

¹¹¹Johnson, supra note 96, at 176.

"appear to have approached the issue with open sensibilities, allowing themselves wide discretion to consider any relevant factors."¹¹² He feels this approach was not used in the Italian situation where he believes the arbitrators failed to see that the crux of the problem was not the word "and," but rather the design of the 1948 Agreement efficiently to distribute air transportation. Larsen correctly notes that there are "economic and sociological elements involved which are not stated in the text . . . national air power, distribution and gain of wealth, ease of transportation and prestige."¹¹³ These are the real problems and the arbitrators need to recognize them.

Metzger, on the other hand, discounts the presence of such problems.¹¹⁴ It is true that not all the factors are always present, but certainly economic motives played a greater role in the "real" problem with Italy than they seem to have in the French situation. France's interest in the Middle or Near East goes back two centuries, and her concern with American air power may stem from her desire to preserve her political influence. For some reason, the changing of American air routes was much less crucial to France than the increase in all-cargo flights was to Italy. This seems to explain the difference between the success in the French case and the failure in the Italian case.

F. Components of Successful Arbitration

Was arbitration really a failure in the Italian experience? Had the parties previously committed themselves to follow whatever decision was handed down?

Larsen stated that the Tribunal handed down an "arbitral decision," as was agreed upon in the Compromis,¹¹⁵ and not an "advisory report." In other words, this was not merely advice that was being rendered. This result would seem to indicate that, similarly to the normal judicial process, the parties were bound to follow the decision. Consequently, the renunciation of the Agreement marks the experience as a failure, at least from outward appearances.

¹¹²Larsen, supra note 73, at 512.

¹¹³Id.

¹¹⁴Metzger, Treaty Interpretation and the United States-Italy Air Transport Arbitration, 61 AM. J. INT'L L. 1007-09 (1967).

¹¹⁵Larsen, supra note 73, at 515.

What does it take for the arbitral process to be successful? The arbitrators in the French situation were international law experts. Those in the Italian situation were international aviation experts. In the French situation, both parties claimed victory; the French because their argument was accepted and the Americans because they were allowed to continue serving the cities in question. In the Italian situation, only one side was able to claim the victory, while the other side was forced to denounce the award.

It must be remembered that the arbitrators in the Italian dispute were asked to discover what the words of the 1948 Agreement meant. That result they accomplished. They left the original Agreement intact and did not try to write a new one or amend the old one. That the parties could not live with the decision should not reflect badly on the Tribunal, because the parties did not ask the arbitrators to find a solution which both sides could live with.

The fact that Italy was unable to live with the Bilateral must reflect to some degree upon the utility of the Bilateral. The Tribunal recognized this when it stated that:

if any amendment appears appropriate, it can only be effected following negotiations between the two governments and the conclusion of a new Agreement.¹¹⁶

The task of the Tribunal was not to keep the old Bilateral alive and functioning if realism dictated an opposite result. The Tribunal was asked to find what certain words meant, and it did. The fact that Italy could not abide by that meaning reflects badly upon the 1948 Agreement and indicates that it was a failure.

The French Tribunal settled the dispute by resolving all the important issues. The Italian Tribunal left open the issue of how the Italian carrier could exist without proper equipment. It did not settle the "real" dispute.

Perhaps arbitration is a middle road between negotiation and judicial decision, and private arbitration is much

¹¹⁶Italy-U.S. Air Transport Arbitration, supra note 77, at 984.

closer to negotistion than is institutional arbitration.¹¹⁷ If arbitration truly varies depending upon the degree of formality followed, then the fact that the French arbitrators tended to "negotiate among themselves," while there was "no compromise whatsoever" among those on the Italian Tribunal, would tend to explain the different results.

It is possible that the Italian arbitrators might have been more "suitable" if the parties had allowed them to take a liberal approach to the problem. Then they might have been able to reach an acceptable compromise. However, is it the function of arbitration to produce compromises? Does compromise have any place in a "judicial process?"

IV. POSSIBLE ALTERNATIVES TO ARBITRATION

What dispute-settling process is better suited to international aviation problems than arbitration? To answer the question, one must speculate on the future of international aviation.

Experience indicates that arbitration will be successful in certain situations, as where a limited number of interested parties are involved. Given the great number of international carriers, there will be very few situations in which the number of parties is limited. In fare and capacity situations, the United States has recommitted itself to the IATA apparatus. Problems will continue because Congress refuses to give effective regulatory power to the C.A.B.¹¹⁸ Because of the great number of interested parties, the sensitive issues involved, and the ability of foreign countries to disrupt our patterns of aviation, fare and capacity situations will probably continue to be areas reserved to the President for final decision.

¹¹⁷Larsen, supra note 65, at 224.

¹¹⁸In the one instance in which a government tried to act unilaterally to influence an IATA resolution, the Conference was deadlocked and the Transportation Minister of Britain, the man who so acted, was forced by Parliament to resign. This took place during 1958 in Honolulu. Rate-making ground to a halt. Koffler, supra note 24, at 233.

American carriers have shown how efficiently and profitably jets can operate over great distances. It will presumably continue to be American policy to push for the lowest fares in order to stimulate greater amounts of traffic. It has been the policy of foreign governments to price flights out of the reach of the average person, to tax those who always fly as heavily as possible, and to make up the resulting deficit by governmental subsidy.

Advanced technology may change the situation. The newer jet planes are more expensive and demand greater outlays of capital. Many countries will never be able to afford the cost of new equipment. Some European countries have made attempts to form air unions to compete with the large American companies.¹¹⁹ If costs increase, the number of international air carriers will decrease and it is possible that they will become more economically viable units. Then the airline problem may become more like other commercial problems and less like sensitive national policy problems.

As the number of international carriers and competition decrease, the ability to use arbitration should increase. Previously, international aviation disputes began over economic and political differences which were not always legitimately connected to contract interpretation. The arbitral process tended to temper the non-legal, non-contract factors. The legal perspective, which depended on the grant of jurisdiction, discriminated between the legal and the emotional issues. Because arbitration is a legal process, it provides that decisions will be reached on legal grounds.

If the number of carriers remains constant or increases, then the feasibility of arbitration would seem to be limited by the many factors which have been enumerated above.

¹¹⁹SAS serves the three Scandinavian countries. There has been some discussion that France, Belgium, Germany, and Italy will form a combine called Air Union. There has also been discussion that Britain, Australia, India, and Canada would form a combine which has been termed the Commonwealth Pool. Many of the carriers of the latter group have joint offices in many cities and offer complimentary schedules on many routes. Lissitzyn, supra note 5, at 256.

The present character of international aviation seems to demonstrate that the older bilaterals which are in use today--those signed immediately after the war--are inhibiting any progress that could be made. They are outmoded. Technology has changed to such a great extent that the words in the instruments are being strained to their limits. They cannot meet the demands placed upon them. The "suitable" issues are not present. New bilaterals should be negotiated to reflect the modern status of international aviation.

If conditions remain as they are, a suitable alternative could be the use of a fact-finding board to which the issues would be submitted. The board could be given a grant of jurisdiction in the same manner that the arbitral bodies have been given theirs. Then, once the facts have been determined, the two parties could sit down to negotiate with an objective determination of their claims before them. At that point, the political issues could be considered and a realistic final resolution could be reached.