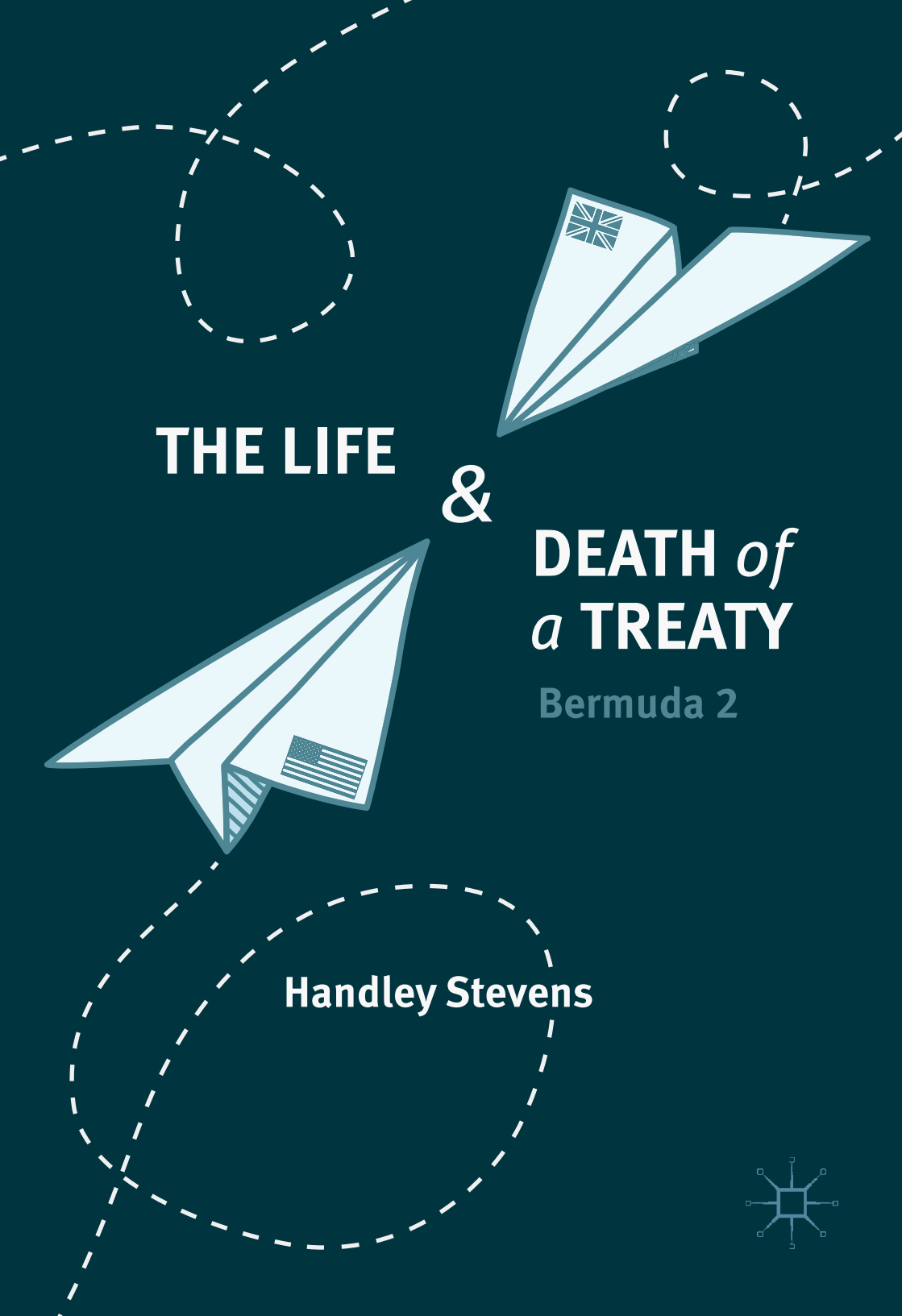

THE LIFE & DEATH *of a* TREATY

Bermuda 2

Handley Stevens

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Handley Stevens
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Foreword

At least since the 1940s, when Winston Churchill first coined the phrase, the United Kingdom and the United States have famously enjoyed a "special relationship." It is predicated on a shared language, similar political and cultural values, a largely congruent approach to economic policy, trade, diplomacy, and military cooperation, and of course the genuine affection Britons and Americans have for each other.

Perhaps it is because our two peoples enjoy so strong and enduring a bond that the long-fraught history of Anglo-American civil aviation relations stands out in such stark relief. Allies standing shoulder-to-shoulder in respect of just about everything else, they have more often been eyeball to eyeball when it comes to the commercial flights that connect their two territories.

That trade in commercial air services could become and remain for decades a bone of such contention between two otherwise like-minded governments speaks volumes about the curious legal and diplomatic framework that governed the conduct of international civil aviation for more than half a century, and that occasionally threatens even now to compromise the availability of competitive and affordable air transportation in some markets.

The basic outlines of the story are clear enough. The air routes between U.S. and U.K. cities have long been among the most highly traveled and thus highly coveted aviation markets in the world. The United States, with its vast land mass, large population, and multiplicity of airlines, sought to allow the market to sort out the number of airlines providing trans-Atlantic service, the number of flights offered, the cities served, and the prices

charged. Why, the U.S. asked, shouldn't travelers flying across "the pond" enjoy the same benefits of robust competition that air travelers enjoy in the deregulated domestic market?

The U.K., equally committed to open and competitive markets in most sectors but concerned that structural constraints peculiar to aviation would necessarily redound to the detriment of U.K. airlines, routinely insisted on a more calibrated approach. Unless U.K. airlines were afforded the opportunity to tap into the huge American travel market in the same way U.S. airlines did through their highly efficient domestic hub-and-spoke networks—an opportunity mostly foreclosed by U.S. law—deregulating the trans-Atlantic aviation market, in the U.K. view, would likely marginalize U.K. airlines.

Handley Stevens has written by far the most comprehensive account that exists of the long and intriguing struggle to bridge the chasm separating the two countries' respective aspirations.

His impressive telling of the life and death of Bermuda 2, as the 1977 Anglo-American aviation accord is known, can be savored on a number of levels. First, it is a richly detailed chronicle of diplomacy in action, the dynamics of which are essentially the same whether the subject is preventing nuclear proliferation or allowing another airline to fly between Boston and Manchester. Students of foreign relations will find no better window on the way governments work together, both formally and informally, to address policy differences, to find compromise, and to maintain the essential integrity of their relations. Of particular interest is Handley's account, notably in Chap. 3, of the efforts undertaken by both sides to reduce the official tension through occasional social outings. There can be no overstating the importance of such occasions, which engender a level of mutual respect and trust without which compromise would remain forever beyond reach. The passage brought back fond, if distant, memories.

Second, by diligently mining a mother-lode of contemporary records Handley has been able to provide the domestic policy and political context for each episode in this long saga. The book thus affords a fascinating look at the behind-the-scenes backdrop—seldom visible to the other side at the time—that motivated the two governments' negotiating positions.

Third, readers will be surprised at the frequency with which political leaders became key actors in this story. Callaghan and Carter, Thatcher and Reagan, and George H. W. Bush all appear in important roles, and always at moments of high drama. The story of Bermuda 2 can thus be read as a significant chapter in Anglo-American history. Throughout the

decades covered by the book, Secretaries of State for Transport on the U.K. side and U.S. Secretaries of Transportation spent significantly more hours together discussing the arcana of civil aviation than they ever wanted to, and too often with little to show for it. However quixotic, their frequent personal interventions are yet another measure of the importance of this account.

Finally, because the author himself played a part in the saga, and this recital reflects his first-hand experience, readers will benefit from the reflections of a keenly observant and insightful participant, affording an invaluable and highly personal glimpse of the human side of diplomacy.

I was privileged for a number of years to be Handley's opposite number, representing the U.S. on the other side of the table, struggling with him to find common ground. When Handley asked if I would review his narrative, therefore, I jumped at the chance. Recalling that Handley's unfailing cordiality and good humor were exceeded only by his effectiveness as an adroit and articulate advocate for the U.K. position, I was determined to do all I could to ensure balance in what I suspected, despite his best intentions, would otherwise be a hopelessly one-sided account.

I needn't have worried. What I found in Handley's text, written a quarter-century after the fact, was a far more interesting and open-textured narrative than I had anticipated. His intention, quite obviously, was not to vindicate any particular position, but instead to portray the 30-year history of Bermuda 2 and its place in the larger bilateral relationship as objectively as possible, to understand the forces that drove *both* sides, and to ensure that the lessons of the story are not lost.

The story's most important value lies in its rigorous portrayal of the process by which, for so much of aviation's history, nations came together to calibrate the air services they would allow to connect their territories. Bermuda 2, with its elaborate rules, complex capacity annex, and intricate city-pair route schedules, was unquestionably the most consummate—one might even say "elegant"—achievement in what, with today's broad acceptance of international aviation liberalization, is rapidly becoming a lost art. That Britain and America—two nations otherwise committed to the importance of markets and competition—could remain engaged in this process for so long illustrates compellingly the importance of civil aviation in the conduct of foreign relations, and the remarkable significance that airlines have long enjoyed as an expression of nationhood itself.

In the end, of course, Bermuda 2 became the sore thumb sticking out from an array of far more liberal arrangements established during its lifespan for most other trans-Atlantic air travel. Europe's transition to a single market for air transport in 1997, moreover, meant that individual member states could not maintain their traditional bilateral agreements with non-EU countries without contravening essential requirements of EU membership. By 2008, the EU had forged an open-skies agreement with the U.S. intended to replace all of the bilateral accords that preceded it, including Bermuda 2. With a stroke of the pen, the product of untold thousands of person-hours was swept away—consigned, as they say, to the dustbin of history.

Or was it? At this writing, now that Britain has voted to leave the EU, it appears that British and American negotiators can look forward to a reunion. We can only speculate, however, about the arrangements that will govern air services between the U.S. and the U.K. post-BREXIT. Perhaps it is time for the partners in the special relationship to do what they did together in 1946 with the adoption of Bermuda 1—forge a bilateral agreement that serves as a new, state-of-the-art template for the rest of the world, finding ways to bring the benefits of aviation to peoples everywhere with even greater efficiency and affordability. Handley's thoughtful and inspiring final chapter thus should be treated as required reading for our respective successors.

Montreal
March 2017

Jeffrey N. Shane

Preface

When I set out to write this book, at the instigation of Patrick Shovelton, who had led the UK team which negotiated Bermuda 2, I thought it was going to tell the story of the ups and downs of a major air services relationship, between Britain and the United States, in which I too had played a small part. The account which follows slips briefly into the first person for one set of negotiations in Chap. 3.

However, as I dug deeper into the files, it became clear that there was a more important story to tell against the background of Bermuda 2. Why use a treaty between governments to regulate a commercial activity which is now entirely within the private sector? What happens to a bilateral treaty when the activity it governs becomes part of a global pattern of multinational alliances? How does a treaty respond to such massive changes in the activity it seeks to regulate? As I asked these questions, I started to track the changing text of the treaty as the Contracting Parties moulded it to respond to these changes, up to the point where the bilateral treaty had to make way for a broader agreement between the United States and the European Union. By including in Part II an annotated text of the Treaty itself, together with a selection of supplementary documents in Part III, I hope I have provided for students of international relations and international law, as well as the community of practitioners, a case study of the birth, life and death of an international treaty—if indeed it is dead (see Chap. 7). Bermuda 2 happens to be about aviation, but this study could very well apply to treaties in other sectors as well.

In the preparation of this book, I have been particularly indebted to the UK Department for Transport, who not only facilitated my access to the

papers, but provided me with their fully annotated version of the Agreement, prepared by Chris Whomersley, with all amendments up to March 2001. The bulky ring-binder he assembled for the use of the Department's negotiating team proved invaluable in preparing Parts II and III of this book. The Civil Aviation Authority kindly provided me with detailed statistical information on all flights between the UK and the USA from 1990 up to 2014.

I am also deeply grateful to all those officials and airline executives on both sides of the Atlantic who have been generous with their time. In particular, Patrick Shovelton, who has since died, sent me his personal recollections together with a bundle of papers relating to the original negotiations; Jeff Shane commented extensively on the draft text and provided me with many thoughtful articles and speeches drawing on more than 25 years' experience in senior positions at the heart of US aviation policy; Tony Baker, leader of the British negotiating team between 1996 and 2003, lent me an invaluable trove of papers which he had kept from those years; and Dr Barry Humphreys also commented on the text drawing on his long experience of Bermuda 2, first with the Civil Aviation Authority and then with Virgin Atlantic. Their combined knowledge and expertise has been invaluable, but the responsibility for any errors of fact or judgment rests with me.

Finally I owe an immeasurable debt of gratitude to my wife Anne, without whose encouragement and support, both as academic mentor and IT adviser, this book might never have seen the light of day.

London, UK
May 2017

Handley Stevens

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Abbreviations

AEA	Association of European Airlines
APEX	Advance Purchase Excursion fares
ATI	Anti-trust Immunity
BA	British Airways
BAA	British Airports Authority (later BAA plc)
BCal	British Caledonian Airways
BOAC	British Overseas Airways Corporation
BREXIT	British Exit from the European Union
CAA	(UK) Civil Aviation Authority
CAB	(US) Civil Aeronautics Board
ECAC	European Civil Aviation Conference
EU	The European Union
HMSO	Her Majesty's Stationery Office
IATA	International Air Transport Association
ICAO	International Civil Aviation Organisation
MoC	Memorandum of Consultations
MoU	Memorandum of Understanding
NPRM	Notice of Proposed Rulemaking (in US Congress)
Pan Am	Pan American Airways
PTI	(UK) Protection of Trading Interests Act
SAS	Scandinavian Air Services
TWA	Trans World Airways

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PART I

The Narrative

CHAPTER 1

Introduction

The title of this book—The Life and Death of a Treaty—makes the point that a treaty is not a static instrument, chiselled into tablets of stone like the Ten Commandments. It is a living organism. It has ancestors in treaties past, parents who give it life, endowing it with some of their own peculiar traits, and godparents to watch over its early development. As it grows up it may try to impose its will on the world about it, but it will also be changed by such encounters. It may have many children, as was certainly the case with Bermuda 1, or none at all, and ultimately, when it can no longer live and breathe and adapt to changing circumstances, it will be allowed to die. If it is lucky, it will receive the decent, respectful, but honest farewell which this book seeks to offer to Bermuda 2. Finally, in politics as in nature, death often makes way for new life, which is arguably what happened when the EU-US Agreement took the place of Bermuda 2, along with all the other air service agreements between the USA and the separate member states of the European Union.

Bermuda 2 is the common name given to the Air Services Agreement between the Government of The United States of America and The Government of the United Kingdom of Great Britain and Northern Ireland, signed at Bermuda on 23 July 1977.[1] It took the place of an earlier Bermuda agreement, now known as Bermuda 1, which had survived from 1946 to 1976, when the UK government gave the twelve months' notice required to terminate it. Bermuda 2 remained in force from 23 July 1977 until 30 March 2008 when its application to air services between the

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United Kingdom and the USA was suspended under the Air Transport Agreement between the United States of America and the 27 Member States of the European Union (Air Transport Agreement 2007).

Since 2008 the ghost of Bermuda 2 has lingered on as the legal basis for air services between the United States of America and the remaining British territories in the Caribbean, as well as Bermuda itself, so it may be a slight exaggeration to speak of its death. There is a theoretical possibility that the main body of the Agreement, which at the time of writing (January 2017) has not been formally terminated, might have a new lease of life when the United Kingdom ceases to be a member of the European Union. All the options will be discussed in Chap. 7 (Conclusions), when it will also be possible to review in the light of the evidence how far Bermuda 2 as a bilateral treaty fits into the patterns of relationship between the European Union and the United States, identified and explored by Steven McGuire and Michael Smith (McGuire and Smith 2008).

Although this book tells the story of a single treaty governing air services, it is also a case study in the art of negotiation and in the practice of international diplomacy at every level of government. With so much at stake—the North Atlantic has long been a major source of profit for the international aviation business—the story itself is an exciting contest, hard fought and of sufficient importance to have engaged the periodic attention of Presidents and Prime Ministers. How did the negotiators, acting on behalf of the Contracting Parties (ie the two governments), succeed in reconciling the divergent policy objectives of their airlines and their governments over a period of thirty years to maintain an agreed framework for the operation of these critically important air services? If Britain's departure from the European Union (Brexit) means that there will have to be a new air services agreement between the UK and the USA, what lessons should be drawn from Bermuda 2 for the shaping of such an agreement?

Finally, it is hoped that the juxtaposition of the narrative in Part I with the consequent Treaty changes in Part II, illuminated by the collection of supplementary documents in Part III, will give students of international law as well as international relations some insight into the capacity of a Treaty to accommodate and respond to change both in the external environment to which it relates, and in the policy preferences of the contracting parties. The hierarchy of legal instruments, both formal and informal, that was used to amend, modify, interpret or apply the Treaty is listed and described in the introduction to Part III.

The story of Bermuda 2 has been of sufficient academic interest and political salience to attract considerable attention over the years both in the Press and in academic journals. *Flying in the Face of Competition* (Dobson 1995) explains how Bermuda 2 accommodated the divergent policies of the US and the UK up to about 1994, including the major crisis in 1991 when Bermuda 2 was implicated in the demise of Pan American World Airways (Chap. 4). The negotiation of the EU-US Air Transport Agreement which superseded Bermuda 2 in 2008 also generated extensive coverage (Chaps. 6 and 7). However, this is the first book to attempt, in Chap. 7, a balanced assessment of Bermuda 2's contribution to the rapidly changing structure of the international air transport industry over the full period of its life.

This first chapter sets the scene for the narrative account which follows in Chaps. 2, 3, 4, 5 and 6 by sketching in the nature of the air transport industry and the way it is regulated internationally, as well as the key differences between the UK and US airline industries, and between the aviation policies of the two governments. It outlines the scope and purpose of a bilateral air service agreement, as well as describing how such an agreement is negotiated, carried into effect, and where necessary changed. With this background to the industry and its framework of regulation, the reader should be able to follow the story of Bermuda 2 with an understanding of the industrial and political context within which its life was played out.

In a book about the air transport industry it is difficult, without cumbersome circumlocutions, to avoid using certain technical terms which may not be familiar to the general reader. Most of them will make their first appearance in this introduction, to which a glossary of aviation terms has therefore been attached.

An Industry Shaped by Regulation

In the case of almost any other industry, it would be appropriate to start with a discussion of the industry itself, before considering the rules developed to regulate it, but in the case of civil aviation, it makes better sense to start with the regulatory ground rules, since these began to be laid almost a decade before the first commercial flights took place, and it is arguable that the industry was shaped by those very early decisions. As long ago as 1910 politicians were worried about the potential vulnerability of their cities to attack from the air; the use of zeppelins to drop bombs on

London in the First World War must have reinforced those concerns (Staniland 2008, 17). As a result, the 1919 Paris Convention on Civil Aviation stated unequivocally that 'every power has complete and exclusive sovereignty over the airspace above its territory,' and this approach was followed by the International Convention on Civil Aviation (the Chicago Convention), signed at Chicago on 7 December 1944,[2] which established the International Civil Aviation Organisation (ICAO)[3] and laid the foundations for the regulation of the modern air transport industry. The wording used in Article 6 of the Chicago Convention is as follows: '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 that state'.

It followed from these early assertions of sovereignty that the aircraft of one state wishing to land in another, or even to fly through another country's airspace without landing, would require formal authority to do so. At Chicago the US Government had proposed a more ambitious International Air Transport Agreement that would have opened all markets to its strong airlines, but the United Kingdom, anticipating the need to secure protection for its severely weakened airlines when the war ended, led a majority of nations which insisted that the commercial rights to take on board or disembark passengers and freight must be negotiated and exchanged bilaterally.

One of the lasting legacies of the Chicago Conference is the series of definitions that appeared in the abortive draft International Air Transport Agreement, setting out the different rights (known as freedoms) which an airline might exercise. These 'freedoms' (for a fuller explanation, see the glossary) were classified as follows:

First freedom—to fly across the territory of another state;
Second freedom—to land in another state for non-traffic purposes;
Third and fourth freedoms—to set down in another state (third freedom) and take on board (fourth freedom) passengers, mail and cargo to or from the airline's home state;
Fifth freedom—the right of the airlines of one state to set down and take on board, in the territory of another state, passengers, mail and cargo to or from a third country.

The first two freedoms are widely, though not universally, exchanged on a multilateral basis under the International Air Services Transit Agreement[4]

(IASTA), but the commercially valuable rights to pick up and set down traffic were jealously guarded by states, which often owned the airlines operating under their flag. These rights were therefore carefully defined and traded bilaterally, becoming in effect the currency of bilateral air service agreements. Other 'rights' have been defined and widely exercised, notably the use of third and fourth freedom rights to carry traffic between places not named in the same agreement by the use of connecting services (the so-called sixth freedom[5]) but it is only the five freedoms named above which are reflected in the route schedules of a bilateral air service agreement (for example, see Annex 1 of the Treaty at Part II). Like most bilateral agreements, Bermuda 2 was designed to accommodate mainly the traffic carried between the two Contracting Parties under the third and fourth freedoms, together with small volumes of fifth freedom traffic.

Bilateral Air Service Agreements

The first post-war air service agreement, signed at Bermuda on 11 February 1946 (Bermuda 1—1946) between the United States and The United Kingdom, established a widely followed template for such agreements. If the carriage of all revenue-earning traffic was to be regulated by such agreements, the Contracting Parties needed to create the legal provisions that would enable them to discharge their obligations to one another. It was therefore agreed at Bermuda that each Party should reserve the right to withhold or revoke the exercise of traffic rights by a carrier 'designated by the other Contracting Party in the event that it is not satisfied that substantial ownership and effective control of such carrier are vested in nationals of either Contracting Party' (Bermuda 1, Article 6). Within a system regulated by bilateral treaties, this strong requirement for national ownership and control reinforced the national character of an industry providing international services.

Building on these national foundations, every bilateral air service agreement has to make provision, *inter alia*, for each Contracting Party to 'designate' airlines to operate services under the agreement, knowing that it can vouch for them as being substantially owned and effectively controlled by its own citizens. This in turn implies a licensing process under which the government satisfies itself not only that the airline meets those ownership and control requirements, but also that it has the financial resources and the technical capacity to operate safely, in accordance with internationally agreed standards. An airline armed with such a licence from

its own government, formally designated to operate services provided for under the Agreement, and able to demonstrate that it is properly regulated for safety purposes, that it has a recognised Air Operators Certificate, and that it is adequately insured, should then be entitled to receive from the other government any permissions it may need to enter its airspace, to land in its territory and to operate services carrying passengers and freight.

Further key elements in any air service agreement concern the routes which may be flown, the 'capacity' of the services that may be operated,[6] and the fares, or 'tariffs' which may be charged. At Chicago the US delegation had argued for a liberal regime allowing airlines to determine both tariffs and capacity in the light of their own commercial judgment, without the intervention of governments. The UK delegation wanted governments to retain control over both. The compromise adopted under Annex II of the Bermuda 1 Agreement conceded a requirement for both governments to control the approval of tariffs, normally following agreement among the airlines themselves within their own trade association—the International Air Transport Association (IATA), which had been set up at Havana in 1945. Under Bermuda 1 Annex II the US Government approved IATA's rate conference machinery for the first year, and evidently expected such approval to be renewed, but in the absence of such approval it took powers for the Civil Aeronautics Board to fix fair and economic rates. Either way, the key point was that the tariffs (fares) to be charged by the airlines required the approval of both governments.

On the other hand the judgment about how much capacity to provide was left to the airlines, subject to certain broad principles which were set out in the resolution adopted at the Final Plenary Session of the Bermuda Conference (Bermuda 1, paragraphs 4–6 of the resolution). These principles included:

> (4) That there shall be a fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories (as defined in the Agreement) covered by the Agreement and its Annex;
> (5) That, in the operation by the air carriers of either Government of the trunk services described in the Annex to the Agreement, the interest of the air carriers of the other Government shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes.

Another key understanding, established in paragraph (6) of the resolution, concerned 'the general principle that capacity should be related:

(a) to traffic requirements between the country of origin and the countries of destination;
(b) to the requirements of through airline operation; and
(c) to the traffic requirements of the area through which the airline passes after taking account of local and regional air services.'

These very general principles affecting the operation of services (the fair and equal opportunity—see paragraph 4 above) and the provision of capacity related to traffic requirements (paragraph 6) were widely adopted in other post-war air service agreements. Back in 1946, when the newly minted Bermuda capacity principles were still being liberally interpreted, the US generated about 70% of all transatlantic traffic and US airlines carried about 80%. By 1960, however, when the bilateral partners of the United States and their airlines had become stronger, the US was still generating about 70% of the traffic, but carrying only 40%. Diamond (1975) argues that this trend was the inevitable consequence of a regulatory structure which was ultimately dependent on bilateral agreement. Partners who generated relatively little traffic were nevertheless in a position to press for arrangements which guaranteed them a more or less equal share of the business. The US international air transport policy statements of 1963 and 1970 continued to support a flexible interpretation of the Bermuda capacity principles, but at the same time the emphasis was shifting towards a more determined effort 'to protect US carriers from the unfair competition of foreign carriers which are either wholly owned or heavily subsidised by government' (Diamond 1975, 483). We shall see in Chap. 2 how this more aggressive policy played out in the negotiations leading to Bermuda 2.

Imperfect as the Bermuda 1 regulatory structure turned out to be, its origins in the Paris and Chicago Conferences of 1919 and 1944, both held in the shadow of war, go a long way towards explaining how and why a government-led structure of bilateral regulation has had such a strong influence on the shape of the international air transport industry. Diamond's thorough analysis of Bermuda 1, and in particular of the compromise on capacity management at its heart, leads him to the conclusion that 'the bilateral air transport system of agreements is not perfect, but it is the best we can expect for a long time to come' (Diamond 1975, 495), a view broadly shared by Shane in his remarks about the operation of the Bermuda capacity principle to an audience in Tokyo in 1993 (Shane 1993).

The International Air Transport Industry

The first consequence of this regulatory framework is that the international industry developed around the concept of the national flag-carrying airline (Dienel and Lyth 1998; Staniland 2003). Air transport was at first an expensive and rather glamorous way to travel, with an aura of adventure and romance about it. Many airlines might compete domestically, particularly in a large country, but even the United States relied on a single airline to operate nearly all its international services. Not for nothing did Pan American's iconic round-the-world air service carry the proud flight number PA 001. European nations used their airlines to strengthen their links with distant colonies. Thus a heady brew of patriotism, wealth, adventure and romance reinforced the concept of the national flag-carrying airline, even if the fundamental requirement for national identity was originally the child of nervous post-war regulation.

A second feature of the international air transport industry was the close partnership between governments and airlines in the management of the business. Proud as the flag-carrying airlines were, the industry was young, and its route structures were heavily influenced by government policies for linking scattered communities at home and far-flung territories abroad. Moreover, in an era when many countries were still trying to build an independent aircraft manufacturing industry, the national airline was frequently required by government to buy nationally manufactured products. Heavy costs were incurred upfront, and revenues were uncertain, but usually far less than was hoped. As a result few airlines turned a profit, and national flag-carrying airlines in particular became heavily dependent on state subsidies. This in turn reinforced the bonds between airline and government.

A third feature of the industry was the explicit dependence of governments on the airlines acting collectively through their own association to determine tariffs. In the interests of making convenient provision for passengers to make complex journeys, and to transfer their booking from one airline to another if necessary, the airlines had been encouraged by the Chicago Conference to set up IATA. Their co-operation necessarily included discussions about the tariffs to be charged (and what could or could not be included in the price[7]), and although the treaties between governments generally required such tariffs to be approved by each of the Contracting Parties, the role of IATA tariff conferences was frequently given favourable recognition in the bilateral treaty, and most governments were content to endorse IATA tariffs.

A fourth feature of the industry was the distinction between different types of service, catering separately for cargo and passengers, and distinguishing between business passengers and holidaymakers. These distinctions are reflected in Bermuda 2, (text at Part II) which includes separate passenger charter and cargo charter provisions at Annexes 4 and 5, and distinguishes in the route schedules at Annex 1 between 'combination' air services for passengers and freight, and all-cargo air services for freight only (see the glossary for more detailed explanation of these terms). However, since the arrival of wide-bodied aircraft in the 1970s, more and more cargo has been carried in the holds of passenger aircraft, and cheaper fares, catering for independent holidaymakers and others who do not need the flexibility of a full-price ticket, have blurred the distinction between scheduled and non-scheduled services. Increased cargo capacity and lower fares with restrictive conditions have allowed scheduled services to make substantial inroads into the previously separate markets for charters and cargo. Charters remain important in the winter sunshine market for package holidays in the Caribbean; up to 2007 they continued to carry about 1 million passengers across the Atlantic every year, but whereas this represented something like 30% of the market in 1977, by 2007 it had fallen to around 5%. All the growth had been in scheduled services.

Perhaps the most powerful influence of all on the shape of the international air transport industry is the way geography, industry rules and government regulation combine to protect the position of a powerful airline at its principal hub airport.

- *Location*. Both London and New York enjoy the natural advantage of being major cities on the leading edge of their respective continents, giving them an advantage over even the largest cities further inland. London in particular is well placed to draw traffic from all parts of the United Kingdom and to provide connecting services facilitating travel between the United States and Europe, as well as Africa and Asia. Such advantages may be reduced by changes in technology (for example the increased range which now allows aircraft to fly direct from the USA to destinations in the Middle East), or enhanced by regulation (see below in relation to Heathrow);
- *Hub dominance*. In the United States, policies of domestic deregulation led to a major restructuring of the industry after 1978, which moved from a large number of airlines providing point-to-point services to a much smaller number of airlines operating more efficient

hub-and-spoke services. An airline operating hub-and-spoke services may come to dominate the airport at the centre or hub of its network, making it difficult for other airlines to compete. Even a foreign airline may be adversely affected, unless the hub airport is located close to a major centre of population such as Chicago or New York generating its own traffic.

- *Congestion*. The anti-competitive effect of such hub dominance may be compounded by congestion, leading to a shortage of landing slots,[8] especially at the most popular times. Under the slot management arrangements which were developed by IATA, but largely incorporated into EU legislation, airlines which have used a given slot in the previous summer or winter season generally have the right to hang onto it for the corresponding summer or winter season in the following year. These arrangements (known as 'grandfather rights') tend to reinforce hub dominance at congested airports.
- *The protected home market*. The advantage enjoyed by UK airlines at Heathrow is of course balanced—some would say outweighed—by the very large size of the USA which when combined with the reservation to US airlines of all traffic between points within the United States (cabotage), arguably confers a significant locational advantage on US airlines. The United States is a vast nation, many of whose citizens need to take a domestic flight to an international gateway airport before boarding their international flight, and since such domestic flights are reserved to US carriers, they have a significant advantage in offering an integrated domestic and international service to their passengers.[9] As hub dominance grew in the USA during the 1980s, the combination of this feature of the market with cabotage protection raised serious questions about the 'fair and equal opportunity' of UK airlines to compete for travellers originating their journeys behind gateway cities in the USA. The inability of the two sides to resolve this issue became a seemingly insuperable obstacle to their shared ambition to liberalise the Bermuda 2 relationship (Chap. 5).

From National Airlines to Multi-national Alliances

The encouragement which governments gave to inter-airline co-operation was not confined to tariff conferences. In a business where in the early days there were few international routes that could sustain more than one national airline on either side, and where those two airlines would usually

operate aircraft with similar performance characteristics, charging passengers the same IATA fares, it often made sense for the two airlines to enter into deeper co-operative arrangements over the scheduling of their flights, even to the extent of pooling revenues. Such arrangements were widely practised in Europe, where many of the airlines operating international services were state owned and heavily subsidised. The governments believed that co-operation was better than competition if losses were to be minimised. The result was an industry which, particularly in Europe, was characterised by cosy duopolies of national airlines, well sheltered from any effective competition. Even on the North Atlantic, and as late as 1973/1974, Pan Am, TWA, National and the British Overseas Airways Corporation (British Airways' predecessor) were operating a quasi-duopolistic service, agreeing both fares and capacity together, with the approval of the UK and US authorities (see Chap. 2).

The termination of Bermuda 1 was among the first signs that this cosy pattern of cartels was beginning to crumble (see Chap. 2). As the United States government began to encourage a more competitive approach to the provision of air services, first domestically and then across the Atlantic, and some of the more aggressive newcomers showed increasing signs of disregarding the gentlemanly customs of the old-established national flag-carriers, the United Kingdom government decided to terminate the 1946 Agreement, and insist on a new agreement imposing tighter limits on all the main parameters—the route schedule, the designation of more than one airline from each country to operate services on the same route, the control of frequency/capacity of service, and strict adherence to approved tariffs. Bermuda 2 did indeed establish such controls, but the tide was already turning, and in response to persistent pressures from a growing industry, and from governments more closely attuned to the benefits of competition, the controls were gradually relaxed over the early years of the agreement's life (Chap. 3).

So long as the air transport industry remained essentially bilateral, Bermuda 2 could be adapted to changing circumstances without too much difficulty. However, in the course of the 1990s the industry began to push at the boundaries of the bilateral system itself, beginning with code-sharing arrangements, which allow a service provided by one airline to be marketed as if it were operated by another. In the context of liberal 'open skies' agreements, which were held to justify exemption from the normal rules of US anti-trust legislation, closer forms of co-operation, for example on pricing and scheduling, were re-introduced

among multi-national alliances of airlines which by the year 2000 dominated international air transport, typically including at least one airline from Europe, one from Asia and one from the USA, to give each alliance global coverage. Chapters 4 and 5 explain how Bermuda 2 adapted to this major change of industrial structure. Globalisation had entered the air transport industry by the back door, but it had quickly occupied the whole property.

Multinational Governance in the European Aviation Area

At the same time, between 1983 and 1997, the European Union was developing the European Aviation Area, drawing the air transport industries of the EU member states into a single aviation market (Chap. 4). This had three important consequences for the industry. First, it turned the separate national markets of EU members into a single market, where an airline with a Community licence valid throughout Europe could carry traffic on any route, including 'cabotage' traffic between two points within another European country. Second, it changed the relationship between governments and airlines. The progressive application of the Community's rules designed to limit state aid made it increasingly difficult for states to continue subsidising their national airline. The major beneficiaries of this new regime have been the new low-fare airlines such as Ryanair and easyJet, granted Community licences by the Irish and British governments respectively, but operating from a variety of hubs spread across Europe, and now carrying over 40% of all passengers making journeys by air within the European Aviation Area.

Within the EU the principle has been established that once an internal market has been created, the member states are no longer entitled to negotiate separately with third countries, if their negotiations will affect the internal market (Kassim and Stevens 2010, 160–171). It would take some time before the Member States would grant the Commission authority to negotiate a collective agreement on their behalf, but its right to do so could not be resisted indefinitely, and the resulting agreement between the EU and the USA (Chap. 6) would not only entail the suspension of all the member states separate air service agreements; it would create a major new regional structure for air services, potentially a significant step towards the multinational agreement that had eluded negotiators at Chicago in 1944. At the time of writing (2017) there has been no sign of further progress

towards such an agreement, and it has to be said that the rights available under the EU-US Agreement for airlines holding Community licences to operate trans-Atlantic services to and from airports other than those in their own home territory have been little used. For now at least, the global air transport industry remains stuck in an essentially national pattern, modified but by no means supplanted by the development of multinational airline alliances and the European Aviation Area.

Differences Between UK and US Air Transport Industries

The biggest difference between the air transport industries of the United Kingdom and the United States is that the US industry depends fundamentally on its domestic market, whereas the UK industry is critically dependent on the success of its international services. On both sides of the Atlantic the first commercial air services were launched in 1919, but whereas US air services were able to develop strongly to serve a large domestic market in the 1920s and 1930s, the main impetus behind the development of UK air services was the political desire to forge closer bonds with the British dominions and colonial territories spread right around the globe. Even after many British colonies became independent in the 1950s and 1960s, the international dimension of UK aviation remained dominant. After all, the market for domestic air services within the UK is small. Most of the major centres of population have been linked by relatively rapid means of communication since the explosion of rail services in the mid-nineteenth century, and the creation of the motorway network a century later. Domestic air services have a role to play on the longer routes (eg those linking London to Scotland and Northern Ireland) but they are a marginal aspect of an essentially international industry.

Another important difference is sheer size. The US population is about four times the size of the UK population, and distances are far greater. Attention has already been drawn to the potentially anti-competitive effect of domestic cabotage protection when combined with hub dominance and airport congestion. The strongest hubs are located at airports serving major cities such as New York, Chicago, or Los Angeles. However, hubs have also been created at gateways such as Charlotte (US Air, now part of American) or Raleigh/Durham (American), where the absence of a large pool of passengers living within easy reach of the airport reduces the scope

for competition. In 2005 US airlines were offering services to London at six airports where they faced no direct competition from other US or UK airlines.

By 2005, towards the end of the period covered by Bermuda 2, six US airlines were serving London from 18 US gateways, though there was head-to-head competition between US airlines only at New York, Chicago and Los Angeles. American Airlines was the biggest player, serving 7 US gateways. In the same year BA was serving 17 US gateways, and Virgin Atlantic 9, competing head-to-head with BA on services from London to 8 US gateways. This is indicative of the difference between an essentially domestic US industry and a predominantly international UK industry. The domestic hub-and-spoke structure of US airline networks enables each airline to concentrate its transatlantic passengers onto a few routes from hub airports which they dominate, and where they are unlikely to face competition from other US airlines. For BA and Virgin Atlantic, whose business is almost entirely international, the USA is the most important destination in the whole network, and the key to success or failure as a business. However, even if they fly direct to more US cities than any of their US airline competitors, an alliance with a strong US airline is essential to access the whole US market. The need for US airlines to have a 'fair and equal opportunity' to access Heathrow and for UK airlines to have a 'fair and equal opportunity' to access the US domestic market became a key factor in the air services relationship as the market became increasingly competitive in the 1990s (Chap. 5).

UK and US Policies: Similarities and Differences

Against this background we can begin to make sense of the similarities and differences in the policies of the two governments, as they developed over the period 1970 to 2010. The differences were most marked at the outset, when the UK was seeking to limit competition between its own airlines, as well as minimising the number of city pairs on which there would be competition between more than one airline of each side. There were signs of increasing convergence during the 1980s, as the market grew and the UK industry strengthened. However, in the 1990s, just as both governments were becoming increasingly committed to similar policies of economic liberalisation, the negotiations between them became less and less productive (Chap. 5). Both governments were concerned to make their domestic industry stronger and more competitive in the interest of the economy

generally as well as passengers and shippers. The problem was that when these similar goals, shared at the highest levels of government, were applied to air transport industries with different domestic and international priorities, they generated conflict rather than convergence.

British Policy 1970–2010

Over many years, British governments have played an active part in seeking to steer the development of the industry. The report of the Edwards Committee, *British Air Transport in the Seventies* (UK Policy 1969) set the course, followed by the Civil Aviation Act (1971). The Act, which was primarily concerned with the development of a strong civil aviation industry, established the British Airways Board, leading in 1974 to the amalgamation of British European Airways and the British Overseas Airways Corporation to become, as British Airways, the principal national airline. However, the Edwards Committee had also advocated the development of at least one major British airline not controlled by the British Airways Board. Direct competition between British airlines on international routes was not envisaged, but British Caledonian Airways (BCal), created in 1970 by a merger of the two largest independent carriers, Caledonian Airways and British United Airways, became the second force airline, with its own separate 'spheres of influence' which included Atlanta, Dallas/Fort Worth and Houston in the USA, as well as parts of West Africa and Latin America.

The Civil Aviation Act also established the Civil Aviation Authority to oversee the development of a safe and efficient air transport industry. The CAA which was given the responsibility for licensing airlines to operate both domestic and international services, was given a substantial degree of regulatory independence, albeit within the broad objectives for a strong industry laid down in the Act. Under the direction of Raymond Colegate, the CAA's licensing regime became a cautious but steady source of pressure for increased competition. However, under Guidance issued by the Secretary of State in February 1976, the CAA was obliged to withdraw the licence it had granted to Freddie Laker for his proposed Skytrain service to New York. In December 1976 the Guidance was overturned in the courts enabling Laker to launch his short-lived Skytrain service to New York in 1977, but the Labour government remained firmly opposed to almost all direct competition between British airlines and this was the policy which shaped Bermuda 2 (see Chap. 2).

Another factor which influenced the pace of change was the Departmental culture in which the UK's negotiators had been brought up. Civil aviation had been a separate government department up to 1967, when it was absorbed into the Ministry of Technology, becoming part of the Department of Trade and Industry from 1970, from 1974 the Department of Trade. Although by 1979 aviation had in effect been part of the Department of Trade for nearly a decade, for much of that time it had remained in its old headquarters at Shell-Mex House off the Strand, where its hard-nosed staff with their tough mercantilist culture were not much exposed to the more liberal policy culture of the Department of Trade, which was in any case, from 1974 till 1979, led by Labour Ministers Peter Shore and Edmund Dell, who were themselves entirely comfortable with a mercantilist policy stance. It was only in the late 1970s, when the officials dealing with aviation were physically integrated with the rest of the Department of Trade in Victoria Street, and senior staff were appointed with a liberal background in Trade rather than an industry-led, mercantilist background in the old Ministry of Civil Aviation, that the case for a more pro-competitive policy could really begin to get any traction with UK negotiators. This also coincided with an important change in political direction.

The Conservative government which came to power in 1979 under Margaret Thatcher had proclaimed in its election manifesto that 'the principles of competition which govern other industries in the community should also be applied to air travel' (Staniland 2003, 199). A new direction had been signalled, but even Conservative Ministers were in no hurry to give up the protective shield of Bermuda 2 while British Airways was being prepared for privatisation, a process which entailed a root and branch reform of the airline extending over a period of eight years. Only after 1987 would a strengthened, privatised and profitable BA be set free to sink or swim in a more competitive environment, promptly using its new freedom to swallow first British Caledonian, then Dan Air with its European network, and finally British Midland as each of them ran into financial trouble.

Meanwhile Virgin Atlantic had begun to emerge, gradually establishing itself from small beginnings in 1984 as a significant player on those intercontinental routes which were strong enough to sustain head-to-head competition between British carriers. Virgin's position was greatly strengthened in 1991, when it was allowed to operate to the United States from Heathrow (Chap. 4). It could be argued that with Virgin Atlantic,

the second airline policy of the Edwards Committee had finally been realised, but there was an important difference. This time the policy was airline-led rather than government-led, and although this might still cause problems from time to time, it was much better to be seeking to amend agreements, including Bermuda 2, in order to accommodate the growth of a strong new airline, rather than to protect a rather fragile creation of government policy.

With a strong industry at home, Britain could take the lead in pressing the EU to establish a single European aviation market within which European carriers enjoyed from 1992 many of the freedoms which US carriers had enjoyed in their home market since 1978 (Chap. 4). Even the right to operate 'cabotage' services within the territory of another European state was included after 1997. This led to a wave of national and transnational amalgamations, generating a much more competitive market within Europe, to the considerable benefit of the travelling public. However, the effect on wider-ranging international air services has been limited, because the national airlines have continued to operate mainly from their national bases, whilst the new low-fare airlines (easyJet, Ryanair, Air Berlin, etc.) have all chosen—so far—not to stray very far beyond the borders of the European Aviation Area.

Access to Heathrow

There is one other aspect of British domestic aviation policy that has had important implications for international air services and particularly for US airlines. As international airports go, London Heathrow occupies a relatively small site. Since it lies close to major centres of population in west London, it can accept only a very small number of services at night. It has just two full-length east-west runways, whereas many more modern airports in Europe and America have at least four. Despite these handicaps Heathrow is one of the world's busiest airports in terms of international services. Given its physical limitations, it is heavily congested, a state of affairs giving the principal incumbent airline a significant competitive advantage.

The first trace of this contentious issue in Bermuda 2 can be seen in the last of the Statements of Interpretation that accompanied US signature of the agreement (Part III, Doc 4). From April 1978 all planeload charter air services were banned from Heathrow (Part III, Doc 6) and in the autumn the London Area Traffic Distribution Rules (1978) banned from Heathrow

any airline which was not already operating there. The precise application of these rules to services between London and points in US territory was spelt out in December 1980 (Part III, Doc 14, and Part II (Treaty text) Annex 1 Section 7). Since the rules were carefully framed to be non-discriminatory—Pan Am and TWA at Heathrow were almost totally unaffected by this, and BA's British competitors Laker and British Caledonian both operated from Gatwick—there were no strong grounds for objection at that time, but the issue would become a major bone of contention in 1990/91 when American and United, who had bought the London services of Pan Am and TWA, were denied access to Heathrow by the specific wording of Annex 1 Section 7 (Chap. 4).

United States Policy 1970–2010

In the United States the policy favoured by the executive branch of government is much more contestable in Congress than is the case with government policy in the British Parliament, where the government of the day usually has a secure majority. Since formal Treaties require the assent of Congress, it is fortunate that air service agreements—regarded as Treaties in the UK—have been classified as Executive Agreements in the USA. This allows the executive branch of government some room for manoeuvre. Even so, the separation of powers between the executive and legislative branches of government does mean that the executive may have to proceed rather cautiously when it does not command a majority in Congress.

Until the mid-1970s domestic and international aviation was closely regulated by the Civil Aeronautics Board. It was the (unlikely) Subcommittee on Administrative Practice and Procedure of the United States Senate, chaired by Senator Edward Kennedy, that in 1975 launched public hearings on whether the CAB's regulatory procedures were still delivering value to the public. These hearings did much to raise the profile of airline deregulation as a policy issue. On the very first day, the Acting Secretary of Transportation, John W. Barnum announced a major proposal for reform of the CAB, which within a few months was itself proposing a series of experiments 'to assess the operation of the US domestic air transport system under limited or no regulatory constraints.'[10] Despite vigorous opposition from most of the airlines, Congress was encouraged by clear direction from President Carter to pass a law deregulating all-cargo air services in 1977, paving the way for the comprehensive Airline Deregulation Act, which was passed in 1978 (Chap. 3).

It took a lot longer to spread deregulation into the international market against fierce opposition from US airlines and almost all the foreign governments which would have to agree it. The Bermuda 2 negotiations, concluded in June 1977, could not be said to have advanced the cause of deregulation. The new US policy, favouring movement 'toward a truly competitive system' in which 'market forces should be the main determinant of the variety, quality and price of air service' was launched in a letter from President Carter to Brock Adams, his Secretary of Transportation, on 6 October 1977 (Shane 2005/2) leading in August 1978 to the publication of a new US Policy Statement for the Conduct of International Air Transport Negotiations, which declared that 'the guiding principle of United States aviation negotiating policy will be to trade competitive opportunities, rather than restrictions, with our negotiating partners (Dobson 1995, 163).'

Meanwhile, in March 1978, a liberalised agreement with the Netherlands had given KLM two new US gateways in exchange for extensive freedoms for airlines to determine both tariffs and capacity. This was a significant step towards undermining the strict regulatory regime that had governed international aviation since the 1940s, and it set alarm bells ringing in the aviation world, but a much sharper attack was to follow. On 6 June 1978 the United States Civil Aeronautics Board (CAB) published an 'order to show cause' why the Board should not terminate the anti-trust immunity which IATA's international airline tariff conferences had enjoyed since 1945.[11] This provoked a storm of protest internationally (see Chap. 3), and although the CAB eventually backed down, what was seen as a high-handed unilateral attempt by the USA to impose their new policy on the rest of the world caused deep resentment, and left a legacy of mistrust.

The Carter Administration's international aviation policy also provoked determined and vociferous opposition from the incumbent US airlines, which saw in it a serious threat to their comfortably regulated position. Their objections have been summarised as follows:

> They complained bitterly to Congress that the US was giving away "hard rights"—new US gateways for the benefit of foreign airlines—in return for "soft rights"—nothing more than the willingness of foreign governments to stop regulating entry, fares and schedules. The US government's worst failing, they said, was its ineffectiveness in responding to the discrimination and other obstacles to full market participation that they routinely encountered in their overseas operations. (Shane 2005/2)

As a result of such representations Congress was persuaded to pass the International Air Transportation Competition Act (1979). This paid lip service to the Carter Administration's procompetitive policy, but it was accompanied by a report from Congress requiring US negotiators to seek in return 'the strengthening of the competitive position of United States air carriers to at least assure equality with foreign air carriers.' Foreign carriers could be offered increased access to the US market 'if exchanged for benefits of similar magnitude for United States carriers or the traveling public with permanent linkage between rights granted and rights given away' (Shane 2005/2).

The airlines had persuaded Congress to set some pretty tough objectives for US international negotiations, but they were not satisfied. As soon as Ronald Reagan took office as President in 1981, they returned to the charge with a memorandum addressed to the new Administration, entitled the Crisis in International Aviation (US Airlines 1981), which criticised the trading of 'hard rights' for 'soft rights' in general, and the 1978 agreement with the Netherlands in particular. They followed this up in December with a review of what was already being called an Open Skies Policy. The airlines maintained 'on an overall basis the United States is worse off to-day in market shares than at any time in the last decade'.[12] They also persuaded the House Subcommittee on Investigations and Oversight to conduct nine public hearings on aviation policy between July 1981 and May 1982, which led to the production of the Levitas Report (he was the Sub-Committee's Chairman), a document highly critical of the US negotiating record. Here is an extract:

> Our carriers economic viability has been adversely affected by an Open Skies policy which has extended domestic deregulation to the international arena. … Our agencies have not forcefully negotiated bilateral agreements that support our air industry. [However] The Sub-Committee is pleased to note that the attitude of US negotiators at bilateral conferences seemed to have hardened since the beginning of our hearings in July 1981…'[13]

Under President Carter the United States had given notice of its intention to apply its deregulatory approach to international aviation, but in the face of such powerful opposition in Congress, as well as the furore stirred up by the CAB's Show Cause Order, it is hardly surprising if US negotiators felt they had to proceed with considerable caution for much of Bermuda 2's first decade (Chap. 3).

Nevertheless, during the 1980s steady pressure gradually delivered a more liberal environment for US airline operations, in accordance with the declared direction of US policy. From a US policy perspective, the pace was frustratingly slow, but as the public and the airlines became more used to deregulation, it became possible to move forward, particularly with policies designed to increase competition in ways which would be hard for Congress or the incumbent airlines to oppose. An early example of this more confident approach was the 'Underserved Cities Programme', proposed in October 1989 and launched in January 1990. The idea was to allow foreign airlines to provide services to new US cities, without seeking any quid pro quo in negotiation, provided that service to the city in question was not already provided (non-stop or with one stop but no change of plane) by any other foreign or US airline. The only other requirement—but it was an important one—was that the foreign airline must be operating under a procompetitive bilateral agreement. By its nature such an agreement would not provide a framework for the negotiation of a traditional exchange of specific aviation benefits, but it would advance the cause of deregulation (USDOT 1990).

The success of the Underserved Cities Programme, granting increased access to the US market as a reward for the conclusion of a liberal agreement led to a new Open Skies policy (USDOT 1992), adopted in August 1992, followed almost immediately by a new agreement with the Netherlands that reflected the new policy. Open Skies agreements encourage and facilitate the development of a competitive market in air services by removing bilateral treaty control over most of the parameters governing the operation of air services. Typically an Open Skies agreement allows either side to designate as many airlines as it likes to provide services to all points in the territory of the other party to the agreement, and sets the airlines free to determine how often they will fly, what size of aircraft they will use, and what fares they will charge. A fully developed Open Skies regime takes almost all the chips off the negotiating table, leaving governments with little or no scope to trade specific opportunities, the business which had been the heart and soul of air service negotiations in the past.

Closely linked to the new agreement with the Netherlands was the grant of anti-trust immunity for the alliance between KLM and Northwest Airlines, which followed within a few months (USDOT 1993). This set a key precedent leading to the rapid spread of such alliances under Open Skies Agreements, and by the end of the century to the creation of the three multinational airline alliances which came to dominate air transport

around the world (USDOT 2000). If US pressure for the deregulation of international aviation markets was constrained in Bermuda 2's first decade by opposition in Congress, reflecting the resistance of the incumbent US airlines as well as the international aviation community, in the second decade the offer of anti-trust immunity for airline alliances within the context of Open Skies Agreements helped US policy to become the dominant model, acting as midwife to the multinational alliances which, in Bermuda 2's final decade, would reshape the international aviation market (see Chap. 5 and USDOT 2000).

The Conduct of Negotiations

A bilateral air service agreement establishes a set of agreed rights, which the airlines should be able to use, obtaining licences from their own government and operating permits from the government of the other contracting party, but these steps are not always as straightforward as one might suppose, leading to a continual traffic of routine business between the two governments, much of it through the diplomatic channel, that is to say, in the case of Bermuda 2, between the UK Embassy in Washington and the US Department of State, or between the US Embassy in London and the UK Department for Transport.[14] Many issues can be resolved at that level, but others will raise questions which need to be discussed in bilateral negotiations between the two Contracting Parties, particularly if an issue which has arisen raises questions about how the agreement is being interpreted, or if it is clear that the request cannot be conceded without amending the agreement to accommodate it.

Even when services are firmly established, the aeronautical authorities will require flight schedules and tariffs to be filed for approval in advance of each summer and winter traffic season—and at other times if they need to be changed—so there is a constant flow of routine business to be transacted. It is normal for an air services relationship as important as that between the UK and the USA to require several meetings in the course of a year, alternating between the two countries, and for the frequency of such meetings to be stepped up when major issues need to be resolved. The tables at the start of each section in Chaps. 2, 3, 4 and 5 illustrate the intensity of such meeting schedules.

It is customary for the Contracting Party seeking change to travel to the other country to launch the negotiations, but further rounds normally alternate between the two capitals. Each side is led by a senior official who

is the principal spokesman. Under Bermuda 2 major negotiations were from time to time elevated to the level of Director-General, and even occasionally to a Minister, but the UK team was normally led by the Director responsible for international aviation within the Department for Transport.[15] More routine negotiations, such as seasonal consultations about tariffs or capacity for example, were normally conducted at a lower level. On the US side the lead was normally taken in major negotiations by the Deputy Assistant Secretary of State for Transportation Affairs (ie a senior official in the State Department). The lead negotiator was then supported by staff from his or her own department to advise and take notes, and by representatives of other government departments; in the UK the Civil Aviation Authority and the Foreign and Commonwealth Office were usually represented; on the US side there would be representatives from the Department of Transportation, and until 1985 from the Civil Aeronautics Bureau. The visitors would usually be accompanied by a member of their Embassy staff specialising in aviation matters. Finally the airlines would be represented; on the UK side they were usually invited to sit at the table; on the US side, because there were potentially so many interested parties, they were usually represented by a member of the Air Transport Association, whose task was to keep in close touch with the airlines, either by phone or if necessary by having them on hand in another room. At times airports and trades unions might also be represented within the national team; the pattern changed over the life-time of Bermuda 2, and will doubtless continue to do so. A first-hand account of one such negotiation, extending over eight rounds in 1986, may be found in Chap. 3. The atmosphere surrounding such negotiations, the high stakes involved, and the influence exerted by powerful figures behind the scenes are all well captured in 'Air Wars', a full and well informed account by John Newhouse of the dramatic Heathrow Succession negotiations in the spring of 1991 (Chap. 4) which appeared in the New Yorker on 5 August of that year (Newhouse 1991, 51–66).

At the outset, in full session with everyone present around the table, each side would lay out its position. Questions would be asked to seek clarification, but once both sides understood one another's position, it was usually necessary to separate so that each team could discuss in private how its negotiating position might be adjusted in order to reach an accommodation with the other side. For this purpose the visitors would often return to the offices of their Embassy, where discussions could if necessary be conducted under secure conditions, and messages dispatched to consult Ministers or more senior airline managers.

There could often be several iterations of this procedure in the course of a week (or however long was set aside for the negotiation), or indeed over several rounds of negotiation extending over many months (see the negotiating histories in Chaps. 2, 3, 4 and 5). Sometimes the lead negotiators would meet on their own to explain the difficulties they might be facing within their respective teams, or to explore without commitment the likely chances of particular compromises they might be able to persuade their teams to run with. At other times, particularly if one side felt that the other was not doing enough to resolve the issues that had been raised, the talks might be formally broken off without any planned resumption. This occurred at least three times under Bermuda 2, in January 1991 during the Heathrow Succession negotiations (see Chap. 4) in August 1996 and in October 1998.

Finally, when the substance of an agreement began to take shape, the terms would be confirmed across the negotiating table, and the home team (who have better access to legal and secretarial services), would then normally take the lead in drawing up a formal statement of what had been agreed, including the wording of any necessary changes to the agreement itself. This would then be closely scrutinised, debated and amended, until there was at last a text which both sides could accept. Sometimes such meetings might continue well into the night, particularly in London if messages from senior officials and airline executives in the USA were still coming in at 10 pm London time, which is only 5 pm in Washington.

Structure of the Book

The first half of this book tells the story of Bermuda 2 from conception and birth to the point where it was suspended and placed on life support for the sake of the family in the Caribbean. Chapter 2 summarises the events leading up to the denunciation of Bermuda 1, as well as the policies which shaped the new treaty and the course of the negotiations. Chapter 3 shows how the tight controls introduced under Bermuda 2 were gradually relaxed over the first decade or so of its life as traffic grew and both governments moved towards the encouragement of increased competition in the aviation industry as elsewhere. Chapter 4 shows how two major disputes tested the limits of what could be achieved bilaterally in a relationship which was coming under increasing strain as progress towards a more liberal treaty turned out to be deeply controversial. Chapter 5 explains how the limits of bilateralism, the pressures arising

from globalisation, and the growing powers of the European Union eventually led to the impasse which could only be resolved by the European denouement described in Chap. 6. The final chapter reviews the complex relationship between Bermuda 2 and the market it served, and considers what lessons might be drawn from the story, particularly if a new bilateral agreement has to be constructed following the UK's departure from the European Union.

Any treaty should give those affected by it the confidence that comes from reliance on an agreed text. However, a treaty is also a living document, and if it is to be applied to changing circumstances—in this case an industry subject to rapid growth and globalisation—it must be subject to periodic amendment and interpretation. The annotated Treaty text in Part II and the supplementary documents in Part III are therefore an integral part of the story. As well as showing precisely how and when the Treaty was amended to reflect the outcome of the negotiations described in Part I, the range of documents in Part III constitutes a fascinating case study in the use of 'hard law' and 'soft law' in the regulation of a significant international industry (see the Introduction to Part III).

Notes

1. The original text was published by HMSO (London, Cmnd 7016, November 1977), and by the US Department of Transportation. Full text with all subsequent amendments at Part II.
2. The Chicago Convention (Chicago 1944) was signed in 1944 by 44 States, including the United Kingdom and the USA. There are now 191 signatories.
3. ICAO was set up in 1944 on a provisional basis. Since October 1947 it has been established as a specialised agency of the United Nations.
4. Also signed at Chicago on 7 December 1944. Certain governments with large and strategically located blocks of airspace above their territories, including Canada and Russia, have never signed IASTA. They negotiate first and second freedom access into and through their airspace bilaterally.
5. Bermuda 2 makes no provision for traffic between New York and Nairobi (for example) but BA carries such sixth freedom traffic on connecting flights via London Heathrow.
6. Strictly speaking, 'capacity' means the number of seats, but in practice control is usually exercised by limiting the frequency of flights.
7. Allegedly this included the size of the sandwiches. What is certain is that IATA employed inspectors to ensure compliance, fining airlines which stepped out of line.

8. At the busiest airports, it is essential on safety grounds to ration time slots for aircraft to land and take off. Slots at the most popular times of day may change hands between airlines for considerable sums of money.
9. In 1998 a passenger survey by the UK Civil Aviation Authority estimated that 42% of US airline passengers on transatlantic services made an onward connection by air from their US gateway, compared to 7% of UK airline passengers (Report HC 532, Appendices, p. 132).
10. CAB Press Release, July 7, 1975.
11. Order 78-6-78 of 9 June 1978, CAB Docket 32851.
12. Aviation Services in America's International Trade: A Review Under Open Skies, International Economic Policy Association, December 1981, p. 23.
13. House of Representatives Report No 98-19, 98th Congress, Ist Session (1983).
14. For examples of such correspondence, see Part III, Documents 22 and 23.
15. Until 1983 aviation and shipping were handled by the Department of Trade and Industry.

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CHAPTER 2

The Shaping of a New Treaty

This chapter explores the circumstances leading to the termination of the air services agreement between the United Kingdom and the United States of America signed at Bermuda on 11 February 1946 (now known as Bermuda 1), and the negotiation of the successor agreement, Bermuda 2, which is the subject of this book.[1]

On 22 June 1976 Sir Peter Ramsbotham, the British Ambassador to the United States delivered a formal Note to the State Department giving the twelve months' notice of termination provided for within the Agreement (Bermuda 1—1946, Article 13). He had warned that termination would provoke an angry reaction in the USA, which it did, but both sides soon embarked on what eventually stretched to six rounds of intense negotiations, the last two rounds extending over four weeks each.

There was a real risk that the negotiations might fail. A few years later, Edmund Dell, who had carried political responsibility for them as UK Secretary of State for Trade, commented: 'No negotiation between supposedly close friends and allies can ever have taken place in a worse atmosphere…. Senior members of the Carter administration made public threats that if the British did not concede … air services between the two countries would be broken off, [a threat repeated so often by Brock Adams, US Secretary of Transportation] that one could only suppose that it was the outcome he himself wanted…. The Prime Minister, James

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9_2

Callaghan, became seriously concerned that air services would be broken off. I assured him they would not but, in truth, could not be certain given the level of indignation in Washington' (Dell 1985, 357).

Contingency plans were indeed laid for services to be rerouted to Amsterdam or Canada if necessary. As the clock ticked towards midnight on the final day, and night flights took off to cross the Atlantic, the chief US negotiator was understood to have authority to instruct them if necessary to return or divert. However, cool heads and good sense prevailed, and a new agreement was initialled in London at 05.10 hours on 23 June 1977, that is to say ten minutes after midnight on 22 June by US Eastern Seaboard Time, when the old agreement expired. Formal signature of Bermuda 2 was delayed until 23 July 1977, while the text was tidied up and arrangements made for the negotiating teams to meet once more, on Bermuda itself, to celebrate their achievement and, in those more spacious days, for the team leaders, Patrick Shovelton and Alan Boyd, to enjoy one more round of golf together.[2]

Although the US side would maintain subsequently, with some justice, that Bermuda 2 was a setback for the policies of deregulation and liberalisation which they had begun to espouse both domestically and internationally, President Carter welcomed the new agreement at the time, proclaiming its fairness and its benefits to consumers and airlines, and saying that it should "last as long as the original 1946 Bermuda Agreement" (Part III, Doc 1). Announcing the new agreement to the House of Commons, Edmund Dell, Secretary of State for Trade, said: "I believe this agreement will open a new and expanding era. It will provide significant new opportunities for the airlines of both sides and promises real benefits to the consumer. It will give British airlines a fairer opportunity to fight for a bigger share of a growing market" (Shovelton 1978, 54). If Dell's assessment sounds rather more partisan than Carter's welcome, it should be remembered that Bermuda I had been terminated because of concerns that the 1946 Agreement had put British airlines at a disadvantage. If Dell had not been able to claim that this situation had been rectified, the negotiations would have been a failure from the British point of view. The fact that Bermuda 2 did in fact last as long as Bermuda 1, in a period of massive change and growth in the transatlantic market for air travel, suggests that it did succeed in providing a robust and flexible framework for the world's most important air transport relationship.

Termination of Bermuda 1

The provisions of Bermuda 1 began to come under increasing pressure from the early 1970s, when tensions arising from developments within the aviation industry itself were reinforced by the more general economic concerns on the British side as a result of the 1973 oil price hike and the balance of payments crisis which in June 1976 caused the British Government to make a humiliating application for assistance to the International Monetary Fund.

The perceived crisis in aviation had its origins in the introduction of the Boeing 747, the world's first wide-bodied airliner, which more or less coincided with first steps in the USA towards a more liberal aviation policy, with increased competition on domestic routes and the opening of international routes to airlines other than Pan Am and TWA, with stronger domestic networks. If the changing US policy stance was in part a response to the erosion of market share under other agreements occasioned by the widespread distortion of the once flexible Bermuda capacity principles (see Chap. 1), its application to UK-US air services was counter-productive. The UK had continued to apply the Bermuda capacity principles quite flexibly up to 1970, but the combination of a more aggressively liberal licensing policy in the USA with a more mercantilist approach to trade and aviation policies in the UK created the conditions in which UK Ministers felt justified in terminating Bermuda 1 in order to secure under Bermuda 2 tighter control over route schedules, airline designation and capacity control.

A first confrontation arose soon after National Airlines and BOAC commenced services between Miami and London in June 1970. In the summer of 1972 National decided to switch from a daily DC-8 to a daily Boeing 747 carrying more than twice as many passengers. BOAC, who did not believe the market could absorb such a large and sudden increase, responded with B-747 services on three days a week, the other four days being served as before by narrow-bodied aircraft with fewer seats. At the same time BOAC protested vigorously to the British Government who responded by unilaterally restricting both airlines to a maximum of four wide-bodied aircraft and three narrow-bodied aircraft per week.

Since the principles laid down in Bermuda 1 to govern the provision of capacity (see Chap. 1) applied in the first instance to the airline's own judgment of the traffic requirements, which was difficult to challenge in advance, and since any restriction on the introduction of larger aircraft

should even then have been the outcome of consultations, the US Government was understandably outraged. They responded with a demand for all BOAC flights to be formally notified within seven days and any subsequent changes submitted to the CAB for prior approval. On 23 August, to the accompaniment of much rattling of sabres on both sides, National offered to reduce its B-747 frequency to five a week until the end of September, and to revert to daily narrow-bodied aircraft for the winter season. Daily B-747s were re-introduced from April 1973 by both National and BOAC, when traffic had grown to the point where the increased capacity could more readily be justified, and no further action was taken. However, the weakness of Bermuda 1's capacity control provisions had been exposed.

The robust British response to what was seen as an over-rapid expansion of Miami-London capacity took place under Ted Heath's relatively liberal Conservative Government of 1971–1974, which was beginning to expose British airlines to more competition both domestically and internationally, but in the General Election of March 1974 he was narrowly defeated by Labour under Harold Wilson. Peter Shore, the new Secretary of State for Trade, set in train an aviation policy review whose conclusions were announced to the House of Commons on 29 July 1975. Any thought of competition between British airlines on the same international route was abandoned. British Caledonian (BCal), the chosen second force airline, would have its own sphere of influence protected from BA competition. By February 1976, when the new policy was enshrined in formal guidance (UK Policy 1976) from the Secretary of State to the Civil Aviation Authority (CAA), which had the responsibility for licensing airline operations, agreement had been reached to make BCal the British airline to West Africa and South America, terminating any services competing with BA (eg to New York), but leaving in place its licences to serve Houston and Atlanta, unusable as they were at the time, since Houston and Atlanta were not available to UK airlines under the route schedule attached to Bermuda 1.

Another consequence of Shore's new policy was the withdrawal of Freddie Laker's licence for a Skytrain service from Stansted (London's newest and under-used third airport) to New York. The licence had been in place since August 1972, but permission had been refused by the US Civil Aeronautics Board (CAB) in 1974 on the dubious grounds that Laker was unfit to mount the Skytrain operation (Dobson 1995, 80). The rationale behind Shore's policy was an essentially static view of the aviation market.

Since few nations would allow Britain to take more than 50% of any bilateral market, any competition between British airlines could not increase the British share of revenue. The guidance given to the CAA was specific: 'In the case of long-haul services … the Authority should not license more than one British airline to serve the same route' (UK Policy 1976).

Meanwhile the economic situation was going from bad to worse. In June 1976, in order to support the pound, the British Government had to apply for support to the IMF, which agreed to provide the necessary loans on condition that the UK reduced the public sector borrowing requirement (Dobson 1995, 86). Securing an improvement in Britain's balance of payments became a key factor in British economic policy-making, and this was the context in which Edmund Dell commissioned his review of the working of the Bermuda 1 agreement. Dell, who had taken over from Peter Shore as Secretary of State for Trade when James Callaghan succeeded Harold Wilson as Prime Minister in April 1976, was happy to describe himself as a mercantilist. Delivering the Rita Hinden Memorial Lecture in February 1977, he defined his position as follows:

> A mercantilist believes that benefit will accrue to the nation from careful calculation of his nation's interests and the adoption of policies appropriate to those interests. Mercantilism does not in principle rule out freer trade or require protection. It requires only calculation of what is in the nation's interests. (Dell, cited in Shovelton 1985)

The imbalance was serious. The disparity between the earnings of US and UK airlines under the Agreement was thought to be in the region of £300 million (US airlines) as against £130 million (UK airlines). These figures included services across the Pacific to and through Hong Kong, but the disparity on the North Atlantic alone was estimated to be upwards of £180 million for US airlines to £127 million for UK airlines (Shovelton 1978, 51). US estimates (formal Note dated 7 May 1977) suggested that the differential might be £166m for UK airlines as against £323m for US airlines. Either way there was a large gap between the two sides, and Dell saw it as being in the national interest to adopt policies that would rectify the situation.

At just this moment the CAB recommended that North West Airlines and Delta should be licensed for North Atlantic services in addition to Pan Am, TWA and National. Driven by the balance of payments imperative, Dell and his advisers in the Department of Trade concluded that they

needed to achieve a 50/50 split of traffic, single designation on each route, pre-determined capacity control (in place of *ex post facto* review), and the withdrawal of all fifth freedom rights, which were of much more value to US than to UK airlines. Under Bermuda I US airlines were entitled to carry fifth freedom traffic between London and many cities in Europe and Asia, on services originating in the United States; UK airlines had corresponding rights to carry traffic between the United States and points beyond, but they were of very limited commercial value. Since there was no prospect of achieving such an outcome under Bermuda 1, Dell concluded that the agreement had to be terminated, and the Foreign Office did not insist on its reservations.

UK Aviation Policy in the Run-Up to Bermuda 2

Whilst the decision to terminate Bermuda 1 may have been driven primarily by an assessment that the economic imbalance could not be corrected under the existing agreement, the negotiating objectives for Bermuda 2 also had to take account of the wider context of UK aviation policy. The direction had been set by the Edwards Report of 1969, *British Air Transport in the Seventies* (see Chap. 1). British Airways had been put together as the principal national airline, with British Caledonian as the second airline operating its own portfolio of international routes from which BA was excluded.

The negotiations for Bermuda 2 offered an opportunity to give substance to the two airlines policy by strengthening the competitive position of both BA and BCal in the world's most important aviation market. Moreover, BCal had been licensed by the CAA to serve Atlanta, Dallas/Fort Worth and Houston, but none of them was available under Bermuda 1. There was therefore an urgent need to gain access to additional gateways in the United States, whilst putting in place a new agreement which would deliver for British carriers the 'fair and equal opportunity' to access the market, which Bermuda 1, in the British view, could no longer be relied on to ensure.

US Aviation Policy in the Run-Up to Bermuda 2

Meanwhile, in the more complex policy environment of Washington, the US administration was edging its way towards a more pro-competitive stance in transportation policy generally, and in international aviation in

particular. In Pan Am and TWA they had the benefit of two world class airlines, as well as a very large and strong domestic aviation market, whose airlines were increasingly keen to expand into the international market. On 22 June 1970 President Nixon approved a Statement on International Air Transport Policy which gave equal weight to the interests of passengers and shippers as well as air carriers, and recognised that 'the United States historically has believed that the economic and technological benefits we seek can best be achieved by encouraging competition (the extent of competition to be determined on a case-by-case basis) and by a relative freedom from governmental restriction' (Dobson 1995, 55).

This policy was unquestionably more pro-competitive than UK policy at the same time, but the pragmatic qualifications included taking into account 'the legitimate air transport interests of other countries', and the constraints were not exclusively external. Policies of regulatory reform across the whole field of transportation had been promoted by the President's Council of Economic Affairs, but they had been vigorously contested by other agencies including the Civil Aeronautics Board (CAB). Even the Department of Transportation was luke warm. In practice very little was achieved in Nixon's first term. One factor which undoubtedly influenced the CAB at this time was the severe economic downturn, which coincided with a bulge in airline capacity as a result of the introduction of more and more wide-bodied aircraft. In 1973/74 the CAB vetoed the introduction of low Advance Purchase Excursion (APEX) fares by BOAC and Lufthansa. Working consistently for higher fare structures for scheduled service airlines, the CAB condoned a 20% capacity reduction agreed between BA, Pan Am, TWA and National, and even toyed with giving their approval to revenue pooling (Dobson 1995, 62–63).

With the gradual easing of the economic constraints, and Gerald Ford's assumption of the Presidency in August 1974, following Richard Nixon's resignation as a result of the Watergate affair, US policy began to move in a more consistently liberal direction. However, Pan Am and TWA were still in serious difficulties, and the US government was obliged to intervene in international markets to stem their losses, fighting back against the direct and indirect subsidies available to state-owned European airlines. In early 1975 a Federal Action Plan to support the airlines, backed by the International Air Transportation Fair Competitive Practices Act, gave the US government the power to take remedial action against such subsidies.

Meanwhile the concept of airline deregulation had begun to be developed in the Sub-Committee on Administrative Practice and Procedure of the US Senate's Judiciary Committee. The Sub-Committee was chaired by Senator Edward Kennedy, who had persuaded Professor Stephen Breyer to come to Washington in the fall of 1974 for a sabbatical year. Having considered an array of possibilities for regulatory reform, the two men chose to focus on airline deregulation and in doing so got the topic onto the agenda of public policy.[3]

Throughout the two and a half years life of the Ford Administration, efforts were made, with some success, to negotiate internally and with Congress the terms of a domestic deregulation of the airline industry. The CAB itself began to experiment tentatively with liberalisation. However Ford lacked the authority of an electoral mandate. The 1976 Airline Deregulation Bill did not get through Congress, and the International Air Transportation Policy Statement of 8 September 1976 was not as different from its 1970 predecessor as some in the Administration might have wished. Alongside an emphasis on the interests of the consumer and the privately-owned competitive aviation companies favoured by the US government, it adopted a pragmatic attitude towards the need to compromise in order to reach agreement with others (Dobson 1995, 93–114). A similarly pragmatic approach was followed in the negotiation of Bermuda 2.

The Negotiation of Bermuda 2

George Rogers, the civil servant who was Under Secretary for International Aviation in the Board of Trade from 1970 to 1979, was a firm believer in the regulation of bilateral aviation markets to achieve a 50% share for UK airlines. Against the background of the 1972/1973 dispute over London-Miami services and the balance of payments crisis which focussed attention on the UK's low share of the revenue from Bermuda 1, he had for some time been advocating termination of the agreement. However, he had been unable to persuade more senior officials, or his Secretary of State Peter Shore. His moment came in April 1976, when Shore was succeeded by Dell with his hard-nosed mercantilist approach (see above), and Patrick Shovelton, a senior official with past experience of the rough and tumble of air service negotiations, became Rogers' line manager.

The immediate *casus belli* was the CAB's recommendation that North West Airlines and Delta should be allowed to join Pan Am, TWA and National in offering trans-Atlantic services to London (see above).

Table 2.1 The negotiation of Bermuda 2

Negotiations	*Outcome and documentation*
June 22, 1976	Negotiation opened by termination of Bermuda 1
September 9–10, 1976	
October 18–22, 1976	
December 6–14, 1976	
February 28–March 11, 1977	
March 28–April 22, 1977	
May 16–June 22, 1977	
June 22, 1977	Draft agreement initialled
July 12–15, 1977	
July 18–22, 1977	
July 23, 1977	Final agreement signed (text at Part II), with associated statements (Part III, Docs 1–4)

This looked like a replay of the Miami crisis of 1972, but on a much larger scale, and Rogers advised pre-emptive action. Shovelton and Dell were open to the persuasive case that Rogers put to them, and on 22 June 1976, with the tacit acquiescence of the Foreign Office, the notice of termination was delivered. The first round of negotiations took place in September (Table 2.1). In order to even up the benefits arising under the agreement, Rogers demanded:

- single designation on all routes;
- governments to determine capacity in advance rather than leaving it to the airlines;
- new US gateways for UK airlines to increase their access to the US market; and
- the abolition of all US fifth freedom rights beyond London.

The case for conceding more US gateways, and for restricting US fifth freedom rights beyond London, was strong. Even in 1979, Pan Am was earning £49 million from its fifth freedom rights to carry passengers between London and points beyond, mostly, Europe, whilst the corresponding opportunities available to BA beyond the United States were worth less then £1 million. However, the first two demands were more questionable, and Joel Biller (leading the US delegation) responded by asking what economic studies had been undertaken to suggest that such a tightly regulated market would be a better option for airlines and consumers. This challenge wrong-footed Rogers, and economic studies were duly

commissioned on both sides, but little progress was made at further rounds in October and December. The US side was hampered by uncertainty over the outcome of that year's Presidential election, and Rogers was regarded by some on the American side as not merely intransigent, a 'tough grinding old cookie', but 'waspish' and 'anti-American' (Dobson 1994, 147).

By the time President Carter was sworn in as President in January 1977, the US airlines were so concerned about the way the negotiations were going that they had petitioned the CAB for permission to plan a co-ordinated cessation of services to the UK if such action became necessary. Brock Adams, the new Secretary of Transportation, proposed the appointment of a special ambassador to give the US delegation stronger leadership. This was approved by the State Department, 'provided it is matched by a similar upgrading on the British side, because it will benefit US interests by lifting the negotiations out of the very narrow aviation context to which the British have attempted to limit them' (Dobson 1994, 149). Representations were made through diplomatic channels, and since there were some members even of the British team (notably Raymond Colegate at the CAA) who had found Rogers too intransigent, it was agreed to resume negotiations in the New Year under Alan Boyd for the USA and Patrick Shovelton for the UK. Both men were more diplomatic in manner than their predecessors, even if they were equally tough in negotiation. Boyd, who was given the personal rank of Ambassador, was highly respected as the first Secretary of Transportation under the Presidency of Lyndon Johnson, whilst Shovelton took the leadership of the UK team to a level of seniority not seen since the Bermuda 1 negotiations in 1946.

Another important change which took place at this time was the appointment of Alfred Kahn to head up the Civil Aeronautics Board. At last the CAB, which had been the main drag on policies of deregulation, was led by a true believer in competition and deregulation, and this, with the support of the President himself, would tip the balance within the US administration towards a much firmer belief in the political desirability of such policies. As early as 4 March 1977 President Carter was urging Congress to reduce Federal regulation of the domestic airline industry 'as a first step towards our shared goal of a more efficient less burdensome Federal government' (Dobson 1995, 149).

Kahn was not a member of the US negotiating team, but his zeal will have influenced the CAB representatives, even if they had to accept that the State Department officials in the lead must still have regard to the more cautious views of the incumbent airlines and the Department of Transportation, as well as the negotiating objectives of their international

interlocutors. Besides, in the early months of 1977, the policy debate was far from over on Capitol Hill. There was still opposition to be overcome from most of the major airlines, from labour organisations and from Congress itself. The President and his supporters were already investing substantial political capital in the project, but it was not until 24 October 1978, more than a year after signature of Bermuda 2, that victory was sealed in the battle for domestic airline deregulation within the US with the signing into law of the Air Transportation Regulatory Reform Bill.

Meanwhile, in December 1976, at the Court of Appeal in London, Lord Denning, the Master of the Rolls, had pronounced a judgment which had a more immediate effect on the UK's negotiating stance, and in particular on the intransigent position which Rogers had taken up on single designation. Laker had refused to accept the cancellation of his licence under the Guidance issued by the Secretary of State in February 1976 (see above). Taking his case to judicial review, Laker had argued that the direction to the CAA not to designate more than one airline on any long-haul route (with the exception of Concorde) went beyond any reasonable definition of guidance and was therefore *ultra vires*. In December 1976 the Appeal Court ruled in his favour. Lord Denning was famous for couching his judgments in plain homely language, and this was a classic example. As Shovelton recalled many years later, Denning began in his broad Hampshire 'burr' with the words 'Mr Laker is a man of enterprise…' The government team, sitting in court to hear the judgment, knew at once that their case was lost. Dell claims that he was not unhappy with this outcome. Writing about it in 1985, he says 'I was rather more sympathetic to the Skytrain proposal than some of my colleagues in government. Moreover, to support Skytrain rather than oppose it was tactically helpful in the Bermuda 2 negotiations. It was an effective answer to the US complaint that the British attitude was anti-competitive' (Dell 1985, 373).

At negotiations lasting two weeks in London (February 1977) and four weeks in Washington (March/April), Boyd and Shovelton developed much better personal relations than Rogers and Biller (who remained members of the negotiating teams), fostered on the golf course as well as at the negotiating table, and progress was made. A Memorandum of Understanding on Passenger Charter Air Services was adopted in time to apply to the summer season (from 1 April), allowing more detailed consideration of charters to be postponed until after the main agreement was signed in the summer. The CAB regarded this as a serious error, since it diminished the leverage the US team needed to get a fully liberal charter agreement, and there is some suggestion that Boyd himself may have

come to feel that the British had 'pulled a fast one on him' in this respect (Dobson 1995, 159). However, any deliberate sharp practice seems unlikely. Shovelton claimed (Interview 2006) that he never really understood either fares or charters.

Agreement was reached on provisions to govern services across the Pacific to Hong Kong, and between the USA and UK territories in the Caribbean. Shovelton recalled uproarious meetings within the UK team in his Washington hotel suite, where lively negotiations with a 20-strong West Indian delegation were lubricated with 'buckets of rum' (Interview 2006).

However, as the days lengthened and the mid-summer deadline began to loom ever closer, the two sides were still far apart on the heart of the negotiation, that is to say the provisions governing trans-Atlantic services. The final round of negotiations commenced on 15 May in London, and lasted the full five weeks which remained up to the expiry on 22 June of the 12-month period of notice which had been given at the outset. It had been agreed to use US Eastern Seaboard Time, which gave the negotiators up to 5am London time. To keep the teams going through the night, Shovelton's wife was dispatched to buy hamburgers in the Strand—not without some difficulty since the hamburger store had a policy of not serving lone women after midnight! The agreement was finally initialled at ten past five in the morning.

As the negotiations went to the wire, not only were they accompanied by a continuing rumble of off-stage threats from Brock Adams (US Secretary of Transportation) to cut off all services with immediate effect if there was no agreement, but there were also three substantial exchanges between President Carter and Prime Minister Callaghan—a 20-minute telephone conversation on 29 April, leading to an exchange of position papers when the President and Cy Vance (Secretary of State) came to London on 8/9 May, and another robust exchange of messages on 15/16 June (Shovelton papers).

It is very much to the credit of the chief negotiators on both sides that they kept their heads in the face of so much intense political pressure, arriving at an agreement which both sides could live with. The most contentious issues, all still unresolved when the final round began on 15 May, were finally settled as follows:

- 13 US gateways for US and UK airlines (UK gained access to San Francisco, Seattle, Houston, Atlanta and Dallas/Fort Worth), with some phasing in over 3 years; in addition US airlines to retain Anchorage (separately available to the UK on the polar route to Japan) and one additional free choice;

- Single designation on all but two gateways, the second being a significant late concession to intense pressure from the United States, which had eight double designation gateways under Bermuda I; further double designation gateways to be triggered by passenger growth;
- Retention of fifth freedom rights for US airlines beyond London on Pan Am's iconic round-the-world service; but gradual scaling back of fifth freedom rights to European destinations over a period of five years to leave only Frankfurt, Hamburg, Munich and Berlin;
- A capacity control procedure (Annex 2) with a life of seven years;
- A tariff control procedure requiring all tariffs to be approved by both governments;
- On charters, a brief statement of principles (Article 14) together with an undertaking to revise the terms of Annex 4—Charter Air Services not later than 31 March 1978.

There were two notes to the negotiations. First, there were several issues of potential or actual concern that needed to be set down in writing for the reassurance of both sides. In an exchange of notes dated 23 July 1977, ie when the Agreement was signed at a final meeting in Bermuda, these matters were described as statements of interpretation (Part III, Doc 4), thus avoiding any requirement to amend the Treaty itself. One concerned the procedure to be followed for the designation of airlines to serve points in the UK dependent territories, where issues of UK ownership and control might arise, particularly in the Caribbean. Others were concerned with the provision of ground handling services at Heathrow, user charges at US airports, and the relief of ground equipment from UK customs duties. The requirement for US airlines to use Gatwick rather than Heathrow for services from Atlanta, Houston and Dallas/Fort Worth operated in competition with a Gatwick-based British airline (ie British Caledonian) was a first step towards the exclusion from Heathrow of all US airlines other than Pan Am and TWA (see Chap. 3); this would become a major bone of contention when these airlines ceased to operate to London in 1991 (Chap. 4). There were in addition a number of tariff matters under dispute at the time. These were either resolved in the July 1977 exchange of notes, for example in respect of currency exchange rates, or signalled and acknowledged, but left to work their way through the relevant national procedures, and resolved bilaterally in advance of the 1978 summer season.

If the conclusion was a little untidy, the outcome remained pretty much as it had been when agreement was reached on 22 June, when Prime

Minister Callaghan sent the following message to President Carter, an honest acknowledgment that the negotiations had been hard fought on both sides:

> I am very glad that we have reached agreement in the air services negotiations. Congratulations are due to the negotiators of both sides, and in particular to your Special Representative, Ambassador Alan Boyd. I believe that this agreement will establish the basis for continued healthy growth in air services on the North Atlantic and other areas involved, with due regard to both competition and the use of resources. I am sure this will be to our mutual benefit. Our negotiations have shown how our two countries can work together even in an area where our interests are different. That is as it should be.[4]

A month later, on the day the Agreement was formally signed in Bermuda, President Carter also put pen to paper to welcome the new Agreement. He had already sent a personal message of congratulations to Shovelton and Boyd. Now, in the more formal message (Part III, Doc 1) which was published with the Agreement by the United States Department of Transportation, he takes the opportunity to underline the United States commitment to 'an international economic environment and air transportation structure founded on healthy economic competition among all air carriers'. Claiming consistency with this objective for the new agreement, he concludes as follows:

> The Agreement is one that reflects well on our two great nations. Its quality, its fairness, and its benefits to the consumer and to airlines should make it last as long as the original 1946 Bermuda Agreement. It continues our long and historic relationship with the United Kingdom.

There were two further statements to welcome the signature of Bermuda 2. The first was a Joint Statement (Part III, Doc 2) offering an upbeat summary of the main provisions. It was remarkable only for the fact that it was made by Dell, the UK minister with responsibility for civil aviation and Boyd, the US Special Ambassador who had led the negotiations. As noted above, Boyd had been Secretary of Transportation under a previous Administration, but in his present capacity he was on a level with Shovelton, the leader of the UK negotiating team rather than Dell.

The second surprise, and presumably the explanation for the first, was that Adams, the US Secretary for Transportation, who had no direct role

in the negotiations, but had been sniping from the sidelines all along (Dobson 1995, 155–156), wanted to issue his own unilateral counter-statement. Not only does his statement (Part III, Doc 3) focus rather heavily on the unresolved charter discussions, which the two sides had agreed to resolve a little later on, but he also takes the opportunity to make it clear that no concessions have been made over access for Concorde, Britain's prestigious but noisy supersonic airliner. Airports are entitled to refuse access on environmental grounds so long as they act without discrimination, and Concorde had been allowed to land at Washington's Dulles airport on a 16-month trial basis, which was due to end on 24 September. Meanwhile New York's Kennedy airport was making no commitment. Unsurprisingly the issue had indeed been raised in the margins of the negotiations, but there had been no proposal to use the Treaty or even the accompanying statements of interpretation to override legitimate airport objections, so it was somewhat undiplomatic to bring it into a statement purporting to welcome the new Agreement.

Moreover, whilst joining in the congratulations for Boyd and his team on their brilliant performance 'over these trying months of very difficult negotiations', Adams was openly critical of the British side 'which had clearly sought a more restrictive agreement.' On the key issue of capacity control, he added the following words of less than enthusiastic consent: 'We will consult when the issue of excess capacity arises, but we have avoided giving either government the ability to unilaterally exercise control over the schedules of another nation's airlines' (Part III, Doc 3). It was clear from the start that the settlement enshrined in Bermuda 2 would continue to be hotly contested.

Notes

1. See also the account of these negotiations in Dobson, Alan P, *Regulation or competition? Negotiating the Anglo-American Air Service Agreement of 1977,* Journal of Transport History (1994) Vol 15 No 2, pp. 144–164.
2. Shovelton papers, report in Mid-Ocean News, Bermuda, 23 July 1977.
3. Based on remarks by Jeffrey N. Shane in recognition of Professor Breyer's pivotal contribution to the Airline Deregulation Act. Since 1994 Professor Breyer has been Associate Justice of the United States Supreme Court.
4. Shovelton papers, text attached to a letter dated 22 June 1977 from Patrick Wright, Private Secretary to the Prime Minister, to Martyn Baker, Private Secretary to Edmund Dell.

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CHAPTER 3

Loosening the Straitjacket

In 1977 the International Civil Aviation Organisation (ICAO) convened a major air transport conference, which marked the high tide of restrictive bilateralism, the attempt by governments to shelter from competition their scheduled service airlines (which in many cases they owned), by restricting route access and multiple designation, and controlling both tariffs and capacity. 'The pressures at the meeting were for more, not less, government intervention in the industry' (Dobson 1995, 155). In these respects Bermuda 2 was a child of its time, but even before the ink was dry on its signature page, the protectionist policies embedded within it were beginning to be challenged, particularly in the United States, by the more liberal economic policies which had been voted into office with President Carter from January 1977.

Right from the start, as already noted in Chap. 2, the warm congratulations addressed to Boyd and his team, who 'deserve the nation's very sincere thanks' (Part III, Doc 3) were accompanied by expressions of thinly veiled criticism. Moreover, Brock Adams was not the only authoritative voice to be raised in criticism of Bermuda 2. By October Alfred Kahn, President Carter's newly appointed Chairman of the Civil Aeronautics Board was criticising the agreement in hearings before the Aviation Sub-committee of the House of Representatives, and President Carter himself was writing to those responsible for the next major negotiation (with Japan) directing them to include certain benefits for US airlines and consumers that had been given away in Bermuda 2.

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9_3

Early in 1978, these critical views were drawn together in a trenchant article by John Barnum, Deputy Secretary of Transportation 1973–1977, cataloguing the anti-competitive shortcomings of Bermuda 2 under the title *Carter Administration Stumbles at Bermuda* (Barnum 1978). Not only is Barnum deeply critical of the provisions for limiting the designation of more than one airline from each side to serve the same route, the provisions for limiting capacity, and the failure to secure a liberal charter agreement; he is particularly critical of the use of an executive agreement to override the CAB's authority to regulate competition in ways which he claims are inconsistent with US antitrust law. It would not be long before the application of US antitrust law would be put to the test in the highly controversial Laker case (See below).

Bermuda 2's honeymoon was short. Nevertheless, it was well into 1978 before the Airline Deregulation Act was passed, and for much of the 1980s (as noted in Chap. 1) a full-blooded implementation of the Administration's pro-competitive policies was hampered by a well-orchestrated campaign of Congressional support for the more cautious position of the incumbent airlines. When a similar, albeit less dramatic, policy change was swept into Downing Street and Whitehall with the election of Margaret Thatcher in May 1979, the effect on British policy was felt much more quickly. The United Kingdom electoral system almost always gives the government a working majority in Parliament, and that in turn ensures full control over the executive. The negotiations which took place between November 1979 and March 1980 opened up so many new gateways that the amended agreement was dubbed Bermuda 2A, and further steps were taken through the 1980s to accommodate increasing levels of competition. The framework of control remained intact, but a process of gradual liberalisation within the agreement began to make room for important changes in the airline industry to take place on both sides of the Atlantic while governments continued to hold the ring.

Deregulating the US Airline Industry

We saw in Chap. 2 how the unelected Presidency of Gerald Ford lacked the authority to persuade Congress to pass the 1976 Airline Deregulation Bill, and how in these circumstances continuing differences between the various Agencies in Washington limited the extent of policy change which the executive could introduce under the 1976 International Air Transportation Policy Statement. President Carter was in a stronger position than his predecessor, and he was personally committed to policies of deregulation

in general and airline deregulation in particular. In a message to Congress as early as 4 March 1977 he stated that: 'One of my Administration's major goals is to free the American people from the burden of over-regulation…. As a first step toward our shared goal of a more efficient less burdensome Federal government, I urge the Congress to reduce Federal regulation of the domestic commercial airline industry' (Dobson 1995, 149). In this he had the support of Senator Edward Kennedy and his allies who were keen to reintroduce a Bill along the lines of the one which had failed in 1976, but there was still substantial opposition to be overcome if the Bill was now to succeed.

Early in his Presidency Carter had made two crucially important appointments to the Civil Aeronautics Board (CAB), which, with public support for low fares, would help to build a majority in favour of deregulatory reform. By securing the appointments to the CAB of Alfred Kahn as Chairman and Michael Levine as Chief of Staff, not only did he set the Civil Aeronautics Board on a course of ruthlessly deregulatory executive action, but he gave to the CAB leaders with conviction whose zeal for deregulation would act as a powerful catalyst for change. Kahn used his executive authority at the CAB to create a more competitive environment in the US domestic market, which served to demonstrate the benefits of deregulation. New entrants were licensed; experimental and low fares were encouraged. The success of this strategy in the market place enabled the Bill's advocates to whittle away at the widespread opposition which the Airline Regulatory Reform Bill continued to face from major airlines as well as labour organisations in the industry, with their supporters in Congress. On 19 April 1978 the Bill finally passed in the Senate and on 24 October, having made its way through the House of Representatives, the President was able to sign it into law.

Meanwhile Kahn had initiated an action under US domestic law, but with major consequences for international air services, which would send shock waves right across the aviation world. On 9 June 1978 the CAB published a 'Show Cause Order' which suggested that the normal procedure for the setting of air fares through the tariff conferences of the International Air Transport Association (IATA)[1] was against the public interest. Such a ruling, if upheld, would make it illegal for US airlines to take part in IATA's tariff conferences; but first, US airlines were given the opportunity to 'show cause' in proceedings before the CAB, if they wished to challenge the proposed ruling. This high-handed unilateral declaration, which had not been discussed in advance with US airlines, the Department of Transportation or the State Department, never mind foreign airlines

and their governments, provoked a storm of international protest from airlines and governments alike, skilfully orchestrated by IATA's highly respected Director General, Knut Hammarskjold. The volume of protest made the State Department uneasy, but Hammarskjold appreciated that he still had to offer the CAB an acceptable way to retreat from the extreme position which they had taken up. His well-judged response was to give added impetus to reaching agreement within IATA on the major reform of its tariff-setting machinery, which he had already set in train. Carrier participation in tariff conferences was to be made optional, and procedures more flexible. Following acceptance at IATA's annual conference in the autumn of 1978, he was able to submit this to the CAB for consideration, and use it to show how reasonable IATA was being.

This new approach to fare-fixing by IATA was sufficient for the CAB to give interim approval to IATA's new procedures in May 1979, and to terminate their Show Cause Order hearings in December. However, the Order itself was kept alive, with its application restricted to the Atlantic market. There it acted as a spur to the tariff negotiations with the European Civil Aviation Conference (ECAC), an intergovernmental organisation under the umbrella of ICAO which brings together virtually all European aviation authorities and their governments. ECAC's constructive engagement in these negotiations was sufficient to allow multilateral fare co-ordination to continue, and for the provisions prohibiting the approval of IATA fare agreements to be removed from the International Air Transportation Competition Act when it was approved by the House of Representatives in November 1979, and signed into law on 15 February 1980 (Dobson 1995, 155–157). Eventually, in 1981, the long-running negotiations with ECAC led to a Memorandum of Understanding which introduced more flexible, market-led arrangements for setting tariffs, permitting airlines to vary them within zones of flexibility[2] for different fare categories.

The term 'Open Skies' was first used by Alfred Kahn in 1979 in relation to domestic deregulation (Button 2009, 62). By the time he left the CAB at the end of that year, he could reflect on his achievements with considerable satisfaction. Not only had he used the executive authority of his Board to open up the domestic market to competition wherever he could, but deregulation had now become almost irreversible as a result of the legislation which had been passed. He had had to back away from the Show Cause Order, but the international tariff-fixing activities of IATA had been acceptably liberalised.

However, there was a downside to Kahn's shock therapy, particularly on the international scene, where the fury provoked by what was perceived as

high-handed unilateralism made many of the United States' bilateral partners, including the United Kingdom, deeply suspicious of the liberalisation agenda. Indeed, the time needed to allow the dust to settle was a significant factor, alongside the reluctance of the airlines themselves to embrace a sharp increase in competition, in producing the extended period of relative quiet and consolidation in US international policy, which lasted for most of the 1980s (Shane 2005/2, 6–7).

It is against the background of these developments in US policy in the years following the negotiation of Bermuda 2 that we turn now to the ongoing bilateral negotiations. The goal had been set, but gradual progress by mutual agreement was the order of the day, and that suited the British well enough. The process began almost immediately, with the resolution of tariff and charter issues left outstanding from the 1977 negotiation, going on to make more substantial progress with the Bermuda 2A negotiations of 1979/1980.

Tariffs

Article 12 of Bermuda 2 required that tariffs be approved by both Contracting Parties before they entered into effect, and stipulated long periods of advance notice to allow time for any necessary consultations to take place. The tariffs were supposed to be established at the lowest level consistent with providing a high standard of safety and an adequate return to efficient airlines assuming reasonable load factors. If agreement was not reached on a new tariff, the old tariff remained in force. More general issues (for example, what was 'a reasonable load factor') could be referred to a Tariff Working Group.

In the early years of the agreement, these provisions gave rise to extensive negotiations every season, but over a period of time the control exercised by the Civil Aviation Authority for the UK, and the Civil Aeronautics Board for the US was gradually relaxed. The first storm blew up almost immediately. As early as 19 September 1977 agreement was reached on low fares between London and New York, where BA, Pan Am and TWA needed to reduce their fares to compete with Laker's Skytrain. However, when Braniff filed for low fares on their new routes from Dallas and Houston, the British side objected, fearing the impact on the Houston service recently inaugurated by British Caledonian Airways (BCal). Braniff were persuaded to accept higher fares, but when the CAB were asked to give their approval, they refused to do so, insisting that both airlines must lower their prices or cease operations.

Table 3.1 Tariff liberalisation

Negotiations	*Outcome and documentation*
October 31–November 4, 1977	
December 5–9, 1977	
February 6–13, 1978	
March 6–17, 1978	Some tariff liberalisation Memorandum of consultations (Part III, Doc 5) accompanying letter (Part III, Doc 7)
November 2, 1978	Tariff liberalisation extended (Part III, Doc 9)

The crisis broke at the beginning of March 1978 (Table 3.1), just as a British delegation was due in Washington for talks about the linked topics of fares and charters, the latter left unresolved when the Bermuda 2 negotiations were concluded. President Carter, whose authority was required where the CAB wished to disapprove a tariff agreed under IATA auspices, intervened to get the CAB to withdraw their order temporarily while the talks were going on, but the pressure was effective. Knowing that he would be very reluctant to disapprove low fares in the face of public opinion, the British side conceded the low fares on the trans-Atlantic sector, whilst limiting the potential damage to BCal by insisting that US airlines should not be allowed to combine the low trans-Atlantic fares with below cost fares on domestic services feeding into US gateways such as Dallas and Houston (Part III, Doc 7). The review which took place at the end of the summer season led in November to the indefinite extension of the more liberal approach, both sides hoping 'that the successful operation of low fares would continue and be developed as a normal feature of airline operations between our two countries' (Part III, Doc 9).

Passenger Charter Services

In 1976 charter services were still carrying some 30% of all North Atlantic passengers, and the Americans pressed for a liberal charter agreement within Bermuda 2. When an interim Memorandum of Understanding, agreed in time for the 1977 summer season, enabled the negotiators to put off dealing with charters until after the main Bermuda 2 agreement was settled, the CAB regarded the failure to press for a liberal charter agreement as a serious error, and the National Air Carrier Association wrote to President Carter to signal their displeasure (Dobson 1995, 123). Moreover, once Laker's scheduled Skytrain service between London and

Table 3.2 Passenger charter provisions

Negotiations	*Outcome and documentation*
October 31–November 4, 1977	
December 5–9, 1977	
February 6–13, 1978	
March 6–17, 1978	Passenger charter provisions agreed MoC, paras 1 and 6 (Part III, Doc 5) Airport restrictions (Part III, Doc 6)
April 13–15, 1978	
April 25, 1978	Exchange of notes (Part III, Doc 8) Article 14 and Annex 4 (Part II)
March 31, 1980	Annex 4 expires, not replaced

New York finally took to the air on 26 September 1977, provoking the development of competitive Advance Purchase Excursion (APEX) fares on the scheduled services of the established airlines, the pricing advantage which charters had enjoyed in a more protected market was rapidly eroded. If US charter carriers were not to be utterly outflanked by low fare competition from scheduled service carriers, it became essential to negotiate liberal charter service provisions (Table 3.2).

Negotiations for such an agreement within Bermuda 2 commenced on 31 October 1977, and continued over five rounds through the winter and spring. The agreement finally reached on 17 March 1978 (Part III, Doc 5) and confirmed by a formal Exchange of Notes on 25 April 1978 (Part III, Doc 8) substituted for the rather vague expressions of support for a distinctive charter regime, set out in the original Article 14 and Annex 4, a genuinely liberal regime (Part II, 1978 revised text of Article 14) based on country-of-origin approval of charter services and the non-discriminatory application by each country of its own charterworthiness rules. Under these arrangements each side gained the right to grant or refuse approval for charter services originating in its own territory, within the agreed framework of liberal charter requirements set out in the new Annex 4. A sideletter dated 17 March 1978 from Shovelton to Atwood (Part III, Doc 6) added a restriction banning planeload charter services from using Heathrow, on a non-discriminatory basis as between UK and US designated charter services. A similar restriction required charter services to the major Scottish destinations to use Prestwick, unless special permission was granted for the use of the Glasgow and Edinburgh airports.

Meanwhile, in March 1978, negotiations had also been opened with the European Civil Aviation Conference for a multilateral agreement to cover all trans-Atlantic charters. However, 'the efforts which ECAC had devoted to securing a co-ordinated multilateral approach to North Atlantic charter policy proved futile in the rapidly changing environment' (ECAC 1995). For similar reasons, when the Bermuda 2 arrangements expired on 31 March 1980, they were allowed to lapse. With wide-bodied aircraft driving up capacity, and lower fares becoming increasingly available, not just on Laker's Skytrain but on services offered by the traditional scheduled carriers too, the separate market for passenger charters was shrinking fast, and with it the need for a distinct regime of economic regulation. Although absolute numbers remained stable (around 1 million passengers per year), in a rapidly growing market the share of UK-US passenger traffic carried on charter services continued to fall. By the end of the century it had sunk to 6.2%, almost all of it carried by UK charter airlines (HC532, CAA Memorandum, Table 1, p. 127).

Cargo Charter Services

If there was initially some hesitation on the UK side about the liberalisation of passenger charter services, there was less concern about cargo charters, where the UK share was negligible, and three short rounds of negotiation, led by Christopher Roberts (UK) and Boyd Hight (US), between December 1978 and March 1979, were all it took to agree a new Annex 5 to the agreement setting out a fully liberal if not totally deregulated regime to take effect from 1 January 1980. Either side could designate as many airlines as it wished, the route schedules were amended to open all points in both countries to cargo services, and airlines were given full control over tariffs and capacity (Table 3.3).

However, the formal Exchange of Notes which amended the Agreement to incorporate the new Annex 5 (Part III, Doc 11) was delayed

Table 3.3 Cargo charter provisions

Negotiations	*Outcome and documentation*
December 14–15, 1978	
February 13–14, 1979	
March 27–30, 1979	Agreement reached on Annex 5 (cargo); text in Part II
January 1, 1980	Annex 5 enters into force
December 4, 1980	Confirmed by exchange of notes (Part III doc 11)

until 4 December 1980 to include the agreement on the major expansion of access to the US market which had been reached in March 1980 (see below). When the Exchange of Notes was published, encompassing this additional material as well as Annex 5, it was accompanied by correspondence dated 4 December 1980 covering the following matters:

a. At Roberts' request, Hight gave such assurances as he could (Part III, Doc 12) that US antitrust laws would not be used to prevent the small UK all-cargo airlines from engaging in such joint ventures or other co-operative arrangements as might be necessary for them to become viable competitors in a deregulated environment; in his reply Roberts reminded Hight that the UK did not accept the extra-territorial application of US anti-trust laws, and advised him that if they were used against UK airlines to frustrate arrangements to which the UK saw no objection, the UK might have to call for consultations leading to modification or even termination of Annex 5;
b. In a separate letter (Part III, Doc 13), Roberts made the more general statement that the UK might seek to change Annex 5 if that proved necessary for UK airlines to maintain an adequate presence in the market;
c. In a third letter (Part III, Doc 14) Roberts took the opportunity to amplify the 1978 restrictions that had been placed on the use of Heathrow (London), Abbotsinch (Glasgow) and Turnhouse (Edinburgh) airports for planeload charter services to cover passenger charter flights which also carried cargo; in the case of London Heathrow his letter stated more generally that 'airlines not currently operating at Heathrow Airport will not be allowed to commence operations there.' The Heathrow rules were translated into a new addition to Bermuda 2—Annex 1, Section 7, which was also included with the omnibus December 1980 Exchange of Notes.

The London Area Traffic Distribution Rules, first introduced in April 1978, were an attempt to reduce the pressure on Heathrow. They were intended to be non-discriminatory in relation to UK and US airlines. When Shovelton applied the restrictions to charter traffic in 1978, and even in 1980 when Roberts extended their application to all airlines not currently operating at Heathrow (Part III, Documents 6 and 14), they were probably welcome enough to Pan Am and TWA as well as BA, since they kept all new competitors out of Heathrow. Annex 1, Section 7 even

made provision for any 'corporate successor in any name change, merger, acquisition or consolidation.' However, a strict application of the rules created a major crisis when the London services operated by Pan Am and TWA were transferred to American and United in 1991 (see Chap. 4).

New US Gateways and Route Access—Bermuda 2A

Bermuda 2 had restricted US airlines to 13 US gateways with two more to be added after three years, i.e. on 23 July 1980. However, Anchorage and Seattle were not used. UK airlines had 11 US gateways with two to be added after three years. Double designation was restricted to two gateways only—both sides chose New York and Los Angeles—with further opportunities for the designation of second airlines being made dependent on the traffic at that gateway building up to more than 600,000 one-way revenue passengers in a year (450,000 where the service was operated by only one US or UK airline).

In a rapidly growing market the number of available gateways and the scope for double designation soon proved insufficient. Under Bermuda 1, Boston had been served by both Pan Am and TWA as well as BA, and its citizens deeply resented the restriction imposed under Bermuda 2. They had powerful representatives in Washington, including Senator Edward Kennedy and Tip O'Neill Jr, Speaker of the House of Representatives, and as President Carter's programme of deregulation gathered pace, they pressed their case vigorously for the designation of a second US airline. On 16 May 1978 Carter supported their request in a letter to Callaghan, and hopes were raised when it became known that Laker was also interested in serving Boston, but Callaghan's reply, when it came, proposed instead that services to Boston and Los Angeles be restricted to no more than 21 flights a week for each side, and that all Pan Am flights should serve Gatwick rather than Heathrow. Edmund Dell (Secretary of State for Trade) had just introduced the London Area Traffic Distribution Rules, so that his response may be seen not merely as a refusal to expand service opportunities, but as an attempt to take advantage of US pressure for additional services to relieve Heathrow's growing congestion problem. This was seen as the priority in London, alongside the need to improve the balance of payments. On this basis the two sides were too far apart for negotiations to be worthwhile, and all attempts to progress matters failed while Callaghan and Dell remained in office.

Meanwhile in the United States pressure for double designation on Boston, and for the opening of more gateways elsewhere, was continuing

to build. It took some months to agree a negotiating stance based on the liberalisation of Bermuda 2 rather than its wholesale renegotiation. It was decided in the end that the latter would be likely to provoke an unhelpfully defensive reaction, whereas a proposal for the opening of new gateways, presented as part of a broadly based programme of liberalisation, alongside the ongoing negotiations on charters and the cargo annex, to which the British were already open, would have a better chance of success (Dobson 1995, 166–170). In the event there was no real linkage, since the passenger charter regime was being applied with increasing freedom on both sides of the Atlantic as any threat of competition with scheduled services faded, and a liberal cargo regime was agreed in March 1979 (see above).

The atmosphere began to change when Margaret Thatcher was elected Prime Minister in May 1979, and John Nott became Secretary of State for Trade. Their economic policy stance was liberal and therefore open to the concept of deregulation, even if they were no more inclined than their predecessors to reopen Bermuda 2, unless it was in the British interest to do so. When negotiations on new services did finally commence in November 1979 (Table 3.4), there was immediate agreement to bring forward to 1 June 1980 the date for the opening of services to the first pair of new gateways for which provision had been made under Bermuda 2—Atlanta on the UK side and an unspecified additional gateway for the US (Part III, Document 10).

This was just an appetiser. By early March 1980, after only two further rounds of negotiation, agreement had been reached on a major expansion of route service opportunities, providing for the introduction of services to five new gateways each from a new list of fifteen US cities. A new Section 6 was added to Annex 1 of the agreement (the Route schedules)

Table 3.4 New gateways ('Bermuda 2A')

Negotiations	*Outcome and documentation*
November 6–8, 1979	Two new services brought forward Exchange of Notes, (Part III, Doc 10)
January 29–February 1, 1980 February 27–March 5, 1980	Annex 1 Section 6 added to the Treaty (text in Part II) to provide for major expansion of services to take effect over three years from 1 April 1981 Exchange of Notes, (Part III, Doc 11)

to govern the orderly introduction of such services over a three year period from April 1981 to April 1983, with such variations in the pattern of service provision as the airlines themselves might subsequently need to make. In order to give new services an opportunity to become established in the market before they had to face direct competition, Section 6 made provision for them to be protected from competition for up to three years, and in the interests of stability gateway selections, once made, could not be changed before March 1985.

At the same time, provision was made for a second US airline to serve Boston from April 1980, and for second airlines of each side to serve Miami—from April 1980 in the case of the UK, and from January 1981 for a US airline. The whole package, together with Annex 5, cargo (see above) was incorporated into the Agreement by an Exchange of Notes dated 4 December 1980 (Part III, Doc 11). The route expansion was so substantial that the package became known as Bermuda 2A.

Adjusting to the Downturn

The liberalisation of passenger charter and cargo regimes in 1978 and 1979, followed by the expansion in gateways and new services agreed in the Spring of 1980 showed the Contracting Parties and their airlines responding constructively to rapid growth in the market. But this was followed by a severe downturn in 1981/1982, when traffic fell by 13.3%.

In the wake of the recession, the early 1980s were a difficult time for all the airlines competing for business on the North Atlantic. The launch of Laker's Skytrain service in September 1977 soon caused BA, Pan Am and TWA to respond with reduced fares on their traditional scheduled services, including notably the new Advance Purchase Excursion (APEX) fares (Part III, Doc 5). Initially Laker's service prospered, but for five weeks in the summer of 1979 his service was affected by the worldwide grounding of all DC-10s, following a major crash. For a while this dented passenger confidence in his DC-10 fleet, and when the economy turned down in 1981, he lacked the financial resilience of the major carriers, with their cushion of first class and full fare business travellers, to sustain lower passenger numbers at reduced prices. He had also borrowed at a fixed rate of exchange to finance the leasing of his aircraft from Mc Donnell Douglas, and was badly caught out when the pound fell against the dollar. Some attempt appears to have been made, at IATA tariff conferences in December 1981 and January 1982, to preserve a niche market for Laker, but by then it was too late, and the airline ceased trading on 5 February.

The recession also drove BA into deficit, prompting the government to set in train a major programme of reform at the airline. The Conservative Party manifesto, on which Margaret Thatcher came to power on 4 May 1979, had declared that 'the principles of competition which govern other industries in the community should also be applied to air travel' (Staniland 2003, 199), and in July 1979 John Nott announced the government's intention to sell a substantial minority holding in British Airways. However, the economic downturn of the early 1980s and the management's persistent failure to tackle overstaffing made even this a difficult proposition. In the spring of 1981, when it became clear that the airline was heading for a major operating deficit, Sir Ross Stainton (Chairman) reacted by putting privatisation on hold, whilst abandoning plans to renew the fleet and cut the labour force (Dienel and Lyth 1998, 74).

This was a serious blow for the government's flagship economic policy, but the search for a successor to Stainton had already been launched, and the Prime Minister decided to bring in Sir John King as Chairman. King was a close associate of the Prime Minister, with a strong record as an entrepreneur in the engineering industry, and she felt she could trust him to deliver a successful privatisation. With the help of a generous compensation package, King launched a management revolution at BA, cutting thousands of staff, and turning to the government to underwrite the massive consolidation of debts (£544 m) which was declared in the airline's 1981–1982 accounts. Clearing the books of historic debt gave the airline a chance to move forward, but the day-to-day management of the business still needed a major shake-up. For this task King brought in Colin Marshall, who as chief executive from 1983 brought to the airline a sharp focus on marketing and consumer service, whilst restructuring the airline's operations to exploit the benefits of its powerful Heathrow hub. This was strong medicine, but it would take time to work through to the bottom line. The target date for privatisation was continually postponed, to 1983, to 1985 and finally to 1987, and throughout that period the high priority attached to making BA profitable so that it could in fact be privatised was a significant factor in every air service negotiation, not least under Bermuda 2.

Meanwhile, the recession had made it impractical to proceed with the rapid expansion of services that had been planned in 1980. Following negotiations begun briefly in the early months of 1982, and resumed in October/November, it was agreed that with certain exceptions for particular services that had already been launched despite the downturn, the opening of new gateways and services planned for 1983 and 1984 should

Table 3.5 Adjusting to the downturn

Negotiations	*Outcome and documentation*
22 January, 1982	
1 February, 1982	
14–21 October, 1982	
8–9 November, 1982	MoC, 9 November 1982 (Part III, Doc 15) defers expansion of services and extends Annex 2, both by 2 years.
20 February 1985	Confirmed by Exchange of Notes (Doc 16); Temporary provisions (Doc 17)

be deferred to 1985 and 1986 (Table 3.5). The terms of this hiatus were set out in an agreed Memorandum of Consultations dated 9 November 1982 (Part III, Doc 15). The downturn had also affected traffic between the United States and UK territories in the Caribbean, so there was a separate letter (part III, Doc 22/1) offering to consider new rights for Cayman Airways in exchange for the moratorium until 1 April 1985 which the US had agreed to observe on new designations of US airlines to provide services between Miami and the Cayman Islands (Part III, Doc 15, paragraph 12). The promised Exchange of Notes formally amending the Agreement followed on 20 February 1985 (Part III, Doc 16).

The Laker Affair

That same November, just as the two governments were reaching agreement on how best to handle the recession, a new cloud was gathering on the horizon. Laker was convinced that the failure of his airline had been precipitated by a conspiracy among the major British, American and European airlines to use their low fare strategies to drive him out of business, and also to destroy a rescue package put together by Mc Donnell Douglas (from whom he leased his aircraft) and the Midland Bank. Laker's allegations were rejected when the UK Civil Aviation Authority considered the fares, which were subsequently approved by both governments in accordance with the procedures laid down in Article 12 of the Treaty (Dell 1985, 366). He did not attempt to challenge the CAA's decision in the UK courts, but on 24 November 1982 Christopher Morris, the liquidator for Laker Airways, launched a civil action against the airlines under US antitrust laws, which, if proven, could have led to

triple damages (i.e. three times the amount of damage done to the victim). A few months later the US Department of Justice opened a parallel criminal investigation into essentially the same allegations (Dell 1985, 355).

We do not know whether there was or was not a conspiracy to drive Laker out of business, because the allegations were never fully tested in a court of law. The case launched by Laker's liquidator in the US court prompted BA and BCal to make application in the British courts for Morris to be restrained from pursuing his action; to which Judge Greene in the US District Court responded (March 1983) with a counter-injunction seeking to prevent any of the defendants in his court from taking any action before a foreign court or governmental authority that would interfere with his jurisdiction. So began a major dispute over the extraterritorial application of US antitrust laws, which delayed for two and a half years the preparation of a financially attractive prospectus for the privatisation of British Airways, and hung like a black cloud over the aviation relationship until it was finally settled out of court in August 1985.

BA and BCal's application for an injunction against Christopher Morris did not run well. Dismissed in the High Court (on 20 May), the injunction was allowed by the Court of Appeal (27 July), but overturned on further appeal to the House of Lords, where Lord Diplock urged caution in the use of injunctions against action in a foreign court, particularly where the defendant had no remedy in the English courts. In his concurring judgment, Lord Scarman set the bar very high for any such intervention in a foreign court, when he declined to support the injunction sought by the airlines on the grounds that the bringing of the suit in the US court was not so 'unconscionable' as to be seen as an infringement of the equitable rights of the applicant (Dell 1985, 371).

The outcome in the House of Lords would have left BA and BCal seriously exposed to the perils and costs of a US antitrust action. However, on 24 June 1983, following the first setback in the High Court, the British Government had already moved to spike the guns of the US District Court by invoking the Protection of Trading Interests Act. The Department of Trade's Press Notice stated that the action taken reflected 'the Government's view that the present attempts to apply US antitrust laws to activities of airlines designated under Bermuda 2 by HMG are damaging to or threaten to damage UK trading interests' (Dell 1985, 368). The effect of the action taken under the PTI Act was to prohibit British airlines from cooperating with the Court, and in particular from supplying the Court with documents in their possession in the United Kingdom.

Since anti-trust cases depend on the defendants being obliged to 'discover' vast quantities of documentation in the expectation that this will bring to light the incriminating evidence which has been suspected, the action taken had a good chance of being successful in bringing the proceedings to a halt, but it was also of course a highly confrontational step to take.

Behind the clash of jurisdictions there lay some much more fundamental issues of policy, which made it very difficult for either side to give way. Under UK law, the alleged activities had not been ruled unlawful. Indeed the low fares that were complained of had been agreed by the appropriate UK and US authorities under the terms of Bermuda 2. However, when the injunction issued by the US District Court went to appeal, Circuit Judge Wilkey took the view that an executive agreement such as Bermuda 2 could not extinguish the rights of US citizens and others under US law. US antitrust law had made provision for private rights to be enforced in US courts, and many of those affected were US citizens. More of the passengers on the North Atlantic air routes were American than British, and since the greater part of Laker's indebtedness was to American creditors, who would stand to lose from a conspiracy to put him out of business, they too had a strong interest in the case. As regards the role of the liquidator for Laker Airways, 'our courts are not required to stand by' Judge Wilkey thundered, 'while Britain attempts to close a courthouse door that Congress, under its territorial jurisdiction, has opened to foreign corporations' (Dell 1985, 368).

For nearly two years the escalating rhetoric of the Courts on either side of the pond, supporting the application of US antitrust law on the one hand and of the UK Protection of Trading Interests Act on the other, contrived not only to delay the privatisation of British Airways, but to poison Anglo-US relations more generally. The confrontation was so fierce that Prime Minister Thatcher felt obliged to take the matter up personally with President Reagan. Having established a strong personal relationship with him during his first term as President, she waited patiently through his re-election campaign, but in November 1984, when they met just two weeks after his landslide victory, she seems to have made it a high priority to persuade him to call off the investigation by the Department of Justice. According to Campbell-Smith's history of BA privatisation, 'a remarkable thing happened. President Reagan gave in. There were, he said, more important fish to fry. Give the lady what she wants' (cited in Dobson 1995, 184). At the time no one was supposed to know why the

Justice Department had halted its investigation. There was speculation in the Journal of Commerce that Thatcher might have gone so far as to threaten termination of the Bermuda 2 Agreement, but she may not have needed to do that. All we know for certain is that the Department of Justice investigation was halted immediately after the two leaders met. The civil case continued until August 1985, but without the DoJ investigation in the background, the prospects of success were much reduced, and the litigants eventually accepted an out of court settlement with BA, which cost the airline £33 m.

In July 1985, as the parties were edging towards a settlement, Dell, who had grappled with earlier antitrust cases as Secretary of State for Trade between 1976 and 1978, but had by then retired from front-line politics, published in the Journal of the Royal Institute of International Affairs the thoughtful analysis of the case on which the present account is largely based (Dell 1985). The article, which is entitled 'Interdependence and the judges: civil aviation and antitrust,' accepts that in an interdependent world it is inevitable that there will be conflicting jurisdictions. He notes that 'comity'—the degree of deference that a domestic forum must pay to the act of a foreign government—is a complex and elusive concept, which had come under intolerable strain in the Laker case. In any case, Dell questions whether the courts are the best judges of comity. As Judge Wilkey himself acknowledged, 'Judges are not politicians. The courts are not organs of political compromise.' (Dell 1985, 369).

There is no answer to such questions where two systems of domestic law find themselves at loggerheads. If the circumstances cannot be anticipated in advance, and regulated within the agreement itself, or resolved promptly before they get out of hand, the unshakeable integrity of two proudly independent legal systems will fuel a conflict which the law cannot resolve. In this instance, as we have seen, the two governments were able to lance that part of the case over which the President had some authority, and the civil case was eventually settled out of court. The US has never conceded that its antitrust laws should not be applied to matters arising under its executive agreements with other countries (see the letters at Part III, Doc 12), nor can it be expected to do so in the future, but no subsequent issue has been allowed to escalate into such a crisis, and it is very much in the interests of good relations between the UK and the USA that none should be allowed to do so in the future.

Capacity, Tariffs and Aviation Security

In the Spring of 1983, I succeeded Roberts as head of the International Aviation Directorate. Following the general election on Thursday 9 June, aviation and shipping were transferred to the Department of Transport, but the Laker affair was already in full swing, and it was decided to leave all matters potentially involving the Protection of Trading Interests Act with the Department of Trade, which had the requisite specialised knowledge and experience. The solicitor dealing with the case was Robert Ayling. He handled it with such skill and tenacity that, as soon as it was resolved in 1985, he moved to British Airways as Legal Director, rising through other senior management posts to become Group Managing Director from 1993 and Chief Executive Officer in succession to Sir Colin Marshall from 1996 to 2000.

Sir Nicholas Ridley, who was appointed Secretary of State for Transport, had developed the government's privatisation agenda as Financial Secretary to the Treasury, so he was already familiar with the Department and lost no time in making his mark. Ridley was a Tory of the old school with a clear understanding of the distinctive roles of politicians and civil servants. Having set the agenda, he made it his business to create the necessary political conditions for success, and then had the confidence to trust his civil servants to deliver the agreed policy. Within 24 hours of his appointment, he had called together his senior management team, on a Saturday (not usually a working day), to agree with each one of us what should be done to carry forward the liberal economic policies on which his government had just been re-elected. Reviewing the options within my field of responsibility, I advised him to give priority to the creation of a liberal aviation market in Europe, where we could work with the Dutch and the Commission to bring about the single market implicit in the Treaty. There would be benefits in this for the travelling public, as well as the British aviation industry. Liberalisation within Europe was a better proposition than with the USA, where it would be risky to expose BA and BCal to the powerful competition to be expected from newly deregulated US airlines operating out of a massive and heavily protected domestic market. He accepted my advice, and did much during his three-year stint at Transport to establish the political momentum which greatly facilitated delivery of the first European air transport package in 1987.

For almost two and a half years, in the shadow of the Laker Case, while the political focus was on European liberalisation, and the industry was

gradually recovering from the economic downturn of the early 1980s, routine consultations over tariffs and capacity continued under Bermuda 2, but there were no major negotiations. In 1986, however, the impending expiry of the critically important capacity control mechanism (Annex 2 of the Treaty) made it essential to reengage at a more senior level.

Settlement of the Laker case had removed one very large obstacle to BA privatisation, but the UK regarded the continued operation of Annex 2 as a critical safeguard against the threat that deregulated US airlines might swamp the North Atlantic with uneconomic capacity. Even if this might occur as the result of a battle amongst US airlines for market share, the downward pressure on fares could have potentially disastrous consequences for BA's profits in its most important market, and hence for its overall earnings. Once again it was credibly represented that the prospectus for privatisation could not be written until the future of Annex 2 was satisfactorily resolved. It did not prove necessary to involve the Prime Minister, but as the talks dragged on through 1986, Ridley made the point forcefully in talks with his US counterpart Elizabeth Dole, and his intervention probably helped to convince the US side that the planned termination of Annex 2 was not an option.

Under Bermuda 1 airlines had been free to determine how many flights to operate in the light of their own commercial judgment (see discussion of Bermuda 1, Article 6 in Chap. 1). Excessive capacity, which might damage or even destroy competition, as well as adversely affecting airline revenues, could be challenged only *ex post facto*. Having found this arrangement unsatisfactory in the early 1970s, the UK side had insisted vehemently, from the outset of the negotiations leading to Bermuda 2, on the need for capacity to be agreed between the two Contracting Parties in advance, fearing that without such control, US airlines other than Pan Am and TWA, with profitable and well protected domestic networks behind them, would swamp new routes across the Atlantic with excessive capacity to the detriment of British incumbents or potential competitors, in an effort to establish themselves in these new markets at almost any cost. Equally US airlines were concerned that a state-owned carrier such as British Airways, with strong feeder services into Heathrow from all over the world, might take advantage of that situation to provide excessive capacity related not to the requirements of passengers travelling between the UK and the USA, but to passengers travelling between the USA and third countries particularly in Europe (so-called sixth freedom passengers) to the detriment of US airlines seeking to serve those markets with direct services from the USA.

As a result Article 11 of Bermuda 2 laid down a more tightly drawn set of general principles for the control of capacity on all routes under the agreement, and set up detailed arrangements in Annex 2 for the predetermination of capacity on the North Atlantic, requiring all schedules to be filed with the aviation authorities of the other side six months in advance of each summer and winter traffic season, and setting a succession of further time limits for each stage of the subsequent consultation procedure. However, the US side was never comfortable with capacity control, and the heavy procedures were a constant source of friction. The text of Annex 2 provided for consultations to take place after five years, and in the absence of agreement, the Annex would expire altogether after seven years (in July 1984). In November 1982 a further extension was agreed up to 23 July 1986, but in the negotiations which commenced in January 1986 (Table 3.6), the US side made a determined effort to get the controls substantially relaxed, if not indeed abolished.

As leader of the British negotiating team, I had a considerable problem on my hands. In addition to the potential impact on British Airways, BCal were finding it extremely difficult to compete effectively with Delta at Atlanta, American at Dallas, and Continental at Houston, all of whom had the benefit of strong domestic hub-and-spoke systems to feed their London services. In Europe, where the UK was taking a lead in seeking to liberalise air services, we were pressing for the old 50:50 capacity and revenue sharing arrangements to be relaxed in the first instance to 40:60, and we could hardly offer less to the Americans. Viewed from their side of the

Table 3.6 Capacity, tariffs and aviation security

Negotiations	*Outcome and documentation*
13–17 January, 1986	
24–28 February, 1986	
20–27 March, 1986	
22 April, 1986	Aviation security; new Article 7 (Part II)
27–29 May, 1986	
25–27 July, 1986	
12–15 August, 1986	
8–11 September, 1986	MoC (Part III, Doc 18); new Annex 2 and addition to
11 September, 1986	Annex 5 (Part II); tariffs (Part III, Docs, 19, 20); fitness and citizenship determinations (Part III, Doc 21)
25 May, 1989	Two Exchanges of Notes (Cm 792, 793)

table, however, a 10 per cent margin around equal shares was nothing like enough. A private note, written in August 1986, shortly after the sixth round of negotiations, reads as follows:

> With the Americans it was quite another story. No golf [*I had just taken the Japanese to Gleneagles*], no excursions [*with the Swiss I had explored Henley and the Thames valley*], no fun and no agreement. In Washington in July we sat up several nights till midnight or later, sustained by take-away pizzas brought in to the State Department, and in London last week [*11–15 August*], though we kept more civilised hours, we worked as hard but in the end agreement eluded us … which was very disappointing.

An article by Shane which appeared in the September 1986 edition of ITA Magazine (Shane 1986), about the difficulties of 'Getting to Yes' in international aviation negotiations, with specific reference (among many other issues) to negotiations with the UK about BCal's problems at Dallas, appears to have been written as early as March. If so, the continuing failure of our negotiations right through the summer holiday season must have been at least as frustrating for him as it was for me.

Looking back at those negotiations now, my private note and Shane's article were both perhaps a little unfair to ourselves. Even if seven rounds of rather tedious and unproductive negotiation between January and August had tested our patience, we had in the course of the year invested enough time away from the negotiating table to build a good personal and working relationship. I recall with pleasure a fierce game of American football at Ann Arbor, and a few days spent negotiating in the more relaxed environment of Wilton Park, an Elizabethan manor house in the Sussex countryside, which was then a Foreign Office conference centre. This allowed us all to visit the Prince Regent's amazing seaside palace in my home town of Brighton, where we all crammed into my dining room for supper. To a jaundiced observer of diplomacy at work, such seemingly frivolous excursions might appear to be a scandalous waste of public time and money, but sometimes there is no more direct path to bring both sides to the centre of the negotiating maze, where they can arrive at a satisfactory conclusion.

In this case, the breakthrough finally came when we returned to Washington for yet another round after the summer holidays. The Sunday afternoon queues for check-in at Heathrow were so long that I missed my direct flight to Washington, and had to travel by way of Boston instead. As a result I had a long journey on my own, with no distractions, and by the time I met the other members of the negotiating team at our Washington

hotel, I had come up with a new proposal. I would present our offer of 40:60 flexibility as allowing an adventurous airline to offer up to 50% more capacity than its more cautious competitor. This was acceptable to my team, including the airlines—it was after all no more than a new presentation of an old position—and for that very reason I was not optimistic about its chances, but it seemed worth trying. The following morning, in private conversation with Shane, I did not pretend to be offering a major concession of substance, but he and his airlines reacted favourably to the more liberal presentation, and with a few further concessions, notably the removal of any right to require an airline to offer less than a daily service to any gateway, we were able to conclude an agreement which removed many of the irritations of the previous capacity control regime, giving US airlines the elbow room they really needed, whilst providing British Caledonian with a degree of reassurance, though not enough as it turned out to save it from bankruptcy. In its more liberal form (see comparative texts in Part II) Annex 2 would remain in force for the whole of the remaining life of the Agreement.

Although these negotiations had turned mainly on the freedom of airlines to determine their own capacity and the scope for governments to use Article 11 (Fair Competition) and Annex 2 to resist or reject their proposals, there had also been considerable debate about a number of other issues within the relationship that needed to be addressed. In April a new aviation security article, proposed by the United States in response to the growing threat of hijacking, had been adopted (Part II, Article 7 of the Treaty). Now the final Memorandum (Part III, Doc 18) was accompanied by the following agreed documents:

The new Annex 2 to govern capacity on the North Atlantic routes (text in Part II);

a new Part V to be added to Annex 5 (cargo) setting out provisions to be followed in the event of the unilateral termination of Annex 5 by either Party (text in Part II);

procedures for the approval of tariffs proposed under Article 12 of the Agreement (Part III, Doc 19); this was accompanied by an information note from the US Department of Transportation about their Special Tariff Permission Procedures (Part III, Doc 20);

a draft Exchange of Notes setting out provisions intended to clarify the application by each Contracting Party of fitness and citizenship criteria to

airlines seeking designation, and their reciprocal recognition by the other Contracting Party (Part III, Doc 21);

The new tariff procedures were implemented immediately, and the new Annex 2 was applied provisionally with effect from 1 November 1986. The new aviation security article, the new Annex 2, and the termination clause for Annex 5 were all confirmed by means of a formal Exchange of Notes dated 25 May 1989 (Part III, Doc 18). The agreed procedures for the application of fitness and citizenship criteria were confirmed by a separate Exchange of Notes on the same date (Part III, Doc 21).

The Caribbean Sub-plot

Although the main focus of Bermuda 2—and certainly the main preoccupation of senior negotiators—has always been on trans-Atlantic services, the route schedule also made provision for services between the USA and UK territories around the world, including Hong Kong, Tarawa (in mid-Pacific), Bermuda itself and a scattering of UK territories in the Caribbean.

Some of these routes were deleted from the Agreement as the territories concerned proceeded to independence. Among those that remained, the air service relationship between the USA and British territories in the Caribbean proved to be the most controversial. A high proportion of the traffic on charter and scheduled services consisted of US tourists, flying with US airlines who expected to receive permits from the UK authorities as freely as they did their own government. By and large, their requests could be met, since the tourists they brought to the islands made a welcome contribution to the economy, but the government of the Cayman Islands was determined to secure for its own airline a 'fair and equal opportunity' to compete for the business. The UK authorities were expected to stand up for Cayman Airways against its mighty competitors, and to be fair the US authorities also came to recognise that they and their airlines needed to respect the legitimate ambitions of a business whose survival was regarded by the government of the Cayman Islands as crucial to the national interest (Part III, Doc 22).

This had already been an issue when Bermuda 2 was being negotiated, giving rise to the 1977 statements of interpretation (Part III, Doc 4). Subject to being satisfied that the airlines designated by the United Kingdom for service between the United States and British territories in the Caribbean were substantially owned and effectively controlled by UK

nationals (and not for example by US nationals or by third country airlines), the United States recognised then that if the United Kingdom or its dependencies considered that proposals from US airlines for multiple designation on such routes were excessive, their views were relevant to the consideration to be given by the Civil Aeronautics Board to such proposals, and to any review of the CAB's proposals by the President.

Scocozza's letter of 9 November 1982 (see above and Part III, Doc 22/1), promising a voluntary moratorium on the designation of additional carriers to provide services between Miami and the Cayman Islands was consistent with these undertakings. By the same letter Scocozza undertook 'that the United States would seriously and expeditiously consider any request from Cayman Airways for new authority to serve any other United States Cayman route on which a United States airline commences services' (Part III, Doc 22, Letter 1). On 17 October 1986, when it was proposed to lift the moratorium which had meanwhile been extended to 30 November 1986, Shane (US State Department) wrote to Maynard (UK Embassy, Washington) (Part III, Doc 22/2) offering in exchange several sweeteners for the benefit of Cayman Airways, which had no doubt been under discussion as a suitable quid pro quo, namely:

- Rights to serve five points (rather than two) in the United States on the relevant UK Routes, including Miami and Houston, and to change any of the other three selections on 60 days' notice;
- The retention as intermediate points on these routes of several islands which had become independent from the UK since 1977, and were therefore no longer 'points in UK territory';
- Freedom for Cayman Airways to operate planeload charter service between US and British points without prior approval.

Maynard replied on 10 November (Part III, Doc 22/3) accepting Shane's offer, but making it clear that the UK's willingness to lift the moratorium on additional designations was not to be interpreted as meaning that the UK would also forego its rights to challenge excessive capacity under Article 11 of the Agreement (Annex 2 did not apply to these services), or inappropriate fares under Article 12, particularly during the transitional period before Cayman Airways could take advantage of the new opportunities. Maynard's letter includes the following plea:

> The Cayman Islands Government regards its national airline's survival as crucial to national interest: the airline's demise would have serious political and economic consequences, which could in fact destabilise the Cayman Islands. Accordingly the Cayman Islands Government expects that United States airlines serving the Cayman Islands will exercise self-restraint concerning capacity and fares.

When Shane replied on 5 December, i.e. after the moratorium had been lifted, he agreed (Part III, Doc 22/4) that his proposals did not affect the rights of the UK under Article 11 (or by implication Article 12), but he did note that with Cayman Airways receiving substantially increased route authority to assist it 'to adapt its operations to the changing competitive environment … we would not expect to be faced with a dispute regarding capacity … or a restrictive interpretation of Article 11 as a substitute for the 23 July 1977 Boyd-Shovelton letters'. His letter concluded with the expectation of 'expeditious United Kingdom approval of new US carrier services to the Cayman Islands' adding that 'we, for our part, would plan to give similar treatment of any new service applications from Cayman Airways during this period'.

It is not clear how far these expectations were fulfilled, but four years later UK and US officials resorted to a much more prescriptive arrangement, set out in paragraphs 4–8 of the summary of negotiations dated 27 July 1990 (Part III, Doc 24). Both Cayman Airways and US airlines in aggregate were limited to a maximum of four round trips a day between Miami/Fort Lauderdale and Grand Cayman. On other routes US airlines in aggregate could operate the same frequencies as Cayman Airways. Only on US gateways not served by Cayman Airways was there no capacity limitation.

The further correspondence at Document 23 builds on these foundations, exchanging increased US airline access to Bermuda and the Cayman Islands for equivalent UK airline access 'on the basis of comity and reciprocity', pending formal Treaty amendments which seem never to have been made. It would appear that there was not much trust in these assurances, which perhaps explains why the 1990 provisions were so narrowly prescriptive, and why they were superseded by similar arrangements set out in a further exchange of letters dated 7 April 1994, which was rolled over annually up to at least 31 March 2001.

Opening the Door to Competition

In an increasingly liberal policy environment, the arrangements agreed for Cayman Airways were exceptional. Elsewhere, by the end of the 1980s the era of sheltered competition was drawing to a close. Sharpened up since 1981 under strong management by Lord King and Sir Colin Marshall, the shares in British Airways were nine times over-subscribed when the company went forward into privatisation in February 1987. Although British Caledonian fell by the wayside in December 1987, and was absorbed into British Airways, competition on the North Atlantic was strengthened as Virgin Atlantic became firmly established after 1984.

Since October 1983, when Nicholas Ridley became Secretary of State for Transport under Margaret Thatcher's second administration, the creation of a liberal aviation market within the European Union had been the principal focus of the UK's international aviation policy, and by the end of 1989 agreement had been reached in the Transport Council of the European Union on a timetable leading to the establishment of a single European aviation market with effect from 1 January 1993. With deregulated markets established or in prospect on both sides of the Atlantic, and the United States developing its Open Skies policy from 1992, there would soon be increasing pressure for services between the whole of Europe and the USA to be opened up to more competition. However, it would take some time after 1993 for the EU to develop its external policy to the point where it could challenge the authority of the Member States to negotiate their own air service agreements (see Chap. 6). Meanwhile there was no shortage of issues to be resolved under such agreements—and not least under Bermuda 2.

Notes

1. IATA was established in 1946 as a forum for international airlines to discuss matters of common interest, including tariffs. Its traffic conferences, which agree the rates and conditions to be set on any given route, are referred to in Article 12 of Bermuda 2 (Tariffs), as was equally the case under Bermuda 1, though the agreements reached are subject to the approval of governments.
2. Zones of flexibility followed a precedent set by the Civil Aeronautics Board (CAB Press Release of 7 July 1975).

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CHAPTER 4

Strain and Stress

The structure of the air transport industry had begun to change as a consequence of deregulation in the United States, from 1977 onwards, and a more gradual process of liberalisation in the United Kingdom under Margaret Thatcher's Conservative governments after 1979. Ten years later, as Bermuda 2 entered its second decade, there was as yet no reason to suppose that the changes required to meet the needs of the industry in a more liberal environment would in the end prove to be more than the bilateral system could accommodate. As we shall see in Chap. 5, proposals for more sweeping liberalisation, or indeed a new agreement, were launched at the political level as early as 1990, and explored in some detail, but for some years such discussions had to be set aside in order to deal with a succession of more urgent crises, all of which were resolved, but led to an atmosphere of increasing strain and stress within the Treaty relationship.

The Heathrow User Charges Dispute

One of the longest running disputes concerned the level of airport user charges on both sides of the Atlantic, but particularly at Heathrow.[1] Although the dispute came to a head in 1987, following the privatisation of the British Airports Authority as BAA plc, it had a long history dating back to before the negotiation of Bermuda 2. Article 10 of Bermuda 2 (User Charges) was longer and more detailed than most such articles in air service agreements precisely because Pan Am and TWA already had concerns about

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9_4

Table 4.1 The Heathrow user charges dispute

Negotiations	*Documentation*
23 July 1977	Bermuda 2 Treaty includes unusually detailed User Charges provisions in Article 10 (Part II)
1979	Airlines, including Pan Am/TWA, take BAA to court USG takes up complaints with HMG
22 Feb 1983	Civil case closed
6 April 1983	UK/US Memorandum of Understanding
1 July 1987	BAA privatised
16 December 1988	US requests arbitration
30 November 1992	Arbitration concludes with decision letter
1 November 1993	Last of tribunal's supplementary rulings
4 February 1994	Settlement agreement initialled
11 March 1994	Exchange of Notes, Cm 2711, (text at Part III, doc 26); UK settles out of court for $29.5 m

Heathrow's user charges, and had drawn these to the attention of the US government. The text imported wording from the Chicago Convention about non-discrimination, and laid down in some detail the basis on which 'just and reasonable' user charges might be assessed on 'sound economic principles,' requiring the Contracting Parties to use their best efforts to ensure that the charging principles were duly observed by the airport and that when changes were proposed (in practice, annually) the airport would engage in consultations, providing the airlines with 'such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles set out in this Article' (Table 4.1).

In 1979 the annual review of charges by the British Airports Authority (BAA) raised the fees to be paid by Pan Am and TWA from 1 April 1980 by some 60–70 per cent. This provoked Pan Am and TWA, with other Heathrow airlines, to take the airport to court in the UK, whilst simultaneously persuading the US government to raise the issue in bilateral negotiations. On 22 February 1983 the civil case was closed when the airport agreed to make its charges reflect its costs more closely, and to implement any future step changes in a more gradual manner; and on 6 April the two governments signed a Memorandum of Understanding (MoU) which conceded further aspects of the US case, hoping that these steps would resolve the dispute.

The dispute rumbled on however, with the airlines fighting their corner vigorously in the annual consultations with the airport, and persuading the US government to keep the issue on the bilateral agenda. Underlying the dispute was an approach to the assessment of costs by BAA which was radically different to that followed by US airports; the latter practised historic cost accounting, whilst BAA favoured current cost accounting, and sought to use differential levels of charge to encourage airlines to reduce peak period congestion.

The matter came to a head once again after 1985 when the UK government published the White Paper on Airports Policy[2] which announced its intention to privatise the British Airports Authority. This move was seen as likely to increase the pressure to generate profits whilst reducing the influence of the UK government over the process for setting charges. Privatisation was close to the heart of John Moore, who had been promoted by Margaret Thatcher to the post of Secretary of State for Transport in May 1986 after three years as Financial Secretary to the Treasury with overall responsibility for the government's flagship privatisation programme. In April 1987 he persuaded US Secretary for Transportation Elizabeth Dole not to take the dispute to arbitration. A pending arbitration would have stymied the privatisation of BAA, which was an important project for Mrs Thatcher's government, and one with which the US government had some sympathy on ideological grounds. Pan Am and TWA thought that this situation was the ideal opportunity to press their case, but according to US sources[3] Moore and Dole arrived at an understanding that the fees would be fixed to the satisfaction of the US side following a study to be carried out while BAA was being prepared for privatisation. This was successfully achieved on 1 July 1987. Moore was further promoted in the summer reshuffle, and Dole left Transportation at the end of September. As a result neither of them was still in post when the study was published, concluding that no change in the fees appeared to be justified.

From that point on the US moved steadily down the path towards formal arbitration. In June 1988 US Transportation Secretary James Burnley determined under section 11 of the US International Aviation Facilities Act that the charges imposed by BAA on US airlines unreasonably exceeded comparable charges in the United States, and were discriminatory (Witten 1995, 182). In a letter to Secretary of State George Shultz he indicated his intention to impose an offsetting fee on British airlines of $1550 for each round-trip transatlantic flight if further bilateral negotiations did not result

in a satisfactory response to US concerns. The consultations, in July, were inconclusive, and on 16 December 1988 the United States formally requested arbitration under Article 17 of Bermuda 2.

Almost all air service agreements make provision for disputes to be resolved by arbitration, but it is rarely used, perhaps because in most cases of serious disagreement, the problem lies in an imbalance which can only be addressed by terminating the whole agreement and starting again. In this case a new text was unlikely to be of any help—Article 10 itself and the MoU of 1983 had done all they could—so arbitration was the only way forward. In January 1989 each party appointed one arbitrator, and these two appointed a third arbitrator to chair the panel, which met under the auspices of the International Court of Justice at The Hague. Following extensive discovery of documents, the filing of four major pleadings, and three rounds of detailed written statements by expert witnesses, the tribunal presided over a difficult and contentious oral hearing from 2 July to 2 August 1991. It was 30 November 1992 before they issued their 369-page decision, and 1 November 1993 before the last of the supplementary rulings was received. By this time, Pan Am and TWA, whose dispute with BAA had instigated the arbitration, had both gone into administration, but the arbitration had continued, having been taken up by the US government, who were no less interested on behalf of their new Heathrow airlines, United and American.

The First Question before the tribunal concerned the legal status of the 1983 Memorandum of Understanding on airport user charges (see above), on which the US airlines had relied. The British government had maintained before the tribunal that the MoU merely interpreted Bermuda 2, and did not create new legal obligations. On this point the tribunal agreed with the UK submission, noting that although the MOU represented political commitments of a significant nature, it had not been published, nor had it been registered with the United Nations or with ICAO. This ruling cast doubt on the reliability of all MOUs between the UK and the US, leading the US Defense Department, for example, to review the terms of its many MOUs with the UK Department of Defence, devising new ways to ensure that they could be legally enforced (McNeil 1994). One very direct consequence was that no further memoranda of understanding were created under Bermuda 2, and the 1994 agreement which resolved the dispute took the more reliable ‘hard law’ form of an Exchange of Notes, duly published as a Command Paper (HMSO 1994).

On the substance of the US claims, the tribunal concluded that the UK government had not used its 'best efforts' to secure just and reasonable charges for US airlines, either in respect of the structure of charges or their level, nor had its 'best efforts' been sufficient to cause BAA to provide the information US airlines needed to assess the reasonableness of the charges imposed. Moreover, the sharply differential peak/off-peak charging system was in practice discriminating against US airlines (Witten 1995, 184–188). On these grounds the UK was in breach of its obligations under the Treaty.

The final stage of the arbitration process would have been for the tribunal to determine what remedy or relief to award, but the two governments preferred to reach a settlement out of court. Bidding opened at $80 million on the US side of the table against £10 million on the UK side. In October 1993, seeing all too clearly which way the wind was blowing, the UK government had belatedly requested the opening of a counter-arbitration on US airport charges, but this was politely withdrawn in the course of eleven rounds of negotiation between mid-September 1993 and 4 February 1994 when the settlement agreement was finally initialled. The terms of the settlement were set out in a formal Exchange of Notes[4] dated 11 March 1994. This amended the User Charges Article of the Agreement (see text of Article 10 in Part II), recorded a series of specific concessions and ongoing obligations relating to the structure and level of Heathrow user charges, and noted certain assurances given by the US government in relation to US airport charges. The superficial reciprocity of the document saved a little face, and the cost was small in the context of a privatisation which had realised £1.2 billion; the British government paid a lump sum of $29.5 million, most of which was promptly passed on by the US Department for Transportation to Pan Am and TWA. However, there could be no disguising the formal defeat which had been handed out to the British government and the now privatised BAA at Heathrow.

Boston and Manchester

Meanwhile two other important negotiations of a more traditional nature had taken place (Table 4.2). The first of these, in the winter and spring of 1989/90, concerned the opening up of Manchester (and other UK regional points) to services from additional US gateways in exchange for access for a second UK airline to Boston (Virgin Atlantic), and increased services on a reciprocal basis between the USA and the Cayman Islands

Table 4.2 Boston and Manchester

Negotiations	*Outcome and documentation*
28–29 November, 1989 20–21 December, 1989 11 January 1990	
27 July 1990	US and UK airlines permitted to serve any three US gateways from UK regional points; second UK designation on London-Boston (Record at Part III, Doc 24)
11 March 1991	Draft Exchange of Notes attached to MoC (Part III, Doc 25) includes confirmation of second UK designation on London-Boston
5 June, 1995	Unrestricted provision for services between UK regional points and any point or points in the United States. Draft Exchange of Notes attached to MoC (Part III, Doc 27) creates UK and US Routes 1A (Part II, Annex 1 of Treaty).

(Part III, Doc 24). Bermuda 2 had originally provided for Boston to be served by only one US airline and one UK airline, but it had been amended in 1980 to restore the service provided under Bermuda 1 by a second US airline (see Chap. 2 and Part III, Doc 11). Bermuda 2 had named Manchester as a point available to the UK for trans-Atlantic air services, but made no corresponding provision for reciprocal services by a US airline.[5] BA were content to serve their Manchester passengers from London Heathrow, but from 1981 to 1993 Manchester airport had an exceptionally energetic chief executive in Gil Thompson, who persuaded American Airlines to operate Manchester's first longhaul service as early as 1986, when they were granted a temporary permit to operate to and from Chicago. As part of the 1990 negotiation mentioned above, US Route 1 (Part II, Annex 1 to the Agreement) was formally amended to accommodate such services, providing for up to three services from any US point to any UK point other than London.

In June 1995, reflecting the commitment made by Brian Mawhinney (UK Secretary of State) and Federico Pena (US Secretary for Transportation) to the progressive liberalisation of the Agreement, a new US route 1A (and a corresponding UK Route 1A) was added to the Route Schedule, providing for unrestricted services from any US point to any point in the United Kingdom other than London Heathrow or Gatwick (Part III, Doc 27). By the summer of 2000 daily services were being provided to and from Manchester by BA (to New York), by Virgin Atlantic (to Orlando, 6 days a week), and by four US airlines providing services from New York,

Newark, Chicago, Atlanta and Philadelphia.[6] By 2015 there were nine US destinations served from Manchester.

The Heathrow Succession Negotiations

The Heathrow Succession affair was probably (after the Laker affair, Chap. 3) the sharpest confrontation to test the resilience of Anglo-American relations under Bermuda 2. There was extensive news coverage at the time, including a very full account by John Newhouse, which was published in the *New Yorker* in August 1991 (Newhouse 1991). More recently Alan Dobson has looked at this episode again, with a particular focus on why the outcome was so favourable to the UK (Dobson 2014). As will be seen, in exchange for permitting American Airlines and United Airlines to take the place of Pan Am and TWA at Heathrow, the British side came away with an astonishing list of concessions. This was something of a surprise to some, given the relative size and strength of the two negotiating partners and their civil aviation industries, but there were other factors at play, as Dobson acknowledges in his article, and these played into the hands of the British negotiators, tipping the balance of advantage decisively in their favour, even if Lord King and Sir Colin Marshall (BA's Chairman and Chief Executive) maintained throughout that even more could and should have been demanded (Dobson 2014, 546).

One of the consequences of the deregulation of the US air transport industry, and particularly the opening up of international air service opportunities to companies other than Pan Am and TWA, was the gradual weakening of these two airlines as the big domestic carriers such as American, United, Delta and Continental added international spokes to their powerful domestic hubs. This process probably generated new traffic, but it also drew traffic away from Pan Am and TWA. Lacking their own domestic feeder services (particularly Pan Am) they were heavily dependent on other airlines to deliver passengers to them at their international gateways.

The deteriorating situation of Pan Am and TWA was already beginning to cause concern when US Secretary for Transportation Samuel Skinner had his first meeting with his UK counterpart Cecil Parkinson, in January 1990, in the context of the negotiations which led to the liberalisation of services to UK regional airports (see above). Taking the opportunity to warn Parkinson in good time that Pan Am and TWA might be forced to transfer their London services with their valuable landing slots at Heathrow to American and United, Skinner expressed the hope that the UK would

give its consent quickly in the interest of saving two historic airlines from extinction. According to Newhouse's well-informed contemporary account (Newhouse 1991, 53), Cecil Parkinson's immediate response was to say: 'We will not take unfair advantage of that.' Shane, who was present in the room, also has a vivid recollection of the visible consternation in the face of David Moss, the then leader of the UK negotiating team, who was sitting beside Parkinson on the sofa.[7] Moss knew that replacing Pan Am and TWA by American and United with their strong domestic networks would dramatically alter the competitive balance between US and UK airlines, and could not therefore be conceded without demanding compensation, preferably in the form of correspondingly enhanced access to the well protected US domestic market, from which American and United drew the strength which was undermining Pan Am and TWA.

Later in the year, when push came to shove, the need for treaty amendment would present the UK with a golden opportunity to redress what they had long perceived as a fundamental imbalance in the agreement, but by then Malcolm Rifkind had taken over as Secretary of State for Transport, and Parkinson's affable consent to the proposition was not seen as amounting to a free pass. Through the early months of 1990, the economic recession already affecting the airline industry increased the pressure on Pan Am and TWA, and in the autumn the war against Iraq, precipitated by Saddam Hussein's invasion of Kuwait in August 1990, was the last straw. Pan Am and TWA went into administration needing to sell valuable assets in order to survive, and in October United Airlines (UA) and American Airlines (AA) made offers to buy the London routes from Pan Am and TWA respectively.

However, there was a snag to be overcome. Since 1978, in an attempt to limit congestion at Heathrow, Traffic Distribution Rules had been introduced which prevented the granting of landing rights to any airline not already operating there. These rules had been reflected in Annex 1 Section 7 of Bermuda 2, added to the agreement by the 1980 Exchange of Notes (Part III, Doc 11), which stated that no airline other than a corporate successor had the right to take the place of Pan Am and TWA at Heathrow. United and American, who would be buying the routes, but not assuming the old corporate names (or the pension liabilities attached to them) did not qualify as corporate successors. There was therefore an urgent need for negotiations to clear the way for United and American to serve Heathrow, rather than being obliged to continue using other London airports such as Gatwick, which is further from the city, and lacks Heathrow's worldwide connections (Table 4.3).

Table 4.3 The Heathrow succession negotiations

Negotiations	*Outcome and documentation*
27–29 November, 1990	
20–21 December, 1990	
14–15 January, 1991	
29–30 January, 1991	
28 February–1 March, 1991	
7–11 March, 1991	MoC of 11 March 1991 (Part III, Doc 25) Access to Heathrow for 4 airlines (2 UK, 2 US); many additional rights for UK airlines; provision for code-sharing

Despite the goodwill expressed by Cecil Parkinson, it was entirely reasonable, from a British perspective, to exploit to the full this opportunity to rebalance the agreement. After all, United and American were the very embodiment of the advantage enjoyed by the new wave of US airlines as a result of their protected domestic networks. Moreover, the timing was politically opportune from the British point of view, since Britain was standing close behind the USA in the Gulf War, which reached its climax in Operation Desert Storm, the invasion of Iraq, between 17 January and 28 February 1991. The US team had broken off the aviation talks in London on 30 January. This was probably a tactical mistake, since the British negotiators could afford to sit on their hands, whereas the US government needed to be seen to have done all they could to avoid being held responsible for the demise of two famous US airlines. Moreover, the Gulf war, combined with the financial crisis facing Pan Am in March (see below), meant that this hiatus in the negotiations almost certainly worked in favour of the UK. When Newhouse asked his contact in the US government whether British support for the United States in the Gulf War had been a factor, he replied: 'They haven't had to mention the Gulf crisis; they hold the high cards, but the war is the icing on the cake.' (Newhouse 1991, 58)

By the time talks were resumed in Washington on 28 February, Pan Am was under intense pressure to complete the sale of its Heathrow slots in order to meet obligations falling due to its creditors on 8 March (Newhouse 1991, 52). From the British point of view, the downside of such urgency was the shortage of time to address directly the fundamental imbalance arising from cabotage protection combined with US restrictions on inward investment in US airlines (see Chap. 5). Even if these issues could have been satisfactorily addressed, any relaxation of US controls would have

required legislation, which the US executive was not necessarily in a position to deliver, and certainly not in a hurry.

As a result, the British side had to fall back on a breathtakingly extensive list of other demands, most of which would be conceded in an intensive series of six rounds of negotiation between 27 November 1990 and 11 March 1991. The outcome, which was set out in a draft Exchange of Notes attached to the Memorandum of Consultations signed on the day the negotiations were concluded (Part III, Doc 25), may be summarised as follows. The point immediately at issue, namely the right of the US government to name any two other US airlines to succeed Pan Am and TWA at Heathrow, was resolved by amending Section 7 of Annex I to the Agreement (London Airports)[8] to provide for any two US airlines and any two UK airlines to operate between Heathrow and the USA. This change, which allowed Virgin Atlantic to transfer its services from Gatwick, as well as providing for American and United to succeed Pan Am and TWA at Heathrow, entailed the abandonment of the Heathrow Traffic Distribution Rules. In addition provision was made for:

- some degree of capacity limitation for US airlines at Heathrow up to March 1994;
- code-sharing on domestic services behind an international gateway (Annex 1, Section 5, paragraphs 10–13); this provision, which enhanced access to cities not directly served by international flights, was reciprocal, but of much more value to UK airlines in the USA than to US airlines in the UK;
- a further increase in the number of gateway points in the USA that might be served from London by two UK airlines, or in up to four cases by three UK airlines, overriding the limits on multiple designation in Article 3(2) of the Treaty (addition of para 10 to Annex 1, Section 6);
- for the UK, any five UK gateway points in the USA (rather than the more inflexible list of seven named points) to be available via Canada, with the right to carry traffic between Canada and the United States (Annex 1, UK Route 2);
- for the UK, services between the UK and Mexico City to be allowed to operate via any five UK gateway points in the USA (in place of five named points), with the right to carry traffic on such services between Mexico and the United States (Annex 1, UK Route 3);

- For the UK, substantially enhanced rights to operate between the UK and points in South America, picking up and setting down traffic to and from South America on such services at San Juan (Puerto Rico), Atlanta and any three other UK gateway points in the USA (Annex 1, UK Route 4);
- For the UK, a new route from points in the UK, via three UK gateways in the USA to New Zealand and five countries in Asia (Annex 1, UK Route 5A);
- For the UK a new route to Australia, but only via Seattle (Annex 1, UK Route 5B);
- For the UK, the right to serve UK gateway points in the USA via points in six named European states, with traffic rights between Europe and the USA, on up to 63 roundtrips per week (Intermediate Points in Europe on UK Route 1);
- Provisions to facilitate UK airline investment in foreign airlines and joint ventures, particularly within Europe (Part III, Doc 25, Section C).

Even if many of the new traffic rights were unlikely to be used, particularly those for UK airlines to operate services between the United States, the provisions for more double and even triple designations, for code-sharing and for airline investments and joint ventures were an imaginative attempt to rebalance the Agreement by enabling UK airlines to take advantage of the opportunities which were emerging to move the industry away from its national roots towards a more global future structure. The provision for UK airlines to carry traffic direct from points in Europe to points in the USA without stopping in London, was an extraordinary concession, amounting as it did to an almost unprecedented formal recognition of seventh freedom traffic rights (see glossary). However, like many of the new fifth freedom rights to carry traffic to points beyond the USA, the use of such rights would depend on obtaining corresponding permissions from the other European countries concerned. In 1991 the regionalisation of traffic rights within a European Aviation Area (see below) was by no means assured. Only with the negotiation of the EU-US Air Transport Agreement which replaced Bermuda 2 from 2008 (Chap. 6) would such services finally become possible.

Given such a cornucopia of benefits, why were there such complaints from British Airways? They had been closely consulted throughout, and many of the additional rights were their suggestions, but nearly all the immediate benefits went to others—to American and United who would be

stronger competitors than Pan am and TWA, and to Virgin Atlantic which would also be a much stronger competitor at Heathrow than at Gatwick. On balance the negotiations were a major achievement for the UK, but for British Airways, already smarting from the withdrawal of the London Area Traffic Distribution Rules which protected them from all newcomers at Heathrow, the only immediate mitigation of the loss they expected from fiercer competition at Heathrow was the modest degree of capacity limitation applied to American and United, and even that expired after three years.

Towards a Global Aviation Industry

The outcome of the Heathrow Succession negotiations may be seen as a first, tentative recognition of the direction in which the international air transport industry was moving. The era of national airlines operating within a network of exclusively bilateral treaty relationships was drawing to a close. In its place the industry was beginning to move into a new era characterised by code-sharing and joint ventures, blurring the sharp lines which hitherto had separated one national airline from another. Beyond code-sharing beckoned the prospect of international airline alliances, each alliance offering worldwide services via the interlinked hubs of at least one major US airline, one major European airline and one major Asian airline. Membership of the alliances has varied and may well continue to do so, but at the time of writing (2017) the main groupings were as follows:

- Star Alliance, founded 1997, built around United Airlines, Lufthansa, Scandinavian Airlines, ANA (All Nippon Airlines), Singapore Airlines, Thai Airways and others;
- One World Alliance, founded 1999, built around American Airlines, British Airways, Iberia, Cathay Pacific, Japan Airlines, Qantas and others;
- Skyteam, founded 2000, built around Delta, Air France/KLM, Aeroflot, China Airlines, Korean Air and others. Virgin Atlantic joined Skyteam in 2012 (see Chap. 5).

A European Aviation Area

The second major change which Bermuda 2 would need to accommodate was the progressive development of a European Aviation Area. The first significant steps towards the liberalisation of air services within the EU had

been taken in 1987, and by the beginning of 1991 EU states were already committed in principle to the implementation of a single internal aviation market, which would in fact be established from January 1993, albeit with some derogations up to 1997 (Kassim and Stevens 2010, 81–129). The Commission had already signalled its ambition to move beyond the internal market to a common external aviation policy under which all EU airlines would enjoy the same rights to operate services to third countries under EU-wide agreements. In 1991 it was not yet possible to say with any certainty what shape such a policy would take, or when it would be agreed, but it was not so difficult to foresee, on the basis of US domestic experience, that within a single market competition would result in a new pattern of services, and probably a considerable reduction in the number of airlines seeking to operate a full range of services.

The (relatively) newly privatised British Airways was weathering the recession better than most of its competitors and was looking to reinforce its worldwide competitive position by buying controlling stakes in airlines both in the USA and in Europe. The agreement reached in March 1991 was intended to ensure that there would be no obstacle under Bermuda 2 to reaping the benefit of such code-sharing, alliances, joint ventures or purchases as BA or Virgin Atlantic might need to make, whether in Europe or in the USA, in pursuit of such a strategy.

The establishment of a European Aviation Area had three major effects on the structure of the industry:

- With the removal of barriers to foreign ownership, the major European flag-carriers took steps to consolidate their position nationally by acquiring smaller competitors. Thus BA bought British Caledonian in 1987 and Dan Air in 1992. Similarly Air France bought UTA in 1990, and with it acquired full control of Air Inter, the major French domestic airline.
- At the same time, where possible, they bought smaller airlines in other European countries. KLM led the way with its 1987 purchase of a 14.9% stake in Air UK, raised to 45% in 1995 and full ownership in 1997. In 1987 SAS took a stake in British Midland, selling 20% to Lufthansa in 1999, who eventually (in 2009) acquired the whole airline. In 1993 BA bought a 49.9% stake in TAT, taking full control in 1996, and merging it with Air Liberté, another small French airline. In 1992 BA also established Deutsche BA following the acquisition of

a 49.9% stake in Delta Air, a company formed after the Berlin Wall came down to operate the Berlin air services formerly reserved to the Allied powers and their airlines—BA, Pan Am and Air France (Staniland 2008, 111–113).

- However, the most dramatic consequence of the single European market in aviation turned out to be the rapid growth of low-fare airlines, notably Ryanair and easyJet, concentrating on point-to-point services, using their fleets more intensively than the long established major airlines, employing staff at lower rates of pay, and shunning the high charges of the more prestigious, expensive airports. In the year ending 30 June 2014 such airlines were carrying more than 220 million passengers per annum, representing over 43% of intra-European scheduled service air travel.[9]

With the passage of time, domestic consolidation has remained an important feature. With the exception of KLM's purchase of Air UK, which became KLM uk in 1998, before being absorbed into KLM Cityhopper in 2003, all attempts by national airlines to establish a presence in another European country by buying into its domestic aviation market have failed. Even KLM Cityhopper focusses mainly on feeding KLM's long-haul services at Schiphol (Amsterdam) which is also Cityhopper's hub. BA pulled out of TAT in 2001, and sold Deutsche BA to Air Berlin in 2006. Swissair, which had invested heavily in this strategy, went bankrupt largely as a result of the consequent losses (HC532, para 29). In the face of the challenge from the low-fare airlines, there has been a progressive drawing together of European national airlines into alliances which have become closer and closer to being mergers. Lufthansa is closely allied with SAS, with Austrian, and with what was left of Swissair; merger talks between BA and KLM failed in 2000, but KLM merged with Air France in 2004, and the joint airline has close links with Alitalia; BA, which had taken a 9% stake in Iberia in 1998, merged the Spanish airline into its International Airlines Group in 2011; and each of these groups is linked to one or more US partners in one of the three big multinational alliances mentioned above. Over a period of twenty years (since 1993) the European industry has been transformed from a set of national near-monopolies into three major groups of airlines competing with one another for long-haul traffic worldwide, and competing in Europe against an array of low fare airlines, of which Ryanair with over 80 million passengers per annum, and easyJet with more than 60 million remain the most powerful.

Further Bilateral Issues

The 1991 resolution of the Heathrow Succession negotiations had entailed so many concessions in classic air service terms, in exchange for what was after all no more than the replacement of Pan Am and TWA by American and United at Heathrow, that there was almost nothing left in the US locker to resolve any further disputes that might arise under the agreement, if it was accepted that no significant concessions could be made on cabotage or inward investment in US airlines on account of the opposition to any such concessions in Congress. Up to this point, bilateralism had risen to the challenge of every crisis presented, but the relationship had been strained and neither side was happy. Well as the treaty had performed so far, it was becoming increasingly difficult to see how it could accommodate further change without fundamental restructuring.

Indeed, more than once the negotiations were formally broken off, only to be resumed a few months later when the exigencies of political pressure or airline needs allowed or even required small extensions to be made to the scope of the agreement. Thus in 1995, a mini-deal was put together (Part III, Doc 27), which included the following elements:

- Addition of US Route 1A and UK Route 1A, further liberalising services to UK regional points (see Table 4.2)
- Amendment of paragraphs 10/11 of Section 5 of Annex 1 to the Agreement (see comparative texts in Part II) concerning code-sharing and joint ventures, with a new paragraph 13 setting a 28-day period for acting on such applications
- Addition of paragraph 12 to Annex 1 Section 5, granting some limited access to Fly America traffic (see Part II)
- Provision for second US airline to serve Chicago-London, with temporary capacity limitations
- Additional gateway for the UK (Philadelphia), with temporary capacity limitations

In 1997, the agreement was amended to remove the services to Hong Kong, which in that year ceased to be a British dependency.

Despite the gains made in 1991 and consolidated in 1995, and the renewed commitment of Ministers to the process of liberalisation (Part III, Doc 27, Attachment 3), British airlines were not much nearer to accessing the whole of the US-originating market for air travel on equal

terms with their US competitors, and US airlines were not much nearer to the full, open skies liberalisation of the UK/US component of trans-Atlantic air services to which they and their government aspired.

The Pittsburgh Affair

The difficulty involved in the structuring of such mini-deals was demonstrated by the row over Pittsburgh. When BA decided to terminate its service to Pittsburgh at the end of the 1999 summer season, Virgin Atlantic chose to use the vacated gateway opportunity to serve Las Vegas, but the citizens of Pittsburgh objected to the loss of their only direct London service with even more passion than had been provoked in Boston between 1977 and 1980 when Bermuda 2 reduced that city's London services from three airlines (two US, one UK) to two (one US, one UK). In Pittsburgh there was, understandably, strong local pressure to approve the replacement service proposed by US Airways, the dominant domestic operator, but since the US had already used up all its gateway entitlements under the agreement, any such service would either have to wait for a vacancy to arise elsewhere, or require British consent. When this was not immediately forthcoming Ohio Senators Shuster and Oberstar launched a Bill in the Senate, which, if enacted, would have imposed penalties on UK airlines if the Pittsburgh service was not approved within 180 days. They even called for the termination of Bermuda 2 if the British government failed to conclude an 'open skies' agreement by the end of 2000.

This was of course intended to turn up the heat under US as well as British negotiators. At the time British Midland Airways was keen to enter the London to New York market. An ingenious proposal was therefore put forward to the effect that both sides should be allowed to designate three airlines for service between New York and London Heathrow. The UK already had the option to designate a third airline to serve New York (though not from Heathrow) as a result of the Heathrow Succession agreement. If the US used their proposed new right to designate Continental, which was already serving London Gatwick from Newark, this would release the gateway opportunity US Airways needed at Pittsburgh. This might appear superficially even-handed. However, the most likely beneficiary of the putative new British rights at New York would be British Midland, which had recently sold a 20% stake to Lufthansa, and joined the powerful Star Alliance. British Midland held a portfolio of Heathrow slots second only to BA, so it was exceptionally well

placed to launch two daily services immediately with the expectation of fairly rapid growth to four daily services, fed by access to Star alliance passengers. As the price for what was likely to remain one daily service from Pittsburgh and a more convenient New York airport for Continental, this exchange did not look at all well balanced from the US side of the negotiating table. Both sides suggested additions to the package that would make it more acceptable to their airlines whilst simultaneously advancing their conflicting longer term policy objectives, but these only tended to make the deal ever more complex and unacceptable.

In the end, after four rounds of talks between mid-October and the end of January, an impasse was reached which led to talks between British Deputy Prime Minister John Prescott and US Secretary of Transportation Rodney Slater. These resulted—just in time for the summer season of 2000—in a much more modest agreement to add one more gateway opportunity on each side (Pittsburgh for the USA) or one additional double-tracking opportunity. The Pittsburgh service survived until 2004, when US Airways withdrew, and was not replaced.

The additional double-tracking opportunity was not sufficient to allow British Midland to serve New York from Heathrow, which remained closed to all but two US and two UK airlines under Annex 1 Section 7. Although bmi (as they had become) operated a number of long-haul services after 2001 from both Heathrow and Manchester (including Manchester to Washington Dulles and Manchester to Chicago O'Hare), they never got permission to operate from Heathrow to the United States. Nor did they have the resources to succeed in breaking out of their essentially European base. When this was attacked by low-cost competition from easyJet and Ryanair, the airline became unprofitable. In 2002 Lufthansa raised their stake to 30%, and in 2009 Sir Michael Bishop exercised his right to oblige Lufthansa to buy his remaining 50% share. Faced with growing losses, Lufthansa put the airline up for sale in September 2011, and in April 2012 it was bought and closed down by IAG, the airline group which includes British Airways.

Even if the Pittsburgh affair now looks like something of a storm in a tea-cup, it illustrates just how difficult it had become to make even quite small and manifestly desirable changes under Bermuda 2. Of course Pittsburgh could not be deprived of its London service just because it was no longer in BA's economic interest to provide it. The problem lay in finding a *quid pro quo* which did not take either side away from their medium to longer term policy objectives—in the British case to open up more

effective access to the whole of the US market, and in the US case to gain greater freedom for its trans-Atlantic services, and especially to open up access for all US airlines to serve Heathrow.

In its second decade Bermuda 2 had found the means to resolve two major disputes, even if one of them required resort to external arbitration under the dispute resolution procedures of the agreement, and to deal with a succession of lesser issues. However, as both sides came to believe that their airlines were hampered by the restrictions of the existing agreement, and that they were therefore entitled if not indeed obliged to seize any opportunity that came to hand to redress the balance, the Bermuda 2 relationship began to show increasing signs of strain.

Notes

1. See also Witten (1995).
2. Cmnd 9542, (HMSO, London), 5 June 1985.
3. Interview, June 2010.
4. Cm 2711 (HMSO, London) December 1994.
5. See Part II—Text of Agreement, Annex 1—Route Schedules, Section 1, Route 1 and Section 3, Route 1.
6. Manchester Airport evidence to the Environment, Transport and Regional Affairs Sub-Committee of the House of Commons, April 2000.
7. Interview, 2 June 2010.
8. This and all the other Treaty amendments listed below can be found in the Treaty text at Part II.
9. Press Release, ELFAA (European Low Fares Airlines Association), 4 September 2014.

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CHAPTER 5

Liberalisation, Alliances and Globalisation

As the twentieth century drew towards its close, it was becoming increasingly clear that the air transport industry could not forever defy the logic of globalisation. An airline that was wholly owned and effectively controlled by the nationals of one state, with access only to the traffic rights negotiated by its own government was well placed to exploit bilateral markets, but not so well suited to the much more complex patterns of the global market for air transport that was developing. Within Europe, the combination of privatisation with the tightening application of the EU's rules against state aid, was loosening the dependence of national airlines on their governments, and with it their ability to influence government policy. Deregulation in the USA and liberalisation within Europe had initially opened the door to greater competition, but on both sides of the Atlantic it was not long before competition was followed by further consolidation. Initially these developments were experienced within national markets, but they soon spread across national borders within the single European market. At the global level, where the rules on national ownership and control meant that consolidation into multi-national companies was not an option, similar pressures encouraged the development of the airline alliances which began to take shape after 1997 (see Chap. 4).

On the surface the global reach of air transport makes it a natural candidate for globalisation, but the legal and regulatory barriers to the formation of international airline companies, are formidable. In US law there are three conditions that have to be satisfied: foreign nationals may hold up to 49% of all shares, but no more than 25% of voting shares, and they must exercise 'no semblance of control'. EU law[1] simply requires majority

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9_5

ownership and effective control to be held by Member States and/or nationals of Member States, but that is still enough to prevent the creation of international airline companies. These limits reflect and are reinforced by the terms of bilateral air service agreements which traditionally require the airlines of each party to be 'substantially owned and effectively controlled' by nationals of the member state concerned if they are to be entitled to exercise the rights available under the agreement (see Chap. 1).[2]

These obstacles have driven the airline industry to enter into multinational alliances falling short of outright ownership and control. Such alliances may very well offer substantial benefits to passengers, but at the same time they have the capacity to undermine the competitive market which governments have been concerned to establish. An alliance (or more often a group of airlines within an alliance) therefore requires the consent of competition authorities on both sides of the Atlantic for any activity that might be held to impair competition in a given market. In the case of alliances affecting UK/US air services, clearance is required from the competition authorities of the European Commission as well as those of the UK and the USA.[3] These operate with a great deal of autonomy under UK, European or US law as appropriate, and have the power to impose conditions, which cannot then be changed by bilateral negotiations between governments.[4]

Well as Bermuda 2 had responded so far, the bilateral regime was beginning to look increasingly ill-suited to the task of regulating what was becoming just one segment of a global industry, in which the scope for competition was no longer being determined in bilateral negotiations between governments, but rather in negotiations between multinational groups of alliance partners and the competition authorities overseeing the markets in which they needed to operate. We shall see in this chapter how Bermuda 2 gradually became an obstacle to progress, not so much because it could not be amended to accommodate liberal policies, but because a bilateral treaty was no longer the appropriate instrument to regulate a multinational economic activity in which the national identity of the participating airlines was no longer clear. A House of Commons Report on Air Service Agreements between the United Kingdom and the United States (Session 1999/2000) makes the point very well.

> Bilateral air service negotiations are based … on a basic principle: that certain airlines can be identified as being of a certain nationality, such that Governments can negotiate with one another on their behalf. The merger of airlines of different nationalities undermines that principle, and consequently the basis for bilateral negotiations. (HC532, 93)

The Obstacles to Full Liberalisation

In the early 1990s there was still room for some degree of optimism that the gradual process of bilateral liberalisation on which the two countries had embarked could eventually lead to a genuinely open market. The political commitment of both sides to policies of progressive liberalisation features in the agreed Memorandum of Consultations dated 11 March 1991 (Part III, Doc 25), and in the Ministerial correspondence attached to the Memorandum of 5 June 1995 (Part III, Doc 27, Attachment 3). However, discussion of the practical steps which this would entail would continually run into the thickets of obstruction rooted in geography, IATA rules and government regulation which were summarised in Chap. 1.

Under the Chicago Convention, each contracting party has the right, which is almost universally exercised, to prohibit the exercise of 'cabotage' (i.e. traffic between two points in the same country) by airlines other than its own (Chicago 1944, Article 7). This gives US airlines, with their extensive domestic networks sheltered from international competition, a significant advantage over UK airlines, whose domestic feeder networks are relatively insignificant; a high proportion of passengers using Heathrow access the airport by car or public transport. The only comparable advantage enjoyed by UK airlines is (or was under Bermuda 2) the limited access of US airlines to London Heathrow with its unparalleled range of international feeder services. Passengers arriving at Heathrow on flights from all over the world, but especially from Europe, would be more likely to choose a UK airline for the trans-Atlantic leg of their journey, rather than a US airline, particularly if the choice of a US airline entailed a bus or taxi ride of an hour or more to one of the other London airports. Successive British governments were not prepared to sacrifice that regulatory advantage for UK airlines at Heathrow unless and until they could obtain for them in exchange a truly fair and equal opportunity to access the whole of the US market through the acquisition of a controlling stake in an American airline, or through some lesser form of alliance offering comparable access. As noted in earlier discussions of US policy, the US government, constrained by Congress, has never been in a position to concede such access, even before the sensitivity surrounding any form of enhanced foreign access to US airspace was heightened by the use of hijacked civilian aircraft (none of them foreign as it happens) to attack and destroy the World Trade Centre in the heart of Manhattan on 11 September 2001.

Alternative Ways to Access the US Market

Given that a combination of US law and politics precludes the achievement of full ownership or even a controlling stake in a US airline, the only viable option for a foreign airline seeking enhanced access to the US market is to enter into an alliance with one or more US airlines, collaborating over timetables, tariff offers and capacity in such a way as to maximize the advantages offered by the complementary networks of the two (or more) companies in the USA and in Europe. The first step towards such collaboration is usually a code-sharing arrangement. Pioneered by Allegheny in the US domestic market, code-sharing was first practised on the North Atlantic by KLM and Northwest Airlines from 1989. Giving a flight the code of the partner airline as well as the airline actually operating the service has significant marketing advantages, since the one flight then receives prominence on the display screens of both airlines computer reservation systems, attracting additional customers. In March 1991, the Heathrow succession negotiations (see Chap. 4) had made provision for British and US airlines to enter into such arrangements, not merely to points for which both airlines had operating authority, but also to other non-gateway points in the US (Part II, Annex 1, section 5, Articles 10–12). However, as a safeguard against anti-competitive practices, code-sharing was not permitted on gateway to gateway route segments (the Atlantic crossing), where these were operated by both airlines.

Although code-sharing had been established as a right under Bermuda 2 since 1991, the exercise of such rights required formal authorisation in order to ensure they were not being used anti-competitively, and this could take some time. Following further negotiations in June 1995, the code-sharing provisions were revised, and a new paragraph 13 added to Annex 1, Section 5 of the route schedule (Part II, Annex 1, Section 5, Article 13), under which 'new applications for economic authority to permit a UK airline to implement a code-sharing arrangement [were to] be acted on within 28 calendar days [after the filing of all the necessary documentation]'. However, the new paragraph also provided that if 'the competent US authorities fail to act on such an application within 28 calendar days … the application shall be deemed [with some limited exceptions] to have been disapproved'. With disapproval as the fall-back option, such authorisations could take much longer than 28 days, particularly if there was any question of the arrangement between the two airlines running deeper than code-sharing into forms of collaboration that might require anti-trust immunity (ATI).

Such deeper arrangements, which may even extend to the sharing of revenue and profits, do have the potential to deliver benefits to passengers as well as to the companies concerned, but they manifestly reduce competition between the alliance partners, and US antitrust law, as well as UK and EU competition law, is so structured as to allow the competition authorities as well as private entities (individuals or companies) to challenge them. In the United States the latter can also sue, and if successful in showing that their business has been damaged as a result of collusion, the complainant may be awarded treble damages (three times the amount of financial harm suffered). US law provides for such alliances to be granted immunity from prosecution if it can be shown that the benefits to the customer (or passenger) are sufficient to outweigh any loss of competition.

Since the granting or withholding of such immunity is a judgment that has to be made by the US Department of Transportation (where a foreign airline is involved[5]) in the light of the anticipated impact on competition, the exercise of this judgment has given the Department an opportunity to shape the alliances that have emerged in air transport in accordance with its view of what is most beneficial for the US market, its airlines and its passengers. Open Skies agreements were not sufficient on their own to justify the granting of ATI; each such decision required detailed market analysis, and was carefully calibrated to preserve competition, for example by the exclusion of certain city-pairs where the alliance partners had hitherto been the only competitors. But it was difficult for a deep airline alliance, extending into co-operation on pricing and scheduling, to sustain a convincing case for ATI without compensating for the loss of competition by embracing the pro-competitive features commonly associated with an 'open skies' agreement, notably the opening up of unrestricted market access for new competitors.

1991–1995, Exploring the Scope for Bilateral Liberalisation

In the face of such obstacles to the development of an open market, on both sides of the Atlantic, progress towards liberalisation was slow, difficult and contentious. At first, as noted in Chap. 4, the more immediate focus was on the opening up of Manchester to services from additional US gateways in exchange for access for a second UK airline to Boston, and increased services on a reciprocal basis between the USA and the Cayman Islands. The quest for bilateral liberalisation was launched on 11 January 1990, at a meeting in Washington between Sam Skinner, US Secretary for

Transportation, and Cecil Parkinson, UK Secretary of State for Transport, but right from the start contemporary UK records referred to these talks as preliminary, informal discussions about the obstacles that might be encountered. In any case, British policy at the time was heavily focussed on the liberalisation of air services within the European Union, and there seems to have been some thought, probably based on the two men's shared political commitment to the benefits of competition, that Anglo-American discussions could help to 'promote a common approach within Europe'. It was difficult to see quite how such an aspiration might be realised, and in any case Jeff Shane, at that time advising Sam Skinner, cautioned that the US had to have regard to fairly delicate relations between the US and other EU states.

Despite such distractions, the preparation of position papers was put in hand, and these were discussed at meetings in November 1990 and January 1991 but by then, the two sides were heavily engaged in the intensive series of negotiations relating to Heathrow access for American Airlines and United Airlines. As noted in Chap. 4, these negotiations did offer the opportunity to make provision for code-sharing and for joint ventures, and in the Memorandum of Consultations which concluded them on 11 March 1991(Part III, Doc 25) 'both delegations concluded that they should now seek to liberalise the air service arrangements … They undertook to hold a meeting on this subject within three months … and expressed the hope that liberalisation could be achieved as soon as possible.'

Between May 1991 and May 1995 the scope for progress towards liberalisation was indeed explored in frequent and detailed negotiations, but since the two sides proceeded from the fundamentally divergent positions outlined at the start of this chapter, it was difficult to make much progress. Both sides were sincere in their search for liberalisation, but there was remarkably little overlap between the obstacles to free and fair competition which each side wanted to target. The main focus of US proposals was the liberalisation of services across the Atlantic, whilst the UK side was looking for liberalisation in such areas as US inward investment policy which would facilitate access by UK airlines to the US hinterland. Setting out their objectives in May 1991, the US side advocated a liberal approach to the designation of additional airlines, capacity, pricing, charters, as well as the resolution of 'operating issues' such as ground handling, airport access (slots) at Heathrow and Gatwick, user charges (then still in arbitration), increased flexibility in the use of change of gauge (see Glossary), and stopover rights. By contrast the initial UK presentation focused on effective access to the

whole of the US/UK market, including the scope for investment in US airlines, marketing alliances, countering the anti-competitive effect of carrier marketing practices (eg hubs, computer reservations systems, frequent flyer programmes), mechanisms to support free and fair competition, and the effects of US law, notably in protecting businesses in administration, including airlines.

Over the following four years, market analyses and position papers were exchanged, and some progress was made from time to time on matters of detail, but there was not much sign of convergence on the underlying issues. The meeting between Cecil Parkinson and Sam Skinner in January 1990 had given the talks their initial impulse. In September 1991 Sam Skinner and Malcolm Rifkind, who had succeeded Parkinson in November 1990, agreed to accelerate progress. In 1992 Skinner's successor Andrew Card travelled to London to 'underscore his commitment to a fully liberalised relationship within a fairly short timescale'. In April 1993 John Macgregor and Federico Pena set a 12 months target for a liberal agreement to be reached. There was to be a phased package, a medium-term vision and a timetabled move to full liberalisation; the first stage would entail agreement to go on to further stages. Two years later, however, correspondence between Pena and his new British counterpart Brian Mawhinney in the context of the 1995 mini-deal (see below) was still committing the delegations to an intensive schedule of monthly meetings through the summer of that year with a view to liberalising 'cargo, charters and pricing aspects of the air services arrangements … as well as access to government financed traffic; and to negotiate very limited and balanced access at Heathrow and/or Gatwick airports. Both sides agreed to adhere to this schedule and to make every effort to complete this negotiation expeditiously' (Part III, Doc 27). But no amount of Ministerial pressure, time-tabling or skilful packaging could finesse the differences between two sides whose visions of a liberal agreement were so far apart.

Several explanations have been advanced for this stalemate. Some participants in the negotiations have put it down to the psychological impact of the Heathrow succession negotiations at the beginning of 1991, which may have left the Americans feeling rather bruised, and consequently reluctant to make further concessions to the UK.[6] It is possible to 'win too big'. This may have been a factor, but any such feelings could have been overcome, were it not for the fundamental differences between US and UK aviation markets and policies, which led the two sides to start from such very different positions, leading in turn to such very different visions and priorities for a liberal agreement.

Early in the 1990s the United States had begun to develop an overall international policy framework, the 'Open Skies' policy, which could quite legitimately be presented as pro-competitive and pro-consumer (see Chap. 1). The fact that such a policy also happened to be in accordance with the interests of those US airlines which had survived domestic deregulation was of course an added bonus. This US policy was announced by the Department of Transportation as early as 1992 (USDoT 1992), and promulgated in the form of the 1995 International Air Transport Policy Statement (see below) which from that point on established clear parameters for their position in negotiations.

The United Kingdom, by contrast, whilst pursuing its long-established policy of support for a second British airline to compete with BA, continued to follow the essentially pragmatic approach to negotiations that had served it well enough in the past, taking advantage of such opportunities as might present themselves from time to time (eg in the Heathrow Succession negotiations), and otherwise supporting its airlines in their endeavours to operate profitably within the framework of Bermuda 2. If UK airlines were to compete successfully for transatlantic passengers in the new market with its focus on hubs as well as the major gateway cities which generated their own traffic, they needed enhanced access by way of code-sharing, alliances and inward investment to the airline networks which were changing the market-place. The US version of 'Open Skies' was all very well, but operating as it did from a protected home market, it would not offer UK airlines the fair and equal opportunity to compete for all the traffic between the UK and the USA which was fundamental to Bermuda 2 in general and to Article 11 (Fair Competition) in particular. It followed that if the US wanted an 'Open Skies' agreement with the UK, they would have to concede enhanced access to the whole market for transatlantic travel, which could no longer be served by access to gateway cities alone.

As the UK policy took shape, it became increasingly clear that the two sides were looking for increased competitive access for their airlines in different parts of the market for air travel between them; the US wanted to liberalise access to the trans-Atlantic segment of the market, with particular reference to Heathrow, whilst the UK was seeking fairer access to the market for travellers whose journey started or finished with a US domestic flight. Since no significant relaxation of the rules limiting access to the US domestic market could be conceded, and since the UK was not prepared to relax the limitations on access to Heathrow without such concessions, the negotiations broke down on more than one occasion, and were periodically suspended. It was after one of these events that in March 2000 UK Deputy

Prime Minister John Prescott and US Secretary of Transportation Rodney Slater had to step in to get things moving again. Their intervention led to agreement on a new framework for the negotiations which drew back from demanding full access to the US market, whilst reflecting 'the fact that the UK would not wish to conclude an "Open Skies" deal … unless and until it became clear that the competition conditions were not so stringent as to preclude UK carriers from securing effective access to the US domestic market through alliances (HC532, Appendix 01, Memorandum by the Department of the Environment Transport and the Regions, para 28).'

This led to a final attempt under Bermuda 2 to craft a series of smaller steps towards liberalisation on both sides, but the only practical outcome was the Pittsburgh mini-deal (Chap. 4) of March/April 2000. After two more years of fruitless negotiations, the Advocate-General of the European Court brought such negotiations to a final halt with a judgment which declared illegal any bilateral agreement which did not concede equal rights to all EU airlines.

We turn now to a fuller description of both policies, before reviewing the attempts which were made by British airlines to gain enhanced access to the US market under existing US policy.

Open Skies and the 1995 International Air Transportation Policy Statement

The order formally establishing an Open Skies policy for the US (USDoT 1992) was issued as early as 5 August 1992, leading to the first such agreement with the Netherlands—willing pioneers as they had been in 1978. In 1994 Federico Pena, US Secretary for Transportation, marked the fiftieth anniversary of the Chicago Convention by calling for Open Skies agreements to be adopted much more widely, and the new policy stance was subsequently elaborated in the International Air Transportation Policy Statement of April 1995 (USDoT 1995).

The Policy Statement begins with a shrewd analysis of the changing market, including the development of international hub-and-spoke systems requiring 'the use of at least two hubs (e.g., one hub in the U.S. and another in Europe for a passenger moving from an interior U.S. point to a point beyond the European hub)'. The statement notes that the exploitation of such multi-hub networks will require cross-border marketing alliances, involving code-sharing and other cooperative arrangements. These should expand the market and bring benefits to consumers, and 'U.S. airlines should be major beneficiaries of this expansion and the concomitant

increased service opportunities, given their competitive advantages.' These operating efficiencies and competitive advantages 'are largely attributable to the US airlines productivity and competitive gains' resulting from 'operating in a deregulated domestic market for more than 15 years' (pages 6 and 7). The statement goes on to advocate the full Open Skies agenda—the removal of all restrictions on service opportunities, frequency, capacity and fares for all classes of traffic—scheduled, charter and cargo services—noting that 'there may be strategic value in adopting liberal agreements with smaller countries where doing so puts competitive pressure on neighbouring countries to follow suit' (page 10). This was a significant change; hitherto smaller countries generating little traffic of their own had been granted very limited access to the USA.

The statement concludes as follows:

> We are living through a period in which international aviation rules must change. Privatization, competition, and globalization are trends fuelled by economic and political forces that will ultimately prevail. Governments and airlines that embrace these trends will far outpace those that do not. The U.S. government will be among those that embrace the future.

Whilst there is a candid acknowledgment that the strongest U.S. airlines should be major beneficiaries of the anticipated expansion of air services under an Open Skies policy, there is perhaps less recognition that their advantages derive not only from their competitiveness, honed in a deregulated market, but also from the benefit of operating from a very large domestic market, sheltered from foreign competition. At the same time it should be noted that the pursuit of domestic deregulation had had uncomfortable consequences for the U.S. industry in the restructuring that had eliminated such early beneficiaries of deregulation as Air Florida, Braniff, and Peoples Express, and more recently had led to the demise of Pan Am and the weakening of TWA. Moreover, the plan of action signals a willingness to 'seek changes in U.S. airline foreign investment law, if necessary, to enable us to obtain our trading partners' agreement to liberal arrangements to the extent it is consistent with U.S. economic and security interests' (page 9). Although such changes would eventually be sought in the context of the EU-US negotiations, they would continue to be blocked in Congress (Chap. 6).

The International Air Transportation Policy Statement was energetically implemented. In January 1993 KLM and Northwest had received

anti-trust immunity for their collaboration within the context of the first 'Open Skies' agreement, between the United States and the Netherlands. By the end of 1995 nine more Open Skies agreements had been concluded with relatively small European partners (six within the EU: Sweden, Luxembourg, Finland, Denmark, Belgium and Austria, as well as 3 more outside the EU: Iceland, Norway and Switzerland), in accordance with the declared intention to bring strategic pressure to bear on others—notably the UK, France and Germany—to accept similar Open Skies agreements in order to prevent traffic being diverted via their neighbours.

A key factor in these negotiations was the granting of antitrust immunity (ATI) to airline alliances, though each application for ATI still had to be considered on its merits, and might not necessarily be approved. The UK remained resolute in refusing to allow additional US airlines into Heathrow, or to liberalise access to its European hinterland, unless the US would grant corresponding access to the whole of the US market, and initially France and Germany adopted a similar position. However, in 1998 Lufthansa, SAS and United Airlines (members of the Star Alliance) were granted immunity on the back of Open Skies deals with Germany and Scandinavia. The French, who in 1992 had terminated their relatively liberal Bermuda 1-style agreement in the face of what Robert Espérou described as an onslaught of overcapacity from six US airlines (Espérou 1999, 17–20), fell back on an annual exchange of permits, on the basis of comity and reciprocity, which over a period of five years restored the French share of the market from about 30% to 42%. In 1998 they reached an agreement with the USA which brought to an end the five-year stand-off, but it was not regarded as an Open Skies deal (Espérou 1999, 38), and although provision was made for code-sharing, it took a year of further negotiations, separate from the bilateral, before Air France was able to persuade the US authorities that its alliance with Delta Air Lines (Air France's partner in Skyteam) would bring sufficient efficiencies to the market to justify the approval of anti-trust immunity.[7]

The US Department of Transportation could justifiably congratulate itself on the success of its 'Open Skies' initiative, which it did in two reports published in December 1999 (*International Aviation Developments: Global Deregulation Takes Off*) and October 2000 (USDoT 2000, *Transatlantic Deregulation: The Alliance Network Effect*). By October 2000 the three grand alliances (still very new) were bringing competitive services and lower prices to more than 200 US cities served by at least two of the three alliances and 138 served by all three. Moreover the structure

of alliances would turn out to be extraordinarily flexible, embracing forms of integration ranging from interlining and access to one another's frequent flyer programmes (Low) through code-sharing (Medium) to fully fledged joint ventures entailing revenue- or profit-sharing and requiring a grant of anti-trust immunity. It is a mark of the distance travelled in policy terms since the 1970s that revenue-sharing, a notorious characteristic of the anti-competitive pooling agreements between two or more airlines serving the same market, is now acceptable once more under joint ventures approved within the international structure of alliances on which competition authorities now rely to sustain competition between the United States and Europe.

The UK Version of Open Skies

The 1999–2000 report of the House of Commons Environment, Transport and Regional Affairs Committee on Air Service Agreements between the United Kingdom and the United States (HC532) includes among its Appendices a Memorandum dated April 2000 from what was then the Department for Environment, Transport and Regional Affairs. This memorandum is the closest UK comparator to the 1995 US Policy Statement, though the British memorandum, responding to the specific concerns of the House of Commons Committee, is more narrowly focussed on relations with the USA alone.

The Committee's inquiry, conducted under its formidably independent Chair Gwyneth Dunwoody MP, had its origins in the public concern which had been aroused by the breakdown of negotiations in January 1999. The committee were concerned about the potential economic impact of a continuing impasse, both nationally and for UK regions, and particularly the pros and cons of granting 'increased Fifth Freedom Rights both in the United States and Europe' (sic), or changing the arrangements for granting airport slots, 'as well as the role of the European Union in future negotiations with the United States over air service agreements (HC532, para 3 of Report).' They took evidence from US and UK airlines, both cargo and passenger carriers, as well as airport management and government officials.

After summarising the origins of Bermuda 2, the report analyses the aviation market as it stood in 1999, including the recent development of international airline alliances, and the 'Reasons for Renegotiating Bermuda 2'. Most of their witnesses were united in urging that the agreement should be amended but their proposed solutions formed two opposing

views—the first being 'The United States Version of Open Skies', summarised above on the basis of the 1995 Policy Statement, the second solution being presented under the heading 'The United Kingdom's Version of Open Skies. This portion of the Committee's report begins with a summary at some length of the criticism of US Open Skies which they had heard in evidence, before going on to sketch the Open Skies reforms which their witnesses had advocated. These included the reciprocal abolition of restrictions on the ownership of one another's airlines, the right to operate cabotage services within the territory of the other party, and the right to lease one another's aircraft and crew to operate services, as well as liberalising access to Heathrow and other airports.

This summary is indicative of the proposals that the UK side had espoused in the negotiations for a liberalised agreement that had been going on for much of the past decade. There has always been some suspicion that the UK adopted such a sweeping agenda knowing full well that US negotiators could not possibly deliver anything of the kind. Meanwhile their refusal meant that the UK could continue to resist proposals for liberalisation on US terms which were not sufficiently attractive (or in UK eyes sufficiently well balanced) to justify conceding open access to Heathrow. There could be some truth in this, but it is of course well understood in negotiations that both sides need to give themselves room to make compromises later on in order to come to an agreement, and there should have been no doubt that the UK would have settled for less than they had demanded initially if there had ever been any serious prospect of reaching a balanced agreement. Be that as it may, the UK felt entitled to make it very clear that serious concessions needed to be made in relation to US market access, and since such concessions were never on offer, the negotiations could not progress. Looking at it from the US side, they had already obtained agreement to Open Skies treaties from almost every other European country, including both Germany and France—after a struggle—and whilst they were keen to gain enhanced access to Heathrow, they knew that they could not deliver anything like what the UK were seeking, and the ongoing success of their Open Skies policy initiative will have led them to believe, quite correctly as it turned out, that the last bastion would eventually fall.

Recognising that there was no early prospect of removing the impediments under US law to a deal on terms proposed by the UK, the House of Commons report went on to advocate a 'phased' approach, under which access to Heathrow would be progressively liberalised 'at the same

time as British carriers obtain access to the US domestic market through alliances 'immunised' from the restrictions of US anti-trust legislation, as well as those of the European Union and United Kingdom competition authorities (HC532, Report para 62).' This was of course consistent with the approach which had already been agreed between Prescott and Slater, so it was a reasonable position for the Committee to adopt, if it did not wish to undermine the UK's negotiating position.

Seeking Fuller Access to the US Market: Investments, Code-Sharing and Alliances

As is so often the case, the development of new policy needed to be spurred on by the pressure of events. An early stimulus to such a development was provided by BA's attempt in 1992 to take a major stake in USAir.

In September 1992, BA came forward with a proposal to invest $700 million in USAir, a mainly domestic US airline which could provide feeder services to BA's transatlantic services. Such an investment quite properly raised important questions about where corporate control of USAir would reside, but it also provoked vehement opposition from the US airline industry protesting that 'our national mass air transit system … is about to become hostage to the tyranny of economic colonialism' (US Airlines 1992). At the high-level meetings mentioned above, between September 1991 and the end of 1992, US and UK Ministers agreed to accelerate progress, and USAir employees were sufficiently enthusiastic about the deal to picket President Bush during his 1992 re-election campaign. However, if BA hoped that political pressure might trump the rigorous application of US competition law, they will have been disappointed. Cold water was poured on BA's plan by James Tarrant (State Department), articulating established US policy, who commented that 'if it were to be approved it would radically alter the bilateral market by seriously imbalancing the competitive scales.'[8] The deal was not approved.

A liberalisation working group had been set up in August 1991, and generated a lot of paper over the following year, but the only outcome from the plenary meeting in November 1992 seems to have been some minor progress on tariff issues. The UK's other proposals had already been dismissed as extremely timid and not in keeping with the Open Skies goal. Meanwhile, the US authorities made their policy stance abundantly clear when in January 1993 they granted antitrust immunity for KLM's alliance

with Northwest Airlines within the context of an Open Skies bilateral agreement with the Netherlands. The note accompanying the Final Order (US DOT 1993, 11–12) asserts that 'the grant of immunity should promote competition by furthering our efforts to obtain less restrictive agreements with other European countries…. We anticipate that our positive attitude and partnership in the Open Skies Accord with the Netherlands will be recognised as a strong demonstration of our commitment to open skies and will lead to other liberal agreements with the EC.'

However, they did not want to slam the door on BA's negotiations with USAir, hoping that these might become a catalyst both for bilateral liberalisation and for relaxation of the triple-lock restrictions on inward investment (see above). Having restructured for its successful privatisation in the 1980s, BA remained profitable through the recession of the early 1990s, and the US authorities were not averse to an investment in USAir if that could help to strengthen competition within the US airline industry. BA and USAir therefore revised their proposals, reducing the scale of BA's proposed stake to less than 20%, and removing BA's right of veto over USAir policy. There were still fierce objections from other US airlines, but the alliance was approved in 1993 subject to review after 12 months, a provision intended to bring pressure to bear on the British side in the bilateral negotiations (Dobson 1995, 214–216). This move failed to unlock the bilateral negotiations, but USAir's financial situation remained precarious, and in 1994 BA was allowed to make a $300 million investment in USAir, which represented a 25% stake. This was a significant investment, giving BA some degree of presence within the US market, but the deal remained within the limits of established policy; it had failed to trigger either a relaxation of US restrictions on inward investment or British resistance to the US concept of Open Skies.

The most that could be achieved in government-to-government negotiations for a more liberal agreement was the 1995 mini-deal (see Chap. 4) which further liberalised access to Manchester and other UK airports outside London on the basis of new UK and US Routes 1A, and allowed capacity on those routes to be regulated under the more liberal provisions of Article 11 rather than Annex 2. The mini-deal also granted BA the right to operate twice daily to Philadelphia throughout the year, and allowed the US to designate a second airline for service from Chicago to London. Since Philadelphia was the main hub for BA's partner USAir, whilst Chicago was a major hub for both United Airlines and American Airlines, these mutual concessions served to bring the provision of transatlantic

services under Bermuda 2 more into line with the changing structure of airline services within the United States. However, in terms of the wider liberalisation objectives, the outcome was even more modest: a revision of Section 5 of Annex 1 (notes applicable to all routes) which granted limited access for UK airlines to compete for Fly America traffic (travel on US government business), and slightly improved the provisions relating to code-sharing and other commercial arrangements (Part III, Doc 27, and Treaty Text in Part II). There was a new 28-day target for the US to respond to applications from UK airlines for such authority, but it was subject to many conditions, and if the US authorities failed to act on the application within the 28-day period, it was 'deemed to have been disapproved'. As a result the processing of such applications would frequently continue to take much longer than 28 days.

Between September 1995 and February 1997 there was an additional incentive to press ahead with negotiations as it became increasingly clear that the power to negotiate such agreements would eventually move to Brussels. Ministers in John Major's Eurosceptic government, including Brian Mawhinney at Transport, were particularly keen to 'get under the wire' before this happened. As a result, the text of a putative new liberal agreement was very largely settled by 1997, but whilst good progress was made on the details, the two sides remained wide apart on the fundamental issue of reciprocal access. In the British view liberal access for US airlines to the European market via the UK would have to be balanced by equivalent access for UK airlines to the US market behind the gateways listed in Bermuda 2, and/or scope for the purchase of a controlling interest in a US airline. Since the US Congress was unlikely to approve any change in the rights for a UK airline to carry traffic between points within the USA (cabotage), or any significant liberalisation of the ownership and control rules, the negotiation of a new agreement, however skilfully drafted, was unlikely to make much headway. David Marchick, who led the US team through three more rounds of inconclusive negotiations in 1998, moved on to other things when he concluded that there was not likely to be a deal, at least in the short term.[9]

Meanwhile, having explored the limits of inward investment in its relations with USAir, by the summer of 1996 BA had begun to consider an alliance with American Airlines. Given the terms of Bermuda 2, as amended in 1991 and 1995, BA and American Airlines could not be prevented from code-sharing, but the two airlines wanted to go beyond code-sharing into closer forms of collaboration. Virgin Atlantic, which feared the creation of

a very powerful competitor, took out newspaper advertisements to warn customers to 'prepare for rip-off.'[10] In early December the British Office of Fair Trading (OFT) recommended that BA/AA should be required to give up 168 airport slots at Heathrow in order to mitigate the anti-competitive consequences of such an alliance.[11] However, clearance from the OFT was not enough, and in January 1997, the proposal was put to the US Department of Transportation and to the European Commission, who should perhaps have been consulted earlier. Virgin Atlantic continued to be very active in lobbying competition authorities in both Brussels and Washington, and this seems to have paid off in raising the cost to the proposed alliance. Meanwhile a disgruntled US Airways (USAir's new name) had abandoned BA to join the Star Alliance, and BA had sold its stake.

It was nearly eighteen months (8 July 1998) before Karel van Miert the European Commissioner for Competition offered to approve the alliance if the partners (mainly BA) would give up 267 Heathrow slots, sufficient to make room for competitors to operate up to 20 roundtrips per day, with the additional proviso that the alliance partners would have to reduce services on certain routes with over 120,000 passengers per annum, if a competitor entered the market.[12] The OFT urged Peter Mandelson (UK Secretary of State for Trade & Industry) to sweeten the pill for BA by overriding Brussels and authorising BA to sell the Heathrow slots (estimated value £500m) rather than giving them away, but BA/AA decided the price was too high, and reacted by watering down their alliance to bring it within the terms of the limited code-sharing authority already written into Bermuda 2.

A second attempt by BA/AA to structure their alliance to obtain anti-trust immunity came closer to agreement in 2001. This approach was sufficiently serious to prompt the US Department of Transportation to float a new offer, still subject to the outcome of Open Skies negotiations but involving slightly fewer slots, which would have allowed the alliance to go ahead, if the UK would guarantee access to Heathrow for 4 more US airlines (in addition to United and American), but this was also rejected by the airlines in January 2002. In the same month the Advocate-General of the European Court of Justice delivered his Opinion on the legality of bilateral air service agreements (see Chap. 6) and although it was November of that year before the formal judgment was received, it was immediately apparent that the long saga of negotiations under Bermuda 2 had run out of time. Negotiations for an agreement between the EU and the US were launched in 2003, and although the EU side initially adopted a position

close to that which had been followed by the UK, demanding much fuller access to the US market in exchange for any further access to Europe for US airlines, in practice the only significant bargaining chip on the European side of the table was access to Heathrow. Only when this was conceded was the way cleared for BA and AA, at their third time of asking, to be granted antitrust immunity for the sort of deep joint venture which they had been seeking since 1996.

Virgin Atlantic and Virgin America

Virgin Atlantic operated its first flight, from London Gatwick to Newark on 22 June 1984, adding further destinations gradually, and transferring some of its services to Heathrow once that became available to a second UK airline after 1991. Virgin's arrival at Heathrow is said to have prompted BA's pugnacious Chairman Lord King to cancel his financial contributions to the Conservative Party. The rivalry between the two companies and between Lord King and Sir Richard Branson became intense and was by all accounts quite personal. The following year, Branson alleged a campaign of 'dirty tricks' by BA, aimed at poaching Virgin Atlantic's customers, and the case was eventually settled out of court, after BA admitted to 'disreputable business practice.' King stepped down as Chairman of BA in 1993, but the public rivalry between the two companies continued. In 1997, when BA took the Union flag off its tailfins, Branson was quick to take advantage of the public (or at least media) outcry against BA, gleefully and very publicly adopting the flag as part of his airline livery instead. A couple of years later, when BA's launch of its London Eye ran into technical trouble, because the great wheel could not be raised into position, Branson seized the opportunity to hire a blimp to fly over the scene proclaiming 'BA can't get it up'. Over the following years Virgin Atlantic continued to expand to the point where by 2006 it was competing with BA on services to nine US gateways. Another court case in that year resulted in fines of £250m being imposed on BA for price fixing in relation to fuel price surcharges, whilst Virgin Atlantic, which had also been involved, was granted immunity as the whistle-blower.

Branson sold a 49% stake in Virgin Atlantic to Singapore Airlines in 1999, which they sold to Delta in 2012. For nearly 30 years Virgin had maintained its independence, steadily increasing its penetration of the transatlantic market without joining any of the alliances, but this changed with Delta's acquisition of SIA's 49% shareholding, taking Virgin Atlantic

into the Skyteam alliance. In 2013 Delta received approval for a full joint venture, entailing a rationalisation of services which supported Virgin's presence in the transatlantic market, but cut many of its services from London to other destinations around the world. In 2017 Branson sold a further 31% to Air France-KLM, cementing Virgin's position as a key member of the Skyteam alliance.

Whereas BA had sought to enhance its access to the US market by first taking a stake in USAir, and then entering into an alliance with American Airways, Branson wanted to establish his own US airline. Blocked in his attempts to get involved in the airline startup which became Jetblue, Branson set about creating his own airline, Virgin America, but had great difficulty getting clearance for it from the Department of Transportation. Although he followed the rules, keeping foreign ownership below 49% and his own voting shares below the 25% threshold, he was forced to sack his first choice of chief executive, even though he was a US citizen, on the grounds that he had been recruited by Branson before the application was made to the Department of Transportation, and he was therefore potentially under the influence of a foreign company. Branson applied for certification in December 2005, but the approval process was dragged out for a whole year, possibly in the hope that pressure from Branson would persuade the UK to make concessions on US access to Heathrow. However, Virgin were no more inclined to make such concessions at Heathrow than were BA or the British government, despite the heavy staff and aircraft leasing costs which resulted from the long delay. Certification, after being formally refused in December 2006, was finally granted in May 2007, not very long after signature of the EU-US Agreement had cleared the way for access to Heathrow to be opened up, but the airline was not able to launch services till August. Although the lengthy certification process had allowed Branson's competitors plenty of time to decide how to respond, Virgin America survived and remained independent until 2016 when it was sold to Alaska Air.

For many years Branson had tried to maintain the independence of the Virgin brand in aviation, first with Virgin Atlantic which resisted being drawn into an alliance until 2013, and then with Virgin America which maintained its independence in the US market until 2016. He was perhaps the last of the great aviation entrepreneurs, but in the end even he was obliged to yield to the dominant US model of deregulation at home and open skies abroad, under which the US domestic aviation industry has become progressively concentrated, and international air services are increasingly the preserve of the three grand alliances, each one built around one of the major US airlines—American, United and Delta.

Beyond Bermuda 2

As negotiations with the United States for a more liberal air services agreement moved from national capitals to Brussels, and from bilateral agreements to a European model, the British version of 'Open Skies', entailing greatly enhanced access to the US domestic market to balance the opportunities available to US airlines serving the European market, was still on the table as an alternative to the US model of 'Open Skies'. We shall see in the next chapter whether the EU could be persuaded to adopt such a model in its negotiations with the United States, and whether they would have more success with it than had the UK in its negotiations under Bermuda 2.

Notes

1. Regulation 2407/92, Article 4.2.
2. Under IATA's *Agenda for Freedom* programme (2009–2010), some governments have agreed not to enforce the nationality clause unless there is a good reason to do so, but this relaxation post-dates Bermuda 2.
3. Usually the competition directorate of the Commission and the UK Office of Fair Trading agree who will give permission and the other backs off.
4. For an authoritative account of EU and US approaches to the application of competition law to airline alliances, see: *Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches,* report dated 16 November 2010 prepared by the European Commission and the US Department of Transportation (EU/US DoT 2010).
5. In the case of domestic mergers this power lies with the Department of Justice. It is widely believed that the Department of Transportation, given its other responsibilities, is more accommodating to the airlines than DOJ would be.
6. Interview notes 2006 and 2010.
7. As recalled in 2015 by Jeff Shane, who had been responsible for the negotiations at the time.
8. From a contemporary UK meeting record.
9. Interview, May 2010.
10. Sunday Times et al., 16 June 1996.
11. Guardian, 7 December 1996.
12. Times 9 July 1998, Le Monde 10 July 1998.

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CHAPTER 6

The European Denouement

In the end the impasse concerning liberalisation in which bilateral negotiations under Bermuda 2 had become stuck would be broken only when unrestricted access to Heathrow was conceded in the context of the establishment in 2007 of an air services agreement between the USA and the European Union. This removed the most glaring obstacle to an open market, but the terms of the agreement itself recognised that there was more to be done in making provision for further progress in subsequent stages of liberalisation towards the realisation of fair and equal opportunities for EU and US airlines alike to access the whole of the market for air transport on both sides of the Atlantic. Provision was even made for the benefits of the first stage to be withdrawn if adequate progress was not made in second stage negotiations, though this was widely seen as a device to allow the UK to concede the trophy of Heathrow access without losing too much face. In the event, although progress in the second stage towards further liberalisation of the market was very limited, the threat to revert to the *status quo ante*, which could have included going back to Bermuda 2 and thereby restricting the access of all but two US airlines to Heathrow, was formally abandoned in June 2010, when the EU Transport Council, with the consent of UK Ministers, endorsed the outcome of the second stage negotiations.

It seemed then that Bermuda 2, or any bilateral air service agreement between the United Kingdom and the USA, was a thing of the past, but there was one more surprise in store. On 23 June 2016 the United

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9_6

Kingdom voted in a referendum to leave the European Union. At the time of writing (early 2017) it is not yet known how or when this will affect Britain's membership of the EU-US Air Transport Agreement, but there is at least a possibility that the European dénouement will turn out to be just one more twist on the road leading to Bermuda 3 (Chap. 7—Conclusions).

Going back now to 2007, even if it was the UK that paid the highest price for the EU-US Agreement, by surrendering full access to Heathrow, the final rounds of negotiation were not altogether comfortable for the United States. For nearly thirty years, in pursuit of the liberalisation policies proclaimed in the US International Air Policy Statement of 1978, and more particularly in the 'Open Skies' policies announced and followed since 1992, confirmed and amplified in the 1995 International Air Transport Policy Statement, the United States had occupied the high ground of market liberalisation, whilst the Europeans and in particular the United Kingdom had felt obliged to retain some limits to market access for so long as this was judged necessary in order to balance what was perceived as the substantial advantage enjoyed by US airlines as a result of their enormous and well protected home market. In 2003, when the EU adopted a negotiating stance in favour of an Open Aviation Area within which US and EU airlines would enjoy equal rights throughout the whole of their respective territories, the Europeans could at least claim to favour a more open, competitive market than the Americans. The barriers to foreign ownership and control remained similar on both sides of the Atlantic, but whereas the European concept of an Open Aviation Area would have allowed EU airlines to pick up and set down traffic within the United States, just as US airlines can pick up and set down traffic between EU countries, the US model of Open Skies would not concede any access by EU airlines to such traffic within the United States. In practice the pattern of operations has still been for EU airlines to operate their trans-Atlantic services almost exclusively from their own national territory, where they have built up hubs strong enough to feed such services, and for US passenger airlines to make little or no use of the rights they have to carry traffic between EU states. The competitive situation is therefore quite evenly balanced, but the theoretical imbalance remains, rooted as it is in the facts of geography, and further adjustments may have to be made in the future if what is now a global multinational business is to thrive under a global regulatory regime, or even under more limited trans-regional arrangements such as the EU-US agreement. Political resistance to any opening of the US domestic market to foreign competition remains very

powerful, as it does in other very large nation states (e.g. China or the USSR) and it may be that we shall all have to wait another generation before any significant further advance is possible, even across the Atlantic, never mind on a global basis.

Setting Up the First EU/US Negotiations

Up to 1990 US negotiators 'had so far had only a fairly limited and unfocussed dialogue with the Commission'.[1] The European Commissioner for Transport and the US Secretary for Transportation had a first exchange of visits in November 1989 and March 1990. However, these initial contacts were very preliminary, so that in January 1990 there was not much interest on the US side in the notion canvassed by UK Secretary of State Cecil Parkinson with his US counterpart Sam Skinner, that a shared UK and US drive towards bilateral liberalisation might help to 'promote a common approach within Europe'. In the light of their bilateral experience with the UK, US negotiators found this suggestion difficult to comprehend, but the UK was looking for allies in its struggle to liberalise air services within the EU, and in very general terms UK Ministers probably thought there was enough common ground to influence that debate. However, the Commission, which had not yet established a single market for air services within the EU, did not yet have any very clear or coherent idea about how to extend its competence into the external air service relations of the Member States. Its early attempts to build such competence on the basis of the competition rules, or by arguing that air transport negotiations should be treated as an aspect of external trade policy (where the Commission has exclusive competence under the Treaties) would be easily batted away by the Member States, and would in fact be ruled out of order by the European Court (ECJ 1994).

The situation began to change once a fully developed internal aviation market was established from 1 January 1993. This led the Member States to establish an Aviation Group to study areas of potential common interest with a view to authorizing the Commission to engage in negotiations on behalf of the Community where this was judged advantageous. The Aviation Group soon authorized the Commission to discuss with the US Departments of Transportation and Justice the differences between the US and EU codes governing computer reservation systems, where the Commission's legal competence was already established, but Member States put a stop to other exchanges for which there had been no formal mandate.

It was the development of US Open Skies agreements (Chap. 5) which finally gave the Commission the opportunity to force their way into the negotiating arena. The first such agreement had been signed with the Netherlands in 1992. When the US issued its International Air Transportation Policy Statement in April 1995 and opened negotiations for open skies agreements with another six EU member states, the Commission denounced such agreements, contending that they were incompatible with Community law, and seeking a mandate to negotiate with the US on behalf of the whole Community. The US had deliberately targeted the smaller EU states first. Sweden, Luxembourg, Finland, Denmark, Belgium and Austria had little to lose from signing such agreements which gave them access to all points in the US and the right of transit to all points in third countries beyond. US airlines already enjoyed open route schedules to and through most of these countries, with freedom for any number of airlines on both sides to determine their own fares and capacity free from government control. The major prize for the European airlines was the opportunity to obtain antitrust immunity for their alliances with US carriers which would deepen and strengthen those relationships. Moreover, the opportunity to establish a globalised presence for alliances built around one or more major US airlines was an attractive goal for US policy-makers. However, neither the member states concerned, nor their airlines, saw any advantage in a Community negotiation, so the Commission's proposed mandate was rejected out of hand, whilst the negotiations were concluded on the usual basis, bilaterally.

Once these negotiations were successfully concluded, the dynamic altered, in the sense that the member states which had negotiated open skies agreements now had less to lose from allowing the Commission to negotiate a further agreement on behalf of the Community as a whole, provided that their existing rights were preserved. They might not relish conceding competence to the Commission over the conduct of their external aviation policy, though they might regard that as inevitable following the establishment of the Single Aviation Market from 1993, and they stood to gain the right to operate into the USA from other EU countries. It is hard to look a gift horse in the mouth, even if the value of the gift is debatable. As a result, a year later, in 1996, the Commission was successful in obtaining a mandate to negotiate for a Common Aviation Area, granting European airlines the same rights within the USA as American airlines would have within Europe. However, the negotiation was to be carried out in two stages, starting with soft rights issues such as

ownership and control of airlines, competition law issues, computer reservation systems, code-sharing arrangements and dispute settlement procedures, only moving on to discuss 'hard rights'—market access, designation, capacity and fares—when any issues arising on the 'soft rights' had been satisfactorily resolved (Kassim and Stevens 2010, 166–169).

This approach was of little interest to the US side, which had made good progress with its Open Skies policy on a bilateral basis, and was now ready to open negotiations with its more important European partners. An Open Skies bilateral was signed with Germany in 1996, and in 1998 a new agreement with many Open Skies features resolved the long-running crisis in air service relations with France, which had terminated its liberal Bermuda 1 style agreement in 1992. Insofar as it needed to discuss matters of wider mutual concern with its European partners, including many of the soft rights issues, it could do so through ECAC, as indeed it did at a series of high level meetings twice a year from 2000. At the turn of the century it could fairly be said that the bilateral system, with some degree of consultation and voluntary co-operation under the aegis of ECAC, was still the preferred way to do business on both sides of the Atlantic.

However, the Commission had not given up. Since 1995 they had been insisting that the open skies agreements were incompatible with Community law. The most serious issue concerned the ownership and control clauses, which as usual stated that the air carriers entitled to the benefits of each such agreement had to be 'wholly owned and effectively controlled' in the bilateral partner country concerned (albeit with a slight variation for SAS in the agreements with Denmark and Sweden). The Commission maintained that such provisions were contrary to the right of establishment in Article 52 of the Treaty of Rome; within a single market, such as now existed in aviation, such rights ought to be available to any carrier established within the EU. When it received a mandate for negotiations in 1996, the Commission suspended the legal action it had initiated in 1994 against those Member States which had signed open skies agreements, but in 1998, when it had become apparent that their negotiations with the Americans were going nowhere, the Commission revived its litigation, instituting formal proceedings against Germany and the UK as well as the six member states who had signed open skies agreements in 1995 (Kassim and Stevens 2010, 169–171).

It was January 2002 before the Advocate-General delivered his Opinion on the Cases brought by the Commission against the Member States, and 5 November 2002 before the formal judgment was received (ECJ 2002), but when it came, the Court's support for Community ownership and

control clauses struck a fatal blow at the very foundations of the bilateral system of air service agreements, at least so far as Community members were concerned. If all rights negotiated had to be available on the same basis to all air carriers wholly owned and effectively controlled within the EU, then in practice most if not all agreements of any significance would have to be negotiated by the Commission on behalf of all the member states and their airlines. On the basis of this judgment, the Commission requested and was promptly granted authority to negotiate a full agreement with the USA.

Meanwhile, in 2001, the US General Accounting Office had reported favourably on the economic benefits to be expected from Europeanising the nationality clauses in US air service agreements with EU countries, and in 2002 the Commission had obtained from the Brattle Group an economic analysis of the benefits to be expected from the full liberalisation of the air services market across the Atlantic, as well as the removal of all restrictions on cabotage operations and foreign ownership of airlines. The economic case for sweeping away the comforting walls of regulatory protection, was strong and well documented (Button 2009), but it was not enough to shake the political case for hanging onto the *status quo*, as the Commission would soon discover in their negotiations with the United States.

2003–2004: A First Draft Agreement Rejected by the EU Transport Council

The negotiating mandate granted to the Commission in June 2003 envisaged an Open Aviation Area, with full rights for US airlines in Europe balanced by corresponding access to cabotage in the USA, as well as reciprocal rights to investment in one another's airlines, and recognition of the concept of the EU carrier (as distinct from national carriers), so that any EU airline could operate into the United States from any EU airport, just as any US airline could operate into any part of the EU. This mandate, which bore a marked resemblance to UK policy over the preceding decade, had the support of all the major EU airlines as well as their governments, having been drafted for the Commission by a committee of the Association of European Airlines (AEA). The US negotiators for their part hoped to secure the extension of their successful Open Skies policy, which by then encompassed eleven EU Member States, to the remaining four EU members—Greece, Ireland, Spain and the UK—the chief prize being the prospect of unlimited access to Heathrow for any number of US airlines.

Arguably the airlines controlling the AEA and the governments controlling the EU Council knew very well that the gap between their negotiating aims and the ambitions of the US negotiators was too wide to be bridged. Moreover, neither Commissioner Loyola de Palacio nor her chief negotiator Michel Ayral had any experience of finding an acceptable way forward in such a difficult negotiating scenario. The US negotiating team, representing the executive branch of government, were in no position to deliver the changes to US law which would be required to open access to US cabotage, or to relax the constraints on European ownership and control of US airlines. They could and did offer access to EU airlines from any point in Europe to any point in the US and beyond to any point in the world, together with freedom from pricing and capacity controls, and in doing so they were willing to concede the novel concept of an EU carrier.

This was probably the top priority for the Commission's negotiators, since it gave legal expression to the concept of a Single Aviation Market, but it was much less important to the airlines and governments sitting behind them. Despite offering open skies across the Atlantic, including unfettered access to Heathrow and unlimited fifth freedom rights within Europe, there was no movement on access to US cabotage, which the EU side regarded as the equivalent of the US right to fly any route within Europe. Moreover, it was explained that any raising of the 24.9% limit on foreign investment in US airlines would require the approval of Congress, which was unlikely to be granted. Nor was there any movement on the right to establish a new carrier in the US if that meant any dilution of the safeguards against foreign control (Dobson and McKinney 2009, 540–544). Nevertheless Ayral and Palacio persuaded themselves that they had a deal they could sell to the member states in the Council, and they were surprised and embarrassed when the Transport Council on 11 June 2004, under strong pressure from the UK government, rejected the proposal out of hand.

2005–2006: A Second Attempt Is Rejected by the US Congress

There followed a period of reflection and reassessment on both sides. In the EU the appointment of a new Commission in the autumn of 2004 led to Jacques Barrot (France) replacing Loyola de Palacio as Transport Commissioner, and in the consequent reshuffle of portfolios at the next level Michel Ayral was replaced by Daniel Calleja, a Spanish diplomat with past experience of complex international negotiations, even if not in air

services. In the USA President George W Bush had been re-elected in November 2004 following a campaign which appeared to be open to liberal market proposals from Europe, but Secretary for Transportation Norman Mineta, who was furious at the Transport Council's rejection of the deal he thought he had secured, was reluctant to contemplate giving ground. It took time to persuade him that it might be worthwhile to look for ways to move towards the Europeans in negotiation, but eventually he was so persuaded, and in November 2005 he authorised his Department to issue a notice of proposed rule-making, which would in effect ease Washington's interpretation of what constituted foreign control of a US airline (Dobson 2009, 150).

As Shane would later insist in giving evidence to the Congressional Sub-Committee on Aviation, there was no intention to dilute the control of United States citizens over security, safety, organisational documentation, or decisions relating to Department of Defense programmes such as the Civil Reserve Air Fleet programme (CRAF).[2] However, in the past this had led to an administrative interpretation of the statute which allowed 'no semblance of foreign control'. Shane argued that this excessively restrictive interpretation did not need to apply to the commercial decision-making of US airlines (Dobson 2009, 150). If the NPRM made that important distinction explicit, US airlines would be better able to attract foreign capital—which they evidently needed, given the recent history of even major US airlines having to resort to Chap. 11 in order to stave off bankruptcy.

This move broke the impasse in negotiations with the EU, and agreement was quickly reached on the text of a putative agreement, but there was no disguising the fact that such a change would be highly controversial on Capitol Hill, and talks were consequently suspended pending the outcome of the NPRM process in Congress. In March 2006, the Council stated clearly that it would await the outcome before deciding whether to proceed with the agreement. For the avoidance of doubt, it 'stressed the crucial importance of clear, meaningful and robust policy changes in this area.'

There has long been acute sensitivity in Congress about the ownership and control of US airlines. Unfortunately this was given a further twist in February 2006 when Dubai Ports World, a state-owned company from the United Arab Emirates, entered into negotiations with P & O for the purchase of six major seaports on the east coast of the USA. This proposal provoked such a frenzy of concern for national security that the deal eventually had to be abandoned. If political and public opinion could not stomach foreign ownership of port installations, it was not a good moment

to propose a change that would relax interpretation of the rules governing ownership and control of US airlines. In the early months of 2006 Byerly (State Department) and Shane (Transportation) attended a series of hearings in the House and the Senate, at which they urged Congress not to block the proposed rulemaking procedure, but it was uphill work in the face of fierce lobbying by the pilots and some of the airlines, quite apart from the security concerns, which were almost certainly the decisive factor. Unsigned documents were circulating in Congress, one of which even suggested that 'the Department of Transportation is handing over the keys to American cockpits to terrorists' (Woll 2012, 928).

The Department did its best to rescue its embattled proposal by issuing a revised NPRM in early May, making it clear that any control powers delegated to foreign minority owners could always be revoked. Shane reminded the Senate Sub-Committee that US citizens would have to own 75% of an airline, make up two thirds of the Board of Directors and two thirds of the managing officers of the company including the president. The revised NPRM confirmed that 'US citizens would ultimately control the decision-making of the airline; any delegation of decision-making to the foreign minority investor would have to be revocable and could not be in the spheres of safety, security, national defence or organizational documents' (Dobson 2009, 151–152).

Despite these reassuring declarations, the crucial hearing on 9 May 2006 before the US Senate Subcommittee on Aviation has been described by one observer as 'one of the scariest hearings' she ever went to. Her comments are cited as follows by Cornelia Woll (Woll 2012, 929):

> It all came together: the union opposition, the Dubai Ports issue, the smear campaign. Then Senator [Ted] Stevens stood up and said: 'I cannot support this on the grounds of national security.'[3] That's when we knew we had lost the Senate. We knew we did not have the House, but that's when we knew we had lost the Senate as well.

Even if the revised NPRM was not enough to reassure the Senate or US public opinion, it was bound to raise doubts in Europe about the true meaning and value of the US proposal. Moreover, Shane recognised that 'a change of this importance, even if wholly within the purview of the Executive Branch—as we maintain that it is—should not and cannot be implemented over significant opposition from members of Congress' (Dobson 2009, 152). The prospects for a solution to the negotiating problem on the basis

of the NPRM were beginning to look increasingly fragile. In July, the DoT promised a full, formal proposal to be issued in August or September, but then Mineta resigned, his acting successor was not in a position to determine the fate of such a sensitive dossier, and in December, when the Democrats had gained control of both Houses of Congress, Mary Peters, the new Secretary for Transportation, decided that the NPRM had to be withdrawn, reasoning that this was better than pressing ahead and risking the even more serious setback of having it repealed (Dobson 2009, 153).

2007: A Way Forward Is Found

The negotiations were now back to square one. In 2004 the EU Transport Council had rejected a deal which failed to offer any improvement in access to the US domestic market; and now, more than two years later, when the US negotiators had endeavoured to find some degree of wriggle-room through the NPRM procedure, they in turn had been knocked back by determined opposition in Congress. Despite these set-backs there was still a degree of momentum behind the negotiations. The Commission desperately wanted their first major negotiation to be a success, and they could not easily settle for the *status quo*. They had argued that many of the member states bilateral agreements were incompatible with Community law, and although they could reopen their legal proceedings against them, it was difficult to see how a Court ruling would help in any way. Equally the Americans valued highly the new structure of multinational airline alliances, which had improved service to the US public, enhancing competition not merely on the North Atlantic, but right around the world. However, the network of open skies agreements was fundamental to the new structure. Without it there was no justification for the granting of the anti-trust immunity, which was essential to the functioning of the airline alliances. Some way needed to be found to dissuade the Commission from reopening its suspended litigation against the member states which had signed separate bilateral agreements privileging their own airlines over the airlines of other member states.

As a result of these pressures on both sides, negotiations were resumed in February and March 2007. Since Congress had now made it abundantly clear that they would not allow any significant concessions to be made on cabotage or on ownership and control of US airlines, the market access concessions which could be scraped together, whilst they demonstrated a continuing willingness to move in the direction demanded by

their European partners, still fell a very long way short of the Open Aviation Area, which remained the European goal. Naturally enough the new draft agreement extended to the whole of the EU the liberal provisions of the bilateral open skies agreements, and accepted the concept of the European carrier. This much was by now common ground. In addition:

- Subject to stringent conditions European carriers could establish US subsidiaries to carry US domestic traffic, and vice versa; there would be scrutiny of holdings of non-voting stock in excess of 49.9%, but no presumption that a higher percentage constituted control, provided that the foreign share of voting stock did not exceed 25 percent;
- The US ban on wet-leasing was lifted, meaning that a US carrier could enter into an agreement with a European carrier to operate certain services on its behalf using European aircraft and crew;
- Some access was granted to the Fly America programme, which had hitherto required all US public servants to travel on US airlines;
- There would be closer co-operation on competition policy;
- There would be mutual recognition of security systems.

In the view of the UK government, and certainly in the view of British Airways and Virgin Atlantic, this list of concessions was still not enough to justify the opening up of trans-Atlantic competition at Heathrow to all US and EU airlines, but whereas in 2004 Germany was prepared to side with the UK in throwing out a manifestly inadequate deal, in the first half of 2007 they held the Presidency, and were therefore obliged to pay more attention to the views of the other Member States, which in the interim had increased in number from 15 to 27. Most of the new Member States were strongly in favour of an EU-wide agreement, and had little to lose by supporting it. Finding himself uncomfortably isolated, Tony Blair, who was himself under pressure to make way for Gordon Brown as Prime Minister, judged that he could not hold out against the EU without German support, but nor could the UK easily back down, paying the price at Heathrow for a European agreement, without getting something more in exchange.

At this point Daniel Calleja demonstrated his skill and experience, coming up with the imaginative new idea of treating the limited deal on the table as a first stage only, with commitment in the treaty to a second stage of reform within three years, backed up by the right for any one member

state, acting unilaterally (see Article 21.3), to suspend the new 'rights specified in this Agreement' (in the UK case this meant access to Heathrow), if a second stage was not agreed by 30 November 2010. In addition, entry into force was delayed until the start of the 2008 summer season to coincide with the opening of a major new terminal at Heathrow.

2008–2010: Negotiating the Second Stage Agreement

The agenda for these second stage negotiations, set out in Article 21.2, included 'the following items of priority interest to one or both of the Parties':

(a) further liberalisation of traffic rights;
(b) additional foreign investment opportunities;
(c) effect of environmental measures and infrastructure constraints on the exercise of traffic rights;
(d) further access to Government-financed air transportation; and
(e) provision of aircraft with crew.'

These were of course the very issues that had bedevilled the bilateral negotiations for the liberalisation of Bermuda 2 since the early 1990s.

The promise of a second stage of reform may have been a fig-leaf of cover for the UK retreat—certainly Cornelia Woll maintains that the main purpose of the suspension clause was to give the UK time to roll over the powerful constituency of its recalcitrant airlines, BA and Virgin Atlantic (Woll 2012, 932)—but it was enough to persuade the UK to accept the agreement, which was consequently approved by the Council of Ministers, signed in April 2007 and entered into force from 30 March 2008. Under the terms of Section 1 (v) of Annex 1 to that agreement, Bermuda 2 together with all its associated agreements and memoranda of consultations was 'suspended or superseded'.

The results from another seven rounds of negotiation between the autumn of 2008 and the summer of 2010 were meagre. If the UK had any serious expectation that 'the further liberalisation of traffic rights' would include US cabotage, or that 'additional foreign investment opportunities' would mean any significant relaxation of US rules on ownership and control of US airlines, they will have been sorely disappointed. There were some improvements in access to Fly America traffic, and provisions relating

to environmental measures (e.g. airport noise restrictions) and to infrastructure constraints were also marginally helpful, but these were designed to limit the ability of either Party to use such measures to benefit their own airlines.

On the other hand, by 2010 the right of establishment, which had become the framework within which US officials felt able to discuss the application of their ownership and control rules, did finally allow Sir Richard Branson to establish a US company—Virgin America—which was able to operate legitimately within the US domestic market. Moreover the One World Alliance linking BA with American Airlines had received anti-trust immunity, and BA was able to operate a direct service from Paris to New York. The anti-trust immunity of the BA/AA alliance has continued, but the other benefits of the EU-US Agreement proved short-lived. BA's Paris-New York service was soon withdrawn on commercial grounds. Once Virgin America became profitable, and its shares were traded on the NASDAQ stock exchange, the airline quickly became a take-over target, and was bought by Alaska Air Group in April 2016 (see Chap. 5).

Although the second stage agreement did not amount to very much, neither the UK government nor its airlines wanted to upset the applecart by exercising their right to pull out of the EU agreement and return to Bermuda 2. Approved by the EU Council on 24 June 2010, the second stage agreement formally removed the threat of suspension which had allowed the first stage to go ahead. Article 21 was deleted in its entirety. In its place the contracting Parties agreed on a new Article 21 entitled Further Expansion of Opportunities, which committed them both 'to the shared goal of continuing to remove market access barriers … including enhancing the access of their airlines to global capital markets, so as better to reflect the realities of a global aviation industry, the strengthening of the transatlantic air transportation system, and the establishment of a framework that will encourage other countries to open up their own air service markets.' It even looked forward to the day when 'the laws and regulations of each Party permit majority ownership and effective control of the airlines by the other Party or its nationals' and made provision in that event for EU airlines to operate some services between the USA and five other third countries, and for US airlines to operate such services between the EU and five third countries.

Seven years on even these aspirations look ambitious, and there is no time-table for such developments to occur. On the contrary, with the United Kingdom set to leave the European Union and the United States

turning away from multilateral trading arrangements, the more immediate question is whether the UK will remain associated with the EU-US Air Transport Agreement after it has left the EU. Associate membership is theoretically possible, but it seems more likely, in pursuit of what Prime Minister May has called a 'clean Brexit', that the UK will seek to negotiate a new bilateral agreement with the USA. The question would then arise, how such an agreement, covering some 40% of air services across the North Atlantic, would relate to the continuing EU-US Agreement and to the regulation of the multinational airline alliances, which no longer fit comfortably into a pattern of bilateral agreements between governments.

In the final chapter we shall have to consider whether the reassertion of the bilateral model for UK-US air services, giving expression to the dramatic political developments of 2016/2017, could open up a new opportunity to lay the foundations of a more liberal multilateral regime, or whether it would signal yet another postponement of any such development to a more propitious time.

Notes

1. UK record of meeting between Cecil Parkinson (UK Secretary of State for Transport) and Sam Skinner (US Secretary of Transportation), Washington, 11 Jan 1990.
2. The CRAF allows the Defense Department to call on civil aircraft in a military emergency, in return for granting exclusive rights to US airlines to carry US government personnel travelling on official business—the Fly America Programme.
3. The finality of this pronouncement and its impact on the assembled officials is reminiscent of the court room drama in December 1976 when Lord Denning pronounced Freddie Laker a 'man of enterprise', signalling the inevitability of his ruling against the British government (see Chap. 2).

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CHAPTER 7

Conclusions

In drawing together the threads of this narrative, it will be appropriate first to examine the impact of Bermuda 2 on the industry it served, and to draw conclusions from that experience, and then to consider the options that its demise, together with the UK's more recent decision to leave the European Union, might open up for the development of a new regulatory framework better suited to a global industry than the pattern of bilateral air service agreements that has served since 1944, but may no longer be the best way to regulate a global industry dominated by a small number of multinational alliances.

In order to assess the success or failure of Bermuda 2 as a treaty, we need to look first at what happened in the UK/US air transport market over the period 1970–2010. We can then see how developments in the Treaty related to developments in the market, including changes in market share as between UK and US airlines, and consider to what extent these were influenced by the terms of the Treaty as well as other factors. Was Bermuda 2 a help or a hindrance to either or both governments in the realisation of their policy objectives? What lessons might be drawn from the history of the negotiation and implementation of Bermuda 2? Are there any that might be relevant to the construction of a new bilateral Treaty, if that is required as a consequence of the UK's decision to leave the European Union.

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9_7

Table 7.1 Passenger traffic under Bermuda 2, 1976–2008

Year	*Scheduled*	*Charter*	*All services*
1976	2,804,316	717,613	3,521,929
1977	3,091,906	1,007,640	4,099,546
1978	4,477,694	659,958	5,137,652
1979	5,108,400	282,516	5,390,916
1980	5,576,975	336,668	5,913,643
1981	5,967,547	175,200	6,142,247
1982	5,029,560	304,073	5,333,633
1983	5,309,410	427,917	5,737,327
1984	6,068,385	429,913	6,497,798
1985	6,614,957	354,810	6,969,767
1986	6,159,411	175,766	6,335,177
1987	7,459,788	274,261	7,734,049
1988	8,158,896	415,418	8,574,314
1989	8,455,705	986,320	9,442,025
1990	9,286,405	1,048,799	10,335,204
1991	8,662,275	1,018,710	9,680,985
1992	10,224,437	1,206,875	11,431,312
1993	10,874,950	1,139,565	12,014,515
1994	11,213,397	959,426	12,172,823
1995	12,292,567	955,240	13,247,807
1996	13,125,618	1,267,347	14,402,975
1997	14,406,092	1,245,615	15,651,707
1998	15,834,920	1,317,277	17,152,197
1999	17,126,941	1,124,519	18,251,460
2000	18,006,024	1,202,053	19,208,077
2001	15,987,502	1,072,017	17,059,519
2002	16,138,591	740,428	16,879,019
2003	15,768,724	815,751	16,584,475
2004	17,049,215	954,845	18,004,060
2005	17,274,976	1,010,869	18,285,845
2006	17,139,222	927,215	18,066,437
2007	17,701,483	856,961	18,558,444
2008	17,471,227	680,463	18,151,690

Source: CAA annual airport data

UK/US Market Growth and Air Travel Under Bermuda 2

In 1977 just over 4 million passengers travelled by air between the United Kingdom and the United States, 3 million on scheduled services and one million on non-scheduled services (charters). By 2007, the last full year under Bermuda 2, the total number of passengers had risen to around 19 million, almost five times the traffic carried in 1977, but almost all the growth had been in scheduled services, by then carrying some 18 million passengers while charters were still carrying just over one million (see Table 7.1).

Up to 2001 there was a close link between economic growth and air travel. The graph at Fig. 7.1 tracks the growth in US and UK per capita figures for GDP from 1970 to 2014. Figure 7.2 shows the corresponding growth in the number of passengers travelling on scheduled services between the UK and the USA over the same period. Air transport was seriously affected by the economic recessions of 1973–1975, 1981–1983, 1991–1992, 2001–2002 and 2008–2010, which show up clearly as kinks in the graph at Fig. 7.2. In 2001/2002 air transport was doubly affected by the economic slowdown associated with the Gulf War, and by the lingering fear of air travel as well as the temporary closure of US airspace which followed the dramatic attack on the World Trade Centre in New York on 11 September 2001. This brought to an end a period of more than thirty years of almost continuous and rapid growth in the scheduled service market, rising from about 3 million to 10.1 million between 1977 and 1990, and then from 10.1 million to 18.5 million between 1990 and 2000. Since 2001, despite continuing economic growth in the UK and the USA, the scheduled service market has levelled out, hovering between 16 million and 18 million for more than a decade, and charter traffic has also fallen significantly.

Within this picture of rapid overall growth up to 2000, one of the most striking features is the almost continuous growth of the scheduled service market, whilst the smaller market for charter services has been much more volatile. Charter traffic is shown in Fig. 7.3. Charter traffic fell from just over 1 million passengers in 1977 to an average of about 320,000 between 1979 and 1988. From this level it recovered to peak at more than 1.6 million in 1997 before falling back to around 1.1 million in 2001, and declining further to below 0.7 million in 2008. Since the recession of 2008–2010 charters have fallen still further to touch a new low in

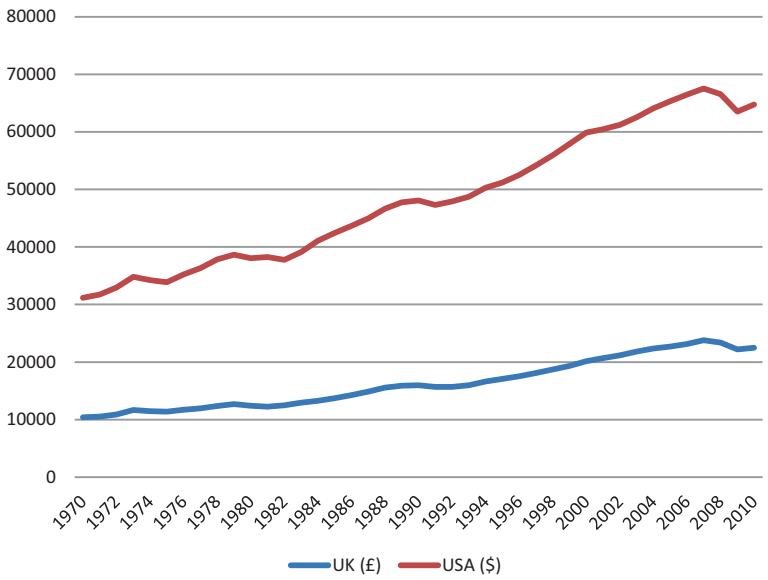

Fig. 7.1 UK/US GDP per capita in national currencies at constant prices
Source: Data from http://www.econstats.com/weo/V006.htm (accessed 7 February 2017) based on International Monetary Fund World Economic Outlook

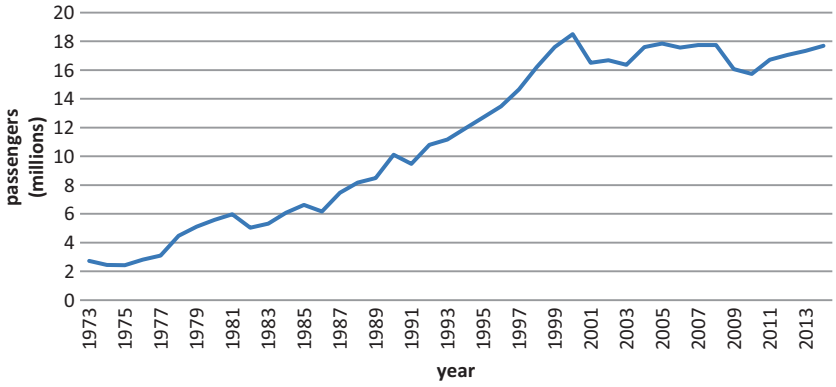

Fig. 7.2 All scheduled service passengers 1973–2014
Source: Data from Civil Aviation Authority

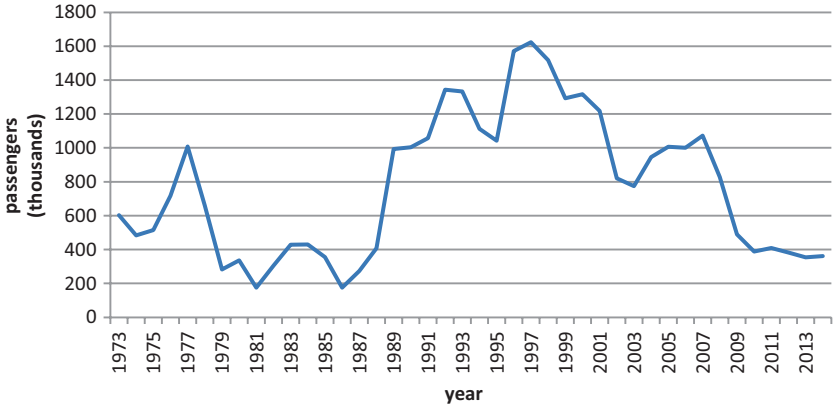

Fig. 7.3 Charter passengers 1973–2014
Source: Data from Civil Aviation Authority

the region of 400,000 passengers per annum. Despite the early (1978) liberalisation of the passenger charter regime (Chap. 3 and Part III, Doc 8), charters have found it difficult to compete with scheduled services, especially once the latter, under the sharp stimulus of Laker's Skytrain fares, had embraced even the modest degree of tariff liberalisation which was encouraged at the same time (Part III, Docs 5, 7, 9), including notably the development of Advance Purchase Excursion (APEX) fares.

Charter traffic is strongly oriented to the leisure travel market, and consequently even more sharply affected by the economic situation than scheduled service traffic. In addition, insofar as charters may have filled gaps in the scheduled service market, they will have been affected by the increased number of US gateways made available for scheduled service during the 1980s. For many years about 90% of the market was carried on services operated by UK airlines; the last US operator, American Transair, withdrew after 2001. Since 2007, the further decline in charter services may reflect the removal of all limits on the availability of US gateways under the Treaty between the EU and the USA, as well as the 2008–2010 recession.

A second intriguing aspect of the air travel market under Bermuda 2 has been the evolution of market shares as between UK and US airlines (Figs. 7.4a and 4b). In 1971, when the United Kingdom began to be

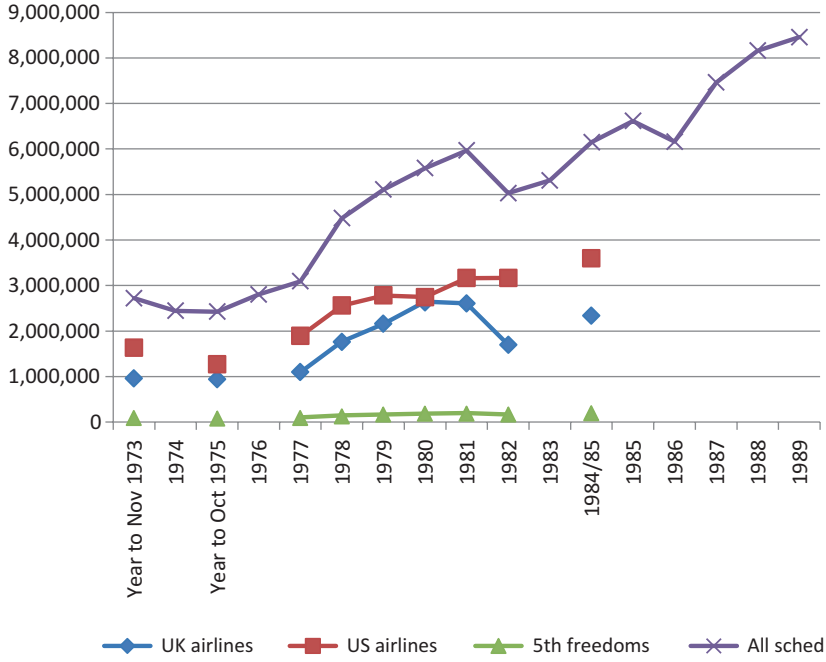

Fig. 7.4a Scheduled service passengers (millions) 1973–1989
Source: Data for 'all scheduled' taken from CAA annual statements of movements, passengers and cargo at UK airports. Fifth freedom traffic assumed to be 3.3% of all scheduled traffic. Data for UK airlines derived from CAA documents in Departmental files at the National Archives (BT 245/1860 for 1973 and 1975, BT 245/1934 for 1977–1982, BT 245/1990 Part 1 for 1984/1985). Data for 1984/1985 includes precise figures for US airlines; otherwise the total for US airlines is assumed to be the balance after allowing for traffic carried by UK and fifth freedom airlines

concerned about its share of the market under Bermuda 1, US airlines had approximately 70% of the scheduled service market. By 1977, when Bermuda 2 was signed, this had fallen to around 61%, with UK airlines carrying around 35%, the small balance being accounted for by a few third country airlines with limited fifth freedom rights. A high proportion of scheduled service passengers flew with British Overseas Airways

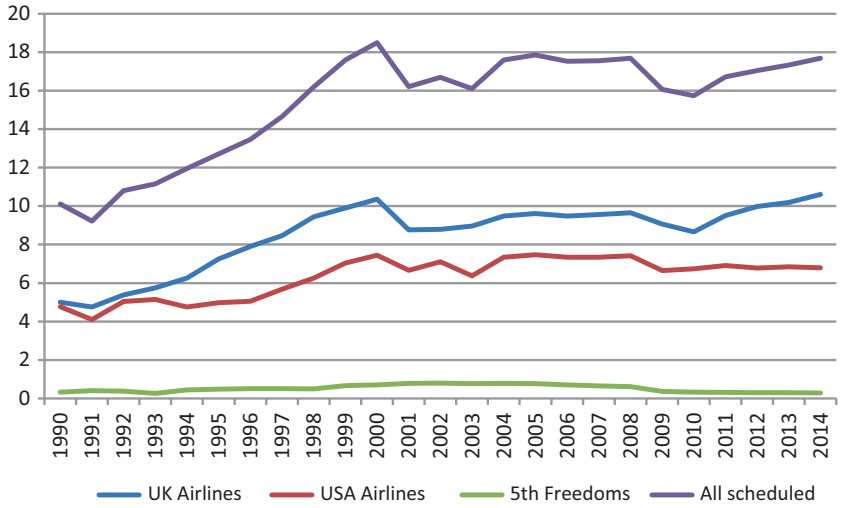

Fig. 7.4b Scheduled service passengers (millions) 1990–2014
Source: Data provided by Civil Aviation Authority

Corporation (the forerunner of British Airways), Pan American Airways or Trans World Airways. The only services operated by other British or American airlines were Miami-London, where BOAC faced National Airlines, and London-New York, where Sir Freddie Laker had just launched his Skytrain service.

By the late1980s UK and US airlines had roughly equal shares, and by 2007 UK airlines were outperforming their US competitors by a considerable margin. In that year, six US airlines (American, United, Continental, Northwest, Delta and US Airways) carried about 7.3 million passengers on scheduled services, whilst four British airlines (predominantly BA and Virgin Atlantic, with small numbers on bmi and Silverjet) carried about 9.6 million passengers. The US share of scheduled service traffic had fallen to around 42%, whilst the British share had risen to 54.5%, with a small balance still carried by Air India, Pakistan International Airways, Air New Zealand, El Al and Kuwait Airways. Since 2007, under the EU/US air transport agreement, which fully liberalised access to Heathrow for all UK and US airlines, the US share has continued to fall.

Comprehensive data for UK/US market shares is not readily available before 1990, but the limited data that is available (see notes to Fig. 7.4a) reflects two significant developments. First, the remarkable rise and fall of Laker Airways, whose traffic grew from 19,000 travelling between London and New York in the summer of 1977 to 626,000 at four US gateways served from Manchester as well as London in the summer of 1981. Laker's explosive growth briefly raised the UK share almost to parity. However, by the summer of 1984/1985, for which detailed market share figures are available, not only had the UK share reverted to below 40%, but interestingly, in all the markets where the traditional airlines were active (BA, Pan Am, TWA, Northwest), each of them took more or less equal shares, 50% where BA faced a single competitor, one third each where there were two US airlines. This does not need to imply collusion, but it does perhaps suggest that the old traditions of collaboration under the auspices of IATA remained alive and well at least until Pan Am and TWA were driven out of the market by more aggressive competitors in the late 1980s.

Figure 7.4b, based on the more comprehensive CAA data available from 1990 onwards, tracks changes in the numbers of scheduled service passengers carried by UK, US and other airlines from 1990 to 2014. The reasons for the growing UK share of the market are consistent with the patterns observed in the earlier period. Just as the growth of Laker briefly boosted the UK share up to 1981, so the decline of Pan Am and TWA in the late 1980s led to a sharp drop in the US share of the market, which the new US flag-carriers have never fully recovered. They turn out to be strong competitors where they fly to London from their US hubs (e.g. American at Dallas/Fort Worth), but much less successful at gateways which are not important hubs. Meanwhile Virgin's strategy of competing head-to-head with BA on its most popular routes turned out to be much more successful than the government-inspired strategy which had sought to nurture BCal by giving it exclusive access to specific gateways which were protected from BA, but exposed to competition from powerful US airlines at their hub airports. Moreover, competition from Virgin seems to have increased the UK share in those markets where BA and Virgin were both present, rather than simply taking traffic away from BA, just as the presence of both Pan Am and TWA boosted the US market share in the past.

Another reason for the growing UK share of UK-US traffic has almost certainly been the relatively early restructuring of the British industry.

British Airways went through a major period of reconstruction leading to its successful privatisation in 1987, and Virgin Atlantic, founded in 1984, soon became a much more effective competitor than BCal, especially after it gained access to Heathrow in 1991. That was the year when American Airlines and United Airlines also gained access to Heathrow, replacing Pan Am and TWA (Chap. 4) but there were still six US airlines competing for UK-US traffic, and in 2005 four of them—Delta, United, US Airways and Northwest—were all sheltering from bankruptcy. Northwest joined with Delta in 2008, Continental joined with United in 2010, and US Airways merged into American in 2013, but the financial pressures which eventually gave rise to these mergers will have taken their toll on US airline performance throughout the later years of Bermuda 2, whilst BA and Virgin had more freedom to focus on their performance in the market.

There are several possible explanations for the levelling off of UK-US traffic growth since 2000, which has occurred despite continuing economic growth (Fig. 7.1). One possible explanation is the heavy congestion at both Heathrow and even Gatwick, making it ever more difficult and ever more expensive to obtain the highly prized early morning arrival slots needed for the trans-Atlantic market. This may have encouraged US airlines to expand their services to other European cities instead, where it is easier to gain competitive slots at lower cost. This incentive to go elsewhere could be compounded by two further considerations, the first arising from technology, the second from the patterns of service developed since about 2000 by the multinational airline alliances (Chap. 4). The technological change is the development by both Boeing and Airbus of a growing range of smaller long-haul aircraft, which it is now economic to operate on 'thinner' routes to certain smaller European cities.

The development of the three great multinational airline alliances, combined with the establishment from 1993 of the European Aviation Area, has led to a new structure of international air services, using the hub-and-spoke pattern originally developed in the US domestic market to maximize airline efficiency. Each of the alliances now has at least one major hub on either side of the Atlantic, and one or more subsidiary hubs. Oneworld has its principal European hub (with BA) at Heathrow and another with Iberia at Madrid. Skyteam, built around Air France/KLM, has major hubs at Amsterdam and Paris, and now with Virgin at Heathrow, as well as Rome and Milan with Alitalia, whilst the Star Alliance, built around Lufthansa and SAS, has is

major hub at Frankfurt, as well as others at Brussels, Copenhagen, and Lisbon. London remains a highly attractive destination in its own right, and many passengers will want to include London on their business or leisure itinerary, but there is no good reason for a US airline (other than BA's partner American Airlines) to deliver to Heathrow passengers requiring onward connections to other European cities. Star and Skyteam airlines will prefer to use their own alliance partners to provide connecting services from alternative European hubs. This may go some way towards explaining the relative stagnation in the growth of traffic on US airlines since around 2000, just when the alliances were becoming established.

Holding the Ring for Divergent Government Policies

The Introduction (Chap. 1) summarised the long-term and short-term objectives of both US and UK aviation policy. In brief, although it took some years to win the battle in Congress, the United States has pursued a liberal policy in international aviation since 1978, consistent with the deregulation policy followed at home, expressed since 1992 in the Open Skies policy and in the International Air Transportation Policy Statement of 1995. Domestic deregulation precipitated a major shake-out in the US aviation industry, whose new champions (American, United, Delta) had within a decade displaced Pan Am and TWA as the dominant US international flag-carriers. By 2008, when Bermuda 2 was suspended under the EU-US Agreement which took its place, no less than seven US airlines were serving the UK-US market from 18 US gateway cities, though the continuing competitive shake-out would in due course reduce this number. In 1990 six cities enjoyed the benefits of competition between two US airlines serving London, but by 2008 direct competition between two US airlines on the same gateway route segment had fallen back to just three cities: Chicago, New York and Los Angeles. Boston and Miami had both lost their second US airline, and in the Washington area there was no longer US airline competition betweeen trans-Atlantic services at Baltimore and Washington Dulles.

Since 1970 UK international aviation policy has been shaped by the Edwards Report (UK Policy 1969) which advocated the creation of a second airline to compete with British Airways (Chap. 1). At the outset British Caledonian was chosen by the government to be the second airline.

Fortunately, by the time BCal failed in 1987, and was bought by British Airways, Virgin Atlantic was already beginning to establish itself as a credible competitor, challenging BA on international routes which could sustain more than one British airline. Twenty years later, BA and Virgin were serving 19 gateway cities (BA:18, Virgin: 10), with BA carrying over 6 million passengers, Virgin nearly 3.5 million, and the two airlines competing head-to-head at 9 US destinations. American Airlines (the largest of the US airlines in the US-UK market) carried 2.5 million in 2008.

Bermuda 2: Towards a Balanced Assessment

The growth of the market and the successful realisation of the rather different US and UK policies for their air transport industries could be held to demonstrate that Bermuda 2 provided a satisfactory political and economic framework for the development of the market for air transport between the two countries. On the other hand one might reasonably ask whether the successful outcome was achieved despite Bermuda 2 or because of it. The sharper edges of the restrictive policies built into Bermuda 2 had to be softened and the Treaty liberalised in order to foster the healthy competition which both governments soon came to recognise as being desirable.

Perhaps we should simply accept that Bermuda 2 was a child of its time. The restrictions on competitive airline tariff strategies, on the freedom of airlines to decide how much capacity to offer, on the designation of additional airlines to compete with one another on the same route, the limitations of the route schedule itself—all these restrictions had to be eased in order to make room for the competitive ambitions of the airlines in a growing market. By 1995 the British architects of Bermuda 2 would scarcely have recognised the Treaty they had designed. After 1995, despite the impetus provided by strong political commitment on both sides (Chap. 5), negotiators were unable to find an agreed pathway within Bermuda 2 to bring them to the shared goal of full liberalisation. It took a new agreement between the European Union and the United States to break that impasse. That is the argument against Bermuda 2 as originally conceived.

The argument in its favour is that the cautiously protectionist stance of the original agreement was precisely what was needed in order to create orderly conditions for the successful development of a competitive market. In 1976 British Airways was still a loss-making nationalised industry.

Britain's second airline (British Caledonian) was a fragile creation of government policy. Both needed protection from the sharpest winds of competition while they were being prepared for a more competitive future; Bermuda 2 allowed the two governments to manage the pace of progress towards a market in which strong airlines from both countries could flourish successfully in the private sector without continual recourse to financial support either from government or from bankruptcy protection laws.

It has to be acknowledged that along the way, the US showed more willingness to adjust the treaty or to make concessions within its terms to accommodate British policy than did the UK government when the boot was on the other foot, notably when the restructuring of the US industry required the substitution of American and United for Pan Am and TWA at Heathrow (Chap. 4: the Heathrow Succession). The US authorities, reflecting pressures in Congress and from US airlines, can be slow to grant permits to new foreign airlines (as is still the case), but they could have used the treaty more rigorously than they chose to do, for example to refuse any renewal of Bermuda 2's capacity control arrangements when Annex 2 should have expired in 1984 and again in 1986 (Chap. 3), or to resist the repeated relaxation of Bermuda 2's restrictive designation provisions (Article 3 of the agreement) to frustrate the growth of Virgin Atlantic alongside BA, which added significantly to the competitive pressures faced by US airlines.

A balanced assessment might perhaps conclude that for all its faults Bermuda 2 provided the two governments with what turned out to be a surprisingly flexible instrument for the regulation of air services over a period of some thirty years of rapid growth and change in a dynamic industry. Bermuda 2 was not designed to give airlines the extensive freedoms they ultimately enjoyed to set their own prices, to choose their own frequencies, to enter into alliances, or for British airlines in particular to compete with one another head-to-head on so many gateway route segments. But with good will on both sides ways were found for Bermuda 2 to operate with the flexibility that the changing market required.

The Implications of BREXIT

Before drawing conclusions for the future from this study of the life and death of Bermuda 2, it should be noted that such an exercise may be of more than academic interest in the context of BREXIT, Britain's decision to exit the European Union. The position is as follows.

Since 30 March 2008, air services between the UK and the USA have been conducted under the umbrella of the Air Transport Agreement between the United States of America and the European Community (Air Transport Agreement 2007). At present (early 2017) the Agreement is still being provisionally applied, but all the formalities for definitive ratification are now in place, and this is expected to happen soon. The application of Bermuda 2 was suspended under Article 22.1 of the EU-US Agreement, except in relation to those UK territories where EU law is not applied, such as Bermuda and British territories in the Caribbean. When the EU-US Agreement is formally ratified, Bermuda 2 will be superseded under Article 22.2 of the Agreement, except in relation to those same territories.

However, in June 2016 the British people decided in a referendum that they wished to leave the European Union. The British government has accepted that result, and is taking steps to implement it. It is not entirely clear from the text of the EU-US Agreement what will happen to the air services of a single member state which is no longer a member of the European Union, but Article 23 (Termination) and Article 25 (Provisional Application) both make provision for any decision to no longer apply the agreement to take effect at the end of the International Air Transport Association (IATA) traffic season in effect one year following the date of written notification.

It seems likely that the main body of Bermuda 2 will have been formally superseded by the EU-US Agreement before the UK leaves the European Union, but even if that were not to be the case, there is no serious expectation or desire for Bermuda 2 to be revived. Quite apart from any other considerations, under an agreement as old-fashioned and restrictive as Bermuda 2, the alliances between BA and American and between Virgin Atlantic and Delta would almost certainly lose their immunity from prosecution under US anti-trust laws. In any case, if the UK were to give notice of its intention to leave the EU-US Air Transport Agreement at the same time as it concluded its negotiations for withdrawal from the EU (for example in March 2019), or if that were held to be the automatic consequence of Brexit, UK air services would cease to be covered by the EU Agreement on 30 March 2020.

Since going back to Bermuda 2 is not a serious option, there would appear, in theory at least, to be three other possible ways forward:

- The UK could accede as an Associate Member to the existing EU-US Agreement, as Iceland and Norway have done;
- The UK could sign a new bilateral agreement with the USA
- The UK could join with the USA in launching a wider, potentially multilateral agreement, perhaps taking as a model the Multilateral Agreement on the Liberalisation of International Air Transport (MALIAT) which has linked Brunei, Chile, New Zealand, Singapore and the USA since 2001.

Writing in 2017, the choice of instrument is very difficult to predict, but it will probably be strongly influenced by political considerations, related to the United Kingdom's decision to leave the EU, as well as the trade policies of a new US Presidency.

Air Services as a Case Study in Euro-American Relations

Before giving further consideration to the options for the future, it may be helpful to review experience of Bermuda 2 within the framework for the study of Euro-American relations which Steven McGuire and Michael Smith proposed in their book on Competition and Convergence in the Global Arena (McGuire and Smith 2008). Four 'images' of the Euro-American system are identified:

- The politics of power and security
- The politics of dominance and resistance
- The politics of interdependence and integration; and
- The politics of co-operation and institution-building

McGuire and Smith note that all four images may be relevant in varying degrees to any given area of policy, but that one image will probably be more significant than the others, and this would appear to be the case in relation to air services, where the predominant image, particularly since the emergence of the multinational airline alliances between 1997 and 2000, has been the politics of interdependence and integration.

Chapter 1 noted that the institutional structures within which international air services are regulated have deep roots in issues of power and security, and Article 7 of Bermuda 2 made specific provision for the Contracting Parties to co-operate in dealing with security threats such as

hijacking. Fortunately, no such threat arose during the life-time of Bermuda 2. The aircraft involved in the terrorist attacks on the World Trade Centre in 2001 were all providing domestic air services within the USA. In civil aviation the politics of power and security is something which unites rather than divides the Contracting Parties.

It is arguable that the politics of dominance and resistance was characteristic of the negotiations which led both to Bermuda 1 and to Bermuda 2. Both in 1946 and in 1976, the British government and its airlines feared the hegemony of the United States and its airlines. In 1946 that fear was justified by the weakened condition of UK civil aviation in the aftermath of the Second World War. The risk of dominance was countered by insisting on a bilateral structure for the regulation of international civil aviation, rather than the multilateral structure that the US government would have preferred, and under Bermuda 1 the international airlines of both sides settled into patterns of co-operation which did not fully exploit the greater potential strength of the US industry.

In 1976 the UK's fear was based on recent and growing experience of the behaviour of new and powerful US domestic airlines, operating from a well-protected home base, which gave them the resources to compete unfairly (as UK officials and airlines believed) in the international arena (Chap. 2). On this occasion the perceived threat of dominance was countered by the constraints imposed under Bermuda 2 on the designation of more than one US or UK airline to operate competing services between the same cities on either side of the Atlantic (Article 3) and on the right to increase the frequency or capacity of service on any route (Article 11 and Annex 2). The establishment of these constraints, not available under Bermuda 1, was a critical UK requirement in the 1976/1977 negotiations (Chap. 2), regarded by UK Ministers and officials as essential to the achievement of their policy objectives for the healthy development of the UK aviation industry. Once a robust British Airways was ready to emerge into the private sector (after 1987), and Virgin Atlantic supplanted British Caledonian as the UK's second international airline, there was less reason to fear the dominance of the US hegemon, but the fear lingered on in the historical memory which continued to influence UK policy throughout the lifetime of the agreement. It was a significant factor in the negotiations for the Heathrow Succession (Chap. 4), which extracted a high price for the substitution of two powerful US airlines with strong domestic networks (American and United) for two weaker international airlines (Pan

Am and TWA), but it continued to influence UK resistance to the opening up of Heathrow to any further US airlines (Chap. 5).

After 1991, when the UK share of the market had risen close to parity, and the right to code-sharing between UK and US airlines had been introduced, the character of the relationship began to shift towards the model of Interdependence and Integration. McGuire and Smith note that this image is characteristic of trade relations, so it is no surprise to find that it is a good fit for air services. Initially interdependence and integration was more apparent in the deepening relationships between the airlines, as the multinational airline alliances took shape (Chap. 5), than it was across the negotiating table, where fears of US dominance and hegemony persisted. Initially UK negotiators resented the way that Manchester Airport and American Airlines forced their hands in the pursuit of rights for US airlines that were not originally included in Bermuda 2 (Chap. 4), but the atmosphere was much less hostile by 1995, when unrestricted provision was made for services between UK regional points and any point or points in the United States. More generally, the provisions made, first for code-sharing in 1991, and then for joint ventures in 1995, are clear evidence of the way that growing interdependence and integration at airline level was displacing the model of dominance and resistance.

Whether Bermuda 2 can be described as an instance of the politics of co-operation and institution-building is a little more doubtful. Institutions, as defined by political scientists, can range all the way from the habits, rules and conventions of a group of people who work together, as the aviation community does, to the formal or informal structures and arrangements that may develop over time to give shape to their shared activity. The classic definition offered by Peter Hall and Rosemary Taylor defines them as 'formal or informal procedures, routines, norms and conventions embedded in the organizational structures of the polity or political economy.... In general, historical institutionalists associate institutions with organizations and the rules or conventions promulgated by formal organizations' (Hall and Taylor 1996). By and large, under Bermuda 2, the framework of rights within which the airlines might act was defined by the Treaty itself, interpreted and amended in negotiation between the Parties from time to time. The two governments and the airlines then acted separately to carry out their functions, only coming together again around the negotiating table when the framework of rules needed further attention. The framework allowed interdependence and integration to develop among the airlines, and twice a year under Annex 2 there were routine

consultations between the two governments about the capacity to be operated, but the bilateral negotiating forum remained essentially confrontational. Bermuda 2 made provision for a Tariff Working Group, but it never met. The airlines were in competition with one another, and the negotiating teams sat facing one another across a long table. These arrangements are not fruitful ground for co-operation or institution-building, even if members of the opposing teams may indeed become good friends within the close-knit aviation community.

The situation could be different within a multilateral setting such as the EU-US Air Transport Agreement which took the place of Bermuda 2. Article 18 of the EU-US Agreement made provision for a Joint Committee to meet at least once a year, and the Article was extensively amended under the Second Stage Agreement in 2010—a sure sign of life. But such institutional developments are much more characteristic of a multilateral agreement. Within the aviation community, there is no shortage of multilateral institutions at international level, both for governments (the International Civil Aviation Organisation) and for airlines (the International Air Transport Association), and the politics of co-operation and institution-building can be observed in the processes which have drawn the leaders of the European aviation community together in the construction of the single European Aviation Area (Chap. 4). But even when the airline industry itself has developed structures of interdependence and integration, the conduct of bilateral air service relationships seems to be better suited to the resolution of conflict and confrontation than to the development of co-operation and institution-building.

A Few Lessons from Bermuda 2

It will be fascinating to see what sort of agreement finally emerges as the successor to Bermuda 2 and the EU-US Air Transport Agreement that has regulated UK-US air services since 2008. Given President Trump's declared preference for bilateral trade agreements, and Prime Minister May's reluctance to countenance any attempt to hang onto little bits of the UK's membership of the European Union, it seems likely to be a new bilateral air services agreement, rather than for example some form of association with the existing EU-US Agreement. There will also need to be a new agreement between the United Kingdom and the EU.

If there is to be a new UK-US bilateral agreement, to be known as Bermuda 3 perhaps, there are a few specific lessons which might be drawn from this account of the life and death of Bermuda 2:

1. The golden thread running through this book is that any treaty, but more particularly a treaty seeking to foster and regulate a dynamic industry, should not be conceived as a static instrument, but rather as a living organism capable of facilitating and adapting to change.
2. It follows that the process of change and adaptation should not be made too cumbersome. An agreement shaped too narrowly by the requirements of one particular moment in time (Chap. 2) with a strong focus on the avoidance of past mistakes rather than on the creation of new opportunities, may all too easily turn out to be ill-adapted to the future needs of the industry, or indeed to a change of political direction, only a few years later (Chap. 3).
3. A third lesson might be that it is a mistake to allow the treaty to be drawn into too much detail. At best, much time will have to be spent in amending provisions that no longer fit; at worst there will be unintended consequences like the Heathrow Succession issue (Chap. 4), which neither side can foresee, handing to one of them an unexpected card of high value.
4. Holding the ring for fair competition is the heart and soul of any treaty seeking to harness the benefits of healthy competition in the interests of the customer. One of the lessons of the Laker affair (Chap. 3) is that any new treaty should find a better way to deal with anti-competitive behaviour without risking the high profile engagement of mutually irreconcilable systems of national law.
5. Finally, the negotiating history of Bermuda 2 suggests that a patient but determined negotiator has a strong chance of getting a good result for his (or her) government, particularly if for any reason 'no agreement' is not an acceptable outcome for the other party.

Bermuda 3 and Beyond

In 1946, the negotiation of Bermuda 1 established a pattern for air service agreements which was widely followed. The timing and circumstances surrounding the negotiation of Bermuda 2 were less propitious, and any opportunity to establish a new template was missed. Despite the warm words with which President Carter and Prime Minister Callaghan greeted

signature of Bermuda 2, in truth it was an old-fashioned agreement, which failed to offer new leadership to the international aviation community.

Over the next few years the negotiators of a putative Bermuda 3 agreement face both risks and opportunities. One such risk is that a negotiation designed to 'Put America First' as President Trump would have it, and on the UK side to 'get the best possible deal for Britain' after leaving the EU, to quote Prime Minister May, could lead, after a bruising encounter, to a new agreement of a rather traditional kind, even if it turns out to have rather more of the features of an 'Open Skies' model than does Bermuda 2. No doubt such an agreement could work, but it would once again lock the US and the UK into a bilaterally structured deal that would at best be a step back from the regional market of the EU-US Agreement. Once again the opportunity to move the international aviation industry towards a more appropriate global regulatory structure would have been missed, perhaps for as long as another generation.

What then of the opportunities? Ten years ago, the EU-US Air Transport Agreement was a small step towards a more global future structure, opening a wider than bilateral range of opportunities to EU and US airlines, but it did not go quite far enough to break the mould (Chap. 6). The multilateral pressure on the UK to reach an agreement meant that the prize of full access to Heathrow had to be conceded without obtaining full access to the US market behind its international gateway airports. The need to negotiate a new agreement between the UK and the EU may now offer the opportunity to create a bolder European model. If the UK is able to negotiate a new agreement with the EU which retains full access to the whole of the EU market, including the reciprocal access to cabotage within other EU member states which all EU airlines have enjoyed since 1997, this could create an exciting precedent for seeking a similar arrangement in a new bilateral agreement with the United States.

An alternative model for Bermuda 3 is offered by the Multilateral Agreement on the Liberalization of International Air Transport (MALIAT), signed in 2001 by the United States and four members of the Asia Pacific Economic Cooperation forum (Brunei, Chile, New Zealand and Singapore), which has since attracted several more signatories, mainly small island states in the Pacific. The absence of cabotage rights makes this model less radical, but it still goes way beyond most other air service agreements in opening up almost unlimited international opportunities to the air carriers of the MALIAT member states, subject only to the usual requirements for substantial ownership and effective control to be vested in the designating Party.

The experience of operating for the past ten years under the relatively open conditions of the EU-US agreement suggests that the leading UK and US airlines are now strong enough for both governments, if they have the will and the vision, to seize the opportunity to construct a new bilateral agreement truly tailored to the world of competition between global alliances. The challenge is to design a new Bermuda 3 treaty which would lend itself, through accession by others, beginning perhaps with Canada and the European Union, to the evolutionary development of a truly multilateral regime such as the United States, in its more visionary moments, has been seeking since at least 1944.

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PART II

The Treaty

Text of Bermuda 2 with Amendments and Commentary

The text of the Treaty, including its Annexes, is here set out in a way designed to enable the reader to see exactly how it was amended to give effect to the outcome of the negotiations described in Part I of this book. Minor amendments are shown in italics in the text; see for example Article 2(3). Where more substantial amendments were made, the original text and the revised text are shown in parallel columns; see for example Article 7. My commentary, including cross-referencing to the narrative in Part I and to the documents in Part III, appears in boxes like this one.

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9_8

Air Services Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America

This agreement, known as Bermuda 2 (HMSO, Treaty Series No. 76 (1977), Cmnd. 7016), replaced the 1946 Agreement. Bermuda 1 (HMSO, Treaty Series No. 3 (1946), Cmd. 6747) had already expired on 21 June 1977, following termination by the UK (Chap. 2), but was continued in force by an Agreed Minute until Bermuda 2 entered into force with effect from 23 July 1977 (see Article 21).

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America;

Resolved to provide safe, adequate and efficient international air transportation responsive to the present and future needs of the public and to the continued development of international commerce;

Desiring the continuing growth of adequate, economical and efficient air transportation by airlines at reasonable charges, without unjust discrimination or unfair or destructive competitive practices;

Resolved to provide fair and equal opportunity for their designated airlines to compete in the provision of international air services;

Desiring to ensure the highest degree of safety and security in international air transportation;

Seeking to encourage the efficient use of available resources, including petroleum, and to minimize the impact of air services on the environment;

Believing that both scheduled and charter air transportation are important to the consumer interest and are essential elements of a healthy international air transport system;

Reaffirming their adherence to the Convention on International Civil Aviation opened for signature at Chicago on 7 December 1944; and

Desiring to conclude a new agreement complementary to that Convention for the purpose of replacing the Final Act of the Civil Aviation Conference held at Bermuda, from 15 January to 11 February 1946, and the annexed Agreement between the Government of the United Kingdom and the Government of the United States of America relating to Air Services between their Respective Territories, as subsequently amended ("the 1946 Bermuda Agreement");

Have agreed as follows:

Article 1

Definitions
For the purposes of this Agreement unless otherwise stated, the term:

(a) "Aeronautical authorities" means, in the case of the United States, the Department of Transportation, the Civil Aeronautics Board, or their successor agencies; and in the case of the United Kingdom, the Secretary of State for Trade, and Civil Aviation Authority, or their successors;
(b) "Agreement" means this Agreement, its Annexes, and any amendments thereto;
(c) "Air service" means scheduled air service or charter air service or both, as the context requires, performed by aircraft for the public transport of passengers, cargo or mail, separately or in combination, for compensation;
(d) "Airport" means a landing area, terminals and related facilities used by aircraft;
(e) "All-cargo air service" means air service performed by aircraft on which cargo or mail (with ancillary attendants) is carried, separately or in combination, but on which revenue passengers are not carried;
(f) "Combination air service" means air service performed by aircraft on which passengers are carried and on which cargo or mail may also be carried if authorized by the relevant national license or certificate;
(g) "Convention" means the Convention on International Civil Aviation, opened for signature at Chicago on 7 December 1944, and includes: (i) any amendment thereto which has entered into force under Article 94(a) thereof and has been ratified by both Contracting Parties; and (ii) any Annex or any amendment thereto adopted under Article 90 of that Convention, insofar as such amendment or Annex is at any given time effective for both Contracting Parties;
(h) "Designated airline" means an airline designated and authorized in accordance with Article 3 of this Agreement;
(i) "Gateway route segment" means that part of a route described in Annex 1 which lies between the point of last departure or first arrival served by a designated airline in its homeland and the point or points served by that airline in the territory of the other Contracting Party;

(j) "International air service" means an air service which passes through the air space over the territory of the other Contracting Party;
(k) "Revenue passenger" means a passenger paying 25 percent or more of the normal applicable fare;
(l) "Stop for non-traffic purposes" means a landing for any purpose other than taking on or discharging passengers, cargo or mail carried for compensation;
(m) "Tariff" means the price to be charged for the public transport of passengers, baggage and cargo (excluding mail) on scheduled air services including the conditions governing the availability or applicability of such price and the charges and conditions for services ancillary to such transport but excluding the commissions to be paid to air transportation intermediaries;

Hong Kong ceased to be covered by Article 1(n) with effect from 9 April 1997 when its own Air Service Agreement with the USA entered into force, except, until 30 June 1997, for the purposes of Article 2(4) (HMSO, London, 1997, Cm 3673)

(n) "Territory" means the land areas under the sovereignty, jurisdiction, protection, or trusteeship of a Contracting Party, and the territorial waters adjacent thereto; and

Original text (1977)	*Revised text (1994)*
(o) "User charge" means a charge made to airlines for the provision for aircraft, their crews and passengers of airport or air navigation property or facilities, including related services and facilities.	(o) "User charge" means a charge imposed by a competent charging authority on airlines for airport or air navigation property or facilities, including related services and facilities

Revised text substituted by Exchange of Notes dated 11 March 1994 (Part III, Doc 26), following settlement of Heathrow User Charges dispute (Chap. 4)

Article 2

Grant of Rights

(1) Each Contracting Party grants to the other Contracting Party the following rights for the conduct of international air services by its airlines:

(a) the right to fly across its territory without landing; and
(b) the right to make stops in its territory for non-traffic purposes.

(2) Each Contracting Party grants to the other Contracting Party the rights specified in this Agreement for the purposes of operating scheduled international air services on the routes specified in Annex 1. Such services and routes are hereafter called "the agreed services" and "the specified routes" respectively. The airlines designated by each Contracting Party may make stops in the territory of the other Contracting Party at the points specified and to the extent specified for each route in Annex 1 for the purpose of taking on board and discharging passengers, cargo or mail, separately or in combination, in scheduled international air service.

(3) Each Contracting Party grants to the other Contracting Party the rights specified in *Article 14* for the purposes of operating charter international air services.

Amended by Exchange of Notes dated 25 April 1978 (Part III, Doc 7). Original reference was to Annex 4.

(4) Nothing in paragraphs (2) or (3) of this Article shall be deemed to confer on the airline or airlines of one Contracting Party the rights to take on board, in the territory of the other Contracting Party, passengers, cargo or mail carried for compensation and destined for another point in the territory of that other Contracting Party except to the extent such rights are authorized in *Article 14 or Annex 1*.

Amended by Exchange of Notes dated 25 April 1978 (Part III, Doc 7). Original reference was to Annex 1 or Annex 4.

(5) If because of armed conflict, political disturbances or developments, or special and unusual circumstances, a designated airline of one Contracting Party is unable to operate a service on its normal routing, the other Contracting Party shall use its best efforts to facilitate the continued operation of such service through appropriate rearrangements of such routes, including the grant of rights for such time as may be necessary to facilitate viable operations.

Article 3

Designation and Authorisation of Airlines

(1) (a) Each Contracting Party shall have the right to designate an airline or airlines for the purpose of operating the agreed services on each of the routes specified in Annex 1 and to withdraw or alter such designations. Such designations shall be made in writing and shall be transmitted to the other Contracting Party through diplomatic channels.

(b) A Contracting Party may request consultations with regard to the designation of an airline or airlines under subparagraph (a) of this paragraph. If, however, agreement is not reached within 60 days from the date of the designation, the designation shall be regarded as a proper designation under this Article.

The right to designate carriers to operate the key North Atlantic services is restricted by Article 3(2) for combination air services (passengers and cargo), by Article 3(3) for all-cargo air services, and less formally for certain other routes by the understandings in respect of UK dependent territories and in respect of the ownership and control of Caribbean-based UK airlines set out in the Statements of Interpretation dated 23 July 1977 (Part III, Doc 4).

Bermuda I had permitted unlimited designations. Here for comparison is the text of the relevant Article:

Article 2

(1) *The agreed services may be inaugurated immediately or at a later date at the option of the Contracting Party to whom the rights are granted, but not before (a) the Contracting Party to whom the rights*

(*continued*)

(continued)

have been granted has designated an air carrier or carriers for the specified route or routes, and (b) the Contracting Party granting the rights has given the appropriate operating permission to the air carrier or carriers concerned (which, subject to the provisions of paragraph (2) of this Article and Article 6, it shall do without delay).

(2) *The designated air carrier or carriers may be required to satisfy the aeronautical authorities of the Contracting Party granting the rights that it or they is or are qualified to fulfil the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operation of commercial air carriers.*

(3) *In areas of military occupation, or in areas affected thereby, such inauguration will continue to be subject, where necessary, to the approval of the competent military authorities.*

(2) Notwithstanding paragraph (1) of this Article, for the purpose of operating the agreed combination air services on US Routes 1 and 2, and UK Routes 1, 2, 3, 4 and 5, each Contracting Party shall have the right to designate not more than:

(a) two airlines on each of two gateway route segments of its own choosing;

(b) one airline on each gateway route segment other than those selected under subparagraph (a) of this paragraph, except that each Contracting Party may designate not more than:

(i) two airlines on any gateway route segment other than those selected under subparagraph (a) of this paragraph, provided: (A) the total on-board passenger traffic carried by the designated airlines of both Contracting Parties in scheduled air service on a gateway route segment exceeds 600,000 one-way revenue passengers in each of two consecutive twelve month periods; or (B) the total on-board passenger traffic carried by its designated airline in scheduled air service on the gateway route segment exceeds 450,000 one-way revenue passengers in each of two consecutive twelve month periods. For the purpose of this subparagraph, the revenue passenger levels specified must be reached for the first time after the entry into force of this Agreement; and

(ii) two airlines on any gateway route segment other than those selected under subparagraph (a) or permitted under subparagraph (b) (i) of this paragraph, where either the other Contracting Party has not made a designation three years after the right to operate that gateway route segment becomes effective or the airline designated by it does not by then operate (either nonstop or in combination with another gateway route segment) or operates fewer than 100 round trip combination flights within a twelve month period. An additional designation under this subparagraph shall continue in force notwithstanding subsequent regular operation by an airline of the other Contracting Party.

If coincident gateway route segments appear on more than one route, the limitations set forth in this paragraph apply to the coincident segments taken together. A Contracting Party making designations under this paragraph shall specify which subparagraph applies.

Article 3 (2), together with Article 3 (5) below, was a critical outcome of the 1976/77 negotiations (Chap. 2), reflecting the determination of the UK to restrict double designation opportunities on the North Atlantic. Since New York and Los Angeles were selected by both sides under paragraph 2(a), all further instances of double designation depended on triggering the passenger capacity thresholds at paragraph 2(b) or securing the approval of the other Contracting Party under paragraph (5).

(3) Notwithstanding paragraph (1) of this Article, for the purpose of operating the agreed all-cargo air services on US Route 7 and UK Routes 10, 11 and 12 (taken together), each Contracting Party shall have the right to designate not more than a total of three airlines, except that, if the airline or airlines designated by one Contracting Party are licensed or certificated by their own aeronautical authorities and authorized by the other Contracting Party to offer all-cargo air services on a gateway route segment on which the airline or airlines designated by the other Contracting Party are not licensed or certificated by their own aeronautical authorities to offer such services, that other

Contracting Party may designate an additional airline on the relevant route or routes to operate all-cargo air services only on that gateway route segment, notwithstanding the fact that such designation will result in the designation of more than three airlines on the relevant route or routes.

Annex 5 removed the restriction on the number of designations for third/fourth freedom all-cargo services on the North Atlantic with effect from 1 January 1983. The limitation to three airlines on each side continued to apply for fifth freedom purposes.

(4) Notwithstanding paragraph (1) of this Article, a Contracting Party receiving a designation of an airline which is authorized by that airline's own aeronautical authorities only to operate aircraft having a maximum passenger capacity of 30 seats or less and a maximum payload capacity of 7500 pounds or less and which was not designated under the 1946 Bermuda Agreement may refuse to regard such designation as a proper designation under this Article if it would result in more than three such airlines or more than the number designated under 1946 Bermuda Agreement (whichever is greater), operating at any point in the territory of the Contracting Party receiving the designation.

(5) If either Contracting Party wishes to designate an airline or airlines for the routes set forth in paragraphs (2) or (3) of this Article, in addition to the designations specifically permitted by those paragraphs, it shall notify the other Contracting Party. The second Contracting Party may either: (i) accept such further designation; or (ii) request consultations. After consultations the second Contracting Party may decline to accept the designation.

Article 3 (5) was used to permit double designation by the US on London-Boston, from 14 April 1980, and on London-Miami from 15 January 1981 (Part III, Doc 11), and on London-Chicago from Summer 1995 (Part III, Doc 27). It was also used to permit double designations by the UK on London-Miami from 14 April 1980 (Part III, Doc 11) and on London-Boston from 1990 (Part III, Docs 24/25).

(*continued*)

(continued)

Paragraph 10 of Annex 1 Section 6 (added in 1991) allowed the UK to make up to two double designations, and to add two more as an alternative to opening new gateways; a further such opportunity (from London Gatwick only) was granted to the UK in exchange for allowing the US an additional gateway (Pittsburgh) in 2000 (Part III, Doc 28). By 2008 the UK had designated Virgin Atlantic to compete with BA on services to ten US gateways.

(6) On receipt of a designation made by one Contracting Party under the terms of paragraphs (1), (2) or (3) of this Article, or accepted under the terms of paragraph (5) of this Article, and on receipt of an application or applications from the airline so designated for operating authorizations and technical permissions in the form and manner prescribed for such applications, the other Contracting Party shall grant the appropriate operating authorizations and technical permissions, provided:

(a) substantial ownership and effective control of that airline are vested in the Contracting Party designating the airline or in its nationals;
(b) the designated airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air services by the Contracting Party considering the application or applications; and
(c) the other Contracting Party is maintaining and administering the standards set forth in Article 6 (Airworthiness).

If the aeronautical authorities of the Contracting Party considering the application or applications are not satisfied that these conditions are met at the end of a 90-day period from receipt of the application or applications from the designated airlines, either Contracting Party may request consultations, which shall be held within 30 days of the request.

(7) When an airline has been designated and authorized in accordance with the terms of this Article, it may operate the relevant agreed services on the specified routes in Annex 1, provided, however, that the airline complies with the applicable provisions of this Agreement.

Article 4

Application of Laws

(1) The laws and regulations of one Contracting Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of the airline or airlines designated by the other Contracting Party and shall be complied with by such aircraft upon entrance into or departure from and while within the territory of the first Contracting Party.

(2) The laws and regulations of one Contracting Party relating to the admission to or departure from its territory of passengers, crew, cargo or mail of aircraft, including regulations relating to entry, clearance, immigration, passports, customs and quarantine, shall be complied with by or on behalf of such passengers, crew, cargo or mail of the airlines of the other Contracting Party upon entrance into or departure from and while within the territory of the first Contracting Party.

Article 5

Revocation or Suspension of Operating Authorisation

(1) Each Contracting Party shall have the right to revoke, suspend, limit or impose conditions on the operating authorizations or technical permissions of an airline designated by the other Contracting Party where:

(a) substantial ownership and effective control of that airline are not vested in the Contracting Party designating the airline or in nationals of such Contracting Party; or

(b) that airline has failed to comply with the laws or regulations of the first Contracting Party; or

(c) the other Contracting Party is not maintaining and administering safety standards as set forth in Article 6 (Airworthiness).

(2) Unless immediate revocation, suspension or imposition of the conditions mentioned in paragraph (1) of this Article is essential to prevent further noncompliance with subparagraphs (b) or (c) of paragraph (1) of this Article, such rights shall be exercised only after consultation with the other Contracting Party.

Article 6

Airworthiness

(1) Certificates of airworthiness, certificates of competency, and licenses issued or rendered valid by one Contracting Party, and still in force, shall be recognized as valid by the other Contracting Party for the purpose of operating the air services provided for in this Agreement, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established pursuant to the Convention. Each Contracting Party reserves the right, however, to refuse to recognize as valid for the purpose of flights above its own territory, certificates of competency and licenses granted to its own nationals by the other Contracting Party.

(2) The competent aeronautical authorities of each Contracting Party may request consultations concerning the safety and security standards and requirements maintained and administered by the other Contracting Party relating to aeronautical facilities, aircrew, aircraft, and the operation of the designated airlines. If, following such consultations, the competent aeronautical authorities of either Contracting Party find that the other Contracting Party does not effectively maintain and administer safety and security standards and requirements in these areas that are equal to or above the minimum standards which may be established pursuant to the Convention, they will notify the other Contracting Party of such findings and the steps considered necessary to bring the safety and security standards and requirements of the other Contracting Party to standards at least equal to the minimum standards which may be established pursuant to the Convention, and the other Contracting Party shall take appropriate corrective action. Each Contracting Party reserves the right to withhold, revoke or limit, pursuant to Articles 2 (Grant of Rights), 3 (Designation and Authorization of Airlines), and 5 (Revocation or Suspension of Operating Authorization), the operating authorization or technical permission of an airline or airlines designated by the other Contracting Party, in the event the other Contracting Party does not take such appropriate action within a reasonable time.

Article 7

Aviation Security

Original text (1977)	Revised text (1986)
The Contracting Parties reaffirm their grave concerns about acts or threats against the security of aircraft, which jeopardise the safety of persons or property, adversely affect the operation of air services and undermine public confidence in the safety of civil aviation. The Contracting Parties agree to provide maximum aid to each other with a view to preventing hijackings and sabotage to aircraft, airports and air navigation facilities and threats to aviation security. They reaffirm their commitments under and shall have regard to the provisions of the Convention on Offences and certain other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, and the Convention for the suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971. The contracting Parties shall also have regard to applicable aviation security provisions established by the International	(1) The assurance of safety for civil aircraft, their passengers and crew being a fundamental precondition for the operation of international air services, the Contracting Parties reaffirm that their obligations to each other to provide for the security of civil aviation against acts of unlawful interference (and in particular their obligations under the Convention on International Civil Aviation, opened for signature at Chicago on December 7, 1944, the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on September 14, 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970 and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971) form an integral part of this agreement. (2) The Contracting Parties shall provide upon request all necessary assistance to each other to prevent acts of unlawful seizure of civil aircraft and other unlawful acts against the safety of such aircraft, their passengers and crew, airports and air navigation facilities, and any other threat to the security of civil aviation. (3) The Contracting Parties shall, in their mutual relations, act in conformity with the aviation security Standards and, so far as they are applied by them, the Recommended Practices established by the International Civil Aviation Organization and designated as Annexes to the Convention on International Civil Aviation; and shall require that operators of aircraft of their registry, operators who have their principal place of business or permanent residence in their territory, and the operators of airports in their territory, act in conformity with such aviation security provisions. In this paragraph the reference to aviation security Standards includes any difference notified by the Contracting Party concerned. Each Contracting Party shall give advance information to the other of its intention to notify any difference.

(*continued*)

(continued)

Original text (1977)	Revised text (1986)
Civil Aviation Organisation. When incidents or threats of hijacking or sabotage against aircraft, airports or air navigation facilities occur, the contracting Parties shall assist each other by facilitating communications intended to terminate such incidents rapidly and safely. Each contracting Party shall give sympathetic consideration to any request from the other for special security measures for its aircraft or passengers to meet a particular threat.	(4) Each Contracting Party shall ensure that effective measures are taken within its territory to protect aircraft, to screen passengers and their carry-on items, and to carry out appropriate checks on crew, cargo (including hold baggage) and aircraft stores prior to and during boarding or loading; and that those measures are adjusted to meet increased threats to the security of civil aviation. Each Contracting Party shall also act favourably upon any request from the other Contracting Party for reasonable special security measures to meet a particular threat. Each Contracting Party agrees that its airlines may be required to observe the aviation security provisions referred to in paragraph (3) required by the other Contracting Party, pursuant to Article 4 of this Agreement, for entrance into, departure from, or while within, the territory of that other Contracting Party. (5) When an incident or threat of an incident of unlawful seizure of civil aircraft or other unlawful acts against the safety of such aircraft, their passengers and crew, airports or air navigation facilities occurs, the Contracting Parties shall assist each other by facilitating communications and other appropriate measures intended to terminate such incident or threat as rapidly as possible commensurate with minimum risk to life. (6) When a Contracting Party has reasonable grounds to believe that the other Contracting Party has departed from the provisions of this Article, the first Contracting Party may request immediate consultations with the other Contracting Party. Failure by the Contracting Parties to reach a satisfactory resolution of the matter within 15 days from the date of receipt of such request shall constitute grounds for withholding, revoking, limiting or imposing conditions on the operating authorizations or technical permissions of an airline or airlines of the other Contracting Party. When justified by an emergency, a Contracting Party may take interim action prior to the expiry of 15 days.

Revised text agreed in Memorandum of Consultations dated 22 April 1986 and formally substituted by Exchange of Notes dated 25 May 1989. Since these documents contain nothing more than the new text, they have not been included with the documents at Part III.

Article 8

Commercial Operations

(1) The designated airline or airlines of one Contracting Party shall be entitled, in accordance with the laws and regulations relating to entry, residence and employment of the other Contracting Party, to bring in and maintain in the territory of the other Contracting Party those of their own managerial, technical, operational and other specialist staff who are required for the provision of air services.

(2) Each Contracting Party agrees to use its best efforts to ensure that the designated airlines of the other Contracting Party are offered the choice, subject to reasonable limitations which may be imposed by airport authorities, of providing their own services for ground handling operations; of having such operations performed entirely or in part by another airline, an organization controlled by another airline, or a servicing agent, as authorized by the airport authority; or of having such operations performed by the airport authority.

In relation to choice of ground handling operations "subject to reasonable limitations", see statement of interpretation at Part III, Doc 4.

(3) Each Contracting Party grants to each designated airline of the other Contracting Party the right to engage in the sale of air transportation in its territory directly and, at the airline's discretion, through its agents. Each airline shall have the right to sell such transportation, and any person shall be free to purchase such transportation, in the currency of that territory or in freely convertible currencies of other countries.

(4) Each designated airline shall have the right to convert and remit to its country on demand local revenues in excess of sums locally disbursed. Conversion and remittance shall be permitted without restrictions at the rate of exchange applicable to current transactions which is in effect at the time such revenues are presented for conversion and remittance. Both Contracting Parties have accepted the obligations set out in Article VIII of the Articles of Agreement of the International Monetary Fund.

(5) Each Contracting Party shall use its best efforts to secure for the designated airlines of the other Contracting Party on a reciprocal basis an exemption from taxes, charges and fees imposed by State, regional and local authorities on the items listed in paragraphs (1) and (2) of Article 9 (Customs Duties), as well as from fuel throughput charges, in the circumstances described under those paragraphs, except to the extent that the charges are based on the actual cost of providing the service.

Article 9

Customs Duties

(1) Aircraft operated in international air services by the designated airlines of either Contracting Party, their regular equipment, fuel, lubricants, consumable technical supplies, spare parts including engines, and aircraft stores including but not limited to such items as food, beverages and tobacco, which are on board such aircraft, shall be relieved on the basis of reciprocity from all customs duties, national excise taxes, and similar national fees and charges not based on the cost of services provided, on arriving in the territory of the other Contracting Party, provided such equipment and supplies remain on board the aircraft.

(2) There shall also be relieved from the duties, fees and charges referred to in paragraph (1) of this Article, with the exception of charges based on the cost of the service provided:

(a) aircraft stores, introduced into or supplied in the territory of a Contracting Party, and taken on board, within reasonable limits, for use on outbound aircraft engaged in an international air service of a designated airline of the other Contracting Party;

(b) spare parts including engines introduced into the territory of a Contracting Party for the maintenance or repair of aircraft used in an international air service of a designated airline of the other Contracting Party; and

(c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Contracting Party for use in an aircraft engaged in an international air service of a designated airline of the other Contracting Party, even when these supplies are to be used on a part of the journey performed over the territory of the Contracting Party in which they are taken on board.

(3) Equipment and supplies referred to in paragraphs (1) and (2) of this Article may be required to be kept under the supervision or control of the appropriate authorities.

(4) The reliefs provided for by this Article shall also be available in situations where the designated airlines of one Contracting Party have entered into arrangements with another airline or airlines for the loan or transfer in the territory of the other Contracting Party of the items specified in paragraphs (1) and (2) of this Article provided such other airline or airlines similarly enjoy such reliefs from such other Contracting Party.

See also Statement of Interpretation dated 23 July 1977 on relief of ground equipment from customs duty (Part III, Doc 4).

Article 10

User Charges

Original text (1977)	Revised text (1994)
(1) Each Contracting Party shall use its best efforts to ensure that user charges imposed or permitted to be imposed by its competent charging authorities on the designated airlines of the other Contracting Party are just and reasonable. Such charges shall be considered just and reasonable if they are determined and imposed in accordance with the principles set forth in paragraphs (2) and (3) of this Article, and if they are equitably apportioned among categories of users.	(1) User charges shall be just and reasonable, as defined in paragraphs (2) and (3) of this Article, and equitably apportioned among categories of users.
(2) Neither contracting Party shall impose or permit to be imposed on the designated airlines of the other Contracting Party user charges higher than those imposed on its own designated airlines operating similar international services.	(2) User charges shall not be unjustly discriminatory. In particular and without limiting the generality of the preceding sentence, neither Contracting Party shall impose or permit to be imposed on the designated airlines of the other Contracting Party user charges higher than those imposed on the first Contracting Party's designated airlines operating similar international air services at the same airport.
(3) User charges may reflect, but shall not exceed, the full cost to the competent charging authorities of providing appropriate airport and air navigation facilities and services, and may provide for a reasonable rate of return on assets, after depreciation. In the provision of facilities and services, the competent authorities shall have regard to such factors as efficiency, economy, environmental impact and safety of operation. User charges shall be based on sound economic principles and on the generally accepted accounting practices within the territory of the appropriate Contracting Party.	(3) The user charges referred to in paragraph (1) are just and reasonable only if they do not exceed by more than a reasonable margin, over a reasonable period of time, the full cost to the competent charging authorities of providing the appropriate airport, air navigation, and aviation security facilities and services at the airport or within the airport system. Such full costs may include a reasonable return on assets, after depreciation. In the provision of facilities and services, the competent charging authorities shall have regard to such factors as efficiency, economy, environmental impact and safety of operation.

(4) Each contracting Party shall encourage consultations between its competent charging authorities and airlines using the services and facilities, where practicable through the airlines' representative organisations. Reasonable notice should be given to users of any proposals for changes in user charges to enable them to express their views before changes are made.

(5) For the purposes of paragraph (4) of this Article, each Contracting Party shall use its best efforts to encourage the competent charging authorities and the airlines to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles set out in this Article.

(6) In the event that agreement is reached between the Contracting Parties that an existing user charge should be revised, the appropriate Contracting Party shall use its best efforts to put the revision into effect promptly.

(4) The Contracting Parties recognize the benefits of reducing undue intervention and detailed supervision of the setting and monitoring of user charges at individual airports. The Contracting Parties shall each maintain a system to safeguard users from charges that do not meet the criteria of this Article. The system shall include a process for resolving complaints which the Contracting Parties in principle expect to be used in the first instance.

(5) A Contracting Party shall not be held to be in breach of a provision of this Article unless: (i) it fails to undertake a review of the charging practice that is the subject of a complaint by the other Contracting Party within a reasonable time; or (ii) following such a review, it fails to take all steps within its power to remedy any charge or practice that is inconsistent with this Article.

(6) Each Contracting Party shall encourage consultations in the first instance directly between the competent charging authorities in its territory and airlines using the services and facilities, or through the airlines representative organizations if the airlines agree. Each Contracting Party shall encourage them to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles set out in this Article. Each Contracting Party shall encourage the competent charging authorities to provide users with reasonable notice of any proposals for changes in user charges to enable users to express their views before changes are made.

1994 text substituted by Exchange of Notes dated 11 March 1994 concluding the Heathrow user charges dispute (Chap. 4 and Part III, Doc 26).

Article 11

Fair Competition

(1) The designated airline or airlines of one Contracting Party shall have a fair and equal opportunity to compete with the designated airline or airlines of the other Contracting Party.

(2) The designated airline or airlines of one Contracting Party shall take into consideration the interests of the designated airline or airlines of the other Contracting Party so as not to affect unduly that airline's or those airlines' services on all or part of the same routes. In particular, when a designated airline of one Contracting Party proposes to inaugurate services on a gateway route segment already served by a designated airline or airlines of the other Contracting Party, the incumbent airline or airlines shall each refrain from increasing the frequency of their services to the extent and for the time necessary to ensure that the airline inaugurating service may fairly exercise its rights under paragraph (1) of this Article. Such obligation to refrain from increasing frequency shall not last longer than two years or beyond the point when the inaugurating airline matches the frequencies of any incumbent airline, whichever occurs first, and shall not apply if the services to be inaugurated are limited as to their capacity by the license or certificate granted by the designating Contracting Party.

(3) Services provided by a designated airline under this Agreement shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such airline is a national and the country of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in this Agreement shall be exercised in accordance with the general principles of orderly development of international air transport to which both Contracting Parties subscribe and shall be subject to the general principle that capacity should be related to:

(a) the traffic requirements between the country of origin and the countries of ultimate destination of the traffic;

(b) the requirements of through airline operations; and
(c) the traffic requirements of the area through which the airline passes, after taking account of local and regional services.

(4) The frequency and capacity of services to be provided by the designated airlines of the Contracting Parties shall be closely related to the requirements of all categories of public demand for the carriage of passengers and cargo including mail in such a way as to provided adequate service to the public and to permit the reasonable development of routes and viable airline operations. Due regard shall be paid to efficiency of operation so that frequency and capacity are provided at levels appropriate to accommodate the traffic at load factors consistent with tariffs based on the criteria set forth in paragraph (2) of Article 12 (Tariffs).

(5) The Contracting Parties recognize that airline actions leading to excess capacity or to the underprovision of capacity can both run counter to the interests of the travelling public. Accordingly, in the particular case of combination air services on the North Atlantic routes specified in paragraph (1) of Annex 2, they have agreed to establish the procedures set forth in Annex 2. With respect to other routes and services, if one Contracting Party believes that the operations of a designated airline or airlines of the other Contracting Party have been inconsistent with the principles set forth in this Article, it may request consultations pursuant to Article 16 (Consultations) for the purpose of reviewing the operations in question to determine whether they are in conformity with these principles. If such consultations there shall be taken into consideration the operations of all airlines serving the market in question and designated by the Contracting Party whose airline or airlines are under review. In the Contracting Parties conclude that the operations under review are not in conformity with the principles set forth in the Article, they may decide upon appropriate corrective or remedial measures, except that, where frequency or capacity limitations are already provided for a route specified in Annex 1, the Contracting Parties may not vary those limitations or impose additional limitations except by amendment of this Agreement.

(6) Neither Contracting Party shall unilaterally restrict the operations of the designated airlines of the other except according to the terms of this Agreement or by such uniform conditions as may be contemplated by the Convention.

The high principle of 'Fair Competition' translates into these rather mundane provisions for the regulation of capacity, though the terms of the more detailed Annex 2 governing capacity on the North Atlantic routes (paragraph 5 above) were significantly liberalised after 1986 (Annex 2 and Chap. 3).

Here for comparison is the relevant text of Bermuda 1. Paragraphs 4–6 of the Resolution adopted at the Final Plenary Session on 11 February 1946 (HMSO, London, Treaty Series No 3, 1946, Cmd. 6747) are the classic statement of a 'fair and equal opportunity' to compete. Widely adopted across the aviation world, it could be and was variously interpreted to allow capacity shares under bilateral agreements either to diverge quite widely, or more often to be held to the strictest equality, with revenue pooling to compensate for any imbalance. The lack of precision and consequent scope for disagreement was a major reason for the UK's decision to terminate Bermuda 1 (see Chap. 2).

Now therefore the representatives of the two Governments in Conference resolve and agree as follows:

(4) *That there shall be a fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories (as defined in the Agreement) covered by the Agreement and its Annex.*

(5) *That, in the operation by the air carriers of either Government of the trunk services described in the Annex to the Agreement, the interest of the air carriers of the other Government shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes.*

(6) *That it is the understanding of both Governments that services provided by a designated air carrier under the Agreement and its Annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in the Annex to the Agreement shall be applied in accordance with the general principles of orderly development to which both Governments subscribe and shall be subject to the general principle that capacity should be related:*

(*continued*)

(continued)

(a) *to traffic requirements between the country of origin and the countries of destination;*

(b) *to the requirements of through airline operation; and*

(c) *to the traffic requirements of the area through which the airline passes after taking account of local and regional services.*

Article 12

Tariffs

(1) Tariffs of the designated airlines of the Contracting Parties for carriage between their territories shall be established in accordance with the procedures set out in this Article.

(2) The tariffs charged by the designated airlines of one Contracting Party for public transport to or from the territory of the other Contracting Party shall be established at the lowest level consistent with a high standard of safety and an adequate return to efficient airlines operating on the agreed routes. Each tariff shall, to the extent feasible, be based on the costs of providing such service assuming reasonable load factors. Additional relevant factors shall include among others the need of the airline to meet competition from scheduled or charter air services, taking into account differences in cost and quality of service, and the prevention of unjust discrimination and undue preferences or advantages. To further the reasonable interests of users of air transport services, and to encourage the further development of civil aviation, individual airlines should be encouraged to initiate innovative, cost-based tariffs.

(3) The tariffs charged by the designated airlines of one Contracting Party for public transport between the territory of the other Contracting Party and the territory of a third State shall be subject to the approval of the other Contracting Party and such third State; provided, however, that a Contracting Party shall not require a different tariff from the tariff of its own airlines for comparable service between the same points. The designated airlines of each Contracting Party shall file such tariffs with the other Contracting Party, in accordance with its requirements.

(4) Any tariff agreements with respect to public transport between the territories of the Contracting Parties concluded as a result of intercarrier discussions, including those held under the traffic conference procedures of the International Air Transport Association, or any other association of international airlines, and involving the airlines of the Contracting Parties will be subject to the approval of the aeronautical authorities of those Contracting Parties, and may be disapproved at any time whether or not previously approved. The submission of such agreements is not the filing of a tariff for the purposes of the provisions of paragraph (5) of this Article. Such agreements shall be submitted to the aeronautical authorities of both Contracting Parties for approval at least 105 days before the proposed date of effectiveness, accompanied by such justification as each Contracting Party may require of its own designated airlines. The period of 105 days may be reduced with the consent of the aeronautical authorities of the Contracting Party with whom a filing is made. The aeronautical authorities of each Contracting Party shall use their best efforts to approve or disapprove (in whole or in part) each agreement submitted in accordance with this paragraph on or before the 60th day after its submission. Each Contracting Party may require the tariffs reflecting agreements approved by it be filed and published in accordance with its laws.

(5) Any tariff of a designated airline of one Contracting Party for public transport between the territories of the Contracting Parties shall, if so required, be filed with the aeronautical authorities of the other Contracting Party at least 75 days prior to the proposed effective date unless the aeronautical authorities of that Contracting Party permit the filing to be made on shorter notice. Such tariff shall become effective unless action is taken to continue in force the existing tariff as provided in paragraph (7) of this Article.

(6) If the aeronautical authorities of one Contracting Party, on receipt of any filing referred to in paragraph (5) of this Article, are dissatisfied with the tariff proposed or desire to discuss the tariff with the other Contracting Party, the first Contracting Party shall so notify the other Contracting Party through diplomatic channels within 30 days of the filing of such tariff, but in no event less than 15 days prior to the proposed effective date of such tariff. The Contracting Party receiving the notification may request consultations and, if so requested, such consultations

shall be held at the earliest possible date for the purpose of attempting to reach agreement on the appropriate tariff. If notification of dissatisfaction is not given as provided in this paragraph, the tariff shall be deemed to be approved by the aeronautical authorities of the Party receiving the filing and shall become effective on the proposed date.

(7) If agreement is reached on the appropriate tariff under paragraph (6) of this Article, each Contracting Party shall exercise its best efforts to put such tariff into effect. If an agreement is not reached prior to the proposed effective date of the tariff, or if consultations are not requested, the aeronautical authorities of the Contracting Party expressing dissatisfaction with that tariff may take action to continue in force the existing tariffs beyond the date on which they would otherwise have expired at the levels and under the conditions (including seasonal variations) set forth therein. In this event the other Contracting Party shall similarly take any action necessary to continue the existing tariffs in effect. In no circumstances, however, shall a Contracting Party require a different tariff from the tariff of its own designated airlines for comparable service between the same points.

(8) The aeronautical authorities of each Contracting Party shall exercise their best efforts to ensure that the designated airlines conform to the agreed tariffs filed with the aeronautical authorities of the Contracting Parties, and that no airline rebates any portion of such tariffs by any means, directly or indirectly.

(9) In order to avoid tariff disputes to the greatest extent possible:

(a) a continuing Tariff Working Group shall be established to make recommendations on tariff-making standards, as provided in Annex 3;

(b) the aeronautical authorities will keep one another informed of such guidance as they may give to their own airlines in advance of or during traffic conferences of the International Air Transport Association; and

(c) during the period that the aeronautical authorities of either Contracting Party have agreements under consideration pursuant to paragraph (4) of this Article, the Contracting Parties may exchange views and recommendations, orally or in writing. Such views and recommendations shall, if requested by either Contracting Party, be presented to the aeronautical authorities of the other Contracting Party, who will take them into account in reaching their decision.

- *See also the Statements of Interpretation dated 23 July 1977 (Part III, Doc 4), para 5 of the Memorandum of Consultations dated 17 March 1978 (Part III, Doc 5), a further letter of the same date (Part III Doc 7), which allowed some degree of tariff liberalisation and introduced the 'sum of sectors' policy, and another (Part III, Doc 9) which extended the application of those policies.*
- *The provision for tariffs to require the consent of both Contracting Parties (paragraph 7) was restrictive, and gave rise to continual negotiations. The Tariff Working Group (para 9, and Annex 3 to the Agreement) never met, but Attachment 5 to the Memorandum of Consultations of 11 September 1986 (Part III, Doc 18) set out an agreed North Atlantic Passenger Tariff Procedure (Part III, Doc 19).*
- *Article 12 did not apply to passenger or cargo charter services (see Article 14) nor, after 1 January 1980, to the pricing of cargo carriage on scheduled combination and all-cargo air services (see Annex 5, paragraph 8).*

Article 13

Commissions

(1) The airlines of each Contracting Party may be required to file with the aeronautical authorities of both Contracting Parties the level or levels of commissions and all other forms of compensation to be paid or provided by such airline in any manner or by any device, directly or indirectly, to or for the benefit of any person (other than its own bona fide employees) for the sale of air transportation between the territories of the Contracting Parties. The aeronautical authorities of each Contracting Party hall exercise their best efforts to ensure that the commissions and compensation paid by the airlines of each Contracting Party conform to the level or levels of commissions and compensation filed with the aeronautical authorities.

(2) The level of commissions and other forms of compensation paid with respect to the sale, within the territory of a Contracting Party, of air transportation, shall be subject to the laws and regulations of such Contracting Party, which shall be applied in a nondiscriminatory fashion.

Article 14

Charter Air Service

Article 14 (1977)

(1) The Contracting Parties recognize the need to further the maintenance and development, where a substantial demand exists or may be expected, of a viable network of scheduled air services, consistently and readily available, which caters for all segments of demand and particularly for those needing a wide and flexible range of air services.

(2) The contracting Parties also recognise the substantial and growing demand from that section of the travelling public which is price rather than time sensitive, for air services at the lowest possible level of fares. The Contracting Parties, therefore, taking into account the relationship of scheduled and charter air services and the need for a total air service system, shall further the maintenance and development of efficient and economic charter air services so as to meet that demand.

(3) The Contracting Parties shall therefore apply the provisions of Annex 4 to charter air services between their territories.

Under an Exchange of Notes dated 25 April 1978 (Chap. 3 and Part III, Doc 8), the original Article 14 was replaced by the text set out below. See also notes on Annex 4, which amplified the regulation of passenger charters between 1 April 1978 and 31 March 1980, and on Annex 5 which governed cargo charters with effect from 1 January 1980.

Article 14 (1978)

(1) Principles

The Contracting Parties recognize the need to further the maintenance and development, where a substantial demand exists or may be expected, of a viable network of scheduled air services, consistently and readily available, which caters for all segments of demand and particularly for those needing a wide and flexible range of air services. The Contracting Parties also recognize the substantial and

growing demand from that section of the travelling public which is price rather than time sensitive for air services at the lowest possible level of fares and rates. The Contracting Parties, therefore, taking into account the relationship of scheduled and charter air services and the need for a total air service system, shall further the maintenance and development of efficient and economic charter air services so as to meet that demand. They shall, accordingly, while continuing their efforts to achieve a multilateral arrangement for charter air services in the North Atlantic market, apply the following bilateral provisions to charter air services.

(2) Application of Articles

Articles 1, 2 (paragraphs (1), (3) and (4)), 4, 5, 6, 7, 8 (except that paragraph (3) shall apply only to the extent authorized by the aeronautical authorities in the relevant territory), 9 and 10 of this Agreement shall apply to international charter air services conducted by airlines of the Contracting Parties between the territories of the Contracting Parties.

(3) Grant of Rights

(a) Each Contracting Party, in addition to the rights granted in paragraph (1) of Article 2, grants to the other Contracting Party the right for its airlines designated and authorized under the provisions of paragraph (4) of this Article (hereinafter referred to as "charter-designated airlines") to uplift and discharge international charter traffic in cargo between:

(i) on the one hand, any point or points in the United States; and
(ii) on the other hand, any point or points in the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as "the United Kingdom").

Such traffic may be carried either directly or via intermediate or beyond points in other countries with or without stopovers.

(b) Charter air services:

(i) having their origin outside the United States and the United Kingdom; or
(ii) operated by an airline of the United Kingdom, having their origin in the United States and a traffic stop or stops outside the United States without a stopover in the United Kingdom lasting for at least two consecutive nights; or

(iii) operated by an airline of the United States, having their origin in the United Kingdom and a traffic stop or stops outside the United Kingdom without a stopover in the United States for at least two consecutive nights

shall not be covered by this Article.

(4) Designation and Authorization

(a) Each Contracting Party shall have the right to designate an airline or airlines for the purpose of operating the international charter air services covered by paragraph (3)(a) of this Article and to withdraw or alter such designations. Such designations shall be made in writing and shall be transmitted to the other Contracting Party through diplomatic channels.

(b) On receipt of such a designation made by one Contracting Party, and on receipt from the airline so designated of an application or applications in the form and manner prescribed, the other Contracting Party shall, with the minimum of formality and administrative burden upon the airline so designated, grant the appropriate operating authorizations and technical permissions, provided:

(i) substantial ownership and effective control of that airline are vested in the first Contracting Party or in its nationals;

(ii) the airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air services by the Contracting Party considering the application or applications; and

(iii) the other Contracting Party is maintaining and administering the standards set forth in Article 6 (Airworthiness) of this Agreement.

(c) If the aeronautical authorities of the Contracting Party considering the application or applications are not satisfied that these conditions are met at the end of a 60-day period from receipt of the application or applications, either Contracting Party may request consultations, which shall be held within 30 days of the receipt of the request.

(d) When an airline has been designated and authorized in accordance with the above terms, it may operate the charter air services described in paragraph (3)(a) of this Article provided that the airline complies with the applicable provisions of this Agreement.

(5) Fair Competition

(a) There shall be a fair opportunity for the designated and charter-designated airlines of both Contracting Parties to compete in international air services.

(b) Each Contracting Party shall afford the charter-designated airlines of the other Contracting Party an equal opportunity to compete with its charter-designated airlines.

(c) Each Contracting Party shall take into consideration the interest of the airlines of the other Contracting Party so as not to affect unduly their opportunity to offer the services covered by this Agreement.

(d) Each Contracting Party shall apply, on a nondiscriminatory basis as between the charter-designated airlines of the two Contracting Parties and as among different charter-designated airlines of the other Contracting Party:

(i) its own charterworthiness rules, administered and enforced by its own aeronautical authorities (hereinafter referred to as "charterworthiness rules");

(ii) such agreed charterworthiness requirements as may be set forth in Annex 4 (hereinafter referred to as "charterworthiness requirements") and

(iii) the provisions of paragraph (7) of this Article.

(e) Neither Contracting Party shall unilaterally restrict the charter operations of the charter-designated airlines of the other Contracting Party or impose limitations on the volume, frequency or regularity of charter air services of charter-designated airlines of the other Contracting Party, except according to the terms of this Agreement or under uniform conditions consistent with Article 15 of the Convention.

(f) The charterworthiness rules of each Contracting Party and the charterworthiness requirements of Annex 4 shall preserve opportunities for charter air services to compete with scheduled air services. Where the Contracting Parties approve adjustments in scheduled fares or rates or tariff conditions which adversely affect the ability of charter air services to compete with scheduled air services, either Contracting Party may request consultations, which shall be held within 60 days, with a view toward adjusting charter rules and requirements to preserve fair competitive opportunities for charter air services.

(g) The Contracting Parties individually shall preserve opportunities for scheduled air services to compete with charter air services. Where charterworthiness rules or requirements of charter prices or rates adversely affect the ability of scheduled air services to compete with charter air services, either Contracting Party may request consultations, which shall be held within 60 days, with a view toward preserving fair competitive opportunities for scheduled air services.

(6) Charterworthiness

Except as otherwise provided in Annex 4, each Contracting Party shall accept as charterworthy traffic originating in the country of the other Contracting Party and complying with the charterworthiness rules of the other Contracting Party in effect on the date of outbound departure of the flight.

(7) Flight or Program Approvals

(a) Each Contracting Party shall minimize the administrative burdens of filing requirements and procedures on charterers and charter-designated airlines of the other Contracting Party.
(b) A charter-designated airline of one Contracting Party proposing to carry charter traffic originating in the country of the other Contracting Party may be required by the other Contracting Party to file charter programs in advance, so that the other Contracting Party may determine whether the programs meet its charterworthiness rules.
(c) Subject to the limitations on information about traffic originating in the country of the other Contracting Party set forth in subparagraph (d) of this paragraph, a charter-designated airline of one Contracting Party proposing to carry charter traffic originating in either country may be required by the other Contracting Party to file information about charter programs in advance, so that the other Contracting Party may determine whether the programs meet such charterworthiness requirements as Annex 4 may contain.
(d) Except as may be otherwise provided in Annex 4, neither Contracting Party shall require a charter-designated airline of the other Contracting Party, which plans to carry charter air traffic originating in the country of the other Contracting

Party, to submit more than the following information with regard to such traffic:

(i) a declaration of conformity with paragraph (6) of this Article and, if applicable, Annex 4;
(ii) the itinerary (dates, times, and points to be served) plus charter categories of each flight;
(iii) the identity of the charterer or charterers;
(iv) the number of seats, volume or tonnage contracted for by each charterer, by charter category;
(v) a description of any tours where there is a mandatory tour package; and
(vi) the price or rate charged by the airline to each charterer.

(e) Notwithstanding subparagraph (d) of this paragraph, each Contracting Party may require that a charter-designated airline of the other Contracting Party provide such advance information with regard to charter flights as is essential for customs, airport, and air traffic control purposes.

(f) Charter-designated airlines shall comply with established and non-discriminatory procedures in regard to airport slotting and shall provide prior notification of flights or series of flights to the relevant authorities if so required.

(g) Neither Contracting Party shall require prior approval of charter flights by charter-designated airlines of the other Contracting Party except as provided in subparagraph (b) of this paragraph.

(h) Neither Contracting Party shall require prior notifications of information by charter-designated airlines of the other Contracting Party except as provided in subparagraphs (c), (d), (e) and (f) of this paragraph.

(8) Prices and Rates

(a) Each Contracting Party may require the filing with its aeronautical authorities of prices or rates to be charged by charter-designated airlines of the other Contracting Party. If it is dissatisfied with the prices or rates so filed, it shall so notify the other Contracting Party as soon as possible, and in any event within 30 days of receiving notification of the price or rate. The other Contracting Party may request consultations

which shall be held as soon as possible, and in no event later than 30 days of the receipt of the request. If the matter cannot be resolved by consultation, the Contracting Party objecting to the price or rate may take appropriate action to prevent use or charging of such price or rate, but only insofar as the price or rate applies to traffic originating in its country.

(b) A Contracting Party shall not regulate the prices or rates charged by charterers to the public for charter traffic originating in the country of the other Contracting Party.

(9) Enforcement

(a) Pursuant to paragraph (6) of this Article, the Contracting Party in whose country the charter air traffic originates shall have exclusive responsibility for the enforcement of its charterworthiness rules.

(b) The Contracting Party in whose country the charter traffic originates shall have primary responsibility for the enforcement of such charterworthiness requirements as Annex 4 may contain.

(c) The Contracting Parties shall cooperate with each other on enforcement matters:

(i) Where evidence is obtained of a possible violation of the charterworthiness rules of the other Contracting Party with regard to traffic originating in the country of the other Contracting Party, a Contracting Party shall transmit such evidence to the other Contracting Party for investigation and appropriate enforcement action, instead of interrupting the return flight or inconveniencing traffic which originated in the country of the other Contracting Party.

(ii) Where evidence is obtained of a possible violation of the charterworthiness requirements with regard to traffic originating in the country of the other Contracting Party, a Contracting Party shall transmit such evidence to the other Contracting Party for investigation and appropriate enforcement action, instead of interrupting the return flight or inconveniencing traffic which originated in the country of the other Contracting Party. In exceptional circumstances, however, where the first Contracting Party is

not satisfied that investigation or appropriate enforcement action has been carried out by the other Contracting Party, it may take appropriate enforcement action itself.

(d) Each Contracting Party may take such steps as it considers necessary to regulate the conduct of its own charterers organizing services covered by this Article. Such regulations shall, however, not preclude or limit the power of the other Contracting Party to regulate within its country and pursuant to its domestic laws, the conduct of charterers of either Contracting Party.

Article 15

Transitional Provisions

(1) *Designation.* On the entry into force of this Agreement, and until 1 November 1977, all designations and authorisations in effect pursuant to the 1946 Bermuda Agreement shall remain in effect. Additional designations shall be subject to the provisions of Article 3 (Designation and Authorisation of Airlines) of this Agreement. By 1 November 1977, each Contracting Party shall indicate to the other all the initial designations applicable under this Agreement. Notwithstanding the provisions of Article 3, until 1 November 1977:

(a) the United States shall be entitled to retain two designated airlines to operate combination air services on each of three gateway route segments on US Routes 1 and 2 taken together; and

(b) the United Kingdom shall be entitled to retain three designated airlines to operate combination air services on one gateway route segment on UK Routes 1, 2, 3, 4 and 5, taken together.

(2) *Capacity.* Notwithstanding the provisions of Annex 2, as regards the winter traffic season of 1977/78 the following procedures shall apply:

Paragraph (3): Airlines shall file schedules not later than 120 days prior to the winter traffic season, instead of 180 days.

Paragraph (3): Airlines shall refile amendments not later than 105 days prior to the winter traffic season, instead of 165 days.

Paragraph (4): A Contracting Party's notice of inconsistency shall be given within 90 days, instead of 150 days.

Paragraph (5): If requested, consultations shall begin not later than 75 days prior to the winter traffic season, instead of 90 days.

Paragraph (6): If agreement on capacity to be operated is not achieved, paragraph (6) procedures shall apply within 60 days prior to the winter traffic season, instead of 75 days.

(3) *Tariffs.* All tariffs filed to become effective on or after 1 November 1977, and all agreements filed to become effective on or after 1 January 1978 shall be subject to the provisions of Article 12 (Tariffs). Agreements filed to become effective prior to 1 January 1978 shall be subject to the provisions of Article 12 to the greatest extent feasible. Tariffs filed to become effective prior to 1 November 1977 shall be subject to the provisions of the 1946 Bermuda Agreement, and all tariffs in effect under the 1946 Bermuda Agreement shall continue in force, but either Contracting Party may notify the other Contracting Party of its dissatisfaction with any such tariffs, and the procedures set forth in this Agreement shall then apply.

Article 16

Consultations

Either Contracting Party may at any time request consultations on the implementation, interpretation, application or amendment of this Agreement or compliance with this Agreement. Such consultations shall begin within a period of 60 days from the date the other Contracting Party receives the request, unless otherwise agreed by the Contracting Parties.

Article 17

Settlement of Disputes

(1) Any dispute arising under this Agreement, other than disputes where self-executing mechanisms are provided in Article 12 (Tariffs) and Annex 2, which is not resolved by a first round of formal consultations, may be referred by agreement of the Contracting Parties for decision to some person or body. If the Contracting Parties do

not so agree, the dispute shall at the request of either Contracting Party be submitted to arbitration in accordance with the procedures set forth below.

(2) Arbitration shall be by a tribunal of three arbitrators to be constituted as follows:

(a) within 30 days after the receipt of a request for arbitration, each Contracting Party shall name one arbitrator. Within 60 days after these two arbitrators have been nominated, they shall by agreement appoint a third arbitrator, who shall act as President of the arbitral tribunal;

(b) if either Contracting Party fails to name an arbitrator, or if the third arbitrator is not appointed in accordance with subparagraph (a) of this paragraph, either Contracting Party may request the President of the International Court of Justice to appoint the necessary arbitrator or arbitrators within 30 days. If the President is of the same nationality as one of the Parties, the most senior Vice President who is not disqualified on that ground shall make the appointment.

(3) Except as otherwise agreed by the Contracting Parties, the arbitral tribunal shall determine the limits of its jurisdiction in accordance with this Agreement, and shall establish its own procedure. At the direction of the tribunal or at the request of either of the Contracting Parties, a conference to determine the precise issues to be arbitrated and the specific procedures to be followed shall be held no later than 15 days after the tribunal is fully constituted.

(4) Except as otherwise agreed by the Contracting Parties or prescribed by the tribunal, each Party shall submit a memorandum within 45 days of the time the tribunal is fully constituted. Replies shall be due 60 days later. The tribunal shall hold a hearing at the request of either Party or at its discretion within 15 days after replies are due.

(5) The tribunal shall attempt to render a written decision within 30 days after completion of the hearing or, if no hearing is held, after the date both replies are submitted, whichever is sooner. The decision of the majority of the tribunal shall prevail.

(6) The Contracting Parties may submit requests for clarification of the decision within 15 days after it is rendered and any clarification given shall be issued within 15 days of such request.

(7) Each Contracting Party shall, consistent with its national law, give full effect to any decision or award of the arbitral tribunal. In the event that one Contracting Party does not give effect to any decision or award, the other Contracting Party may take such proportionate steps as may be appropriate.
(8) The expenses of the arbitral tribunal, including the fees and expenses of the arbitrators, shall be shared equally by the Contracting Parties. Any expenses incurred by the President of the International Court of Justice in connection with the procedures of paragraph (2)(b) of this Article shall be considered to be part of the expenses of the arbitral tribunal.

This formal procedure was used for the Heathrow User Charges Dispute (Chap. 4).

Article 18

Amendment
Any amendments or modifications of this Agreement agreed by the Contracting Parties shall come into effect when confirmed by an Exchange of Notes.

Article 19

Termination
Either Contracting Party may at any time give notice in writing to the other Contracting Party of its decision to terminate this Agreement. Such notice shall be sent simultaneously to the International Civil Aviation Organization. This Agreement shall terminate at midnight (at the place of receipt of the notice) immediately before the first anniversary of the date of receipt of the notice by the other Contracting Party, unless the notice is withdrawn by agreement before the end of this period.

Article 20

Registration with ICAO
This Agreement and all amendments thereto shall be registered with the International Civil Aviation Organisation.

Article 21

Entry into Force
This Agreement shall enter into force on the date of signature

IN WITNESS WHEREOF the undersigned, being duly authorised thereto by their respective Governments, have signed the present agreement.

DONE in duplicate at Bermuda this 23rd day of July, Nineteen Hundred and Seventy-Seven

For the Government of the United States of America	For the Government of the United Kingdom of Great Britain and Northern Ireland
Brock Adams	Edmund Dell
Alan S. Boyd	W. Patrick Shovelton

Annex 1: The Route Schedules

Section 1: Scheduled Combination Air Service Routes for the United States

Section 2: Scheduled All-Cargo Air Service Routes for the United States

Section 3: Scheduled Combination Air Service Routes for the United Kingdom

Section 4: Scheduled All-Cargo Air Service Routes for the United Kingdom

Section 5: Notes Applicable to All Routes

Section 6: Notes on New Gateway Points

Section 7: London Airports

H. Stevens, *The Life and Death of a Treaty*,
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The route schedules at Sections 1–4 define very precisely the routes over which US and UK airlines might carry traffic. The rights differ as between Combination Air Services carrying passengers and cargo (Section 1 for the US, Section 3 for the UK), and All-Cargo Services carrying cargo only (Sections 2 and 4).

The route schedules of Bermuda 2 are possibly the most complex in any air services agreement. This is partly because they needed to make provision for services not only between the United States and the United Kingdom, but also to and from United Kingdom territories around the world, including notably Hong Kong, Bermuda and UK territories in the Caribbean. But it is also because Bermuda 2, as originally conceived, was an old-fashioned, restrictive agreement, describing precisely what rights might be exercised by the airlines of each Contracting Party. As a result, every proposed change was contentious, giving rise to complex negotiations designed to maintain or restore a fair balance of opportunities.

The main restrictions were embedded in the route schedules themselves, but a great many more were contained in notes reflecting the terms of exchanges of notes, memoranda of consultations and letters. In the route schedules which follow, few of the notes are original. In order to present the route schedules as clearly as possible, with all the changes which took place throughout the life of the Agreement, it has been necessary to summarise many of the details, rather than always citing original texts. However, references have been provided to the supplementary documents in Part III, and to the published Exchanges of Notes in which most but not all of the changes were formally recorded. Reference is made to the following Exchanges of Notes, all published by HMSO, London:

Cmnd 7016 – Treaty Series No 76 (1977) – the Agreement
Cmnd 7862 – Treaty Series No 34 (1980)
Cmnd 8222 – Treaty Series No 21 (1981)
Cmnd 9720 – Treaty Series No 9 (1986)
Cm 972 – Treaty Series No 41 (1989)
Cm 3673 – Treaty Series No 34 (1997)

(*continued*)

(continued)

Where Treaty amendments affecting the route schedules were not the subject of a formal Exchange of Notes, reference is made to the documents included in Part III.

The main purpose of almost all the services permitted under the Agreement was to carry traffic between points in US territory and points in UK territory (Columns A and C). The only major exceptions to this general rule were US Route 2, which made provision for Pam Am's iconic round-the-world service, and UK Route 5, the polar route between the UK and Japan by way of Anchorage in Alaska. Liberal 'open skies' route schedules would typically make provision for services to be operated from any point or points in the country of origin to any point or points in the country of destination (see for example US Route 1A and UK Route 1A, added to the Agreement in 1995 as a first step towards liberalisation—Chap. 4 and 5), but in the original text of Bermuda 2 this was true only of US Route 6 to UK territories in the Caribbean, whose tourist industries wanted the widest possible spread of services from US cities. For the US, which had traditionally controlled access to its market by limiting the availability of US gateways, it will be noted that the number of gateways available on each route varies considerably. For the UK, with London, Manchester and Prestwick/Glasgow available to US airlines on all UK mainland routes, the key restriction concerned access to Heathrow (Annex 1 Section 7).

The route schedules also made provision for traffic to be carried to and from intermediate points between the two Contracting Parties (Column B) or to and from points beyond the main destination in the other Contracting Party (Column D), but it will be seen that such rights were in general tightly constrained. Rights for US airlines to pick up traffic in London and carry it to points beyond in Europe were gradually reduced over the first five years of Bermuda 2's life (see notes to US Route 1). For reasons of geography it has always been difficult for UK airlines to make much use of any rights beyond the USA, but the opportunities were significantly increased as a result of the Heathrow Succession negotiations in 1991 (see for example UK routes 2, 3, 4, 5A, 5B).

Annex 1. Section 1: Scheduled Combination Air Service Routes for the United States

US Route 1: Atlantic Combination Air Service
US Route 1A: Atlantic Regional Combination Air Service
US Route 2: Round the World Combination Air Service
US Route 3: Pacific Combination Air Service
US Route 4: Bermuda combination Air Service
US Route 5: Bermuda combination Air Service—Beyond
US Route 6: Caribbean Combination Air Service

H. Stevens, *The Life and Death of a Treaty*,
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US Route 1: Atlantic Combination Air Services

(A) US gateway points[1]	(B) Intermediate points	(C) Points in UK territory	(D) Points beyond[7,8]
Anchorage Atlanta Boston Chicago Dallas/Ft Worth Detroit Houston Los Angeles Miami Minneapolis/St Paul[2] New York Philadelphia San Francisco Seattle Washington/Baltimore Five additional gateways from list at Annex 1 Section 6[3] Pittsburgh[4]	Shannon[5]	London Prestwick/Glasgow Any UK point excluding London[6]	Berlin Frankfurt Hamburg Munich Oslo One point in Western Europe[9]

[1]Certain gateways were not to be served nonstop before specific dates; thus Denver, a Section 6 selection, 14 April 1980 (Cmnd 8222); Houston, 23 July 1980 (Cmnd 7016) but 1 July 1980 (Cmnd 7862)

[2]Minneapolis/St Paul was 'the additional point to be agreed between the Contracting Parties' (Cmnd 7016)

[3]Section 6 selections (Cmnd 8222 and 9720), phased in 1981–1986, could be changed on 3 months' notice. At different times Charlotte, Cincinatti, Cleveland, Newark, Pittsburgh (see also Note 4), Raleigh-Durham and St Louis were all selected. Services from these gateway points did not enjoy local traffic rights between points in Column (C) and points in Column (D) except between Prestwick/Glasgow and Oslo (see also Note 7). This restriction also applied to services operated by any airline designated pursuant to Article 3, paragraph 5

[4]Pittsburgh, originally selected under Section 6, was added as an additional gateway from 2000 (Chap. 4 and Part III Doc 28), but restricted to London Gatwick airport

[5]Shannon was added to Column (B) in November 1982 (Cmnd 9720), to be served by only one US designated airline, with full traffic rights between Shannon and Prestwick/Glasgow, on up to seven round trips per week

[6]From 27 July 1990 US airlines could operate services on any three gateway route segments between the US and UK airports other than London (Part III, Doc 24). See also US Route 1A from 1995

[7]Austria and Belgium were available until 23 July 1980, Netherlands, Norway and Sweden until 23 July 1982 (Cmnd 7016). Thereafter Oslo was retained, but only for services through Prestwick/Glasgow (Cmnd 8222)

[8]Only one US airline to be designated to serve each point in Column (D) on this route, except for Frankfurt for which two airlines might be designated on US Routes 1 and 2 taken together (Cmnd 7016). If a point named in Column (D) is also selected pursuant to Note 9 below, two designated airlines might provide service with full traffic rights, except for Frankfurt for which three designated airlines might provide such service on US Routes 1 and 2 taken together (Cmnd 9720)

[9]From 9 November 1982 (Cmnd 9720). Point to be selected by the United States which might change it on six months' notice. Only one US airline to be designated to serve this point with full traffic rights on up to seven round trip flights per week. This right additional to and not limited by those already exercised under Note 8

US Route 1A: Atlantic Regional Combination Air Service[1]

(A) US gateway points	(B) Intermediate points	(C) Points in UK territory[2]	(D) Points beyond
Any point or points in the United States		Any point or points in the United Kingdom excluding London's Heathrow and Gatwick Airports	

[1]US Route 1A was added to the Agreement in 1995 (Part III, Doc 27). For the purposes of this Agreement and of the Exchange of Notes dated 25 May 1989 concerning the licensing of airlines to operate international air services (Part III, Doc 21 and Cm 793), and Attachment 5 to the Memorandum of Consultations dated 11 September 1986 concerning North Atlantic passenger tariff procedures (Part III, Doc 19), references to US Route 1 shall apply to US Route 1A, except for the purposes of Article 3 paragraph (2), Annex 1 Section 3 (notes), Section 6, Section 7 and Annex 2. (This released these services to UK regional points from various restrictions, notably on designation and capacity)
[2]An airline otherwise authorised to operate to Heathrow and Gatwick may carry online and connecting traffic between those airports and points in Column (C)

US Route 2: Round the World Combination Air Service[1]

(A) US gateway points	(B) Intermediate points	(C) Points in UK territory	(D) Points beyond
Segment (a) New York Washington/Baltimore		London	Frankfurt[3] Turkey Lebanon Syria Iran Pakistan New Delhi Calcutta
Segment (b) Honolulu Los Angeles San Francisco	Japan	Hong Kong[2]	Points on Segment (b)[4] Thailand Points on Segment (a)[4]

[1]Not more than seven flights per week may operate in each direction on each segment (Cmnd 7016)
[2]Hong Kong was deleted from column C with effect from 9 April 1997 when the Air Service Agreement between Hong Kong and the USA entered into force (Cm 3673)
[3]Not more than two US airlines may be designated to serve Frankfurt on US Routes 1 and 2, taken together (Cmnd 7016)
[4]Segments (a) and (b) shall be combined, except as may be agreed pursuant to Article 2, paragraph (5) (Cmnd 7016)

US Route 3: Pacific Combination Air Service[1]

(A) US gateway points	(B) Intermediate points[6]	(C) Points in UK territory	(D) Points beyond[5,6]
Anchorage/Alaska[2]			Thailand
Chicago	Japan[4]	Hong Kong	Singapore
Guam/Commonwealth of the Marianas[3]			
Honolulu			
Los Angeles			
New York			
San Francisco			
Seattle			

[1]This route was deleted in 1997, when Hong Kong ceased to be a UK territory (Cm 3673)
[2]Alaska was substituted for Anchorage by an unpublished Memorandum of Consultations dated 6 October 1994
[3]Guam/Commonwealth of the Marianas was substituted for 'Guam' by an unpublished Memorandum of Consultations dated 8 September 1988
[4]Not more than 14 round trip combination flights per week may serve Japan with full traffic rights between Japan and Hong Kong. Flights which serve Japan on US Route 2 shall count towards this number (Cmnd 7016)
[5]Thailand and Singapore may not be served on the same flight. Not more than seven round trip combination flights per week may serve these points taken together with full traffic rights between Hong Kong and these points. Flights which serve Thailand on US Route 2 shall count towards this number (Cmnd 7016)
[6]Intermediate and beyond points available on US Route 3 only

US Route 4: Bermuda Combination Air Service

(A) US gateway points	(B) Intermediate points	(C) Points in UK territory	(D) Points beyond
Atlanta		Bermuda	
Baltimore			
Boston			
Charlotte[1]			
Chicago			
Detroit			
Miami			
New York			
Philadelphia			
Raleigh/Durham[2]			
St Louis[3]			
Washington			

[1]Charlotte was added to the list from March 1992 (Part III, Doc 23/2) in exchange for corresponding rights for a UK airline, but 'on the basis of comity and reciprocity', and subject to termination by either side after not less than one year

[2]Raleigh/Durham was added by letters dated 28 March 1989 (Part III, Doc 23/1) in exchange for an additional US gateway on UK Route 8; gateways changeable on giving 90 days' notice

[3]St Louis added by letters dated 1 February 2000 between Madison (US State Dept) and McClymont (UK Embassy, Washington)

US Route 5: Bermuda Combination Air Service—Beyond

(A) US gateway points	(B) Intermediate points	(C) Points in UK territory	(D) Points beyond
Atlanta Baltimore Miami Washington		Bermuda	Azores Two points in Europe other than the United Kingdom to be agreed between the Contracting Parties[1]

[1]Brussels and Dusseldorf agreed 5 March 1981

US Route 6: Caribbean Combination Air Service

(A) US gateway points	(B) Intermediate points	(C) Points in UK territory	(D) Points beyond
Any point or points in US territory	Antigua[1] Aruba Bahamas Barbados Belize[1] Bonaire Cuba Curacao Dominica[1] Dominican Republic Grenada Guadeloupe Guyana Haiti Jamaica Martinique St Christopher (St Kitts) and Nevis[1,2] St Lucia[1] St Maarten St Martin St Vincent and the Grenadines[1] Trinidad and Tobago US points in the Caribbean area Venezuela	Anguilla British Virgin Islands Cayman Islands[3] Montserrat Turks & Caicos Islands	

[1]Points transferred from Column C to Column B by letters of 17 October and 10 November 1986 (Part III, Documents 22/2 and 22/3), following their independence from the UK

[2]Any one or more of the points may be served

[3]For conditions applying to Cayman Islands services, see Part III, Doc 22

Annex 1. Section 2: Scheduled All-Cargo Air Service Routes for the United States

US Route 7: Atlantic All-Cargo Air Service
US Route 8: Pacific All-Cargo Air Service
US Route 9: Bermuda All-Cargo Air Service
US Route 10: Bermuda All-Cargo Air Service Beyond
US Route 11: Caribbean All-Cargo Air Service

H. Stevens, *The Life and Death of a Treaty*,
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US Route 7: Atlantic All-Cargo Air Services

(A) US gateway points[1]	(B) Intermediate points	(C) Points in UK territory[1]	(D) Points beyond
Boston		London	Belgium
Chicago		Manchester	Netherlands
Detroit		Prestwick/Glasgow	Federal Republic of Germany
Houston			Turkey
Los Angeles			Lebanon
New York			Syria
Philadelphia			Jordan
			Iran
			India

[1]With effect from 1 January 1983, Annex 5 (see Part II) allowed free access for cargo services between all points in the United States and all points in the United Kingdom. Although the right to carry fifth freedom traffic between the UK and points beyond remained restricted as above, FedEx was granted unrestricted fifth freedom rights from Prestwick under letters from Patricia Hayes (UK) to Paul Gretch (US) dated 25 August 1999

US Route 8: Pacific All-Cargo Air Service[1]

(A) US gateway points	(B) Intermediate points	(C) Points in UK territory	(D) Points beyond
Anchorage/Alaska[2]		Hong Kong	
Chicago			
Guam/Commonwealth of the Marianas[3]			
Honolulu			
Los Angeles			
New York			
San Francisco			
Seattle			

[1]US Route 8 was deleted in 1997, when Hong Kong ceased to be UK territory (Cm 3673)
[2]Alaska was substituted for Anchorage by an unpublished Memorandum of Consultations dated 6 October 1994
[3]Guam/Commonwealth of the Marianas was substituted for 'Guam' by an unpublished Memorandum of Consultations dated 8 September 1988

US Route 9: Bermuda All-Cargo Air Service

(A) US gateway points	(B) Intermediate points	(C) Points in UK territory	(D) Points beyond
Atlanta Baltimore Boston Chicago Detroit Miami New York Philadelphia Washington		Bermuda	

US Route 10: Bermuda All-Cargo Air Service—Beyond

(A) US gateway points	(B) Intermediate points	(C) Points in UK territory	(D) Points beyond
Atlanta Baltimore Miami Washington		Bermuda	Azores Two points in Europe other than the United Kingdom to be agreed between the Contracting Parties[1]

[1]No points agreed

US Route 11: Caribbean All-Cargo Air Service

(A) US gateway points	(B) Intermediate points	(C) Points in UK territory	(D) Points beyond
Any point or points in US territory	Antigua[1] Aruba Bahamas Barbados Belize[1] Bonaire Cuba Curacao Dominica[1] Dominican Republic Grenada Guadeloupe Guyana Haiti Jamaica Martinique St Christopher (St Kitts) and Nevis[1,2] St Lucia[1] St Maarten St Martin St Vincent and the Grenadines[1] Trinidad and Tobago US points in the Caribbean area Venezuela	Anguilla British Virgin Islands Cayman Islands[3] Montserrat Turks & Caicos Islands	

[1]Points transferred from Column C to Column B by letters of 17 October and 10 November 1986 (Part III, Documents 22/2 and 22/3), following their independence from the UK

[2]Any one or more of the points may be served

[3]For conditions applying to Cayman Islands services, see Part III, Doc 22

Annex 1. Section 3: Scheduled Combination Air Service Routes for the United Kingdom

UK Route 1: Atlantic Combination Air Service
UK Route 1A: Atlantic Regional Combination Air Service
UK Route 2: Atlantic Combination Air Service via Canada
UK Route 3: Atlantic Combination Air Service Beyond to Mexico City
UK Route 4: Atlantic Combination Air Service Beyond to South America
UK Route 5: Atlantic Combination Air Service Beyond to Japan
UK Route 5A: Atlantic Combination Air Service Beyond to the Pacific
UK Route 5B: Atlantic Combination Air Service Beyond to Australia
UK Route 6: Pacific Combination Air Service
UK Route 7: Pacific Combination Air Service via Tarawa
UK Route 8: Bermuda Combination Air Service
UK Route 9/9A: Caribbean Combination Air Service

H. Stevens, *The Life and Death of a Treaty*,
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UK Route 1: Atlantic Combination Air Service

(A) UK gateway points	(B) Intermediate points[3]	(C) Points in US territory[6]	(D) Points beyond
London Manchester Prestwick/Glasgow Belfast[1] Points in the United Kingdom excluding London[2]	Points in Luxembourg, The Netherlands, and the Republic of Ireland[4] Points in Belgium, France and Germany[5]	Atlanta[7] Boston Chicago Dallas/Ft Worth[8] Detroit Houston Los Angeles Miami New Orleans[9] New York Philadelphia St Louis[9] San Francisco Seattle Washington/Baltimore Five additional gateways from list at Annex 1 Section 6[9] One further gateway[10]	

[1]May be served nonstop if selected under Section 6 of Annex 1 (see Part II and note 9 below)
[2]From 27 July 1990, UK airlines were allowed to operate services on any two gateway route segments between any point or points in the UK other than London and points in US Territory (Part III, Doc 24)
[3]Services on UK Route 1 operating via intermediate points, available from 11 March 1991 (Part III, Doc 25), were released from the conditions prioritising third/fourth freedom traffic (Article 11.3) and from the conditions relating to change of gauge (Annex 1, Section 5, paragraph 6 a–d)
[4]From 11 March 1991 (Part III, Doc 25), not more than 21 round trip combination flights per week to serve the United States from points in Luxembourg, the Netherlands, and the Republic of Ireland with full traffic rights between those points and the United States
[5]From 11 March 1991 (Part III, Doc 25), not more than 42 round trip combination flights per week to serve the United States from points in Belgium, France and Germany with full traffic rights between those points and the United States, provided that not more 21 round trip combination flights per week to serve the United States from points in any one country. Berlin to be available from 1 April 1993, or sooner if the US Government so notifies the Government of the United Kingdom
[6]From 9 November 1982, one UK designated airline permitted to carry its own stopover passengers between two points in Column C provided the service begins or ends at a point in Column A (Cmnd 9720); points to be selected by the United Kingdom, selection changeable on six months' notice
[7]Not to be served nonstop before 1 June 1980 (Cmnd 7862); originally not before 23 July 1980 (Cmnd 7016)
[8]Not to be served nonstop before 23 July 1980 (Cmnd 7016)
[9]Service to St Louis to begin on or after 14 April 1980 (Cmnd 8222); service to New Orleans to begin on or after 1 April 1981 (Cmnd 8222); Section 6 selections (see text in Part II), phased in 1981–86, could be changed on 3 months' notice. At different times Charlotte, Dallas/Ft Worth, Las Vegas, Orlando, Phoenix, San Diego and Tampa were all selected
[10]Added by correspondence 31 March/3 April 2000 (Part III, Doc 28); gateway selection could be changed on 60 days' notice

UK Route 1A: Atlantic Regional Combination Air Service[1]

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
Any point or points in the United Kingdom excluding London's Heathrow and Gatwick airports		Any point or points in the United States	

[1]UK Route 1A was added to the Agreement in 1995 (Part III, Doc 27). For the purposes of this Agreement and of the Exchange of Notes dated 25 May 1989 concerning the licensing of airlines to operate international air services (Part III, Doc 21 and Cm 793), and Attachment 5 to the Memorandum of Consultations dated 11 September 1986 concerning North Atlantic passenger tariff procedures (Part III, Doc 19), references to UK Route 1 shall apply to UK Route 1A, except for the purposes of Article 3 paragraph (2), Annex 1 Section 3 (notes), Section 6, Section 7 and Annex 2. (This released these regional services from various restrictions, notably on designations and capacity)

UK Route 2: Atlantic Combination Air Service via Canada

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
London Manchester Prestwick/Glasgow	Canada	Boston Chicago Dallas/Ft Worth[1] Detroit New York Philadelphia Washington/Baltimore Five points to be selected from UK Route 1[2]	

[1]Available from 23 July 1980
[2]Points added 11 March 1991 (Part III, Doc 25). Only gateway route segments that are available on UK Route 1 may be selected

UK Route 3: Atlantic Combination Air Service Beyond to Mexico City

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
London Manchester Prestwick/Glasgow		Boston Detroit New York Philadelphia Washington/Baltimore Five Points to be selected from UK Route 1[1]	Mexico City

[1]Five points in US territory were added to Column C on 11 March 1991 (Part III, Doc 25). Selections were limited to gateway route segments also available on UK Route 1

UK Route 4: Atlantic Combination Air Service Beyond to South America

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
London Manchester Prestwick/Glasgow		Atlanta[2] Houston[3] San Juan[4] Three points to be selected from UK route 1[1]	Bolivia[4] Chile[4] Colombia Ecuador[4] Peru Venezuela Manaus[5] Other points in South America[6]

[1]Three points in US territory were added to Column C on 11 March 1991 (Part III, Doc 25). Selections were limited to gateway route segments also available on UK Route 1

[2]Available from 23 July 1980 (Cmnd 7016). Full traffic rights to be exercised from Atlanta only to Colombia, Peru and Venezuela, unless Atlanta is also selected as one of the three US points from UK Route 1 (11 March 1991, Part III, Doc 25)

[3]Houston was omitted from Column (C) after 11 March 1991, but could still be served as one of the three additional points to be selected; under the Agreement (Cmnd 7016), there was no right to carry local traffic between Houston and Peru

[4]These points were all added in 1991 (Part III Doc 25), when the rights available under UK Route 4 were substantially enhanced

[5]Manaus, in Brazil, was included in the original Treaty, but removed in 1982 (Cmnd 9720) when 'Other points in South America' was added to column (D)

[6]These points to be served with full traffic rights only through San Juan (Cmnd 9720)

UK Route 5: Atlantic Combination Air Service Beyond to Japan

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
London		Anchorage	Japan

UK Route 5A: Atlantic Combination Air Service Beyond to the Pacific[1]

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
London Manchester Prestwick/Glasgow Other points in the United Kingdom[2]		Three Points to be selected from UK Route 1[3]	Indonesia Korea Malaysia New Zealand Singapore Taiwan

UK Route 5B: Atlantic Combination Air Service Beyond to Australia[1]

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
London Manchester Prestwick/Glasgow Other points in the United Kingdom[2]		Seattle	Australia[4]

[1]UK Routes 5A and 5B added 11 March 1991 (Part III, Doc 25). For purposes of the Agreement and the 1989 Exchange of Notes on licensing of airlines (Cm 793), references to UK Route 5 shall be deemed to include Routes 5A and 5B

[2]These points must also be UK gateway points on UK Route 1

[3]Only gateway route segments that are also available on UK Route 1 may be operated. Los Angeles was selected

[4]Only one UK airline may operate up to seven weekly round trip combination flights with full traffic rights between Seattle and one point in Australia. United Kingdom to notify the United States of its selection in writing through diplomatic channels; selection may be changed on 30 days' notice

UK Route 6: Pacific Combination Air Service[1]

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory[3]	(D) Points beyond
Hong Kong	Japan[2]	Alaska[4] Guam[5] Honolulu Los Angeles San Francisco Seattle	Vancouver[6]

[1]UK Route 6 was deleted on 9 April 1997 when the Air Service Agreement between Hong Kong and the USA entered into force (Cm 3673)
[2]As long as there is any frequency limitation on combination air services of US designated airlines between Japan and Hong Kong, UK designated airlines may not serve Japan with more than 7 round trip combination flights per week with full traffic rights between US points and Japan (Cmnd 7016)
[3]Only two of the points San Francisco, Seattle or Los Angeles may be served during a traffic season. Selection may be changed each traffic season with not less than 90 days' notice (Cmnd 7016)
[4]Alaska was added by a Memorandum of Consultations dated 6 October 1994 (unpublished)
[5]Guam/Commonwealth of the Marianas was substituted for Guam by a Memorandum of Consultations dated 8 September 1988 (unpublished)
[6]Honolulu to Vancouver not available until 23 July 1982 (Cmnd 7016)

UK Route 7: Pacific Combination Air Service via Tarawa[1]

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
Tarawa	Christmas Island	Honolulu	

[1]Route deleted in July 1979 when Tarawa, as part of Kiribati, became independent of the United Kingdom

UK Route 8: Bermuda Combination Air Service

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
Bermuda		San Juan[1] Three (from 1989 four) points to be selected by the UK and notified to the US[2]	

[1]San Juan was added 28 March 1989 by correspondence between US State Department and UK Embassy, Washington, (Part III, Doc 23/1) in exchange for addition of Raleigh-Durham to US Route 4; gateways changeable on giving 90 days' notice

[2]Baltimore, Orlando and Tampa were selected. In correspondence dated 28 March 1989 between US State Department and UK Embassy, Washington, a fourth point was added (Part III, Doc 23/1). A further point was added from 1992, in exchange for the operation of Charlotte-Bermuda operations by USAir (Part III, Doc 23/2), but this was done 'on the basis of comity and reciprocity' not requiring formal amendment of the Agreement

UK Route 9/9A: Caribbean Combination Air Service[1,2]

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory[4]		(D) Points beyond
		Route 9 (1977)	Route 9A (1991)	
Anguilla British Virgin Islands Cayman Islands Montserrat Turks & Caicos Islands	Antigua[3] Bahamas Barbados Belize[3] Cuba Dominica[3] Dominican Republic Grenada Guadeloupe Guyana Haiti Jamaica Martinique St Christopher (St. Kitts) and Nevis[3] St Lucia[3] St Maarten St Martin St Vincent and the Grenadines[3] Trinidad & Tobago Any point or points in Column A	Baltimore Houston Miami New Orleans Puerto Rico Tampa US Virgin Islands Washington	Houston Miami Five additional points to be selected by the UK and notified to the US[5]	

[1]The first reference to Route 9A is in the draft Exchange of Notes attached to the Memorandum of Consultations dated 11 March 1991 (Part III, Doc 25). For purposes of this Agreement references to Route 9 shall be deemed to include Route 9A, except for purposes of note 2

[2]Only Cayman Airways or its successor airline based in the Cayman Islands can operate on UK Route 9A. This route is available provided that the operations of US airlines to the Cayman Islands are not restricted pursuant to either paragraph (4) of Article 3 of the Agreement or the July 23, 1977 Statements of Interpretation of the Agreement (Part III, Doc 4). Otherwise Route 9 is available to Cayman Airways or its successor airline based in the Cayman Islands (Part III, Docs 22/2 and 22/3)

[3]Following independence from the UK, these UK gateway points were transferred from Column A to Column B (Part III, Docs 22/2 and 22/3). As regards St Kitts—Nevis—Anguilla, any one or more of these points may be served

[4]Under Route 9 (1977) each UK designated airline might not during a traffic season serve more than two of the US mainland points listed in Column (C). Selection might be changed each season with not less than 90 days' notice. Under Route 9A (1991) these restrictions were lifted, and gateway selections might be changed on 60 days' notice to the US authorities through diplomatic channels (Part III, Docs 22/2 and 22/3)

[5]Route 9A (1977) had only three additional points in US territory, but one further point was agreed in the 1990 negotiations summarised in Part III, Doc 24, and a fifth point, to be operated on the basis of comity and reciprocity, was added by correspondence dated 13 November 1991 (Part III, Doc 23/2)

Annex 1. Section 4: Scheduled All-Cargo Air Service Routes for the United Kingdom

UK Route 10: Atlantic All-Cargo Air Service
UK Route 11: Atlantic All-Cargo Air Service Beyond to South America
UK Route 12: Atlantic All-Cargo Air Service Beyond to Mexico
UK Route 13: Pacific All-Cargo Air Service
UK Route 14: Pacific all-Cargo Air Service via Tarawa
UK Route 15: Bermuda All-Cargo Air Service
UK Route 16/16A: Caribbean All-Cargo Air Service

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UK Route 10: Atlantic All-Cargo Air Service[1]

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
London Manchester Prestwick/Glasgow	Canada[2]	Boston Chicago Detroit Los Angeles[2] New York Washington/Baltimore	Panama[2]

[1]Under paragraph (3) (b) of Annex 5 (see text in Part II), added to the Agreement in 1980, traffic could be carried between all points in the UK and all points in the US, but fifth freedom traffic remained limited to the named points in US territory and subject to Note restrictions
[2]Without rights to carry local traffic between Los Angeles and Canada and between Los Angeles and Panama

UK Route 11: Atlantic All-Cargo Air Service Beyond to South America[1]

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
London Manchester Prestwick/Glasgow		Atlanta[2] Houston	Venezuela Colombia Manaus Peru[3]

[1]Under paragraph (3) (b) of Annex 5 (see text in Part II), added to the Agreement in 1980, traffic could be carried between all points in the UK and all points in the US, but fifth freedom traffic remained limited to the named points in US territory and subject to Note restrictions
[2]May not be served nonstop until three years after this Agreement enters into force
[3]Without rights to carry local traffic between Houston and Peru

UK Route 12: Atlantic All-Cargo Air Service Beyond to Mexico[1]

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
London Manchester Prestwick/Glasgow		Miami	Mexico City

[1]Under paragraph (3) (b) of Annex 5 (see text in Part II), added to the Agreement in 1980, traffic could be carried between all points in the UK and all points in the US, but fifth freedom traffic remained limited to the named points in US territory and subject to Note restrictions

UK Route 13: Pacific All-Cargo Air Service[1]

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
Hong Kong		Alaska[2] Guam[3] Honolulu Los Angeles San Francisco Seattle	

[1]UK Route 13 was deleted from the Schedule upon Entry into force of the 1997 UK-Hong Kong Air Service Agreement and related Memorandum of Understanding (Cm 3673)
[2]Alaska was added by a Memorandum of Consultations dated 6 October 1994 (unpublished)
[3]Guam/Commonwealth of the Marianas was substituted for Guam by a Memorandum of Consultations dated 8 September 1988 (unpublished)

UK Route 14: Pacific All-Cargo Air Service via Tarawa[1]

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
Tarawa	Christmas Island	Honolulu	

[1]UK Route 14 was deleted in July 1979 when Tarawa, as part of Kiribati, became independent of the United Kingdom

UK Route 15: Bermuda All-Cargo Air Service

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory	(D) Points beyond
Bermuda		Three points to be selected by the UK and notified to the US	

UK Route 16/16A: Caribbean All-Cargo Air Service[1,2]

(A) UK gateway points	(B) Intermediate points	(C) Points in US territory[4]		(D) Points beyond
		Route 16 (1977)	Route 16A (1991)	
Anguilla British Virgin Islands Cayman Islands Montserrat Turks & Caicos Islands	Antigua[3] Bahamas Barbados Belize[3] Cuba Dominica[3] Dominican Republic Grenada Guadeloupe Guyana Haiti Jamaica Martinique St Christopher (St. Kitts)[3] and Nevis[3] St Lucia[3] St Maarten St Martin St Vincent and the Grenadines[3] Trinidad & Tobago Any point or points in Column A	Baltimore Miami New Orleans Puerto Rico Tampa US Virgin Islands Washington	Houston Miami Three additional points to be selected by the UK and notified to the US	

[1]The first reference to Route 16A is in the draft Exchange of Notes attached to the Memorandum of Consultations dated 11 March 1991 (Part III, Doc 25). For purposes of this Agreement, references to Route 16 shall be deemed to include Route 16A, except for purposes of note 2

[2]Only Cayman Airways or its successor airline based in the Cayman Islands can operate on Route 16A. This route is available provided that the operations of US airlines to the Cayman Islands are not restricted pursuant to either paragraph (4) of Article 3 of the Agreement or the 23 July 1977 Statements of Interpretation of the Agreement (Part III, Doc 4). Otherwise Route 16 is available to Cayman Airways or its successor airline based in the Cayman Islands (Part III, Docs 22/2 and 22/3)

[3]Following independence from the UK, these UK gateway points were transferred from Column A to Column B (Part III, Documents 22/2 and 22/3). As regards St Christopher (St. Kitts)-Nevis-Anguilla, any one or more of these points may be served

[4]Under Route 16 (1977), each UK designated airline might not during a traffic season serve more than two of the US mainland points listed in Column C. Selection might be changed each season with not less than 90 days' notice. Under Route 16A (1991), these restrictions were lifted, and gateway selections might be changed on 60 days' notice to the US authorities through diplomatic channels (Part III, Docs 22/2 and 22/3)

Annex 1. Section 5: Notes Applicable to All Routes

The original text consisted of paragraphs 1–9 only. Paragraphs 10–11 were added in the Heathrow Succession Negotiations of March 1991 (Chap. 4 and Part III, Document 25) to make provision for code-sharing; these paragraphs were revised in 1995 (Part III, Document 27), when paragraph 12 was added, granting access to some Fly America traffic, and paragraph 13 setting a 28-day time limit (subject to conditions) within which the US Department of Transportation undertook to act on applications for economic authorization under paragraphs 10–12. The code-sharing provisions in these Notes were a critical first step towards the facilitation of airline alliances (Chap. 5) even if deeper levels of co-operation required further approval under UK, EU and US competition rules (anti-trust immunity).

1. In addition to the right to carry transit, connecting, and local traffic between points in column B and points in column C and between points in column C and points in column D, designated airlines may carry transit and on-line connecting traffic between points in column C and points in other countries, including countries not listed in columns B or D. Such on-line connecting traffic may be connected at any points in columns A, B, C, or D at any points in countries not listed in such columns.

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2. Each designated airline may carry transit and on-line connecting traffic between any two points in the territory of the other Contracting Party which appear in either column C or column D on any route for which that airline is designated.
3. Except as may be otherwise specifically provided, a designated airline may, on any or all flights, and at its option, serve points on a route and operate via points not listed in columns A, B, C, or D in any order, operate flights in either or both directions, and omit stops at any point or points, without loss of any right to uplift or discharge traffic otherwise permissible under the relevant routes or notes applicable thereto, provided that the service begins or terminates in the territory of the Contracting Party designating the airline. Unless specifically restricted, a point on a route appearing in column B shall be considered as also appearing in column D, and a point in column D shall be considered as also appearing in column B.

The complexity of paragraphs 3 and 4, allowing airlines to serve intermediate points (Column B), points in the territory of the other party (Column C) and beyond points (Column D) in any order, has its origin in the court case Seaboard World Airlines Inc v Department of Trade (Lloyds Law Reports 1976, p 42–47). Seaboard was a US cargo airline which found it convenient to operate New York—Paris—London—New York, setting down in London cargo which it had carried from New York by way of Paris. Operating under Bermuda 1, as interpreted by an agreed memorandum dating from 1966, Seaboard chose to call at the 'beyond' point in Europe before coming to London. The cargo they were off-loading in London was all New York-London cargo, not Paris-London cargo, but the Department of Trade argued that the return flight started in Paris, and all the cargo carried from there to London was therefore to be regarded as Paris-London cargo, which the airline had no right to carry. The Court ruled against the Department, insisting that the airline should be free to serve 'intermediate' and 'beyond' points in any order, provided that it did not off-load in London cargo originating in Paris. The right of UK courts to interpret international treaties was subsequently challenged and struck down (Pan-American World Airways Inc v Department of Trade), but the point won by Seaboard was recognised as sensible and reflected in these notes.

4. A designated airline may carry traffic between points in column A and points in column C, on the same flight or otherwise, via points in other countries, including countries not listed in columns B or D.
5. A designated airline may serve points behind any homeland gateway point shown in column A with or without change of aircraft or flight number and may hold out and advertise such services to the public as through services.
6. A designated airline of one Contracting Party may make a change of gauge in the territory of the other Contracting Party or at points in column B or column D or at points in other countries, provided that:

   (a) operations beyond the point of change of gauge shall be performed by an aircraft having capacity less, for outbound services, or more, for inbound services, than that of the arriving aircraft;
   (b) aircraft for such operations shall be scheduled in coincidence with the inbound or outbound aircraft, as the case may be, and shall have the same flight number;
   (c) in the case of combination air services only, the onward flight, inbound or outbound as the case may be, shall be scheduled to depart within three hours of the scheduled arrival of the incoming aircraft, unless airport curfews, airport slots, or other operational constraints, at the point where change of gauge occurs or at the next point or points of destination of the flight, prevent such scheduling; and
   (d) if a flight is delayed by unforeseen operational or mechanical problems, the onward flight may operate without regard to the conditions in paragraphs (b) and (c) of this Note.

7. Stops for non-traffic purposes may be made at any point in connection with the operations on any route.
8. Notwithstanding the terms of Notes 1, 4, and 7 of this Section, US designated airlines serving Hong Kong shall not make stops for traffic or non-traffic purposes at any point or points in the mainland territory of the People's Republic of China.
9. In these Notes:
   "Transit traffic" means that traffic which is carried on a flight through a point. Flight, for the purpose of this definition, means either:

(a) The arrival and onward operation of an aircraft by an airline whether or not under the same flight identification number, or
(b) the arrival of one aircraft and next onward operation of another aircraft under the same flight identification number, as otherwise allowable under this Agreement, including Note 6 of this Section; and
"On-line connecting traffic" means that traffic which is carried on an incoming flight of an airline and is transferred to an onward flight of the same airline under a different flight identification number. For passengers only, the onward transfer shall be ticketed on the first available onward flight of that airline for the point to which a passenger is connecting, provided that the time between the scheduled arrival of the incoming flight and the scheduled departure of the onward flight does not exceed 24 hours.

1991 text	1995 text
10. United States and United Kingdom designated airlines may enter into commercial arrangements with any other airline whereby services under this Agreement on any route or sector of a route may carry the airline designator code of the US or UK designated airline, in addition to that of the carrier operating the flight, and may be held out by the US or UK airline as though those services were its own, provided that the US or UK designated airline has authority to exercise traffic rights (whether under this Agreement or otherwise) over the whole of the route and the other airline has authority to exercise traffic rights (under this Agreement or otherwise) over the sector or sectors it operates. Notwithstanding the preceding sentence, airlines designated on and serving the same gateway route segment cannot enter into such arrangements with each other for service on that gateway route segment. Only one flight to which this paragraph applies may be operated beyond the gateway point in the territory of the other Contracting Party for each flight operated between the territories of the Contracting Parties.	10. United States and United Kingdom designated airlines may enter into commercial arrangements with any other airline whereby services under this Agreement on any route or sector of a route may carry the airline designator code of the US or UK designated airline, in addition to that of the carrier operating the flight, and may be held out by the US or UK airline as though those services were its own, provided that the US or UK designated airline has authority to exercise traffic rights (whether under this Agreement or otherwise) over the whole of the route and the other airline has authority to exercise traffic rights (under this Agreement or otherwise) over the sector or sectors it operates. Notwithstanding the preceding sentence, airlines designated on and serving the same gateway route segment cannot enter into such arrangements with each other for service on that gateway route segment.

(*continued*)

(continued)

1991 text	1995 text
11. (a) Any United Kingdom designated airline may enter into a commercial arrangement with any US airline or airlines on a sector between a US gateway point for which the UK airline is designated and another point in US territory under which arrangement the US airline's flights carry the airline designator code of both airlines and may be held out by the UK designated airline as services from or over a point in the territory of the UK to a point in US territory as though those services were its own, provided that: (i) the sector between the US gateway point for which the UK airline is designated and the point in US territory to which the service is held out is one for which the other airline has authority to provide service; and (ii) the sector is between two cities, one of which is a gateway point for which the UK airline is designated and the other is a city which is held out by any designated US airline for service in conjunction with its flights to or from the United Kingdom, such service being: 1. on-line connecting and non-stop behind its gateway point in the US; or 2. a connecting service operated by another airline on which that airline's designator code appears; or 3. a through-plane service (i.e., a service which uses the same aircraft throughout, irrespective of the number of stops).	11. (a) Any United Kingdom designated airline may enter into a commercial arrangement with any US airline or airlines on a sector between a US gateway point for which the UK airline is designated and another point in US territory under which arrangement the US airline's flights carry the airline designator code of both airlines and may be held out by the UK designated airline as services from or over a point in the territory of the UK to a point in US territory as though those services were its own.
(b) Notwithstanding the above, US and UK airlines designated, under this Agreement, on and serving the same gateway route segment cannot enter into such arrangements with each other for service on that gateway route segment. (c) Once a UK designated airline begins to hold out services to any city pursuant to subparagraph (a) of this paragraph, such services shall be permitted to continue, even if the conditions in paragraph 11(a)(ii) no longer apply.	(b) Notwithstanding the above, US and UK airlines designated, under this Agreement, on and serving the same gateway route segment cannot enter into such arrangements with each other for service on that gateway route segment.

12. Without prejudice to any arrangements otherwise permitted (including those allowed under this Agreement), any United Kingdom designated airline may enter into a commercial arrangement with any United States airline or airlines under which services between points in the UK and Washington, Baltimore, Philadelphia, Tampa, and San Francisco operated by the United Kingdom designated airline under this Agreement may carry the airline designator codes of both the United Kingdom designated airline and the United States airline for the purpose of ensuring that such services shall be eligible under any applicable United States laws or regulations to provide transportation by air of traffic (excluding mail) that is referred to in 49 United States Code §40,118. The US aeronautical authorities shall grant all economic authorizations necessary to permit the above arrangements.
13. (a) The rights in paragraphs 10–12 of this section may be exercised without regard to the restrictions in paragraph 6 of this section.
    (b) In considering applications to exercise rights available under paragraphs 10, 11, and 12 of this section, the Contracting Parties shall act on any necessary economic authorizations promptly. In the case of the United States, new applications for economic authority to permit a UK airline to implement a code-sharing arrangement shall be acted on within 28 calendar days after the applicant has filed all documents necessary for obtaining said economic authority. In the event that the competent US authorities fail to act on such an application within 28 calendar days, for the purpose of this agreement only, the application shall be deemed to have been disapproved unless the operations are covered by any automatic extension provisions under applicable US laws and regulations. The foregoing time limits shall not apply to an application for economic authority from (1) an airline that requires new or additional FAA operating authority; (2) a US airline for which the application requires an initial fitness determination; or (3) a US airline for which the requested service would involve a substantial change in operations, ownership or management under DOT regulations. In the event that the US authorities consider that the 28-day time limit does not apply to an application for any of the reasons set out in the preceding sentence, they shall inform the UK airline involved accordingly within 28 calendar days after the application has been made. Any applications approved in accordance with this paragraph shall be for a period of no less than two years.

Annex 1. Section 6: Notes on New Gateway Points

Section 6 was added to Annex 1 of the Agreement by the Exchange of Notes dated 4 December 1980 (Part III, Doc 11 and Cmnd 8222) which gave effect to the negotiations which had agreed the major expansion of gateways and services known as Bermuda 2A (see Chap. 3). Originally designed to amplify Annex 1 Section 5 in relation to the introduction by each side of additional services to and from five new US gateways over five years from April 1981 to 1985, it was revised in November 1982 (Part III, Doc 15 and Cmnd 9720) following the economic downturn experienced since 1980, to defer by two years to 1985/86 the expansion of services that had been planned for 1983/84. The two-year hiatus agreed in 1982 is shown in the revised time-table at paragraph 3 below, which was published, along with other changes to the Agreement dating from November 1982, in the 1985 Exchange of Notes (Part III, Doc 16 and Cmnd 9720). Paragraph 10 was added to Section 6 following the Heathrow Succession negotiations of 1991 (Chap. 4 and Part III, Doc 25) to allow the UK to exercise greater flexibility in the designation of more than one British airline to serve the same US gateway, either as an alternative to the opening of new gateways (para 10 a), or at existing gateways (para 10 b), despite the restrictive terms of Article 3 (2) (b) of the Treaty.

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1. In accordance with the provisions of this section, a Contracting Party may select new gateway points from among the following:
   (a) Cleveland, Denver, Ft. Lauderdale, Honolulu, Kansas City, Las Vegas, Minneapolis/St. Paul, New Orleans, Orlando,' Phoenix, Pittsburgh, Portland, St. Louis, San Diego and Tampa.
   (b) Any other point in United States territory whose international airport is located more than 100 direct air miles from the international airport of a point already served or selected for service under this Agreement.
   (c) Any other point in the United States territory whose international airport is located less than 100 direct air miles from the international airport of a point already served or selected for service under this Agreement, provided that the other Contracting Party does not object to its selection. In deciding whether to object, the other Contracting Party shall have regard to whether the proposed point is generally considered to be a separate metropolitan area from the proximate gateway point.
   (d) Notwithstanding subparagraph (c) above, Newark and Baltimore. Services at these points may be held out, promoted and sold as services at New York and Washington, respectively, as well as Newark and Baltimore. Such selections and services shall not derogate from the rights of airlines designated for services at New York and Washington/Baltimore on North Atlantic routes to use any or all New York or Washington/Baltimore area airports and hold out, promote and sell their flights as Newark and Baltimore services as well as New York and Washington services without regard to the airport used. The traffic carried on gateway route segments to/from New York and to/from Washington/Baltimore by airlines designated for these gateway route segments (including their services, if any, to and from Newark and Baltimore airports) shall, for the purposes of Article 3(2)(b)(i) of this Agreement, be counted separately from traffic carried on gateway route segments to/from Newark and to/from Baltimore, respectively, by airlines designated for Newark or Baltimore gateway route segments subsequent to gateway selection pursuant to this Section.
   (e) Belfast, solely by the United Kingdom.

2. (a) At the time of selecting a new gateway point in accordance with the provisions of this Section, a Contracting Party may notify the other Contracting Party that it wishes the services of its designated airline at that gateway to receive market development protection for a period not to exceed three years from the date on which the service is permitted in accordance with paragraphs 2 to 6 of this Section or such later date as all necessary authorizations and technical permissions have been granted by the other Contracting Party (provided that reasonable efforts have been made to obtain them). During a period of invoked market development protection, no nonstop North Atlantic service under this Agreement may be commenced at that gateway point by an airline of the other Contracting Party, unless the designated airline of the Contracting Party invoking such protection operates fewer than 100 non-stop round trip combination flights within the first twelve-month period after the start of the market development period, or fewer than 150 such flights within any subsequent twelve-month period.

   (b) Such market development protection shall be accorded to the United Kingdom designated airline or airlines serving St. Louis and New Orleans and shall commence on 14 April 1980 and 1 April 1981, respectively, or on such later dates as all necessary authorizations and technical permissions have been granted by the United States (provided that reasonable efforts have been made to obtain them). It may be invoked by the United States for its designated airline serving Denver, and if so shall commence on 14 April 1980, or on such later date as all necessary authorizations and technical permissions have been granted by the United Kingdom (provided reasonable efforts have been made to obtain them), and provided that the United States gives notification to the United Kingdom of its wish to invoke such protection at the time of or before signature of the Exchange of Notes incorporating this Section into this Agreement.

3. A gateway point shall be selected by written notification to the other Contracting Party through diplomatic channels and such notification shall take place in accordance with the following timetable regarding sequence, timing and, subject to the provisions of paragraph 2 above, commencement of services at the gateway point. For

services permitted to start as set out in column (A), the Contracting Parties shall select new gateway points in the sequence set out in column (B) and shall observe the latest dates for delivery of notification set out in column (C).

(A) Date of Permitted Start of Services	(B) Sequence of Selection	(C) Latest Date for Delivery of Notification of Selection
1 April 1981	(1st) US—Point A	30 November 1980
	(2nd) UK—Point A	31 December 1980
1 April 1982	(1st) UK—Point B	31 October 1981
	(2nd) US—Point B	30 November 1981
1 April 1985	(1st) US—Point C[1]	31 October 1984
	(2nd) UK—Point C	30 November 1984
1 April 1986	(1st) UK—Point D	31 October 1985
	(2nd) US—Point D[2]	30 November 1985
1 April 1985	(1st) US—Point E[3]	31 October 1984
	(2nd) UK—Point E[4]	30 November 1984

[1]Notwithstanding the date of permitted start of services for Point C, the United States may select Newark as Point C and designate an airline to initiate Newark service on or after April 1, 1983
[2]Notwithstanding the date of permitted start of services for Point D, the United States may select San Juan as Point D and designate an airline to initiate San Juan service on or after November 1, 1984
[3]Selected by the United States on January 12, 1981 pursuant to paragraph 4
[4]Selected by the United Kingdom on February 24, 1981 pursuant to paragraph 4

A point selected by the United Kingdom in accordance with the provisions of this Section shall be regarded as appearing in column (C) of UK Route 1 (or column (A) in the case of Belfast) from the date of permitted start of services. A point selected by the United States in accordance with the provisions of this Section shall be regarded as appearing in column (A) of US Route 1 from the date of permitted start of services. Each point thus selected shall be one of the "Points to be selected under Section 6 of the annex" referred to in those routes.

4. Either Contracting Party may advance the selection of Point E so that service at that point may start on 1 April 1981 or the same date in any subsequent year. The latest date for notification of advance selection of Point E by a Contracting Party having the first right of selection for service to begin in a given year shall be 2 January of the year of permitted start of service (or 1 February in 1981); the latest

date of such notification by a Contracting Party having second right of selection in a given year shall be 1 February of the year of permitted start of service (or 1 March in 1981). Any advance selection of Point E by a Contracting Party having second right of selection in a given year shall be made only after the Contracting Party having first right of selection has made its second selection in that year, or the latest date of notification of such second selection has passed, or the Contracting Party having first right of selection has signified an intention not to make a second selection in that year.

5. A Contracting Party shall to the extent feasible provide to the other Contracting Party advance notice of its intention to select a gateway point or of its decision not to exercise such right. Such notice shall not be binding upon the sending Contracting Party, but receipt of a notice of decision not to select shall permit the receiving Contracting Party to proceed forthwith to make its next available selection pursuant to paragraph 4, 6 or 7 of this Section.
6. A Contracting Party not selecting a gateway point in accordance with the timetable set forth above may nevertheless select such gateway point at any subsequent time except during any four-month period prior to the latest date for notification, under paragraph 3 above, for the other Contracting Party. Services may start at such gateway point on the date which would have been applied if the selection had been made on time, or three months after the actual selection (whichever is later).
7. Either Contracting Party may change a previous selection of a gateway point during any period when it is entitled to make a selection pursuant to paragraphs 3, 4, or 6 of this Section or at any time after 1 December 1984 (and in the same manner as for a selection). In such an event, services from the new point shall be permitted to start on the first date of the traffic season immediately after the notification of the change or three months after the date of such notification (whichever is later). Services from the point renounced shall cease no later than the permitted start of services at the new point. Market development protection may not be invoked or continued at either the new point or the point renounced.
8. In their selection of gateway points as set out above, the Contracting Parties shall have regard to the availability and quality of service from nearby gateways and the need to develop an attractive pattern of frequent service at gateways which are in the early years of operation.

9. Both Contracting Parties shall use their best efforts to grant necessary authorizations and technical permissions in the shortest possible time, and the periods set forth in Article 12 (Tariffs) and Annex 2 (Capacity on the North Atlantic) shall be reduced to the extent necessary to permit airline planning, marketing and start of services on the permitted date.
10. Notwithstanding Article 3(2) of this Agreement:
    (a) The Government of the United Kingdom may forgo up to two of the points which were selected or which could have been selected by the United Kingdom in accordance with the provisions of this Section. To the extent to which it has forgone such points, it shall have the option to designate an airline or airlines on UK Route 1 for an existing gateway route segment that is being served by any designated UK airline[s] on UK Routes 1, 2, 3, 4, or 5; provided that, not more than three UK airlines may be designated on any gateway route segment. The Government of the United Kingdom may exercise, or change its selection of, this opportunity upon sixty days' written notification to the Government of the United States of America through diplomatic channels.
    (b) The Government of the United Kingdom shall have two opportunities to designate an additional UK airline or airlines on UK Route 1 for an existing gateway route segment that is being served by any designated UK airline on UK Routes 1, 2, 3, 4, or 5; provided that, not more than three UK airlines are designated on any gateway route segment. The Government of the United Kingdom may exercise, or change its selection of, this opportunity upon sixty days' notification to the Government of the United States through diplomatic channels.
    (c) The Government of the United States of America shall accept such designations pursuant to paragraph (5) of Article 3.
    (d) If coincident gateway route segments appear on more than one route, the limitations set forth in this paragraph apply to the coincident segments taken together.

Annex 1. Section 7: London Airports

Access to Heathrow was first restricted, for charter services only, by Shovelton's letter of 17 March 1978 to Atwood (Part III, Document 6). Introduction of the 1978 London Area Traffic Distribution Rules (Chap. 3) led to a further letter from Roberts to Hight dated 4 December 1980, which added a restriction on all 'airlines not currently operating at Heathrow' (Part III, Document 14). The 1980 text of Annex 1 Section 7 (column 1 below), which translated Roberts' letter into the more formal language of the treaty, was attached as Enclosure 4 to the Exchange of Notes dated 4 December 1980 (HMSO, London, Cmnd. 8222, May 1981), but was considered to have entered into force on 1 April 1980. The restriction of Heathrow Access to Pan Am and TWA in the 1980 text was the cause of the Heathrow Succession negotiations (Chap. 4) which generated the 1991 text (column 2 below).

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https://doi.org/10.1007/978-3-319-65705-9_16

1980 text	*1991 text*
1. Any London airport (including Heathrow) may be served by British Airways, Pan American World Airways, and Trans World Airlines (or the corporate successor airline in any name change, merger, acquisition or consolidation in which any of the above three airlines is the major airline element) on US Routes 1 and 2 and UK Routes 1, 2, 3, 4, and 5 if the first point of arrival in United States territory or the last point of departure from United States territory is one of the following gateways, served as a traffic point: Anchorage, Boston, Chicago, Detroit, Los Angeles, Miami, Minneapolis/St Paul (US designee only), New York, Philadelphia, San Francisco, Seattle, or Washington/Baltimore	1. Any London airport (including Heathrow) may be served by two US and two UK airlines nominated by their respective governments on US Routes 1 and 2 and UK Routes 1, 2, 3, 4, and 5 if the first point of arrival in US territory or the last point of departure from US territory is one of the following gateways, served as a traffic point: Anchorage, Boston, Chicago, Detroit, Los Angeles, Miami, Minneapolis/St. Paul (US designee only), New York, Philadelphia, San Francisco, Seattle, or Washington/Baltimore. The above nominations may be changed through written notification through diplomatic channels. United Kingdom authorities may add additional US gateways to the preceding list for Heathrow service, if the gateway is not available on US Route 1. The Government of the United Kingdom will notify the Government of the United States in writing through diplomatic channels of its decision to exercise the above opportunities. Nonstop service between the newly selected US gateways and Heathrow Airport may commence at the UK authorities' discretion.
2. Notwithstanding the provisions of paragraph 1, any airline designated by either Contracting Party pursuant to paragraph (5) of Article 3 and serving the gateway segments Boston-London or Miami-London may use any London airport except Heathrow	2. Notwithstanding the provisions of paragraph 1, any airline designated by the United States pursuant to paragraph (5) of Article 3 and serving the gateway route segment Miami-London and any airline designated by either Contracting Party pursuant to paragraph (5) of Article 3 and serving the gateway route segment Boston-London may use any London airport except Heathrow 3. Notwithstanding the provisions of this section, any London airport (including Heathrow) may be served by the UK carriers nominated for Heathrow service on UK Routes 1, 2, 3, 4, and 5 on flights operated via third-country intermediate points served as traffic points
3. All other services on US Routes 1 and 2 and UK Routes 1, 2, 3, 4, and 5 may use any London airport except Heathrow	4. All other services on US routes 1 and 2 and UK Routes 1, 2, 3, 4, and 5 may use any London airport except Heathrow

Annex 2. Capacity on the North Atlantic

The control of capacity was a key UK objective in the original negotiation of Bermuda 2 (Chap. 2). Any such control was strongly resisted by the US, who insisted on a drop-dead clause after seven years (1977 text, para 12). However this was extended for a further two years, and the more liberal text negotiated in 1986 (Chap. 3), substituted for the original by an Exchange of Notes dated 25 May 1989 (Cm. 972), continued in force throughout the remaining life of the agreement.

(1) In order to ensure the sound application of the principles set forth in Article 11 (Fair Competition) of this Agreement and in view of the special circumstances of North Atlantic air transport, the Contracting Parties have agreed to the following procedures with respect to combination air services on US Routes 1 and 2 and UK Routes 1, 2, 3, 4 and 5 specified in Annex 1.

(2) The purpose of this Annex is to provide a consultative process to deal with cases of excess provision of capacity, while ensuring that designated airlines retain adequate scope for managerial initiative

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9_17

in establishing schedules and that the overall market share achieved by each designated airline will depend upon passenger choice rather than the operation of any formula or limitation mechanism. In keeping with these objectives, the Contracting Parties desire to avoid unduly frequent invocation of the consultative mechanism or limitation provision in order to avoid undue burden of detailed supervision of airline scheduling for the Contracting Parties.

1977 text	*1986 text*
(3) Not later than 180 days before each summer and winter traffic season, each designated airline shall file with both contracting Parties its proposed schedules for services on each relevant gateway route segment for that season. Such schedules shall specify the frequency of service, type of aircraft and all the points to be served. The designated airlines may amend their filings in the light of the schedules so filed and shall file such amendments with both Contracting Parties not later than 165 days before each summer and winter traffic season. In the event that adjustments in schedules are later required, such adjustments shall be filed with both Contracting Parties on a timely basis. A resulting increase in frequency by an airline shall be subject to the approval of the other Contracting Party.	(3) Not later than 130 days before each summer and winter traffic season, each designated airline shall file with both Contracting Parties its proposed schedules for services on each relevant gateway route segment for that season. Such schedules shall specify the frequency of service, type of aircraft and all points to be served. In the event that increases in frequencies are later required, such increases shall be filed with both Contracting Parties on a timely basis. Any such late-filed increases in frequencies by an airline on any gateway route segment shall be subject to the approval of the other Contracting Party only if the increase could have been the subject of consultations under paragraph (4) of this Annex if it had been filed by the deadline specified in this paragraph.

(continued)

(continued)

1977 text	*1986 text*
(4) If a Contracting Party (the "Receiving Party") believes that an increase in frequency of service on a gateway route segment contained in any of the schedules so filed with it by a designated airline of the other Contracting Party (the "Requesting Party") may be inconsistent with the principles set forth in Article 11 of this Agreement, it shall, not later than 150 days before the next traffic season, notify the Requesting Party, giving the reasons for its belief and, in its discretion, indicating the increase, if any, in frequency of service on the gateway route segment which it considers consistent with the Agreement. Such notification shall not, however, be permitted in respect of a schedule for a summer traffic season which specifies a total of 120 or fewer round trip frequencies on any gateway route segment or for a winter traffic season which specifies 88 or fewer such frequencies. The Requesting Party shall review the increase in frequency of service called into question in the light of the principles set forth in Article 11, taking into account the public requirements for adequate capacity, the need to avoid uneconomic excess capacity, the development of routes and services, the need for viable airline operations, and the capacity offered by airlines of third countries between the points in question. The Requesting Party shall, not later than 120 days before the next traffic season, notify the Receiving Party of the extent to which it considers the increase in frequency is consistent with the principles set forth in Article 11.	(4) If a Contracting Party (the "Receiving Party") believes that an increase in frequencies on a gateway route segment contained in any of the schedules so filed with it by a designated airline of the other Contracting Party (the "Requesting Party") may be inconsistent with the principles set forth in Article 11 of this Agreement, it may, not later than 105 days before the next traffic season, request consultations, notifying the Requesting Party of the reasons for its belief and, in its discretion, indicating the increase, if any, in frequencies on the gateway route segment which it considers consistent with the Agreement. Such request shall not, however, be permitted in respect of a schedule for a summer traffic season which specifies a total of 214 or fewer round trip winter traffic season which specifies 151 or fewer such frequencies.

(continued)

(continued)

1977 text	*1986 text*
(5) If the Receiving Party is not satisfied with the Requesting Party's determination with respect to the increase in frequency in question, it shall so notify the Requesting Party not later than 105 days before the next traffic season, and consultations shall be held as soon as possible and in any event not later than 90 days before that traffic season. In such consultations, the Parties shall exchange relevant economic data, including forecasts of the percentage increase in total on-board revenue passenger traffic expected on the gateway route segment in question when the next traffic season is compared with the previous corresponding season.	(5) Consultations shall be held as soon as possible and in any event not later than 90 days before the traffic season in question.
(6) If, 75 days before the traffic season begins, agreement has not been reached through such consultations, each designated airline on the gateway route segment in question shall be entitled to operate during the next traffic season the schedule it proposes to operate, but not more than the sum of: (a) the total number of round trips frequencies (excluding extra sections) which that airline was allowed under this annex to operate on that gateway route segment during the previous corresponding season; and (b) such number of round trip frequencies as are determined by applying to the number described in sub-paragraph (a) the average of the forecast percentages mentioned in paragraph (5) of this Annex. An addition of 20 round trip frequencies during a summer traffic season or 15 during a winter traffic season shall in any event be permitted. In no event shall a designated airline be required to operate fewer than 120 round trip frequencies during a summer traffic season or 88 during a winter traffic season.	(6) If, 75 days before the traffic season begins, agreement has not been reached, each designated airline whose proposed schedule was the subject of consultations shall be entitled to operate during that season, on the gateway route segment in question, the total number of round trip frequencies which it was authorized to operate on that gateway route segment during the previous corresponding season, plus an additional 30 round trip frequencies during a summer traffic season or 22 during a winter traffic season. However, if the authorized frequencies for the previous corresponding season were also determined under this paragraph, such authorized frequencies shall be deemed not to include such 30 or 22 additional frequencies except to the extent they were actually operated in that season.

(continued)

(continued)

1977 text	*1986 text*
(7) A designated airline of one Contracting Party which inaugurates service on a gateway route segment already served by a designated airline or airlines of the other Contracting Party shall not be bound by the limitations set forth in paragraph (6) of this Annex for a period of two years or until it matches the frequencies of any incumbent airline of that other Contracting Party, whichever occurs first.	(7) A designated airline of one Contracting Party which inaugurates service on a gateway route segment already served by a designated airline or airlines of the other Contracting Party shall not be bound by the limitations set forth in paragraph (6) of this Annex for a period of two years or until it matches the frequencies of any incumbent airline of that other Contracting Party, whichever occurs first.
(8) Operations of Concorde aircraft by United Kingdom designated airlines shall not be subject to the provisions of this Annex. In order, however, that this exclusion should not unfairly affect United States designated airlines, the United States airline designated to operate combination air services on the Washington-London gateway route segment may not be required, under paragraph (6) of this annex, to operate fewer than seven round trip flights per week.	(8) In no event, except when sub-paragraph (b) of paragraph (9) of this Annex applies, shall the designated airline(s) of one Contracting Party be required, in aggregate, to operate on any gateway route segment fewer than either (a) the total number of authorized frequencies of the airline(s) of the other Contracting Party including Concorde frequencies or (b) 150 percent of the total number of authorized subsonic frequencies of the designated airline(s) of the other Contracting Party.
(9) Each Contracting Party shall allow filed schedules which have not been Questioned under paragraph (5) of this annex to become effective on their proposed commencement dates. Each Contracting Party shall allow schedules which may have been determined by agreement through consultations or, in the absence of such agreement as provided in paragraph (6) of this Annex, to become effective on their proposed commencement dates. Each Contracting Party may take such steps as it considers necessary to prevent the operation of schedules which include frequencies greater than those permitted or agreed under this Annex.	(9) (a) For the purpose of applying the provisions of this Annex to a designated airline which replaces a designated airline of the same Contracting Party, the replacement airline, in so far as it begins to operate the same agreed services on a regular basis within 12 months of the previous airline ceasing to operate them, shall, in respect of the previous corresponding season, be deemed to have been authorized to operate the frequencies authorized for the previous airline, and to have operated the frequencies actually operated by that airline. (b) Where the replacement airline begins operations after the start of a traffic season, it shall be entitled to operate for the remaining part of that season on a pro-rata basis the frequencies authorized for the previous airline. (c) A replacement airline shall file schedules with the other Contracting Party as soon as it has been designated, or in accordance with paragraph (3) of this Annex, whichever is the later.

(continued)

(continued)

1977 text	*1986 text*
	(10) If a newly designated airline that is not a replacement airline is unable, because of the date of its designation, to file schedules with the other Contracting Party in accordance with the provisions of paragraph (3) of this Annex, it shall file its proposed schedules as soon as it has been designated. Schedules filed may be operated unless the Receiving Party objects within 15 days of the schedules being filed. If there is an objection, the level of operations may not be held to a level less than a total of 214 round-trip frequencies, if it is a summer-traffic season, and 151, if it is a winter traffic season. Where such airline begins operations after the start of a traffic season, it shall be entitled to operate such frequencies for the remaining part of that season on a pro-rata basis. (11) Each Contracting Party shall allow filed schedules which have not been the subject of a request for consultations under paragraph (4) of this Annex to become effective on their proposed commencement dates. Each Contracting Party shall allow schedules which have been determined by agreement or as provided in paragraphs (6), (8), (9) or (10) of this Annex to become effective on their proposed commencement dates. Each Contracting Party may take such steps as it considers necessary to prevent the operation of schedules which include frequencies greater than those permitted or agreed to under this Annex.

(continued)

(continued)

1977 text	*1986 text*
(10) Each designated airline shall be entitled to operate extra sections on any gateway route segment, provided that such extra sections are not advertised or held out as separate flights.	(12) Each designated airline shall be entitled to operate extra sections on any gateway route segment, provided they are operated as duplicate flights to meet unforeseen short term demand for additional seats; are not sold, advertised or held out or shown in any reservations system (except in an airline's internal system for inventory control purposes) as separate flights; and are operated as close to the time of the flights which they duplicate as airport conditions allow.
(11) In the event that either Contracting Party believes that this Annex is not achieving the objectives set forth in paragraph (2), they may consult at any time, pursuant to Article 16 (Consultations) of this Agreement, to consider alterations to the procedures or numerical limitations.	(13) In the event that either Contracting Party believes that this Annex is not achieving the objectives set forth in paragraph (2) of this Annex, it may at any time request consultations, pursuant to Article 16 of this Agreement, to consider alterations to the procedures or numerical limitations.
(12) Subject to Article 19 (Termination) of this Agreement, this Annex shall remain in force for a period of five years. The contracting Parties shall consult during the first quarter of the fifth year after the entry into force of this Agreement to review the operation of the Annex and to decide as to its extension or revision. If the Contracting Parties do not agree on extension or revision, this Annex shall remain in force for a further period of two years and shall then lapse.	(14) Subject to Article 19 (Termination) of this Agreement, this Annex shall remain in force for an initial period of 3 years from November 1986. A Contracting Party may give notice in writing to the other Contracting Party of its intention to terminate this Annex. If such notice is given, this Annex shall terminate twelve months later, but in no event before October 31, 1989.
(13) For the purposes of this Annex, "summer and winter traffic seasons" mean, respectively, the periods from 1 April through 31 October and from 1 November through 31 March.	(15) For the purpose of this Annex, "summer and winter traffic season" mean, respectively, the periods from April 1 through October 31 and from November 1 through March 31.

Annex 3. Tariffs

This Annex established the Tariff Working Group for which provision was made under Article 12 (9) (a) of the Treaty. Although the Working Group never met, tariff issues were frequently discussed in bilateral consultations, giving rise in particular to Documents 4 (in part), 7, 9, 19 and 20, all in Part III.

(1) A Tariff Working Group shall be established and shall consist of experts from each Contracting Party in areas such as accounting, statistics, financial analysis, economics, pricing and marketing.
(2) The Tariff Working Group shall meet within 90 days of the entry into force of this Agreement and thereafter as necessary to accomplish the objectives of this Agreement.
(3) The Tariff Working Group shall develop procedures for the exchange, on a recurrent basis, of verified financial and tariff statistics in order to assist each Contracting Party in assessing tariff proposals.
(4) The Tariff Working Group shall, by 23 July 1978, make recommendations to the Contracting Parties on load factor standards and evaluation and review criteria for North Atlantic tariffs.
(5) The Contracting Parties shall review the recommendations of the Tariff Working Group and, subject to the outcome of this review, shall

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9_18

give due consideration to these recommendations in reviewing tariffs and agreements reached under the auspices of the International Air Transport Association.

(6) Either Contracting Party may from time to time request that the Tariff Working Group be convened to consider specific issues.

Annex 4. Charter Air Service Provisions

Provision is made in Article 14 of the Treaty for charter air services to be governed by Annex 4. The first text (below) applied for one year only from April 1977. The second text, which applied for two years from April 1978, is the only substantive passengercharter Annex; new arrangements were adopted for cargo charters from 1 January 1980 (see Chap. 3 and Annex 5). Since the Contracting Parties failed to reach agreement on new arrangements for passenger charters, the 1978 text of Annex 4 expired on 31 March 1980 and was not replaced. Thereafter each Contracting Party agreed to continue to regulate charter traffic 'in a responsible manner and on a basis of comity and reciprocity' (see below, correspondence between Hight, US State Department, and Roberts, UK Department of Trade), published as Letters 1 and 2 with the Exchange of Notes at Part III, Document 11, Cmnd 8222.

H. Stevens, *The Life and Death of a Treaty*,
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Annex 4—1977 Text

(1) The Memorandum of Understanding on Passenger Charter Air Services between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, applying from 1 April 1977, shall be regarded as being incorporated in this annex for as long as it remains in force.

(2) Articles 1, 2 (paragraph (1), (3), and (4), 4, 6, 8 (except that paragraph (3) shall apply only to the extent authorized by the aeronautical authorities in the relevant territory, 9, 10, 14, 16, 17, 18, 19, 20, and 21 of this Agreement shall apply to airlines authorized by both contracting Parties to operate charter international air services between the territories of the two Contracting Parties.

(3) In furtherance of paragraphs (1) and (2) of Article 14 of this Agreement, the contracting Parties agree that it is desirable to work toward a multilateral arrangement for charter air services in the North Atlantic market. The contracting Parties also agree that a bilateral agreement would be an appropriate means of achieving their common objective. Such bilateral agreement should include, among other matters, progressive charterworthiness conditions, freedom of market access, arrangements for designation and authorization of charter airlines which lead to the issue of permits rather than individual flight licences, minimization of administrative burdens, all-cargo charter arrangements, and capacity and price arrangements consistent with those contained in the Memorandum of Understanding on Passenger Charter Air Services. The contracting Parties shall enter into negotiations as soon as possible and, in any event, not later than 31 December 1977, to work towards the foregoing objectives. In the absence of agreement by 31 March 1978, the Contracting Parties agree to consult further with a view to a continuation of liberal arrangements for charter air services.

Annex 4—1978 Text

(1) Passenger Charterworthiness Requirements

(a) Each Contracting Party may require conformity of passenger charter air traffic originating in the country of the other Contracting Party with the provisions and criteria of this

paragraph. Although a Contracting Party may not require prior approval of flights in order to enforce the provisions and criteria of this paragraph, it may, as a condition upon the exercise of the rights granted under paragraph (3)(a) of Article 14 of this Agreement, proscribe the operation of charters unless the information set forth in paragraph (7)(d) of Article 14 has been received in sufficient time prior to the flight arrival to judge conformity with this paragraph. Its aeronautical authorities may also notify a charter-designated airline that they have determined that a particular flight or series of flights is not in conformity with this Annex for a specified detailed reason or reasons, and further that such flight or flights may not be operated unless such authorities subsequently inform the airline that the flight or flights so conform. Both Contracting Parties anticipate that such challenges will be exceptional and agree to consult should they become frequent.

(b) Each Contracting Party may require that all passenger charter air traffic referred to in subparagraph (a) of this paragraph conforms to the following criteria:

(i) Each charterer shall have purchased not less than 20 seats per charter category in subparagraph (c) of this paragraph; and

(ii) No more than three charter categories as set forth in subparagraph (c) of this paragraph shall be commingled in the same aircraft.

(c) Each Contracting Party may require that all passenger charter air traffic referred to in subparagraph (a) of this paragraph also conforms to the requirements of one of the following categories (to be selected by the relevant charter-designated airline):

(i) *Category A*. Travel is offered for sale to the general public or a selected segment of the public without a mandatory tour package. All passengers shall be named on an advance list at least 21 days before the planned date of flight departure, except that 10 percent of the seats of the category contracted for by each charterer on each flight may be occupied by unlisted passengers substituted for

those on the advance list referred to above. No substitute passengers shall be accepted in the five days immediately preceding the planned date of flight departure. All passengers shall be sold a return (round-trip) charter journey, the minimum duration of which shall be seven days counting the day on which the originating flight is scheduled to take off and the day on which the returning flight is scheduled to land.

(ii) *Category B.* Travel is offered for sale to the general public or a selected segment of the public with a mandatory tour package which includes charter air transportation and sleeping accommodation for at least three nights. All passengers shall be named on an advance list at least 15 days before the planned date of flight departure, except that in each group contracted for, two seats may be occupied by passengers who are substituted for persons on the advance list up to the five days immediately preceding flight departure. All passengers shall be sold a return (round-trip) charter journey, the minimum duration of which shall be seven days counting the day on which the originating flight is scheduled to take off and the day on which the returning flight is scheduled to land.

(iii) *Category C.* The entire cost of the charter air transportation is borne by the charterer and not by individual passengers, directly or indirectly.

(iv) *Category D.* Travel is offered for sale by specially authorized charterers solely to military personnel and civilian employees of military departments, and their immediate families.

(v) *Category E.* Travel is provided to and from an event which at least one Contracting Party considers to be a "special event," where the charterer demonstrates that the date or place of the event were not known and could not have been known in time for the charter to be operated as a Category A charter.

(vi) *Category F.* The charter is a "Buy In" Sales Incentive charter which would be in Category C but for the charterer allowing some or all passengers to pay in whole or in part in sales credit script.

(d) Notwithstanding paragraph (7)(d) of Article 14, advance lists and lists showing substituted passengers (alphabetically arranged so far as possible) for both Category A and Category B charters originating in the country of one Contracting Party may be required by the aeronautical authorities of the other Contracting Party as follows:

(i) Advance lists may be required with proof of dispatch 21 days (for Category A) and 15 days (for Category B) prior to the day on which the originating flight is scheduled to land;

(ii) Receipts of lists showing substituted passengers for Category A and Category B charters (containing the names of both substitute and substituted passengers) may be required by the aeronautical authorities of the other Contracting Party five days prior to the day on which the originating flight is scheduled to land. Such lists may be transmitted by telex or other suitable means;

(iii) On flights where advance listed and non-advance listed charter categories are commingled, receipt of a list of the passengers of non-advance listed charter categories may be required by the aeronautical authorities of the other Contracting Party five days prior to the day on which the originating flight is scheduled to land.

(2) Cargo Charters

(a) The Contracting Parties agree that international charter traffic in cargo constitutes an important transportation service and that liberal provisions concerning cargo charters should be included in this Agreement. For this purpose the Contracting Parties agree to continue negotiations concerning cargo charters with objective of concluding a more liberal and comprehensive agreement on this matter by 31 March 1979. In this interim period the Contracting Parties agree to permit international cargo charter operations between their two countries in accordance with the terms of this paragraph, and with all other terms of this Agreement not inconsistent with this paragraph.

(b) Each Contracting Party shall permit the following categories of cargo charters:

(i) *Sole use/single entity cargo flights.* The sole purpose of each flight shall be the carriage of cargo consigned by a single person (other than a forwarder, consolidator, or shipper's association) who has contracted for the exclusive use of the carrying capacity of the aircraft.

(ii) *Specialist cargo flights.* The sole purpose of each flight shall be the carriage (separately or in combination) of livestock, bloodstock, or out-of-gauge (outsize) cargo.

(iii) *Other cargo flights.* For traffic originating in the United States, other cargo charters shall be permitted to the extent that the carrying capacity of the aircraft is exclusively purchased for cargo carriage by a single person. The term "person" for this purpose shall include a forwarder, consolidator, or shippers' association. For traffic originating in the United Kingdom, other cargo charters shall be permitted to the extent that the sole of each flight is the carriage of cargo in which each of the individual consignments exceeds either 1000 kilograms in weight or 7 cubic meters in volume.

(c) Each Contracting Party may limit carriage prior to 31 March 1979 by each charter-designated airline under category (iii) of subparagraph (b) to no more than 1000 tonnes of cargo in each direction between the United States and the United Kingdom, of which no more than 250 tonnes may be carried in each direction between any point in column A and any point in column C as shown in the United Kingdom routes 10, 11, and 23 of Section 4 of Annex 1 except for the gateway route segment London-New York. There shall be no weight limitation on flights in category (I) or category (ii) of subparagraph (b).

(d) No passengers shall be carried for compensation on any cargo charter flights other than ancillary attendants responsible for care or protection of cargo.

(e) In accordance with paragraph (5)(g) of Article 14 of this Agreement, the Contracting Parties agree that designated airlines shall have the opportunity to meet, on a timely basis, prices

or rates charged or proposed to be charged by charterers or by charter-designated airlines for carriage of cargo. Similarly, in accordance with paragraph (5)(f) of Article 14, charter-designated airlines shall have comparable opportunity to respond to competitive offers by designated airlines for such carriage. The Contracting Parties shall therefore administer their tariff requirements and the provisions of Article 12 and paragraph (8) of Article 14 of this Agreement in a liberal and flexible manner so as to ensure compliance with the above obligations.

(f) The Contracting Parties agree to consider amendments to or exemptions from the provisions of this paragraph in the course of the negotiations referred to in subparagraph (a) of this paragraph.

(3) Modification and Waivers

(a) If either Contracting Party wishes to propose any modification of the agreed charterworthiness requirements set forth above, it shall inform the other, and the other Contracting Party may accept or reject such proposal. If accepted, the modification shall take effect for the purposes of this Annex on an agreed date. If rejected, either Contracting Party may request consultations which shall be held within 60 days. Modification of the agreed charterworthiness requirements shall not come into effect for the purposes of this Annex unless accepted or agreed between the Contracting Parties by an Exchange of Notes.

(b) In any twelve-month period beginning 1 April, each Contracting Party may, in respect of its own originating traffic within the scope of this Annex, grant waivers of the charterworthiness requirements up to three percent of the number of charter flights operated between the United Kingdom and the United States during the immediately preceding twelvemonth period and the other Contracting Party shall accept as charterworthy traffic carried pursuant to such waivers duly notified to it.

(4) *Directional Balance*. Neither Contracting Party shall require that charter-designated airlines of the other Contracting Party balance the volume of charter traffic they originate in the country of the first Contracting Party with the volume of charter traffic they originate in their home country.

(5) *Amendment.* If a multilateral agreement or arrangement concerning charter air transportation accepted by both Contracting Parties enters into force, Article 14 of this Agreement and this Annex shall be amended so as to conform with the provisions of the multilateral agreement.

(6) *Termination.* Subject to Article 19 (Termination) of this Agreement, this Annex shall remain in force until 31 March 1980. Upon the request of either Contracting Party, consultations shall be held within 30 days to review the operation of this Annex and to decide as to its revision or modification. In any event, the Contracting Parties shall for these purposes enter into consultations not later than 31 December 1979. If the Contracting Parties do not agree on revision or modification, paragraphs (1) to (5) inclusive of this Annex shall terminate on 31 March 1980. If such paragraphs terminate and are not revised or modified, each Contracting Party shall thereupon be entitled, for the purposes of Article 14 of this Agreement, to impose on charter air traffic covered by paragraph (3) of Article 14 such charterworthiness rules and such conditions in regard to prices and rates as it considers necessary.

Extract from Letter Dated December 4, 1980

From B. Boyd Hight (US State Department) to C.W. Roberts (UK Department of Trade)

Since the Contracting Parties were unable to reach agreement on the passenger charter regime to replace the arrangements embodied in Annex 4 to the Agreement, which expired, under paragraph (6) of that Annex, on 31 March 1980, they decided that:

(a) Annex 4 should not be replaced on its expiry;

(b) each Contracting Party would thereafter continue to regulate charter traffic in a responsible manner and on a basis of comity and reciprocity; and

(c) the two Contracting Parties would meet in due course when they had gained further experience of the way in which passenger charter operations were developing, to consider a new passenger charter regime.

Roberts replied on the same date confirming the accuracy of these understandings. No new passenger charter regime was ever agreed. Under Article 14, which remained in force, each Contracting Party was responsible for the regulation of all passenger charter services originating in its own territory 'in a responsible manner and on a basis of comity and reciprocity.'

Annex 5. North Atlantic Air Cargo Operations

The text of Annex 5 was agreed in consultations in March 1979 (see Chap. 3). This Annex, an early step towards a more liberal framework for air services, was added to the Agreement under the Exchange of Notes dated 4 December 1980 (Part III, Document 11 and Cmnd 8222), but was considered to have entered into force on 1 January 1980. Part V, making provision for Annex 5 to be terminated without bringing down the rest of the Agreement, was simplified in 1986 (Part III, Doc 18 and Cm 972). The termination provisions were not used.

Part I: Scope and Applicability

(1) The Contracting Parties adopt the following provisions concerning international traffic in cargo (excluding mail) transported by designated airlines and charter-designated airlines (and, in regard to pricing, by airlines of other countries) in scheduled combination air service, scheduled all-cargo air service, and charter air service over the North Atlantic between:

(a) on the one hand, any point or points in the United States of America (hereinafter referred to as "the United States") and
(b) on the other hand, any point or points in the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as "the United Kingdom").

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9_20

The effect of Part I is to limit the applicability of Annex 5 to the carriage of third and fourth freedom cargo between the Contracting Parties.

Part II: Transitional Period

(2) From 1 January 1980 to 31 December 1982 the contracting Parties shall apply the following provisions to North Atlantic cargo charter traffic as defined in Part I of this Annex:

(a) *Charterworthiness*: Each Contracting Party shall permit the following categories of cargo charters:

(i) *Sole use/single entity cargo flights*. The sole purpose of each flight shall be the carriage of cargo consigned by a single person (other than a forwarder, consolidator, or shippers' association) who has contracted for the exclusive use of the carrying capacity of the aircraft.

(ii) *Specialist cargo flights*. The sole purpose of each flight shall be the carriage (separately or together) of livestock, bloodstock, or out-of-gauge (outsize) cargo.

(iii) *Other cargo flights*. The carrying capacity of the aircraft on each flight shall be purchased exclusively for cargo carriage by one or more persons, including shippers, forwarders, consolidators, or shippers' associations. Either Contracting Party may require that individual consignments carried (within which there may be consolidations of cargo) shall exceed either 1000 kilograms in weight or 7 cubic meters in volume.

(b) *Tonne Limitations on Charters*. Each Contracting Party may limit carriage by each charter-designated airline under category (iii) of sub-paragraph (a) of this paragraph to no more than 1500 tonnes in each direction in 1980, 2000 tonnes in each direction in 1981, and 3000 tonnes in each direction in 1982. Not more than 400 tonnes in 1980, 600 tonnes in 1981, and 900 tonnes in 1982 of the above airline cargo allowance may be carried in each direction between any point in Column (A) and any point in Column (C) as shown in UK Routes 10, 11 and 12 (except for the gateway route segment London-New York where no weight limitations by gateway shall apply). There shall be no weight limitation on flights in category (i) or category (ii) of sub-paragraph (a) of this paragraph.

Part III: Liberalized Cargo Air Services

(3) From 1 January 1983, the Contracting Parties shall cease to apply the limitations set out in Part II of this Annex, and thereafter shall apply the following provisions to international traffic in cargo as defined in Part I of this Annex:

(a) *Scheduled All-Cargo Designations.* Notwithstanding paragraph (3) of Article 3, the United States may by reference to this sub-paragraph designate for U.S. Route 7, and the United Kingdom may by reference to this sub-paragraph designate for UK Routes 10, 11, and 12, any number of airlines to operate scheduled all-cargo air services. The procedures and requirements in paragraphs (1), (6), and (7) of Article 3 shall apply.

(b) *Scheduled All-Cargo Routes.* All airlines designated by either Contracting Party for scheduled all-cargo air services may operate such services between any point or points in the United States and any point or points in the United Kingdom. Consequently, for the purposes of the application of this Part, "United States" shall be considered as appearing in Column (A) of US Route 7 and Column (C) of UK Routes 10, 11, and 12, and "United Kingdom" shall be considered as appearing in Column (C) of US Route 7 and Column (A) of UK Routes 10, 11, and 12.

(c) *Scheduled All-Cargo Traffic Rights.* Airlines designated with reference to sub-paragraph (a) above may claim the rights and shall be subject to the obligations set out in Section 5 of Annex 1. However, only airlines now or hereafter designated under paragraph (3) of Article 3 (without reference to sub-paragraph (a) above) may pick up and discharge traffic (in addition to transit and on-line connecting traffic) at points in Column (C) for transport between points in Column (B) and points in Column (C) and between points in Column (C) and points in Column (D) in the Route Schedules set out in Annex 1.

(d) *Cargo Charter Operations.* International charter traffic in cargo shall continue to be governed by the pertinent provisions of Article 14 of this Agreement, except as those provisions are modified or suspended by this Annex.

Part IV: General Provisions for Both Periods

(4) From 1 January 1980 the Contracting Parties shall apply the following general provisions to international traffic in cargo as defined in Part I of this Annex.

(5) *Surface Transportation*. Notwithstanding any other provision of this Agreement, the airlines and indirect providers of cargo air transportation of each Contracting Party shall be permitted by the other Contracting Party and its aeronautical authorities, to the extent the matter is within their jurisdiction, to employ in connection with the carriage of cargo by international air transportation any surface transport in the territories of the Contracting Parties or to or from third countries, provided that shippers are not misled as to the facts concerning such transportation. Such joint services may be offered at a single price filing (made under paragraph (8) of this Annex) provided that all applicable laws governing surface transportation are complied with.

(6) *Authorizations*. The aeronautical authorities of each Contracting Party shall issue, subject to paragraph (6) of Article 3, sub-paragraphs (b) and (c) of paragraph (4) of Article 14 of this Agreement, and paragraph (3) of this Annex upon timely and proper request by designated and charter-designated airlines of the other Contracting Party, all necessary licenses, permits, and authorizations, expeditiously and with a minimum of administrative complexity.

(7) *Fair Competition*. The Contracting Parties suspend the operation of paragraphs (2), (3) (United States-United Kingdom gateway route segments only), (4), and (5) of Article 11 of this Agreement in regard to scheduled all-cargo air service.

The effect of paragraphs 7 is to set cargo operations free from the capacity constraints in Article 11 of the Agreement (Annex 2 does not apply to cargo),

(8) *Pricing*. Subject to sub-paragraph (e) of this paragraph the Contracting Parties suspend the operation of paragraphs (4), (5), (6) and (7) of Article 12 of this Agreement and Article 13 of this

Agreement in regard to the pricing of cargo carriage on scheduled combination and all-cargo air services, and paragraph (8) of Article 14 of this Agreement in regard to the pricing of cargo carriage on charter air services, and shall instead apply the following provisions to tariffs, prices, and rates charged for the carriage of cargo by designated and charter-designated airlines:

(a) Each Contracting Party may require notification of or filing with its aeronautical authorities of tariffs, prices, and rates charged, but such notification or filing may not be required before the proposed effective date.

(b) Subject to the provisions of sub-paragraph (e) of this paragraph, neither Contracting Party shall take unilateral action to prevent the initiation, continuation, or termination of a tariff, price, or rate charged by an airline designated by either Contracting Party. If either Contracting Party considers that a tariff, price, or rate proposed or in effect is predatory as regards other airlines, discriminatory as between shippers in similar circumstances, or unduly high or restrictive in such a way as to constitute abuse of a dominant market position, it may notify the other Contracting Party of the reasons for its dissatisfaction and request consultations. If so requested, such consultations shall commence not later than 30 days after the receipt of the request. If agreement is reached through such consultations on an appropriate tariff, price, or rate, each Contracting Party shall use its best efforts to put such agreement into effect. In the absence of agreement the tariff, price, or rate originally proposed or charged shall come into effect or continue in effect.

(c) In regard to tariffs, prices, or rates proposed or charged by airlines of third countries in the market defined in Part I of this Annex, the Contracting Parties shall seek to promote and fully maintain competition for cargo transport and shall consult before taking any action to disallow a tariff, price, or rate proposed or charged by an airline of a third country.

(d) Neither Contracting Party shall regulate the tariffs, prices, or rates proposed or charged by indirect providers of cargo air transportation for international traffic in cargo originating in the country of the other Contracting Party.

(e) Until 1 January 1983, where dissatisfaction has been notified pursuant to sub-paragraph (b) of this paragraph on the grounds that a tariff, price, or rate is unduly high or restrictive in such a way as to constitute abuse of a dominant market position created by restrictions on entry to the market, and more competitive tariffs, prices, or rates are not available, the Contracting Party expressing dissatisfaction may prevent the use of such tariff, price, or rate pending consultations, take the unilateral action permitted under paragraph (7) of Article 12 of this Agreement for charter cargo.

The effect of paragraph 8 is to substitute more liberal pricing controls for the more onerous provisions in Articles 12–13 and 14(8) of the Agreement.

(9) *Combination Charters*

(a) Until 1 January 1985 or such earlier date as may be agreed, no passengers shall be carried for compensation on any cargo charter flights other than ancillary attendants responsible for care and protection of cargo, and no cargo shall be carried for compensation on any passenger charter flight, except as provided in sub-paragraph (10)(a) or in paragraph (11) of this Annex.

(b) From 1 January 1985 or such earlier date as may be agreed, passengers may be carried in combination with cargo on charter flights operated by charter-designated airlines provided that such passengers are carried in accordance with any agreement between the Contracting Parties regulating the carriage of charter passengers including any requirements imposed by either Party in accordance with paragraph (6) of Annex 4 and Article 14 of this Agreement, other than requirements which discriminate against combination charters. Cargo may be carried both above and below the main floor of the aircraft.

(10) *Boston Operations*

(a) From 1 January 1980 cargo may be carried below the main floor of aircraft on passenger charter flights serving or transiting Boston to or from any point or points in the United Kingdom. Until 31 December 1981 such cargo shall be included in the calculation of the weight limits set out in paragraph (2) of Part II of this Annex, except that for both 1980 and 1981, the limits per gateway per airline shall be 600 tonnes per year in each direction between Boston and London, Boston and Manchester, and Boston and Prestwick/Glasgow on combination charter and cargo charter flights.

(b) Notwithstanding paragraph (3) of Article 3 of this Agreement, the United States may by reference to this sub-paragraph designate any number of airlines over US Route 7, and the United Kingdom may by reference to this sub-paragraph designate any number of airlines over UK Route 10, for scheduled all-cargo air services to and from Boston beginning on or after 1 January 1982.

(c) From 1 January 1982 until 31 December 1982 "United Kingdom" shall be considered as appearing in Column (C) of US Route 7, and in Column (A) of UK Route 10, solely for scheduled all-cargo air services to, from and through Boston.

(d) An airline designated with reference to sub-paragraph (6) of this paragraph shall not be entitled to pick up and discharge traffic (other than transit and on-line connecting traffic) at points in Column (C) for transport between points in Column (B) and points in Column (C) and between points in Column (C) and points in Column (D) on the routes specified in sub-paragraph (c) of this paragraph, but may claim the rights and shall be subject to the obligations set out in Section 5 of Annex 1.

(11) *Charter Waivers.* In each of the five years 1980–1984. each Contracting Party may in respect of one-way cargo charter flights in either direction grant waivers *to* its charter-designated airlines from the limitations set out in this Annex to the extent of the greater of 15 one-way flights or 3 percent of the number of one-way cargo charter flights operated during the immediately preceding year between the United Kingdom and the United States. The other Contracting Party shall accept as charter-worthy traffic carried pursuant to such waivers duly notified to it. This provision may be used to permit, *inter alia*, combination charter flights.

Part V: Modification or Termination

Original text (1979)	*Revised text (1986)*
(12) Upon the request of either Contracting Party consultations shall be held within 30 days from the date of receipt of the request to review the operation of the provisions of this Annex and to decide as to its revision or modification. Parts I through IV of this Annex shall terminate one year from the date of the receipt of the request for consultations unless within that period the Contracting Parties have agreed to make no revision or modification or have agreed on the question of revision or modification and have put such revision or modification into effect. Should Parts I through IV of this Annex terminate all other provisions of this Agreement governing scheduled cargo services and cargo charter services which have been suspended by the operation of this Annex shall return into effect as they had effect on 31 March 1979, but for the purposes of paragraph (2)(e) of Annex 4 to this Agreement the weight limits shall be 250 tonnes and 62.5 tonnes respectively for a 90-day period after termination. Within this further 90-day period the Contracting Parties shall commence negotiations concerning cargo charters with the objective of concluding a liberal and comprehensive agreement for cargo charters prior to the end of the 90-day period. If agreement has not been reached by the end of the 90-day period the revived provisions of Annex 4 to this Agreement governing cargo charter services shall terminate. Each Contracting Party shall thereupon be entitled, for the purposes of Article 14 of this Agreement, to impose on cargo charter traffic covered by paragraph (3) of Article 14 such charterworthiness conditions and such conditions in regard to prices and rates as it considers necessary.	(12) Subject to Article 19 (Termination) of this Agreement, this Annex shall remain in force until terminated by either Contracting Party. A Contracting Party wishing to terminate this Annex may give notice in writing to the other Contracting Party of its intention to do so. If such notice is given, the Annex shall terminate twelve months later, but in no event before 31 October 1989. Each Contracting Party shall thereupon be entitled, for the purpose of Article 14 of this Agreement, to impose on cargo charter traffic covered by paragraph (3) of Article 14 such charterworthiness conditions and such conditions in regard to prices and rates as it considers necessary.

PART III

Supplementary Documentation

Introduction to Documents

These 28 documents, ranging from formal Exchanges of Notes and agreed Memoranda of Consultations to statements of interpretation by one side or the other and correspondence between the two parties, show how the Treaty was amended or interpreted through the course of its 30-year life. As well as adding a further dimension to our understanding of the Treaty's life, these documents constitute a fascinating and instructive case study in the use of 'hard law' and 'soft law' in the regulation of a significant international industry. Abbott and Snidal (2000) define 'hard law' as 'legally binding obligations that are precise … and delegate authority for interpreting and implementing the law'. 'Hard law' would include the Treaty itself, and all documents which formally amend it. The realm of 'soft law' begins, they say, 'once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation'. Within 'soft law' there is a spectrum which runs all the way from provisional arrangements that will become 'hard' as soon as they are formally confirmed by an Exchange of Notes, to purely political arrangements in which legalization is largely absent.

The primary legal instrument is of course *the Treaty* itself (text at Part II), published by HMSO (Cmnd 7016), and by the US Department of Transportation. Article 18 of the Treaty makes provision for formal amendments to come into effect when confirmed by an *Exchange of Notes.* Examples include documents 8, 10, 11, 16 etc., all published like the Treaty itself by HMSO. Where the Treaty has been formally amended, the new rights granted can be varied or withdrawn only by means of a further amendment.

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9_21

There is no instance of a *Memorandum of Understanding* in the documents attached. One reason for this may be because no such memoranda were adopted after the UK government maintained successfully, in the Heathrow User Charges arbitration case (Chap. 4), that the 1983 MoU, on which the US government and its airlines had relied, was not a legally binding instrument (McNeill 1994).

There are however several *Memoranda of Consultations*. A Memorandum of Consultations may be used to make provision for changes set out in a draft Exchange of Notes to be applied administratively, from a given date or with immediate effect, pending the formal exchange, which may follow much later, if at all. For example, document 18 was followed (three years later) by two formal Exchanges of Notes (Cmd 792, 793). In these cases the 'soft law' of administrative application paved the way for the 'hard law' of formal Treaty amendment. In the case of documents 25 and 27, however, it would appear that the formal Exchanges of Notes never took place, though the changes were applied with immediate effect 'on the basis of comity and reciprocity'. In another case (document 24) an agreed *Summary of Negotiations* served the same purpose as a Memorandum of Consultations. Where reliance is placed on 'comity and reciprocity' the rights granted and exercised clearly fall into the category of 'soft law', since the very language of comity and reciprocity implies a degree of uncertainty and the possibility of withdrawal.

Other Memoranda of Consultations contain statements of 'soft law', for example about code-sharing or joint ventures, which are more in the nature of political commitments falling short of enforceable legal entitlements—for example, parts of Documents 25 and 27.

Some less significant changes to the agreement were set out in *correspondence between officials*, with or without a subsequent Exchange of Notes. Examples of this practice are to be found in documents 22, 23 and 28.

It is customary for all significant Notes, Memoranda and letters affecting the exercise of rights under the agreement, even if they are expressed in the form of 'soft law' rather than 'hard law', to be acknowledged by a reply sent on the same day, often in identical terms—a sure sign that the terms of the exchange have been agreed in advance.

There is a further category of documentation which does not change the Treaty, but may affect its application, or show where one side or the other felt the need to place on record their concerns. Examples include:

- Statements of interpretation (document 4)
- Unilateral statements of policy, procedure, or concern (3, 6, 12, 13, 14, 20)
- Agreed statements (2, 7, 9, 19)
- Temporary provisions (17 and Section D of 25)

Schedule

Doc	*Date*	*Title*
1	23 July 1977	Letter from US President Jimmy Carter
2	23 July 1977	Joint Statement by Edmund Dell, UK Secretary of State for Trade and Alan Boyd, US Special Ambassador
3	23 July 1977	Statement by Brock Adams, US Secretary of Transportation
4	23 July 1977	Statements of Interpretation • Art 3 (Multiple Designation in Respect of Dependent Territories) • Art 3 (Caribbean Ownership and Control) • Art 8 (Ground Handling) • Art 9 (Customs Duties) • Art 10 (User Charges) • Art 12 (Tariffs) North Atlantic Fare Investigation • Art 12 (Tariffs) Currency Exchange Rates and Local Selling Prices • Annex 1 (Route Schedules) Use of London airports
5	17 March 1978	Memorandum of Consultations, with associated documents
6	17 March 1978	• Shovelton to Atwood, use of UK airports for charter services
7	17 March 1978	• Shovelton to Atwood, tariffs (includes sum-of-sectors policy)
8	25 April 1978	Exchange of Notes (Cmnd 7332), amending the Agreement to incorporate new passenger charter regime (Article 14 and Annex 4)
9	2 Nov 1978	Steele to Atwood, extends cautious experiment in tariff liberalisation at Doc 7
10	27 Dec 1979	Exchange of Notes (Cmnd 7862) advancing start of two new services

(*continued*)

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9_22

(continued)

Doc	*Date*	*Title*
11	4 Dec 1980	Exchange of Notes (Cmnd 8222) amending the Agreement to incorporate a new cargo regime (Annex 5), double designations on London-Miami, and on London-Boston (US only), addition of new gateways and services (Annex 1 Section 6) and further restrictions on use of UK airports (Annex 1 Section 7). Associated documents:
12	4 Dec 1980	• Boyd Hight to Roberts, Application of US anti-trust laws to cargo
13	4 Dec 1980	• Roberts to Boyd Hight, Monitoring UK airline presence in cargo market
14	4 Dec 1980	• Roberts to Boyd Hight, Use of airports in the UK
15	9 Nov 1982	Memorandum of Consultations modifying Doc 11
16	20 Feb 1985	Exchange of Notes (Cmnd 9720) implementing Doc 14
17	20 Feb 1985	Enclosure 4 to Doc 16, temporary provisions for designation and capacity
18	11 Sept 1986	Memorandum of Consultations, with associated documents
19	11 Sept 1986	• North Atlantic Passenger Tariff Procedures
20	11 Sept 1986	• US Department for Transportation Special Tariff Permission Procedures
21	11 Sept 1986	• Draft Procedures for Reciprocal Recognition of Fitness and Citizenship Determinations, with final version (25 May 1989, Cm 793)
		Caribbean Services
22/1	9 Nov 1982	Scocozza to Roberts restricts US designation of additional US airlines to serve Miami-Cayman Islands till 11 April 1985 (see also Doc 16, para 12,) and encourages Cayman Airways to seek additional rights
22/2	17 Oct 1986	Correspondence between Shane and Maynard concerning
22/3	10 Nov 1986	services to and from Cayman Islands, with protection for
22/4	5 Dec 1986	Cayman Airways
23/1	28 March 1989	Bermuda—McMillan to Bay, additional gateways on US Route 4, UK Route 8
23/2	13 Nov 1991	Bermuda—Tarrant to Griffins, further gateways on US Route 4, UK Routes 8 and 9A
24	27 July 1990	Summary of negotiations—enhanced access to UK regional points, second UK designation for Boston, further access for Cayman Airways with equal sharing of capacity
25	11 March 1991	Memorandum of Consultations and Draft Exchange of Notes—extensive provisions for new routes, code-sharing and joint ventures
26	11 March 1994	Exchange of Notes (Cm 2711) concerning airport user charges
27	5 June 1995	Memorandum of Consultations, small first steps towards goal of liberalisation
28	31 March 2000	One last mini-deal—Pittsburgh for US, with corresponding opportunity for UK

Documents

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9_23

DOCUMENT 1

THE WHITE HOUSE

WASHINGTON

The Agreement governing civil air services between the United States and the United Kingdom was negotiated over a period of several months and signed in Bermuda on July 23, 1977. It replaces and updates the predecessor agreement reached in 1946 and last amended in 1966.

The new agreement provides for continuing the basic principle of a fair and equal opportunity for the airlines of both countries to compete, and dedicates both Governments to the provision of safe, adequate, and efficient international air transportation responsive to the present and future needs of the public and to the continued development of international air commerce. It emphasizes that both scheduled and charter air transportation are important to the consumer interest and are essential elements of a healthy international air transport system.

The United States seeks an international economic environment and air transportation structure founded on healthy economic competition among all air carriers. The new agreement is consistent with this objective. We shall continue to rely on competitive market forces as much as possible in our international air transportation agreements so that the public may receive the improved service at costs that reflect efficient operations.

The Agreement is one that reflects well on our two great nations. Its quality, its fairness, and its benefits to the consumer and to airlines should make it last as long as the original 1946 Bermuda Agreement. It continues our long and historic relationship with the United Kingdom.

July 23, 1977

Jimmy Carter

Document 2

Joint Statement by the Rt. Hon. Edmund Dell, MP, UK Secretary of State for Trade, and the Hon. Alan S. Boyd, US Special Ambassador

A new era of international air travel promising more direct flights and greater route flexibility for airlines to serve public interests began today with the signing in Bermuda of a new Air Services Agreement between the United Kingdom and the United States. This Agreement will govern air services between U.S. and U.K. points on North Atlantic, Bermuda, Caribbean, and Pacific routes for the airlines of both countries.

Signing for the United Kingdom were Secretary of State for Trade Edmund Dell and Deputy Secretary Patrick Shovelton, head of the U.K. delegation.

Signing for the United States were Secretary of Transportation Brock Adams and Ambassador Alan Boyd, special representative of President Carter and Chairman of the U.S. delegation.

The Agreement replaces a 31 year old pact between the two nations commonly called the "Bermuda Agreement," which expired on June 21 *of* this year, but was temporarily continued in effect until today's Agreement came into force.

Mr. Dell read the personal congratulations of Prime Minister Callaghan to the two negotiating teams. The Prime Minister's message congratulated the two delegations "on having achieved, after difficult and complex negotiations, an agreement which gives the promise of significant benefits to the travelling public and to the airlines of both our countries."

Secretary Adams, expressing similar praise for the new Agreement, read from letters that President Carter had written to the heads of the two delegations. The President's letter said, in part, that the agreement "should prove an excellent instrument to chart the course of our future civil aviation relationships. Its quality, its fairness, its benefits to consumers and to airlines should make it last as long as the predecessor agreement."

More American cities are being opened to nonstop flights to and from Great Britain. In the first three years of the agreement, United States airlines will be authorized to serve Atlanta and Dallas/Ft. Worth nonstop to London; a British airline will be authorized to serve Houston nonstop. After this three year period, airlines of both nations will be authorized nonstop service on these routes; one-stop services may be operated immediately. In addition, after three years the United States will be free to select

a new gateway point for nonstop air services to London. British competition to the present United States flag service from Seattle to London will be permitted in the new agreement. In addition, the United States receives the rights to fly between Anchorage and London, a route that British Airways today operate en route to Tokyo. The present requirement that London-San Francisco flights by a United Kingdom airline operate via New York will be dropped. As a result, British Airways intend to inaugurate London-San Francisco nonstop flights on 1 April 1978.

As soon as appropriate designations have been made and operating permits issued, services between the relevant points may begin. In the case of Houston the selected British carrier, British Caledonian Airways Ltd, plans to start operations on October 23. In the case of new U.S. airline nonstop services, authorization must be first obtained from the U.S. Civil Aeronautics Board (CAB).

In addition to the new nonstop services, British airlines will be free to combine their U.S. points on each route as they choose. U.S. airlines will be permitted, subject to U.S. CAB approval, to operate direct flights to London from any U.S. city with an intermediate stop at one of the fourteen designated U.S. gateway cities. Moreover, U.S. flights may continue beyond London to any other city with transit and on-line connecting traffic rights; U.K. airlines will be permitted to operate flights from Europe through London to the United States and points beyond.

On the North Atlantic the problem of "excess capacity" will be of continuing concern to the two nations. The Agreement provides a consultative process to deal with cases of excess provision of capacity, while ensuring that the designated airlines retain adequate scope for managerial initiative in establishing schedules and that the overall market share achieved by each designated airline will depend upon passenger choice rather than the operation of any formula or limitation mechanism. It is also the objective of the two nations to avoid unduly frequent invocation of this consultative mechanism in order to avoid an undue burden of detailed supervision of airline scheduling by governments. The hope of the two nations is that these provisions will lead to the better use of resources and help to keep fares down.

New machinery has also been instituted to cope with problems of fares and rates on services between the territories of the two nations. A Tariff Working Group is being set up to review standards for rate-setting and make recommendations on pricing policy. The two governments hope these recommendations will lead to air fares that are more competitive and better attuned to the requirements of the public.

The United States and the United Kingdom will each have two passenger airlines authorized to operate the Transatlantic route between London and New York—British Airways, Laker Airways, Pan American and TWA. The new Laker Airways Skytrain service is due to start on or about 26 September; competitive services by the other airlines on the New York-London route are proposed. Each side is permitted one other Transatlantic route of its choice on which it may designate two airlines for passenger services. On other transatlantic routes, each nation may designate only one airline for passenger services. For routes and services in other market areas there is no general limitation on the number of designated airlines.

In the Pacific a United Kingdom airline has received additional rights between Hong Kong and the American West Coast via Japan. United States airlines have obtained certain new operating rights between Hong Kong and Singapore and between Osaka and Hong Kong.

All existing U.S. routes to Bermuda have been renewed. Atlanta, Miami and Philadelphia have been added as new U.S. gateways to Bermuda. U.K. airlines, should any wish to serve the U.S.-Bermuda market, will have their choice of three U.S. gateways. In addition, the United States gains rights from Atlanta, Baltimore, Miami and Washington through Bermuda to two points on the European Continent to be determined later.

New routes have also been granted between U.K. points in the Caribbean and the United States. U.K. airlines operating in this area will in the future have the choice of serving any two of the following U.S. mainland gateways—Baltimore, Houston, Miami, New Orleans, Tampa, Washington.

All-cargo routes have been specified separately from passenger routes. There will be new and expanded opportunities in this field which should be of advantage to airlines and shippers alike.

Charter Services. For the first time in a bilateral air services agreement charter services have been covered. The two countries have agreed that it is desirable to work towards a multilateral arrangement for charter air services. They have also agreed as soon as possible and, in any event, before the end of the year to enter into negotiations towards a bilateral agreement covering all aspects of charter services. In the absence of agreement by 31 March 1978, the two countries agreed to consult further with a view to a continuation of liberal arrangements for charter air services.

There is no change in the status of the Concorde supersonic transport as a result of the Agreement. Each side retains the rights of the previous Agreement.

The signing of the Agreement (to be known as Bermuda 2), at the Southampton Princess Hotel, Bermuda, was attended by the Acting Governor, the Premier and other ministers and officials of the Bermuda Government and by delegations from the United Kingdom and United States.

Document 3

Statement of U.S. Secretary of Transportation Brock Adams on the Signing of the United States-United Kingdom Air Service Agreement in Bermuda, July 23, 1977

Americans from every section of our country will find air travel cheaper and more convenient as a result of the new "Bermuda Agreement" signed today.

The American traveller is assured of either non-stop or one-stop flights to London from many more cities in the United States than in the past, as well as unprecedented flexibility to fly on to any point in the world. The United States has stood almost alone in the world for the principle of competition in the international marketplace. Although the British side had clearly sought a more restrictive agreement, our negotiators held firm for that principle. In certain respects, more competition is permitted under the new agreement than under the old.

For example, America's fast-growing "Sunbelt" will prove to be a substantial new market for international travel with the addition of three non-stop cities, Atlanta, Dallas-Ft. Worth, and Houston.

In a letter this week to the Civil Aeronautics Board, President Carter expressed his personal interest in starting this new service as quickly as possible. If the CAB acts promptly, non-stop flights from Atlanta and Dallas-Ft. Worth could begin as early as November 1.

The cost savings to passengers will come in several ways. One is through more direct access to Europe from all parts of the United States. Another is the joint government working group set up by the agreement that will, for the first time, monitor fare structures-seeking the lowest possible travel costs consistent with the economic health of the airlines.

A third way is through the continued insistence of the United States on liberal charter provisions. This country is determined to have charter service as a dependable option for air travellers. This agreement for the first time recognizes the legal status of charter operations. Our job now is to conclude a bilateral charter provision as a full partner to this agreement by March 31, 1978—the date when the current memorandum of understanding on charters expires.

We must push forward with the final charter negotiations. They will begin in the fall, and they will be under the leadership of a knowledgeable and high-level team for the American side.

Another controversial subject has been the Concorde supersonic transport. The British government made it clear that it wished to change the provisions dealing with landing rights, and while President Carter and I have supported a trial for the Concorde to two American cities, we insisted that our airport operators maintain their existing rights. Therefore, the Concorde situation, from an international agreement viewpoint, stands exactly where it did under the old Bermuda Agreement.

There are a few other points worth stressing that resulted from these successful negotiations:

(1) Those who ship goods to and from the United States will find that their air carriers now have greater freedom to take cargo where they want it and when they want it.
(2) Flexibility that serves the public interest is a cornerstone of the new agreement. The CAB and the airlines will be able to decide what type of service is best for gateway cities to Great Britain and beyond.
(3) The United States retains all of the long-haul rights, such as New Delhi, Tehran, and now Singapore, that were of importance to U.S. carriers.

From the start of these negotiations, the American side has wanted airlines to retain responsibility for establishing schedules they wish to fly. It is our view that an airline's share of the market should be determined by passenger choice rather than a government imposed formula. We will consult when the issue of excess capacity arises, but we have avoided giving either government the ability to unilaterally exercise control over the schedules of another nation's airlines.

The agreement also provides that a second U.S. flag airline may be added to any route where more than 600,000 passengers travel each year. This means that as markets grow, U.S. carriers will be able to serve them.

Special Ambassador Alan Boyd and his team have performed brilliantly over these trying months of very difficult negotiations. They deserve the nation's very sincere thanks.

As we now move on to the last unresolved issue, we feel that we have the commitment of the British government to work in harmony with us. We hope as soon as possible to reach a longer-term, liberal charter agreement that will protect the interests of the growing numbers of Americans who travel by air.

DOCUMENT 4

These Statements of Interpretation were attached to the Agreement when it was signed on 23 July 1977, and published with the Treaty—HMSO, Treaty Series No 76 (1977), Cmnd 7016

Statements of Interpretation

Article 3 (Designation and Authorisation of Airlines) Multiple Designation in Respect of Dependent Territories

The United Kingdom Government has expressed concern over the situation which could arise under Article 3 of the Agreement if the United States were to designate more airlines to serve Bermuda, Hong Kong, and United Kingdom points in the Caribbean area than were designated under the 1946 Bermuda Agreement without the United Kingdom and its dependencies having the opportunity to do more than consult with the United States. While the terms of the Agreement do not impose any general limitations on the number of United States airlines which may be designated to serve those points, the wishes of the United Kingdom and its dependencies are relevant to the decision of the United States Government concerning such designations. Should the United Kingdom transmit to the United States its views or those of its dependencies concerning United States Civil Aeronautics Board proceedings which might result in designations believed to be excessive by the United Kingdom or its dependencies, those views would be transmitted by the Department of State to the Civil Aeronautics Board for consideration during the Board's proceedings, and would also be transmitted to the President for consideration in his review of Civil Aeronautics Board proposals.

Article 3 (Designation and Authorisation of Airlines) Caribbean Ownership and Control

(1) Under the terms of Article 3 (Designation and Authorisation of Airlines) of the Agreement, it is the intention of the Government of the United Kingdom to designate, in the first instance, the following Caribbean-based United Kingdom airlines for services on United Kingdom Routes 9 and 16:

LIAT (1974) Limited
Air BVI (1976)
Cayman Airways Limited
Belize Airways Limited

(2) The Government of the United States will use its best efforts to ensure that the necessary operating authorisations are issued to those airlines, provided that:

(a) substantial ownership and effective control of such airlines continues to include at least as great an element of United Kingdom ownership and control as existed when operating authorisations were last issued to these airlines; and
(b) significant financial interest or control in such airlines is not exercised by United States nationals or by nationals or governments of major developed States or by airlines of third countries; and
(c) such airlines demonstrate to the United States aeronautical authorities that they are taking significant steps towards greater ownership and control by United Kingdom nationals.

(3) The Government of the United States will use its best efforts to ensure that the necessary operating authorisations are issued to any additional airlines designated by the United Kingdom for services on United Kingdom Routes 9 and 16, provided that there is no less degree of United Kingdom ownership and control than has been accepted in the case of the airlines named in paragraph (1) above and provided that the conditions set out in paragraph (2) above are likewise fulfilled.

(4) The United States Government understands that the Recommended Opinion of the Civil Aeronautics Board on Belize Airways Limited (Docket 29740) is, in the view of the United Kingdom Government, consistent with the above assurances. The recommended permit has not yet been approved. It is understood that, during the two-year term the permit issued to Belize Airways would remain in effect, the United States aeronautical authorities expect Belize Airways to take significant steps to transfer substantial ownership and effective control to United Kingdom nationals.

Article 8 (Commercial Operation)—Ground Handling

It is the intention of the United Kingdom and the United States Governments that airlines should, to the greatest extent feasible, be permitted flexibility in ground handling. To the extent that designated airlines

of one Contracting Party are performing their own ground handling at any airport on the date the Agreement enters into force, such airlines will be permitted unless circumstances change to continue to perform such services at that airport. Designated airlines whose ground handling has been performed under arrangements with other airlines or organisations will similarly be permitted unless circumstances change to continue such arrangements. Should circumstances change, consultations will be held before any changes are made. It is understood that no changes in ground handling arrangements are currently contemplated at London-Heathrow.

Article 9 (Customs Duties)
The United Kingdom Government has indicated that it understands the importance that the United States attaches to the relief of ground equipment from Customs duty. The United Kingdom Government has indicated that because the grant of relief from Customs duty is governed by Regulations of the Council of the European Economic Community, it is precluded from autonomously granting relief from Customs duty on ground equipment introduced into the United Kingdom for use in the maintenance, repair and servicing of aircraft engaged in international air service. If the Community by Regulation agrees to provide for relief from duty on ground equipment, the United Kingdom Government will be prepared to amend Article 9 of the Agreement so as to provide for the grant of relief. In the interim, the United Kingdom authorities will relieve ground equipment from Customs duty to the fullest extent permitted by national law and will give the most favourable consideration possible to requests from United States airlines under the existing Hire and Loan provisions.

Article 10 (User Charges)
With respect to paragraph (4) of Article 10, the United States Government expects that in its territory consultations will normally take place directly between the competent charging authority and airlines.

Article 12 (Tariffs)—North Atlantic Fare Investigation
(1) A proceeding, entitled *North Atlantic Fare Investigation*, is currently under way before the United States Civil Aeronautics Board. The purpose of the investigation is to consider rate-making standards and principles that should be used in reviewing the reasonableness of tariffs for North Atlantic passenger air services.

(2) The ultimate decisions in the *North Atlantic Fare Investigation* must be based on a public record according to procedures specified in the United States Administrative Procedure Act. Depending upon the nature of the decision, certain aspects may be legally binding on the United States Civil Aeronautics Board. Under the United States domestic law, the Civil Aeronautics Board has authority over agreements concluded under the auspices of the International Air Transport Association, while Civil Aeronautics Board action disapproving tariffs must be reviewed by the President.

(3) It is hoped that during the course of the *North Atlantic Fare Investigation,* the Tariff Working Group can consult and exchange information on the issues and facts developed in that proceeding. Following the United States Civil Aeronautics Board's decision in the *North Atlantic Fare Investigation*, the United States hopes that the Tariff Working Group will meet to consider the United States Civil Aeronautics Board's determinations, to identify points of agreement and disagreement, and to develop recommendations for their respective Governments with respect to the disposition of agreements.

(4) If the Tariff Working Group established by Article 12 (Tariffs) adopts recommendations on standards and criteria for North Atlantic tariffs, the United States Civil Aeronautics Board will give due consideration to such recommendations in reviewing tariffs and agreements concluded under the auspices of the International Air Transport Association.

Article 12 (Tariffs)—Currency Exchange Rates and Local Selling Prices

(1) Article 12 of the Agreement does not cover one matter which has been of pressing concern to the authorities of the United Kingdom and the United States, namely, conversion of tariffs agreed under the auspices of the International Air Transport Association, or otherwise, into selling prices in local currencies. In recent years, as certain currencies have depreciated in relation to others, the conversion mechanism applied to tariff prices to determine local selling prices payable in pounds has frequently not kept pace with the changing currency relationship. This has led to the dilution of revenues of

airlines of the countries with stronger currencies and may have contributed to distortion of traffic flows and marketing abuses. It is the intention of the Governments of the United Kingdom and the United States that, in principle, the fares paid in each currency should reflect actual currency exchange rates.

(2) Pending full implementation of this general principle, the United Kingdom Government will use its best efforts to increase the level prevailing for passenger transportation and the currency surcharges applicable to cargo shipments not later than 1 October 1977, and the surcharges applicable to APEX travel not later than 1 April 1978. In the case of APEX fares, however, which are geared essentially to specific market conditions in the country of origin of the traffic (including the general level of competing charter services), there may, under some circumstances, need to be directional differences in the fares themselves, as distinct from the surcharges applied to them.

(3) The United States Government recognises that the general principle set forth above is applicable also in relation to Hong Kong.

Annex 1—Route Schedules

Non-stop combination air services by a United States airline or airlines between Atlanta and London and between Houston and London will serve London-Gatwick Airport, provided that the United Kingdom airline serving these United States points also serves London-Gatwick Airport on these routes. If non-stop combination air services between Dallas/Ft. Worth and London are operated by a United States airline which already serves London-Heathrow, that airline will serve London-Heathrow on this route until a United Kingdom airline operating non-stop combination air services on this route serves London-Gatwick Airport, at which time the United States airline will also serve London-Gatwick Airport on its non-stop combination air services on this route. If the United States airline designated to serve Dallas/Ft. Worth-London does not already serve London-Heathrow, it will serve London-Gatwick Airport, provided that the designated United Kingdom airline, when it starts services on the route, also serves London-Gatwick Airport.

Document 5

The letters mentioned at para 1 and para 4 are to be found at Documents 6 and 7. The passenger charter regime (paragraph 8) was agreed on 25 April 1978 (Document 8)

Memorandum of Consultations

Delegations representing the Governments of the United Kingdom of Great Britain and Northern Ireland and the United States of America met in Washington, D.C. from 6 March to 17 March, 1978, to discuss mutual civil aviation issues. Delegation lists are attached. In addition to agreements concerning charter air services and low scheduled air fares and rates, which it was agreed would come into force forthwith (apart from paragraph (2) of Annex 4), the following matters were agreed:

1. Concerning the operation of charter air services between points in the United States and points in the United Kingdom, it is agreed that the airports within the United Kingdom used for such services shall be consistent with the terms set forth in a letter from Patrick Shovelton to James Atwood dated today, a copy of which is attached.
2. Concerning currency exchange rates in Hong Kong, it is agreed that the United States Government shall give early consideration to the representations made at the last two rounds of talks by the UK Delegation and set out in a letter from Patrick Shovelton to James Atwood dated 14 February, 1978, a copy of which is attached.
3. Concerning the foreign air carrier permit issued to Laker Airways by the United States Civil Aeronautics Board (CAB) pursuant to section 402 of the Federal Aviation Act of 1958 (49 U.S.C. sec. 1372), the United Kingdom raised the question of the issuance of a new permit of indefinite duration for the carrier which had already been designated under Article 3 of the 1977 Air Services Agreement between the United States and the United Kingdom for the gate-way route segment London-New York of UK Route 1 in Section 3 of Annex 1. It is understood that the carrier intends to submit its application for the new permit without delay. It is agreed that the United States aeronautical authorities shall promptly consider such

application in accordance with Article 3 of the 1977 Air Services Agreement between the United States and the United Kingdom.

4. Concerning Apex fares, designated airlines have filed or shortly will file Apex fares in accordance with paragraph (2) of the letter from Patrick Shovelton to James Atwood dated 17 March, 1978, a copy of which is attached. It is agreed that early consideration shall be given by the aeronautical authorities of both countries to subsequent filings made by designated airlines for reduction of the advance listing time for Apex fares. It is further agreed that neither Government shall disapprove elimination or alteration of limitations on the number of seats that may be offered in connection with such fares that may have been filed by designated carriers.
5. Concerning tariff filings under Article 12 of the Agreement, the United Kingdom and United States representatives agree that the 75-day filing period, or any such shorter filing period for which waiver has been granted, shall be deemed to begin on the date of receipt of a filing by the relevant aeronautical authorities, if such filing substantially conforms with the technical filing requirements of those authorities, but does not fully comply with them. In any event, however, such tariff filings shall conform with such requirements at least 45 days in advance of the effective date, or such shorter period as may be mutually agreed.
6. Concerning cargo charters, it is agreed that the bracketed cargo charter provision in Annex 4 shall be further considered by the United Kingdom within the next 15 days. If the United Kingdom has any objection to such provision, they shall notify and consult with the United States as soon as possible concerning the reason or reasons for such objection. If the matter is not resolved in such consultations, the cargo charter provision shall not be included within Annex 4. In that event, the United States and the United Kingdom shall consult further for the purpose of obtaining an agreement on cargo charter air services within the next six months.
7. Concerning proposed interchange services, the United Kingdom representatives raised the question of the agreement between British Airways and Braniff Airways for the operation of a Concorde interchange service between London and Dallas/Fort Worth via Washington. They urged that the CAB begin consideration of the

agreement without awaiting either final decision in the current rulemaking/environmental impact statement process or any decision by the Federal Aviation Administration to grant a US-type certificate. The United States authorities agreed to consider this request, promptly and to inform the United Kingdom of its response as soon as possible.

8. Concerning possible further liberalisation of Annex 4, it is agreed that each Contracting Party shall in good faith study and consider the feasibility and desirability of introducing part charters (the carriage of charter air traffic on scheduled air services under certain conditions) and fill-up (the carriage of passengers who are neither advance-listed nor substituted for advance-listed passengers) on Category A and B charter air services as defined in Annex 4. Within six months after the revised Article 14 and Annex 4 of the Agreement enter into force, the Contracting Parties shall consult with each other concerning a possible arrangement whereby Annex 4 would be amended to include these facilities.
9. The United Kingdom authorities would expeditiously examine the problem raised by the United States authorities concerning the problem of the levying of Canadian air navigation charges by the United Kingdom Civil Aviation Authority and would give the United States authorities a considered response as soon as possible via the British Embassy in Washington.

W. Patrick Shovelton
Chairman
United Kingdom Delegation

James R. Atwood
Chairman
United States Delegation

Washington, DC
17 March 1978

Document 6

This letter, linked to the Memorandum of Consultations at Doc 5, but apparently given the same date as the Exchange of Notes at Doc 8, was the first restriction on the use of UK airports, which would become a major issue in the relationship. See also the notes in Part II at the head of Annex 1, Section 7 of the Treaty.

Department of Trade
London
25 April 1978

Mr. James Atwood
Deputy Assistant Secretary for Transportation
US State Department
Washington, DC 20520

Dear Mr. Atwood,

Airports in the United Kingdom Available for Charter Air Service

In the course of our negotiations for the revision of Article 14 and Annex 4 of the Bermuda 2 Agreement I told you that United Kingdom regulations imposed certain restrictions on the points in the United Kingdom which may be served by United States charter-designated airlines. These are:

a. Heathrow Airport will not be available for planeload charter air services from 1 April 1978.
b. Abbotsinch (Glasgow) and Turnhouse (Edinburgh) will only be available for North Atlantic planeload charter air services when special permission is granted by the relevant United Kingdom authorities. Normally planeload charters serving Scotland will use Prestwick Airport. If either airport becomes available for long-haul services, it will become available to both scheduled and charter services on a nondiscriminatory basis.

I wish to emphasise that these restrictions will be applied on a nondiscriminatory basis as between United Kingdom and United States designated and charter-designated airlines.

Yours sincerely,
W.P. Shovelton

Document 7

British Embassy
Washington, DC
17 March 1978

Mr. J. Atwood
Deputy Assistant Secretary Department of State
Washington, DC

Dear Mr. Atwood,

Our Governments have in recent weeks been in disagreement over the air fares and rates filed by various airlines for use over the North Atlantic during the coming summer season. Consultations which began in London on 10 February were resumed in Washington on 6 March.

During these latter consultations US representatives made a presentation of the attitudes and policies of the United States in favour of low and innovative air fares and rates, and argued strongly that the tariffs filed by US airlines satisfied the criteria in Article 12(2) of the Bermuda 2 agreement, taking these criteria as a whole. The United Kingdom side was impressed by many of the considerations and arguments that were advanced and moreover was conscious that British airlines would also wish to put forward their own innovative proposals. While remaining concerned that low fare innovations should not be taken to the point where possibly irreparable damage was done to the essential fabric of the civil aviation industry, or at any rate inadequate returns were achieved by efficient airlines, the United Kingdom aeronautical authorities have decided in the light of the consultation to withdraw their expressions of dissatisfaction and subject to paragraph 5 below to approve forthwith new filings based on the fares, rates and conditions filed by United States airlines which are currently the subject of expressions of dissatisfaction by the United Kingdom aeronautical authorities. The United Kingdom authorities have assured the United States that they will not require limitations on the number of seats to be offered at the subject fare from carriers which have not already requested such limitations.

In taking this action the United Kingdom aeronautical authorities understand that the United States aeronautical authorities will withdraw their expressions of dissatisfaction and subject to paragraph 5 below

approve forthwith new filings based on the fares, rates and conditions filed by British airlines which are currently the subject of expressions of dissatisfaction by the United States aeronautical authorities.

In taking the action referred to in my second paragraph above it is also the understanding of the United Kingdom aeronautical authorities that the United States aeronautical authorities will accept and approve forthwith short notice filings by British designated airlines that match or are competitive with approved filings of United States designated airlines. The United Kingdom aeronautical authorities will similarly accept and approve such filings made by United States designated airlines.

It is our understanding that the United States aeronautical authorities will not object if stand-by, budget, group 100, single-coupon APEX and matching fares are made available only between gateway points listed in columns A and C of US Route 1 or UK Route 1; and that the United States aeronautical authorities agree that for journeys behind and beyond the gateways the fare to be charged should be the sum of the standby, budget, group 100, single-coupon APEX or matching fare and the applicable domestic fare. APEX fares not limited by their terms to a single coupon will continue to be approved for applicability to both gateway and non-gateway points. All filings should have an expiry date not later than 31 March 1979. The United Kingdom aeronautical authorities will require the currency surcharge applicable to APEX fares sold in the United Kingdom to be standardised at 50% with effect from 1 April 1978. Arrangements for the handling, ticketing and checking-in of stand-by passengers are a matter to be determined on a non-discriminatory basis by the airport operators in consultation with the airlines concerned.

It is our further understanding that the aeronautical authorities of both our countries will give prompt and sympathetic consideration to subsequent innovative tariff filings by their carriers within the scope of Article 12. It is the view of the United Kingdom, which we understand to be shared by the United States, that the innovative fares and rates which have been the subject of our consultations together with those yet to be filed are experimental in character and should therefore be monitored, and reviewed in October or November 1978, as a basis for the more assured projection of low fare policies for the future.

It is understood that this agreement does not include rates for the sale of space on a scheduled service flight to a charter organiser for resale to the public under charter rules and at prices set by the organiser (part-charters).

I should be grateful to have your confirmation that this is also your understanding of the position we have reached.

Yours sincerely,
W.P. Shovelton

In a brief reply on the same date Mr. Atwood confirmed the understandings set out in this letter.

Document 8

This Exchange of Notes (Julius L Katz, US State Department, replied on the same day in identical terms) amended the Agreement to incorporate a passenger charter regime. The amended texts of Article 14 and Annex 4 of the Treaty are to be found in Part II. The Exchange of Notes was published by HMSO as Cmnd 7332.

Exchange of Notes Amending the Air Services Agreement
Her Majesty's Ambassador at Washington to the Secretary of State of the United States of America

British Embassy
Washington, DC
25 April 1978

Sir,

I have the honour to refer to negotiations which have taken place in London and Washington on the question of charter air services in the North Atlantic Market, in accordance with Annex 4 to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning Air Services, signed at Bermuda on 23 July 1977 (hereinafter referred to as 'the Agreement').

As a result of these negotiations, and in accordance with Article 18 of the Agreement, I now have the honour to propose that Article 14 of the Agreement and Annex 4 to the Agreement (including the Memorandum of understanding on Passenger Charter Air Services between our two Governments which was regarded as incorporated in that Annex for so long as it remained in force) shall be replaced by the new Article 14 and the new Annex 4 which are attached to this Note. In consequence of these amendments, I further propose that in paragraph (3) and (4) of Article 2 of the Agreement, the references to 'Annex 4' shall be replaced by references to 'Article 14'.

If the foregoing proposals are acceptable to the Government of the United States of America, I have the honour to propose that the present

Note and its enclosures, together with your reply in that sense, shall constitute an agreement between our two Governments which shall be considered to have entered into force on 1 April 1978.

I avail myself of this opportunity to renew to you, Sir, the assurances of my highest consideration.

Peter Jay

Document 9

This letter, together with Mr Atwood's brief affirmative reply of the same date, confirmed and extended the experimental liberalisation of the tariff regime agreed in Doc 7.

British Embassy
Washington, DC
2 November 1978

James R. Atwood Esq.
Deputy Assistant Secretary for Transportation Affairs
United States Department of State
Washington, DC

Dear Mr. Atwood,

During consultations held in Washington this week we and our respective delegations discussed the results of an agreed experiment with innovative air fares and rates between the United States and the United Kingdom during the past six months. This review had been agreed to in an exchange of letters between yourself and Mr. W. P. Shovelton in Washington on March 17, 1978 interpreting Article 12 (Tariffs) of Bermuda 2 and including several specific commitments.

We agreed that these low fares have benefited both consumers and airlines, and should be continued. Against this background, both sides agreed to continue to be guided by the above exchange and to expand it to include further mutual undertakings, including a broadening of focus for the Tariff Working Group (TWG).

Both sides agreed, in relation to services between the UK and the US, that they would like to see continued reduction of governmental intervention in individual airline pricing decisions. The undertakings in the March exchange of letters will be administered liberally to this end. They agreed in particular:

(a) That they would accept but not seek to impose capacity limitations on discount fare categories.

(b) That they would recommend to their respective airlines that as each airline reviews its conditions for standby and deep discount fares it gives due consideration to:

  (i) modifications that would ease congestion problems, including possible use of peak-period differentials and supplying better information for passengers on the conditions of standby fares; and
  (ii) the desirability of ensuring adequate space for on-demand passengers willing to purchase a full-fare ticket at short notice.

(c) That they saw no objection in principle to one way directional prices or to separate adjustment of one way prices.
(d) That they would accept tariff filings by airlines incorporating expiry provisions of the airlines' choice.

Both sides agreed that the TWG should continue as an advisory body to both Governments and as an important forum for the exchange of views on aviation pricing policy, concepts of economic regulation, and information. The following new topics were agreed upon as important for future TWG meetings:

(a) The possibilities of identifying and correcting predatory behaviour and the exploitation of market power.
(b) The exploration of the preliminary US recommendation that Laker's successful use of current bankers' exchange rates could be extended, on a voluntary basis, to all airlines operating in the market.
(c) Possible difficulties for airlines arising from differences in the operation of the UK and US regulatory mechanisms.

Both sides hoped that the successful operation of low fares would continue and be developed as a normal feature of airline operations between our two countries.

I shall be grateful to have your confirmation that the above correctly describes the understandings we have reached on this subject.

Yours sincerely,
J.R. Steele

Document 10

This Exchange of Notes (Cmnd 7862) brought forward the date set in the Treaty for the opening of two new services, a first small step towards the major expansion of gateways and services agreed in March 1980 (Part III, Doc 11).

Exchange of Notes Amending the Air Services Agreement

Note No. 1
From the Secretary of State of the United States of America to Her Majesty's Ambassador at Washington

Department of State
Washington, DC
27 December 1979

Excellency,

I have the honor to refer to the Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland concerning air services signed at Bermuda on 23 July 1977 (Cmnd 7016), as amended (Cmnd 7332), (hereinafter referred to as "the Agreement") and to consultation between Delegations representing our two Governments held at Washington November 6–8, 1979, to review major elements in the aviation relations between our two countries.

The Delegations agreed that it would be in the interest of both countries to advance from July 23, 1980 to June 1, 1980 the permitted inaugural date for nonstop scheduled combination service by the United Kingdom designated airline between London and Atlanta; and of nonstop scheduled combination service by a United States designated airline between London and the additional U.S. gateway point to be agreed in accordance with the provisions of U.S. Route 1 in Annex 1 to the Agreement.

In accordance with Article 18 of the Agreement, I have the honor to propose that Note 1 to "U.S. Route 1: Atlantic Combination Air Service," as set out in Section 1 of Annex 1 to the Agreement, be amended to read: "(1) May not be served nonstop until three years after this Agreement

enters into force, except that the additional point to be agreed between the contracting parties may be served nonstop from June 1, 1980." Similarly, I have the honor to propose that Note 1 to "U.K. Route 1: Atlantic Combination Air Service" as set out in Section 3 of Annex 1 to the Agreement be amended to read: "(1) May not be served nonstop until three years after this Agreement enters into force, except that Atlanta may be served nonstop from June 1, 1980".

If the foregoing proposal is acceptable to the Government of the United Kingdom of Great Britain and Northern Ireland, I have the honor to propose that this Note, together with your affirmative reply, shall constitute an agreement between our two Governments which shall be considered to have entered into force on 27 December 1979.

Accept, Excellency, the renewed assurances of my highest consideration.

For the Secretary of State
E. Johnston

Note No. 2
From her Majesty's Ambassador at Washington to the Secretary of State of the United States of America

British Embassy
Washington, DC
27 December 1979

Sir,

I have the honour to acknowledge receipt of your Note of today's date which reads as follows:

[As in Note No. 1]

In reply, I have the honour to confirm that the proposal set forth in your Note is acceptable to the Government of the United Kingdom of Great Britain and Northern Ireland. My Government further agrees that your Note, together with this reply, shall constitute an agreement between our two Governments which shall be considered to have entered into force on 27 December 1979.

I avail myself of this opportunity to renew to you, Sir, the assurances of my highest consideration.

Nicholas Henderson

Document 11

This Exchange of Notes (Cmnd 8222) between Mr Johnston for the US Secretary of State and Sir Nicholas Henderson, UK Ambassador at Washington, confirmed the outcome of negotiations for a cargo regime (Annex 5), concluded March 1979, as well as the major expansion of gateways and services agreed in March 1980. These were reflected in amendments to the route schedule (US Route 1 and UK Route 1), the addition to the route schedule of Annex 1 Section 6, and new rights to double designation on Miami (for the UK), Miami and Boston (for the US). Annex 1 Section 7 incorporated into the Agreement the new restrictions on the use of UK airports set out in the letter at Document 14. The enclosures are not included here. The amendments to the route schedule, as well as the texts of Annex 5, Annex 1 Section 6 and Annex 1 Section 7 are all to be found in Part II. See also three of the seven accompanying letters at Documents 12, 13 and 14.

Exchange of Notes Amending the Air Services Agreement

Department of State
Washington, DC
4 December 1980

Excellency,

I have the honour to refer to negotiations which have taken place in London and Washington pursuant to the Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland concerning Air Services, signed at Bermuda on 23 July 1977, as amended by the Exchange of Notes on 25 April 1978 and 27 December 1979 (hereinafter referred to as the "Agreement").

As a result of these negotiations and in accordance with Article 18 of the Agreement, I have the honour to propose that:

(1) If the Government of the United Kingdom designates a second airline for the gateway route segment London-Miami as set forth in UK Route 1 in Section 3 of Annex 1 to the Agreement, the

Government of the United States shall, pursuant to paragraph (5) of Article 3 of the Agreement, accept such further designation. Subject to compliance with the remaining provisions of the Agreement, the second designated airline may commence services on or after 14 April 1980. The Government of the United States shall use its best efforts to grant necessary authorisations and technical permissions in the shortest possible time, and the periods set forth in Article 12 (Tariffs) of the Agreement and Annex 2 (Capacity on the North Atlantic) to the Agreement shall be reduced to the extent necessary to permit airline planning, marketing and start of services on the permitted date.

(2) If the Government of the United States designates a second airline for the gateway route segment Boston-London or a second airline for the gateway route segment Miami-London as set forth in US Route 1 in Section 1 of Annex 1 to the Agreement, the Government of the United Kingdom shall, pursuant to paragraph (5) of Article 3 of the Agreement accept such further designation or designations. Subject to compliance with the remaining provisions of the Agreement, the second designated airline may commence services on Boston-London on or after 14 April 1980 and on Miami-London on or after 15 January 1981. The Government of the United Kingdom shall use its best efforts to grant operating authorisations and technical permissions in the shortest possible time, and the periods set forth in Article 12 (Tariffs) of the Agreement and Annex 2 (Capacity on the North Atlantic) to the Agreement shall be reduced to the extent necessary to permit airline planning, marketing and start of services on the permitted date.

(3) US Route 1 in Section 1 of Annex 1 to the Agreement shall be amended to read in its entirety as shown in Enclosure 1 to this Note.

(4) UK Route 1 in Section 3 of Annex 1 to the Agreement shall be amended to read in its entirety as shown in Enclosure 2 to this Note.

(5) A Section 6 shall be added to Annex 1 to the Agreement as set out in Enclosure 3 to this Note.

(6) A Section 7 shall be added to Annex 1 to this Agreement as set out in Enclosure 4 to this Note.

(7) An Annex 5 shall be added to the Agreement as set out in Enclosure 5 to this Note.

If the foregoing proposals are acceptable to the Government of the United Kingdom of Great Britain and Northern Ireland, I have the honour to propose that the present Note and its enclosures, together with your reply in that sense, shall constitute an Agreement between our two Governments which shall be considered to have entered into force on 1 April 1980, except that Annex 5 shall be considered to have entered into force on 1 January 1980.

Accept, Excellency, the renewed assurances of my highest consideration.

For the Secretary of State
Ernest B. Johnston

Sir Nicholas Henderson, UK Ambassador, replied in identical terms on the same day.

Document 12

This letter, and Roberts' reply, representing a stand-off between the two sides on the extra-territorial application of US anti-trust laws in general, and more particularly their potential impact on co-operation among UK airlines offering cargo services, were published as Letters 5 and 6 attached to the Exchange of Notes at Document 11 (Cmnd 8222).

Department of State
Washington, DC
4 December 1980

Dear Mr. Roberts,

In connection with negotiations between our two governments on deregulation of air cargo services in the US-UK market, you raised questions concerning the applicability of U.S. antitrust laws to possible joint operations among U.K. all-cargo airlines. This letter, which I have reviewed with the Civil Aeronautics Board and the Departments of Justice and Transportation, attempts to respond to your concerns and to provide those assurances which are possible under the circumstances.

As I understand it, your government is concerned that U.S. antitrust laws might inhibit U.K. all-cargo airlines from engaging in some joint or co-operative arrangements that may be essential for them to be viable competitors in a deregulated environment. You have stated that the U.K. all-cargo airlines are presently very small companies, lacking large, modern aircraft and a strong financial base. They also lack extensive experience in the US-UK market, due in part to past regulatory policies. It appears that a number of U.S. airlines interested in the US-UK cargo market are larger carriers and may be growing rapidly in the coming few years. They may also have greater experience and established positions with shippers and forwarders. You government is, accordingly, hopeful that the U.K. carriers might have a wide degree of freedom to consider joint or co-operative commercial arrangements for the US-UK market, at least for a start-up period. The purpose of those arrangements would be to ensure that the smaller, less experienced U.K. airlines could operate as effective competitors in the less regulated environment on which we have agreed.

The United States appreciates your interest in having U.K. carriers participate actively in the US-UK cargo market. Indeed, we share that interest to a large degree, for efficient airlines regardless of flag will contribute to an active, competitive market with resulting benefits for U.S. shippers and importers. Also, we recognise that the UK's continued support for a deregulated environment will be better assured if your airlines have satisfactory operating results in that environment. For these reasons, the United States would—as a general matter of policy—be sympathetic to efforts by U.K. airlines to be effective and successful competitors. We would in turn be concerned if it were thought that U.S. law was preventing U.K. airlines from filling that role.

The question, then, is whether the U.S. antitrust laws would prevent U.K. airlines from engaging in joint or co-operative activities which were necessary for those airlines to fulfil this shared desire that they be active and effective competitors. (Of course, in many circumstances an airline—even a very small one—will be a more effective competitor if it operates wholly independently. For purposes of this discussion, however, we are assuming that the airline managements have reached a different conclusion.) We believe that there is both sufficient flexibility and rationality in U.S. law that this would not be the case. Further, the United States Government would be prepared to co-operate with your government to minimise any such risk.

First, aside from questions of immunity, several types of joint activities by U.K. airlines would be consistent with the U.S. antitrust laws. Those laws are flexible on the subject of joint ventures, particularly those operating in international commerce where risks may be greater, costs higher, and joint experience needed. Considerations of comity would also play an important role in the case of joint activities among U.K. airlines where U.K. laws and/or policies support the conduct in question. It is, of course, very difficult to state meaningful generalisations in this area, and assurances concerning unknown factual situations are impossible. Nevertheless, your government and airlines can take comfort from the fact that the application of U.S. antitrust laws to foreign joint ventures has been exceedingly limited, although such ventures are in fact common. Particularly when conducted among smaller airlines and new entrants, co-operative arrangements including shared terminal space, joint promotional efforts, aircraft leasing, blocked-space agreements, and consortia operations could well be structured with little antitrust risk. The Department of Justice, through its Business Review Procedure, would be prepared to comment on any particular arrangements your airlines might wish to propose.

Second, under specified circumstances, foreign airlines may obtain explicit immunity from antitrust enforcement. Section 412(a) of the Federal Aviation Act (as recently amended) provides that the Civil Aeronautics Board shall approve a contract or agreement filed by air carriers or foreign air carriers "that it does not find to be adverse to the public interest, or in violation of this Act." The Board may not approve a contract or agreement "which substantially reduces or eliminates competition" unless it finds that the contract or agreement "is necessary to meet a serious transportation need or to secure important public benefit *including international comity or foreign policy considerations* and it does not find that such need can be met or such benefits can be secured by reasonably available means having materially less anticompetitive effects." (Emphasis added.)

Section 414, in turn, provides for a grant of antitrust immunity to the extent necessary for persons to proceed with the contract or agreement so approved, where the Board finds that such exemption is required in the public interest, or whenever an agreement or contract which substantially reduces or eliminates competition, and is subject to the above-quoted finding, has nonetheless been approved. The Board staff, as well as independent counsel, would be in a position to provide more detailed information on the background of these provisions and the decisional law under them. The essential point is that U.S. law provides a clear procedural avenue for obtaining immunity for inter-airline agreements that meet certain standards. To the extent such an agreement involving U.K. cargo airlines would advance the shared interest stated above and is not unnecessarily anticompetitive, the case for approval and immunity would be substantial.

Most agreements among air carriers do not have substantial anticompetitive consequences, and therefore do not require an elaborate justification to be found consistent with the public interest. Others, such as agreements to set prices or allocate markets, are likely to have severe enough anticompetitive consequences to require a showing of considerable *public* benefit that cannot be obtained by less anticompetitive alternatives before they can be approved. While no one can bind the Board, or predict beyond doubt what it would do in an individual case (particularly given recent amendments to U.S. law), it is likely that the Board's interest in securing and maintaining a more competitive US-UK cargo environment would be given considerable weight in its deliberations.

As you know, it is not possible under U.S. law to give assurances that the Civil Aeronautics Board (or a successor agency) will grant antitrust

immunity for future agreements that may be filed with it. Nor can I give assurances that, under no circumstances, will an antitrust action be brought by either the government or a private party against future, unspecified conduct. Nor can I guarantee that United States law will not change over the coming years. I can assure you, however, that we share your desire that the U.K. all-cargo airlines benefit from and actively compete in the new deregulated regime for the US-UK market, and as a government the United States will be sympathetic to joint or co-operative activities among smaller U.K. airlines, that may be necessary to further that goal. We would also, as a government, be most interested in the views of your government in any administrative or judicial proceeding concerning such joint operations, and would give the fullest possible weight to those views. The United States would also, of course, honour its agreements with your government concerning notification and consultation concerning potential actions under the U.S. antitrust laws. Finally, on behalf of the Department of State, I assure you that we would provide whatever assistance possible to ensure that the views of your government are made known to any relevant agencies of the U.S. Government and are, under the principle of comity, given the most careful consideration.

Sincerely,
B. Boyd Hight
Deputy Assistant Secretary for
Transportation and Telecommunications

Department of Trade
London
4 December 1980

Dear Mr. Hight,

I acknowledge your letter of to-day's date on the scope of US anti-trust laws and the assistance you are able to give in respect of the possible application of these laws to UK carriers. As you know, my Government does not accept the jurisdiction which the US claims in respect of these laws, nor their appropriateness in some circumstances to international air services operations.

You were unable in your letter to give firm assurances that the US Government and the CAB would exercise their powers and discretions in favour of UK airlines if the UK saw no objection to the arrangements

proposed. It is only fair to advise you that if after consultation HMG indicates that it sees no objection to the arrangements proposed but nevertheless anti-trust action is brought against the UK airlines concerned then we might consider such action as a reason for seeking modification, and if necessary termination, of the cargo agreement as provided for in Part V of that annex to the Agreement.

Yours sincerely,
C.W. Roberts

Document 13

This letter, published as Letter No 7 with the Exchange of Notes at doc 11 (Cmnd 8222), put down a marker for the possible modification of the liberal cargo regime if UK airlines proved unable to compete effectively in the market.

Department of Trade
London
4 December 1980

Mr. B. Boyd Hight
Deputy Assistant Secretary for
Transportation and Telecommunications
Department of State, Washington, DC

Dear Mr. Hight,

In the course of our negotiations concerning North Atlantic UK/US cargo operations which led to the conclusion of Annex 5 to the Air Services Agreement, which is provided for in the Exchange of Notes of today's date, I said that my Government would want to monitor carefully the progress towards the liberal regime and operation during that regime.

We would want to be satisfied that the large number of US operators and their greater financial operational capability did not prevent UK airlines from being effective and successful competitors in the market. We expect to see our airlines maintaining an adequate presence in the market.

If my Government felt that the measures agreed had created a situation in which UK airlines were not operating in this way then we might wish to seek changes in Annex 5 by use of the modification procedure provided for in it.

Yours sincerely,
C.W. Roberts

Document 14

This letter and Hight's reply, were published as Letters No 3 and 4 with the Exchange of Notes at Doc 11 (Cmnd 8222), although the substance of the London airports restrictions entered the Treaty simultaneously as Section 7 of Annex 1 (see Part II). The UK relied on Annex 1 Section 7 as well as this letter in resisting the use of Heathrow by American Airlines and United Airlines, when they took over from Pan Am and TWA in 1990 (see Chap. 4).

Department of Trade
London
4 December 1980

Mr. B. Boyd Hight
Department of State
Washington, DC

Dear Mr. Hight,

Use of Airports in the UK

In the course of our negotiations concerning cargo operations from 1 January 1980, I amplified the UK regulations, referred to in Mr. Shovelton's letter to Mr. Atwood dated 25 April 1978, which impose certain restrictions on the use of airports in the UK as follows:

(a) Airlines not currently operating at Heathrow Airport will not be allowed to commence operations there.
(b) Heathrow Airport will not be available for passenger charter flights on which cargo is carried nor for cargo flights on which charter passengers are carried.
(c) Passenger charter flights on which cargo is carried and cargo flights on which charter passengers are carried will be subject to the same restrictions as other planeload charters as regards the use of Abbotsinch (Glasgow) and Turnhouse (Edinburgh) airports.

It is intended that these regulations will be applied in such a manner so as not to discriminate against US airlines in competition with UK or foreign airlines of similar designation status and historical operating pattern.

Yours sincerely,
C.W. Roberts

In his reply Mr Hight confirmed 'that these statements are understood by my Government' and welcomed the assurances in the final paragraph.

DOCUMENT 15

Having agreed in 1980 (Doc 11) the addition of five new gateways and services for each side, to be phased in over the years 1981–1985, this 1982 memorandum, responding to an economic recession, deferred by two years the new services planned for 1983 and 1984. At the same time a number of specific concessions were made on both sides (paragraphs 3–8) and a Working Group was set up to review both Annex 2 (capacity) and the expired Annex 4 (charter services).

Memorandum of Consultations

Delegations representing the Governments of the United Kingdom of Great Britain and Northern Ireland and the United States of America met in Washington. D.C. from 14 October to 21 October 1982 and in London from 8 November to 9 November 1982 to discuss issues arising from the Air Services Agreement—signed in Bermuda on 23 July 1977, as amended (hereinafter referred to as the "Agreement"). The following matters were decided:

1. Except as provided for in paragraph 2 below:
   (a) The timetable for the selection of new gateway points provided for in Section 6 of Annex I to the Agreement will be deferred for two years beginning on 1 April 1983. Thus the date of permitted start of services for the Point C Selections would be 1 April 1985.
   (b) From the date of signature of this Memorandum until 31 March 1985 the facility to change a previous selection set out in Paragraph 7 of Section 6 of Annex I will be suspended.
   (c) From the date of signature of this Memorandum until 31 March 1985 the right to designate under Article 3 of the Agreement will be suspended for North Atlantic Combination Air Service routes.
   (d) A designated airline which, at the date of signature of this Memorandum, has ceased to operate a North Atlantic Combination Air Service may not resume that service until 1 April 1985.

2. (a) The provisions of paragraph 1(c) above do not apply to Denver/London nor where, after the signature of this Memorandum, a designated airline ceases to operate a service on a gateway route segment. However, if a designated airline ceases to serve Miami it may not be replaced before 1 April 1985 if thereby two carriers of the same Contracting Party would serve Miami.
   (b) The United States may select Newark as US Point C and designate an airline to operate a Newark/London (Gatwick) service from 1 April 1981 Until 1 April 1985 the designated airline will be permitted to operate 416 round trips, provided that the number of round trips in any one week does not exceed five.
   (c) The United States may change a previous selection of a gateway point in order to designate an airline to operate a service between San Juan and London if the United Kingdom airline operating this gateway route segment ceases to do so and the United Kingdom does not designate another airline within three months of such cessation. In any event, the United States may select San Juan as US Point. D, or change a previous selection, in order to designate an airline to operate a service on this route from 1 November 1984.
   (d) A designated airline which has ceased or ceases to operate a service during one season may nevertheless resume operating that service during the following season.
3. The United Kingdom will grant fifth freedom rights to one United States designated airline to operate up to seven round trips a week between Shannon and Prestwick/Glasgow.
4. The United Kingdom will grant a United States designated airline the right to operate up to seven round trips a week beyond Prestwick with fifth freedom rights to a point in Western Europe to be selected by the United States. The point selected may be changed with six months notice.
5. The United States will grant to a United Kingdom designated airline the right to carry that airline's own stopover passengers between two US points (to be selected by the United Kingdom) on the airline's services between the United Kingdom and the United States. The points selected may be changed with six months notice.

6. Notes 1 and 3 to United States Route 1 in Annex 1 to the Agreement will not apply to the local traffic rights between points in Column C and Frankfurt.
7. Pursuant to Paragraph (6)of Annex 3 to the Agreement, and without prejudice to the rights of either Party under Article 12 of the Agreement, either Party, after review by its aeronautical authorities responsible for tariff matters, may refer pricing problems to the Tariff Working Group established under Article 12 of the Agreement for timely consideration.
8. United Kingdom Route 4 in Annex 1 to the Agreement will be replaced by the attachment to this Memorandum.
9. A Working Group will be established to examine on a factual basis the extent to which the operation of the procedures set out in Annex 2 to the Agreement have succeeded in avoiding either excess capacity or the under provision of capacity, and, if necessary, to make recommendations to the two Governments for the improvement of the procedures. The Working Group will also consider replacing the expired Annex 4 (charter air services) to the Agreement with a revised charter annex and make recommendations accordingly. If the Working Group fails to agree on recommendations regarding replacement of Annex 2, or if the two Governments are unable to reach agreement before 23 July 1984 on whether to adopt such recommendations made by the Working Group, Annex 2 to the Agreement shall be extended in its present form until 23 July 1986. Such an extension will not eliminate the obligation of the Working Group and the Parties to consider revisions in both Annexes.
10. The United Kingdom will permit Pan American World Airways to exercise fifth freedom rights between London and New Delhi and Karachi until 23 April 1983 in accordance with the schedules already filed with the United Kingdom aeronautical authorities.
11. Between 24 April 1983 and 23 April 1985 the United Kingdom will permit Bombay to be served with fifth freedom rights in addition to the points in Column D of United States Route 2 in three or the four traffic seasons ending on 31 March 1985, provided that, if Bombay is served, no more than five services per week may serve points in India and only one point in India is served on any one service.

12. Until 1 April 1985 the United States will not exercise its right to designate additional carriers to provide services between Miami and the Cayman Islands.
13. Extra sections will continue to be governed by Annex 2 Paragraph (10).
14. Where necessary, appropriate modifications to the Agreement will, in accordance with Article 18, be effected by an Exchange of Notes.

Matthew V. Scocozza
Chairman
United States Delegation

Christopher W Roberts
Chairman
United Kingdom Delegation

London
9 November 1982

Document 16

This Exchange of Notes (Cmnd 9720) between Sir Brian Crowe, UK Ambassador at Washington, and Mr Colwell for the US Secretary of State, together with the temporary provisions set out in enclosure 4 (Doc 17) gave formal effect to the Memorandum of Consultations dated 9 November 1982 (Doc 15). Enclosures 1, 2 and 3 containing the modifications to US Route 1 and UK Route 4, as well as the amended (i.e. deferred) time-table for the introduction of new services under Section 6 of Annex 1, are all reflected in the text of the Agreement at Part II.

Exchange of Notes Amending the Air Services Agreement

British Embassy
Washington, DC
20 February 1985

United States Department of State
Washington, DC

Sir,

I have the honour to acknowledge receipt of your Note of today's date which reads as follows:

"Excellency

I have the honour to refer to negotiations that have taken place in London and Washington pursuant to the Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland concerning Air Services, signed at Bermuda on July 23, 1977, as amended by the Exchange of Notes of April 25, 1978, December 27, 1979 and December 4, 1980 (hereinafter referred to as the "Agreement").

As a result of these negotiations, which concluded on November 9, 1982, and in accordance with Article 18 of the Agreement, I have the honour to propose that:

(1) US Route 1 in Section 1 of Annex 1 to the Agreement shall be amended to read in its entirety as shown in Enclosure 1 to this Note.
(2) UK Route 4 in Section 3 of Annex 1 to the Agreement shall be amended to read in its entirety as shown in Enclosure 2 to this Note.
(3) The timetable for the selection of new gateway points in paragraph 3 of Section 6 of Annex 1 to the Agreement shall be amended to read in its entirety as shown in
Enclosure 3 to this Note.
(4) UK Route 1 in Section 3 of Annex 1 to the Agreement shall be amended by the addition at the end of the heading to column (C) of a reference to a new Note (6) which shall read as follows:

> Notwithstanding the provisions of Note 2 in Section 5 of this Annex, one UK designated airline may carry on that service its own stopover passengers between two points in column (C), provided the service begins or ends at a point in column (A). The points shall be selected by the United Kingdom and may be changed on 6 months' notice.

(5) Pursuant to paragraph (6) of Annex 3 to the Agreement, and without prejudice to its rights under Article 12 of the Agreement, either Contracting Party may, after review by its aeronautical authorities responsible for tariff matters, refer a pricing problem to the Tariff Working Group for timely consideration.
(6) The temporary provisions set out in Enclosure 4 to this note be adopted.

If the foregoing proposals are acceptable to the Government of the United Kingdom of Great Britain and Northern Ireland, I have the honor to propose that the present Note with its enclosures, together with your reply concurring therein, shall constitute, an Agreement between our two Governments which shall be considered to have entered into force on November 9, 1982.

Accept, Excellency, the renewed assurances of my highest consideration."

For the Secretary of State
(signed) T.C. Colwell

In reply, I have the honour to confirm that the proposals set forth in your Note are acceptable to the Government of the United Kingdom of Great Britain and Northern Ireland. My Government further agrees that

your Note and its enclosures, together with this reply, shall constitute an Agreement between our two Governments which shall be considered to have entered into force on 9 November 1982.

I avail myself of the opportunity to renew to you, Sir, the assurances of my highest consideration.

For the Ambassador
(signed) B.L. Crowe

Document 17

This enclosure to the 1985 Exchange of Notes (Doc 16) contains details of the complex temporary provisions agreed in 1982, within the terms of the Agreement, to help the airlines cope with the downturn in growth resulting from the recession.

Enclosure 4

(1) Prior to April 1, 1985, neither Contracting Party shall designate airlines under Article 3 of the Agreement on US Routes 1 and 2 in Section 1 of Annex 1 to the Agreement or on UK Routes 1, 2, 3, 4 and 5 in Section 3 of Annex 1 to the Agreement. Notwithstanding the foregoing, each Contracting Party shall have the right to designate airlines for the purpose of operating the agreed combination air services on the said routes as follows:

(a) Each Contracting Party may designate a replacement airline if the designated airline ceases to operate a service on a gateway route segment after November 9, 1982. However, if a designated airline ceases to serve Miami on US Route 1 or UK Route 1, a Contracting Party may designate a replacement airline only if it does not result in more than one airline of that Contracting Party serving Miami.

(b) The United States may designate:

(i) an airline to serve Newark-London (Gatwick) from April 1, 1983 (if the United States selects Newark as Point C pursuant to paragraph 3 in Section 6 of Annex 1 to the Agreement), such airline to operate up to March 31, 1987 no more than such a number of frequencies as are agreed by the aeronautical authorities of the two Contracting Parties;

(ii) an airline to serve San Juan-London (Gatwick) pursuant to (4) below;

(iii) an airline to serve Denver-London (Gatwick).

(c) The United Kingdom may designate an airline for a London (Gatwick)-Houston Service on UK Route 1 and for a London (Gatwick)-San Juan service on UK Route 4, as amended.

(2) A designated airline, which, before November 9, 1982, had ceased to operate a service on a gateway route segment on US Route 1 or on UK Route 1 shall not be entitled to resume operation of that

service until April 1, 1985. However, the provisions of the preceding sentence will not apply to an airline that did not operate a service for the winter traffic season 1982–1983 if such airline resumes operating that service in the summer traffic season of 1983.

(3) If a designated airline ceases to operate a service on a gateway route segment at any time between November 9, 1982, and March 31, 1985, such service may be resumed by that designated airline or by a replacement airline designated pursuant to paragraph 1(a) above.

(4) Until March 31, 1985, neither Contracting Party may change a previous selection of a gateway point under paragraph 7 of Section 6 of Annex 1, except that the United States may change a previous selection of a gateway point in order to designate an airline to operate a service between San Juan and London (Gatwick) if at any time the United Kingdom designated airline operating the gateway route segment London (Gatwick)-San Juan on UK Route 1 or UK Route 4 in Section 3 of Annex 1 to the Agreement ceases to operate such segment and neither it nor another airline designated by the United Kingdom resumes the service within three months of such cessation. In any event, the United States may change a previous gateway selection or exercise its rights of selection under Section 6 of Annex 1, as amended, to designate an airline to operate a San Juan-London (Gatwick) service on or after November 1, 1984.

(5) The US designated airline shall have full traffic rights on the route segments London-New Delhi and London-Karachi on US Route 2 in Section 1 of Annex 1 to the Agreement until April 23, 1983 in accordance with the schedules on file with the UK aeronautical authorities.

(6) During the period April 24, 1983 through April 23, 1985, Bombay may be served as a point on Column (D) of Route 2 in Section 1 of Annex 1 to the Agreement in three of the four traffic seasons, the last of which shall for these purposes be deemed to end on April 23, 1985. When Bombay is served, no more than five flights per week may serve points in India with full traffic rights between London and India and only one point in India may be served with full traffic rights on any one of those flights.

(7) Extra sections will continue to be governed by paragraph 10 of Annex 2.

(8) Prior to April 1, 1985, the Government of the United States shall not designate additional US airlines for services between Miami and the Cayman Islands on US Route 6.

(9) A Working Group shall be established to examine on a factual basis the extent to which the operation of the procedures set out in Annex 2 to the Agreement have succeeded in avoiding either excess capacity or the under-provision of capacity, and, if necessary, to make recommendations to the Governments of the United States and the United Kingdom for the improvement of the procedures. The Working Group shall also consider replacing the expired Annex 4 to the Agreement concerning Charter Air Services with a revised annex and shall make recommendations accordingly. If the Working Group fails to agree on recommendations regarding replacement of Annex 2 to the Agreement, or if the Contracting Parties are unable to reach agreement before July 23, 1984, on whether to adopt either recommendations made by the Working Group, or other provisions replacing or modifying Annex 2, that Annex shall be extended in its present form until July 22, 1986, and shall then lapse. During the period of such extension, the Working Group and the Contracting Parties shall continue to consider revisions to Annexes 2 and 4.

(10) Each designated airline shall be entitled to operate extra sections on any gateway route segment, provided they are operated as duplicate flights to meet unforeseen short term demand for additional seats, are not sold, advertised or held out or shown in any reservations system (except in an airline's internal system for inventory control purposes) as separate flights are operated as close to the time of the flights which they duplicate as airport conditions allow.

(11) In the event that either Contracting Party believes that this Annex is not achieving the objectives set forth in paragraph (2) of this Annex, it may at any time request consultations, pursuant to Article 16 of this Agreement, to consider alterations to the procedures or numerical limitations.

(12) Subject to Article 19 (Termination) of this Agreement, this Annex shall remain in force for an initial period of 3 years from 1 November 1986. A Contracting Party may give notice in writing to the other Contracting Party of its intention to terminate this Annex. If such notice is given, this Annex shall termination twelve months later, but in no event before 31 October 1989.

(13) For the purposes of this Annex, "summer and winter traffic seasons" mean, respectively, the periods from 1 April through 31 October and from 1 November through 31 March.

Document 18

The significance of this memorandum, the outcome of lengthy negotiations (Chap. 3) lies in the documents attached to it, notably the new Annex 2 governing capacity on the North Atlantic (Attachment 3, text in Part II), the new procedures for resolving tariff issues (Attachment 5, Doc 19) and the agreement on reciprocal fitness and citizenship determinations (Attachment 6, Doc 21). The new Annex 2, and the new termination clause for Annex 5 (text below), were published in a formal Exchange of Notes, dated 25 May 1989 (Cm. 972); the agreement on reciprocal fitness and citizenship determinations was published in a separate Exchange of Notes, also dated 25 May 1989 (Cm. 973).

Memorandum of Consultations

1. Delegations representing the Governments of the United Kingdom and of the United States met in Washington, D. C. from 8 through 11 September 1986 to discuss air services. Delegation lists are at Attachments 1 and 2.
2. The delegations agreed on the text of a new Annex 2 on capacity (Attachment 3), which the respective aeronautical authorities intend to apply administratively pending confirmation by an Exchange of Notes pursuant to Article 18 of the Air Services Agreement. The new Annex will replace the special arrangements for the London/Newark route dated 9 November 1982, as amended. For the avoidance of doubt the authorized round trip frequencies for the Summer 1986 traffic season and Winter 1986/1987 traffic season which will be used in applying the provisions of the Annex are at Attachment 4.
3. The delegations agreed on the text of the following new Part V of Annex 5.

Part V Termination

(12) Subject to Article 19 (Termination) of this Agreement, this Annex shall remain in force until terminated by either Contracting Party. A Contracting Party wishing to terminate this Annex may give notice in writing to the other Contracting Party of its intention to do so. If such notice is given, the Annex shall terminate twelve months later, but in no event before 31 October 1989. Each Contracting Party shall thereupon be entitled, for the

purposes of Article 14 of this Agreement, to impose on cargo charter traffic covered by paragraph (3) of Article 14 such charter -worthiness conditions and such conditions in regard to prices and rates as it considers necessary.

Parts 1 through IV of Annex 5 will, accordingly, continue in effect. The amendment will ssssbe confirmed by an Exchange of Notes pursuant to Article 18 of the Air Services Agreement.

4. The delegations agreed on the North Atlantic passenger tariff procedures at Attachment 5. The aeronautical authorities of the two Governments will implement these procedures immediately. The delegations thus expect that tariffs now before their aeronautical authorities or submitted in the near future will be considered promptly on their merits.
5. The delegations agreed on the text of a draft Exchange of Notes constituting an agreement on the reciprocal recognition of fitness and citizenship determinations (Attachment 6).
6. The delegations agreed to hold further negotiations on a replacement for Annex 4 (Charter Air Service), on competition law issues, on market access and on future US-UK pricing arrangements.
7. The U.S. delegation reiterated the U.S. Government's objection that the proposed U.K. rule banning all-cargo flights at Heathrow and Gatwick during peak hours would unfairly discriminate against Flying Tigers. The U.K. delegation stated that it would respond to the U.S. diplomatic note of 2 September 1986 on this subject, but emphasized that the new rules would have no practical effect before next April and that they were expected to make provision for airlines to seek exemptions.
8. The U.K. delegation informed the U.S. delegation that the U.K. proposal to revise the permits of U.S. airlines would be revised to reflect as necessary the new arrangements referred to above. The proposals would therefore be withdrawn forthwith and, after due consideration of the views already expressed by the U.S. Government and U.S. airlines, new proposals would be circulated as soon as possible.

Handley Stevens
Chairman
UK Delegation

Jeffrey N. Shane
Chairman
US Delegation

Washington, DC
11 September 1986

Document 19

These agreed procedures were attached to the Memorandum of Consultations at Document 18. Although they carry forward the gradual process of tariff liberalization already seen in Documents 7 and 9, they bear witness, alongside the unilateral US Information Note at Document 20, to the continuing tensions generated by the Treaty's tariff approval procedures (Article 12).

North Atlantic Passenger Tariff Procedures

The following procedures regarding filing of and decisions on passenger tariffs will be applied by the aeronautical authorities of the Contracting Parties, without prejudice to the right or either to revert, after giving written notice, to the procedures set forth in Article 12 of the Air Services Agreement.

(1) The filing period referred to in paragraphs (5) and (6) of Article 12 of the Air Services Agreement is reduced to 30 days, and notices of dissatisfaction referred to in paragraph (6) of Article 12 will be delivered within 15 days of the date of receipt of the tariff filing.

(2) (a) Tariff filings (hereinafter referred to as "filings") or applications for short-notice approval (hereinafter referred to as "applications") will be lodged with the aeronautical authorities of both Contracting Parties at the same time (within two working days), and neither Contracting Party's aeronautical authorities will approve, or permit to become effective, filings or applications of designated airlines of either Contracting Party which do not state that a comparable filing or application is being lodged with the aeronautical authorities of the other Contracting Party.

(b) Proposed tariffs may not be sold, advertised or listed in computer reservations and fare quote systems until a filing or application has been lodged with the aeronautical authorities of both Contracting Parties.

(3) The aeronautical authorities of each Contracting Party will provide a notification in writing of their decision on each filing or application, together with their reasons therefore in *the case of a disapproval, to the airline which has submitted the filing or application, or to the airline's tariff agent, within 15 days of receipt of such filing or application. Notification of disapproval will be provided to the aeronautical authorities of the other Contracting Party within 15 days of receipt of the filing or application by a designated airline of that other Contracting Party. If the aeronautical authorities of either Contracting Party disapprove a filing or application, all sales of proposed tariffs covered by such filing or application shall cease by 2359 hours local time on the second business day following receipt of such disapproval.

(4) Filings or applications in the following categories will be approved expeditiously, and the aeronautical authorities will use their best efforts to act on such filings or applications within three business days of receipt:

  (i) matching tariffs (i.e., tariffs with the same, closely equivalent or more restrictive conditions); and
  (ii) tariffs which qualify for "automatic approval" under the terms of the US-ECAC MOU.

(5) Neither Contracting Party's aeronautical authorities will impose more restrictive tariff filing or application procedures on designated airlines of the other contracting Party than they impose on their own designated airlines.

(6) Within 28 days of a filing or application being disapproved, the aeronautical authorities of either Contracting\party may refuse to accept a refiling or re-application that includes one or more of the elements identified as *the reason(s) for the initial disapproval. In so doing, they will promptly notify the aeronautical authorities of the other contracting Party of the action they have taken.

(7) The aeronautical authorities of each Contracting Party will provide the aeronautical authorities of the other contracting Party and the designated airlines of the other contracting Party with reasonable notice, in writing, at the same time notice is provided to their own airlines, of any proposed changes in their policy, guidance or procedures regarding tariffs.

DOCUMENT 20

This note, complementing the agreed procedures at Document 19, was not attached to the agreed Memorandum of Consultations (Document 18), since it was a unilateral statement by the US Department of Transportation.

Information on US Department of Transportation Special Tariff Permission Procedures

During the consultations held 8–11 September 1986, in Washington, DC, members of the UK delegation made a number of inquiries about the US Department of Transportation's policies and procedures regarding special tariff permission (STP) applications. In response to those inquiries, the staff of the US Department of Transportation has provided the following information.

Once a carrier files an STP application with the Department, it is free to market, advertise, issue tickets and carry traffic under the fares and conditions contained in the STP application, on a "Subject to government approval" basis. Therefore, the relevant fares may be loaded into computer reservations and farequote systems with a "subject to government approval" annotation once the STP application is received by the Department.

The denial of an STP application has the same practical effect as the rejection or suspension of a statutory tariff filing. In each case, the affected fares should no longer be held out to the public.

The STP approval or "grant" number is assigned when the Department decides to approve an STP application. The number is used for internal control purposes and is referred to by the filing carrier when it files the tariff pages containing the relevant fare changes. STP approval numbers are often communicated telephonically to the filing carrier or its agent, and the STP is considered to be approved at that time. It should be noted that the approval or denial of an STP application is a discretionary action, and there are rare instances when an approval number is assigned in error; when the error is discovered, the Tariffs Division immediately telephones the carrier or its agent and withdraws the number.

Carriers may submit a statutory tariff filing and an STP application covering the same proposed changes at the same time, and either may be submitted in advance of the other. After an STP application has been approved,

the tariff pages containing the approved changes must be filed within 15 days if the carrier wishes to use the short-notice permission it sought in its STP application. However, the Department may allow exceptions to the 15-day rule upon showing a good cause.

Once an STP application is approved, the tariff pages effecting the proposed changes will be allowed to become effective automatically once they are filed, unless the STP approval is rescinded.

US Department of Transportation
11 September 1986

Document 21

A draft of this Exchange of Notes on the reciprocal recognition of fitness and citizenship determinations, a prerequisite for the licensing of airlines, was attached to the Memorandum of Consultations at Document 18. The 1986 text is shown below where it differs from the final version published on 25 May 1989 (Cmd 793).

Exchange of Notes

Draft text (11 September 1986)	*Final text (25 May 1989)*
between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the reciprocal, recognition of fitness and citizenship determinations made for the purposes of certain international air services.	between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the licensing of their respective airlines to operate International Air Services.
Excellency,	Excellency,
I have the honor to refer to discussions which have taken place between representatives of our aeronautical authorities relating to the criteria and procedures currently employed by them in determining whether their respective airlines may be licensed under their respective national laws; to operate international air services. As a result of those discussions it is my understanding that our two Governments are satisfied that the criteria and procedures currently employed provide a basis for an agreement having as its purpose the facilitation of the prompt issuance of operating authorisations and technical permissions to each other's airlines. I therefore have the honour to propose an Agreement in the following terms.	I have the honor to refer to discussions which have taken place between representatives of the aeronautical authorities of the United Kingdom of Great Britain and Northern Ireland relating to the criteria and procedures currently employed by them in determining whether their respective airlines may be licensed under their respective national laws; to operate international air services. As a result of those discussions I have the honour to propose an Agreement in the following terms:

1. Scope of the Agreement

   This Agreement specifies procedures for implementing the obligations of each Contracting Party under Bermuda 2 to grant certain operating authorisations and technical permissions to airlines designated by the other Contracting Party, and does not effect any change in those obligations. This Agreement shall apply to airlines designated

under Bermuda 2 for services US Routes 1, 2 and 7; UK Routes 1, 2, 3, 4, 5, 10, 11 and 12; and for transatlantic charter air services.

2. Definitions

For the purposes of this Agreement:

(a) "Bermuda 2" means the Air Services Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, signed at Bermuda on 23 July 1977, as amended;
(b) "Fitness criteria" means those factors by which each of the aeronautical authorities determines in accordance with their respective national laws whether an airline is fit to operate the international air services for which it has applied to those authorities for a license, that is to say, whether it has satisfactory financial capability, adequate managerial expertise and is disposed to comply with the laws, regulations and requirements which govern the operation of such services;
(c) "Citizenship criteria" means those factors by which the aeronautical authorities of each Contracting Party determine whether an airline is substantially owned and effectively controlled by that Contracting Party or by its nationals;
(d) "Fitness determination" means a finding by the aeronautical authorities of a Contracting Party that an airline has met their fitness criteria;
(e) "Citizenship determination" means a finding by the aeronautical authorities of a Contracting Party that an airline has met their citizenship criteria;
(f) "Aeronautical authorities" has the same meaning as in Bermuda 2;
(g) "Operating authorizations and technical permissions" means, in the case of the United States, permits or exemptions issued under Title IV of the Federal Aviation Act, and, in the case of the United Kingdom, permits issued under Article 83 of the Air Navigation Order 1985.

3. Reciprocal Recognition of Determinations

(a) This Agreement shall apply whenever an airline which has been designated under Bermuda 2 by one Contracting Party applies to the other Contracting Party for appropriate operating authorizations and technical permissions. When considering such application

the aeronautical authorities of the latter Contracting Party shall give the same validity to any fitness or citizenship determination made by the aeronautical authorities of the other Contracting Party as if the determination had been made by its own aeronautical authorities, and shall not inquire further (word added in 1989) into the question of fitness or citizenship, except as provided in subparagraph (b) of this paragraph.

(b) If after receipt of such an application the aeronautical authorities have a specific reason for believing that, despite the determinations made by the aeronautical authorities of the other Contracting Party, the conditions prescribed in Bermuda 2 for the grant of the appropriate operating authorizations or technical permissions have not been met, the aeronautical authorities which received the application shall promptly inform the aeronautical authorities of the other Contracting Party, giving reasons, so that the latter can, if they so desire, request consultations pursuant to Article 3(6) or Article 14(4) of Bermuda 2, as the case may be.

4. Procedure

(a) If necessary, procedures for implementing the provisions of this Agreement may be agreed from time to time between the aeronautical authorities.

(b) The Contracting Parties shall encourage co-operation and assistance between their respective aeronautical authorities in developing, as necessary, their fitness and citizenship criteria.

(c) Each of the aeronautical authorities shall inform the other of any proposals for any material change to the fitness and citizenship criteria which it applies.

(d) If a Contracting Party intends to effect any such change it shall give the other Contracting Party at least 90 days notice of such intention. If the other Contracting Party requests consultations they shall be held within 30 days of such request.

(e) If, following such consultations, the Contracting Party requesting them considers the fitness or citizenship criteria, if so changed, would no longer be satisfactory for the purposes of the Agreement, it may notify the other contracting Party of this and that, if the changes come into effect, it will regard the Agreement to have terminated on the date they come into effect.

5. Termination

Without prejudice to the provisions of paragraph 4 (e), either Contracting Party may terminate this Agreement at any time by giving not less than 60 days written notice to that effect to the other.

If the foregoing proposals are acceptable to the Government of the United Kingdom of Great Britain and Northern Ireland, I have the honour to propose that the present Note, together with your reply in that sense, shall constitute an Agreement between our two Governments which shall enter into force on the date of your reply.

Accept, Excellency, the renewed assurance of my highest consideration.

For the Secretary of State
Charles Angevine

A. J. Hunt (for the Ambassador) replied on the same day in identical terms.

DOCUMENT 22

These four letters about services between the United States and the Cayman Islands illustrate the pragmatic arrangements that could be made to enable a UK-designated airline (Cayman Airways) to survive in a market dominated by US airlines.

Letter 1

DESIGNATION OF CARRIERS BETWEEN MIAMI AND THE CAYMAN ISLANDS

US Embassy
London
9 November 1982

Mr. C.W. Roberts
Department of Trade
London SW1

Dear Christopher,

In the course of our civil aviation negotiations concluded this day, the United States delegation agreed that until April 1, 1985 the United States would not exercise its right to designate additional carriers to provide services between Miami and the Cayman Islands.

In addition, I indicated that although I would not be able to guarantee that the United States would give additional rights to Cayman Airways, the United States would seriously and expeditiously consider any request from Cayman Airways for new authority to serve any other United States Cayman route on which a United States airline commences services.

Sincerely,
Matthew V. Scocozza
Deputy Assistant Secretary for Transportation and Telecommunications
Department of State

The first paragraph above repeats the undertaking given in paragraph 12 of the Memorandum of Consultations at Document 15, adding to it the less formal offer in paragraph 2. The three letters from 1986 which follow show how these undertakings played out.

Letter 2

GRANT OF ADDITIONAL RIGHTS TO CAYMAN AIRWAYS

Department of State
Washington, DC
17 October 1986

Roger Maynard
British Embassy
Washington, DC

Dear Mr Maynard,

US aviation authorities have considered the request by Her Majesty's Government on behalf of the Cayman Islands and Cayman Airways.

On the basis that the current moratorium on additional US airline designations between Miami and the Cayman Islands terminates on November 30, 1986, the US Government is prepared to agree that, for the operations by Cayman Airways on UK Routes 9 and 16, Column (C) shall be considered as reading, in its entirety: Miami, Houston, and three additional points in the United States. The three additional points may be changed by giving 60 days' prior notice to the US authorities through diplomatic channels. Moreover, in addition to the points listed in Column (B) of UK Routes 9 and 16, Antigua, Dominica, St Christopher, St Kitts, Nevis, St Lucia, St Vincent, and Belize shall be considered as appearing in Column (B) rather than Column (A).

These rights will be available to Cayman Airways, or to its successor airline based in the Cayman Islands, provided that the operations of US airlines to the Cayman Islands are not restricted pursuant to either Paragraph (4) of Article 3 of the US-UK Air Services Agreement or the July 23, 1977, exchange of letters between Alan S Boyd and W Patrick Shovelton on Statements of Interpretation of the Agreement.

The US authorities confirm that, based on current charter reciprocity and comity, Cayman Airways may operate planeload charters between US

and British points without prior approval. Requests for approval of charter flights between US points and non-British points will be subject to the usual decisional criteria applied by the Department of Transportation to such requests.

If the foregoing proposals are acceptable to the Government of the United Kingdom of Great Britain and Northern Ireland, I propose that they be applied administratively pending confirmation by an Exchange of Notes pursuant to Article 18 of the Air Services Agreement.

Sincerely,
Jeffrey N. Shane
Deputy Assistant Secretary for Transportation Affairs

Letter 3

PROTECTION OF CAYMAN AIRWAYS FROM EXCESSIVE COMPETITION

British Embassy
Washington, DC
10 November 1986

Jeffrey Shane
Department of State
Washington, DC

Dear Jeff,

Thank you for your letter of 17 October concerning proposals by Her Majesty's Government on behalf of the Cayman Islands Government and Cayman Airways. After giving further thought to your response I can confirm that Her Majesty's Government can agree that the current moratorium on additional US airline designations between Miami and the Cayman Islands terminates on 30 November 1986 on the basis that the US Government is prepared to agree that for the operations by Cayman Airways on UK Routes 9 and 16, Column (C) shall be considered as reading, in its entirety: Miami, Houston and three additional points in the United States. The three additional points may be changed by giving 60 days prior notice to US authorities through diplomatic channels. Moreover, in addition to the points listed in Column (B) of UK Routes 9 and 16, Antigua, Dominica, St Christopher and Nevis, St Lucia, St Vincent and the Grenadines and Belize shall be considered as appearing in Column (B) rather than Column (A).

Your 17 October letter notes that operations of United States airlines to the Cayman Islands are not to be restricted pursuant to the 23 July 1977 exchange of letters between Alan S Boyd and Patrick Shovelton. Among other things, those letters contained a discussion of the provision of the United States-United Kingdom Air Services Agreement concerning "Designation and Authorization of Airlines" (Article 3). And they specify a mechanism under which Her Majesty's Government can notify your Government concerning "designations believed to be excessive". Her Majesty's Government point out that the provisions of the 23 July 1977 exchange of letters concern excessive designation under Article 3, not excessive capacity under Article 11. Under Article 11, Her Majesty's Government agreed upon a procedure for consultations to remedy "airline actions leading to excess capacity". By agreeing not to invoke the 23 July 1977 exchange of letters provisions concerning excessive designations under Article 3, Her Majesty's Government and the Cayman Islands Government do not waive any of their rights under Article 11 (and Article 12).

Although the Cayman Islands Government appreciates the United States Government's willingness to grant new routes to Cayman Airways, it notes that the moratorium will end before Cayman Airways has an opportunity to commence operations on those routes. During the transitional period especially, the Cayman Islands Government believes that Cayman Airways will remain vulnerable to the impact of excessive competition and fare discounting. The Cayman Islands Government regards its national airlines survival as crucial to national interest: the airline's demise would have serious political and economic consequences, which could in fact destabilise the Cayman Islands. Accordingly, the Cayman Islands Government expects that United States airlines serving the Cayman Islands will exercise self-restraint concerning capacity and fares.

I also note that the US authorities have confirmed that based on current charter, reciprocity and comity, Cayman Airways may operate plane load charters between the US and British points without prior approval. Requests for approval of charter flights between US points and non-British points will be subject to the usual decisional criteria applied by the Department of Transportation to such requests.

Finally I note that the US proposes to apply these proposals administratively pending confirmation by an Exchange of Notes pursuant to Article 18 of the Air Services Agreement.

Sincerely,
Roger Maynard
Counsellor (Civil Aviation and Shipping)

Letter 4

A CAREFUL STAND-OFF

Department of State
Washington, DC
5 December 1986

Roger Maynard
British Embassy
Washington, DC

Dear Mr Maynard,

This is to acknowledge receipt of your Government's letter of 10 November in which you agreed that the moratorium on additional US airline designations between Miami and the Cayman Islands would terminate 30 November 1986 on the basis that the United States would agree to operations by Cayman Airways as described in your letter and in our letter to you of 17 October. As your letter indicated, I have understood that the proposals concerning Cayman Airways and its operations, and the operations of US carriers to the Cayman Islands, are being administratively applied pending confirmation by an Exchange of Notes.

With regard to the views expressed in your 10 November letter on the applicability of Article 11 (*Fair Competition*), we agree that the proposals recently exchanged do not rescind the right of either Contracting Party to use the procedure in the Article which provides for consultations and precludes unilateral action. However, I must point out that we were led to believe that the additional route authority for Cayman Airways, would be used to allocate resources to the most promising markets and to assist the airline to adapt its operations to the changing competitive environment. In the context of this grant, which provides substantially increased route authority and flexibility for Cayman Airways, we would not expect to be faced with a dispute regarding capacity attendant to new entry (i.e., at least up to a daily service by each carrier serving in a city pair) or a restrictive interpretation of Article 11 as a substitute for the 23 July 1977 Boyd-Shovelton letters.

As anticipated in our correspondence of 10 November and 7 October 1986, US authorities would expect expeditious United Kingdom approval of new US carrier services to the Cayman Islands, assuming normal requirements are met by the carriers, under administrative application of these proposals pending confirmation by an exchange of

notes pursuant to article 18. We, for our part, would plan to give similar treatment of any new service applications from Cayman Airways during this period.

Sincerely,
Jeffrey N. Shane
Deputy Assistant Secretary for Transportation Affairs

It would appear that these assurances were not sufficient. The story continues at paragraphs 4–8 of Document 23, which provides for equal sharing of capacity between Cayman Airways and US airlines taken together on any gateway route segment served by airlines of both parties.

DOCUMENT 23

These two letters about services between the United States and Bermuda, and their replies of the same date confirming acceptance of the proposals, are an example of correspondence which had the effect of amending the route schedules at Annex 1 to the Agreement even though there is no record of any more formal amendment being concluded. Paragraph 3 of the 1991 letter also enhanced the rights available to Cayman Airways under UK Route 9A, continuing the developments noted in Documents 22 and 24.

Letter 1

RECIPROCAL ADDITIONS TO US ROUTE 4 AND UK ROUTE 8 (BERMUDA)

Department of State
Washington, DC
28 March 1989

David McMillan
First Secretary (Civil Aviation and Shipping)
British Embassy
Washington, DC

Dear Mr McMillan,

This letter is in reference to the recent discussions between the Departments of State and Transportation and the British Embassy in Washington regarding an amendment of the United States—United Kingdom Air Services Agreement of 1977 (the Agreement), to expand air services between the United States and Bermuda.

It is the understanding of the United States Government that two changes will be made to the Agreement's route schedules. First, a new US gateway point, Raleigh-Durham, will be added to column (A) of US Route 4. Second, a new US gateway point will be added to column (C) of UK Route 8 of the Agreement, to be chosen by the appropriate authorities of the United Kingdom. Each Contracting Party may change its new gateway point upon 90 days' notice to the other Contracting Party.

This letter and your reply confirming this understanding will allow the new opportunities to be exercised provisionally pending conclusion of an amendment of the Agreement in accordance with Article 18.

Sincerely,
Janice Bay
Director
Office of Aviation Negotiations

Letter 2

FURTHER RECIPROCAL ADDITIONS TO BERMUDA AND CAYMAN ROUTES

Department of State
Washington, DC
13 November 1991

Mr Roy Griffins
Counsellor (Transport)
British Embassy
Washington, DC

Dear Roy,

USAir wishes to begin a Charlotte-Bermuda service and based on our discussions, we understand the UK authorities are prepared to allow USAir to provide such service for at least one year commencing on 1 March 1992. This operation, which is to be permitted on the basis of comity and reciprocity is to be in addition to those rights available on US route 4 to the Bermuda 2 Agreement. On the basis of comity and reciprocity, US authorities are prepared to allow a UK-designated airline to operate between Bermuda and a US gateway selected by UK authorities in addition to those rights available on UK Route 8 for a period coextensive with the period for which USAir's Charlotte-Bermuda operation is permitted.

It is our understanding that the arrangement in the foregoing paragraph may be terminated at any time after March 1, 1993, by either side giving notice of termination to the other. The arrangement would then terminate either at the end of the traffic season in which the notice was given or after 90 days, whichever is later.

I am also pleased to express the intent of my government to amend the Bermuda 2 agreement to permit the UK authorities to select a further gateway point in addition to those already available under Column (C) of UK Route 9A. Until such time as that amendment is concluded, it is the intention of the US aeronautical authorities to permit such operations on the basis of comity and reciprocity.

I also confirm that we recognise the importance of air service to the region, and accordingly the US authorities will play their full part in seeing that the designated airlines of both parties have a fair and equal opportunity to compete in the provision of air services between US territory and the UK Caribbean dependent territories, and will use their good offices with US airlines to encourage appropriate commercial arrangements with UK-designated airlines based in those territories.

If this arrangement is acceptable to your government, I would appreciate a letter from you to that effect.

Sincerely,
James R. Tarrant
Acting Deputy Assistant Secretary
for Transportation Affairs

Document 24

This summary of negotiations, attached to a letter dated 27 July 1990 from the State Department to British Embassy, Washington, deals with:

1. *additional rights to and from UK regional airports (paragraphs 1 and 3);*
2. *second UK designation for Boston (paragraph 2); and*
3. *further access to the US market for Cayman Airways, with equal sharing of capacity with US airlines serving the same cities (paragraphs 4–8).*

The letter proposed, and the reply confirmed, that these understandings should be implemented on the basis of comity and reciprocity without waiting for a formal Exchange of Notes to be prepared.

1. The Government of the United States of America shall have the right to select three additional gateway route segment opportunities for inclusion in US route 1 in Section 1 of Annex 1 to the Agreement between any point or points in the United States and any point or points in the United Kingdom, excluding London. The Government of the United States shall select, for one of the three additional gateway route segment opportunities, the Chicago-Manchester gateway route segment currently operated by American Airlines. The Government of the United States may change its selection of any or all of these opportunities upon 60 days' notice to the Government of the United Kingdom. 1 provisions of the Agreement shall apply.
2. The Government of the United Kingdom shall have the right to designate a second airline for the gateway route segment London-Boston as set forth in UK route 1 Section 3 of Annex 1 of the Agreement. The Government of the United States shall accept such designation under paragraph 5 of Article 3 of the Agreement. All provisions of the Agreement shall apply. Traffic carried by airlines designated under paragraph 5 of Article 3 of the Agreement on Boston-London gateway route segment by the Government of the United States and on the London-Boston, gateway route segment by the Government of the United Kingdom shall not count towards the passenger traffic levels specified under Article 3 (2) (b) (i) of the Agreement.

3. The Government of the United Kingdom shall have the right to select two additional gateway route segment opportunities between any point or points in the United Kingdom excluding London, and any point or points in the United States. Either or both of these gateway route segment opportunities may be used to designate an airline or airlines on a new or existing gateway route segment or segments. For the purposes of these additional opportunities, the provisions of Article 3 (2) and paragraphs 1, 2, 3, 5 and 6 of Section 5 of Annex 1 shall not apply. The Government of the United Kingdom may change its selection of either or both of these opportunities upon 60 days notice to the Government of the United States of America. All other provisions of the Agreement shall apply.
4. The Government of the United Kingdom shall have the right to select an additional point in the United States to be operated by Cayman Airways. This point shall be added to the UK route 9.
5. Airlines of the United States shall be limited in aggregate to four round trips a day between Miami/Fort Lauderdale and Grand Cayman. Cayman Airways shall also be limited to a maximum of four round trips a day between Miami/Fort Lauderdale and Grand Cayman. This provision shall terminate on March 31, 1993.
6. United States designated airlines shall have the right to operate, in aggregate, to each of the points in the United States that .Cayman Airways serves, excluding Miami/Fort Lauderdale, as many gateway route segment frequencies as. Cayman Airways. operates to each of those points. This provision shall terminate on March 31, 1993.
7. A United States, designated airline operating between Grand Cayman and Miami/Fort Lauderdale shall have the right to exceed the frequencies to a United States point or points referred to in paragraph (6) above, provided that it shall reduce its frequencies between Grand Cayman Miami/Fort Lauderdale correspondingly. These frequencies shall not be replaced while they are being used at the alternative gateway; however, the United States designated airline shall have the right to transfer the frequencies back to the Grand Cayman and Miami/Fort Lauderdale route, provided that the frequencies on the routes between the other United States point or points and Grand Cayman are correspondingly reduced. This provision shall terminate on March 31, 1993.
8. There shall be no limitation placed on the frequencies operated by United States airlines between any US gateway point and Grand Cayman which is not served by Cayman Airways.

Document 25

This Memorandum of Consultations, together with the attached draft Exchange of Notes, concluded the Heathrow Succession Negotiations (Chap. 4). It sets out all the changes agreed in those negotiations, as well as other changes outstanding from earlier negotiations, notably those in Document 23. In addition to extensive changes to the Route Schedule, and a further increase in the scope for multiple designation, mostly for the benefit of UK-designated airlines, the Exchange of Notes begins to establish the ground rules for code sharing (added to Annex 1 Section 5) and for joint ventures (Section C below). The Notes were never formally exchanged, but the covering Memorandum of Consultations, gave the changes immediate effect on the basis of comity and reciprocity.

Memorandum of Consultations

Delegations representing the Government of the United Kingdom and the Government of the United States of America met in Washington DC from March 7–11, 1991. Delegation lists are at Attachment 1.

The delegations reached agreement on a set of changes regarding the US-UK Air Services Agreement (at Attachment 2) which will enter into force upon an exchange of notes. The delegations stated that their aeronautical authorities intend to apply the provisions of the attached text, from and after March 11, 1991, on the basis of comity and reciprocity, pending the exchange of notes. The delegations also confirmed that changes to Section 7 of Annex 1 of the Agreement with respect to operations between Boston and Heathrow remained open for consideration by both sides.

The US delegation welcomed the decision of the UK Government to liberalise its rules relating to the use of the various London airports. With regard to these rules, the UK delegation noted that the statements made in Mr Shovelton's letter of April 25, 1978, to Mr Atwood and Mr Roberts' letter of December 4, 1980, to Mr Hight, that are now inconsistent with the current traffic distribution rules or with the provisions of the attached amendments to the Agreement, are no longer applicable.

Both delegations considered that they should now seek to liberalise the air services arrangements between their two countries, and to this end they undertook to hold a further meeting on this subject within three months. They both expressed the hope that this liberalisation could be achieved as soon as possible.

For the Delegation of the
United Kingdom
David Moss
Chairman

For the Delegation of the
United States of America
Charles Angevine
Chairman

Washington, DC
11 March 1991

Draft Exchange of Notes Amending the Air Service Agreement

Department of State
Washington, DC
1991

Excellency,

I have the honour to refer to the Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland concerning Air Services, signed at Bermuda on 23 July 1977, as amended (hereinafter referred to as the "Agreement"); the exchange of letters between the British Embassy and the Department of State, which rested with the latter's letter dated 5 December 1986, regarding air services between the Cayman Islands and the United States; to the Memorandum of Consultations, dated 8 September 1988, regarding air services between Hong Kong and the United States; to the exchange of letters between the Department of State and the British Embassy, dated 28 March 1989, regarding air services between Bermuda and the United States; to the exchange of letters between the Department of State and the British Embassy, dated 27 July 1990, regarding transatlantic and Cayman air services; and to the Memorandum of Consultations dated 11 March 1991.

In accordance with Article 18 of the Agreement, I have the honour to propose that:

There follow detailed amendments and additions to UK Routes 1, 2, 3, 4, 5A, 5B, 6, 8, 9, 9A, 13, 16, and 16A; and US Routes 1, 3, 4, and 8 (for details see the Route Schedules at Annex 1 of the Agreement in Part II).

There were also additions or amendments to:

Annex 1, Section 5, new paragraphs 10 and 11, to govern commercial arrangements for UK and US airlines, including code-sharing.

Annex 1, Section 6, new paragraph 10 permitting the UK to select additional gateways in the US and/or to designate additional airlines to serve existing gateways.

Annex 1, Section 7, London Airports

All the new texts are included in the Agreement at Part II

The Exchange of Notes continues as follows:

In addition to the amendments to the Agreement enumerated above, I have the further honour to propose that:

(A) The Government of the United Kingdom shall have the right to designate a second airline for the gateway route segment London-Boston as set forth in UK Route 1 in Section 3 of Annex 1 to the Agreement. The Government of the United States shall accept such designation under paragraph 5 of Article 3 of the Agreement. Traffic carried by airlines designated under paragraph 5 of Article 3 of the Agreement on the Boston-London gateway route segment by the Government of the United States and on the London-Boston gateway route segment by the Government of the United Kingdom shall not count towards the passenger traffic levels specified under Article 3(2) (b) (i) of the Agreement.

(B) Where nationals of the United Kingdom hold an ownership interest of less than 50 per cent of an airline incorporated and having its principal place of business in another Member State of the European Community, the government of the United States will not object to the airline's entitlement to provide air services under the bilateral arrangement between the United States and that other Member

State solely on the basis of the UK ownership interest or on the basis that the UK ownership constitutes control or effective control.

(C) With respect to joint venture arrangements:

(1) Notwithstanding Articles 3 (6) (a) and 5(1) (a) of the Agreement, the agreed services on. UK Routes 1, 2, 3, 4, and 5 in Annex 1 of the Agreement may be operated to a point or points in Luxembourg, the Netherlands, Belgium and/or the Republic of Ireland behind or as an intermediate point to any gateway point shown in Column (A) of those Routes under a joint venture arrangement between that designated airline and an airline incorporated and having its principal place of business in the country concerned.

(2) The Government of the United States of America agrees to approve requests from the Government of the United Kingdom that a designated airline of the United Kingdom be permitted to enter into a joint venture arrangement with an airline incorporated and having its principal place of business in the Republic of France or in the Federal Republic of Germany to provide service to gateway points in the United States which are available under both the US-UK Air Services Agreement and under the air services arrangements between the United States and France or Germany, as the case may be.

(3) The Government of the United States of America agrees that it is willing to consider sympathetically any request from the Government of the United Kingdom that a designated airline of the United Kingdom be permitted to enter into a joint venture arrangement, with an airline incorporated and having its principal place of business in any other country to provide service to gateway points in the United States which are available under both the US-UK Air Services Agreement and under the air services arrangements between the United States and the country concerned. In considering such requests, the Government of the United States will consider the overall aviation relationship between the United States and the country whose airline would participate in the joint venture.

(4) In instances in which a joint venture arrangement of the kind referred to in subparagraph (1) has been entered into, the designated airline of the United Kingdom and/or the airline with which it has that arrangement may serve any point behind any

gateway point shown in Column (A) of UK Routes 1, 2, 3, 4, and 5 in Annex 1 to the Agreement with or without change of aircraft or flight number and may hold out and advertise such services to the public as through services.

Section (D) is not included here, since it simply repeats the terms of the undertakings in paragraphs 5–8 of Document 24, setting out temporary capacity arrangements for Atlantic Combination services up to the end of the winter season 1993/1994, and for US-Cayman Islands services up to 31 March 1993.

Section (E) below made doubly sure that the old provisions governing the use of London Airports (Docs 6 and 14) were completely superseded by the new Annex 1 Section 7.

(E) The Statements made in Mr W P Shovelton's letter of April 25, 1978, to Mr James R Atwood and Mr C W Roberts' letter of December 4, 1980, to Mr B Boyd Hight, that are now inconsistent with the current traffic distribution rules or with the provisions of the Agreement, as amended herein, are no longer applicable.

If the foregoing proposals are acceptable to the Government of the United Kingdom of Great Britain and Northern Ireland, I have the honour to propose that the present Note and its enclosures, together with your affirmative reply, shall constitute an Agreement between our two Governments which shall enter into force on the date of your note in reply.

Accept, Excellency, the renewed assurances of my highest consideration.

For the Secretary of State:

It was proposed that Charles Angevine should sign the Note for the Secretary of State, and that Roy Griffins, on behalf of the UK Ambassador, should confirm UK acceptance of these proposals in a Note repeating them in identical terms, but this appears not to have taken place. When the documents associated with Bermuda 2 were listed in the Official Journal of the European Union dated 25 May 2007, in the Annex to the EU-US Air Transport Agreement (OJL 134), this Memorandum (with its attachments) was listed among the arrangements being provisionally applied.

Document 26

This Exchange of Notes sets out the terms on which the Heathrow User Charges Dispute was settled (Chap. 4). Conrad Harper, for the Secretary of State, replied in identical terms on the same day. The Treaty amendments which were set out in Attachment 1 can be found at Article 1 (o) and Article 10 of the Treaty text in Part II. Attachments 2, 3 and 4 are not included here, but can be found in the text published by HMSO (Cm 2711).

Exchange of Notes Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning Airport User Charges

Her Majesty's Ambassador at Washington to the Secretary of State of the United States of America

British Embassy
Washington
11 March 1994

I have the honour to refer to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning Air Services, with annexes and exchange of letters, done at Bermuda on 23 July 1977, as amended ("the Agreement"). I have the further honour to refer to (i) the US/UK Arbitration Concerning Heathrow Airport User Charges (the "Heathrow Arbitration"), initiated by the Government of the United States of America on 16 December 1988, and (ii) the request for arbitration made by the Government of the United Kingdom in its Embassy's Note No. 87 of 13 October 1993 (the "UK Arbitration"), both of which were submitted under Article 17 of the Agreement.

I have the further honour to refer to recent discussions between representatives of our two governments that were initiated to enable our governments to terminate the Heathrow Arbitration and the UK Arbitration and to fully and finally settle the matters that gave rise to those proceedings. As a result of these discussions, I hereby propose that our Governments agree upon the following terms and conditions for termination and settlement:

(a) Article l (o) and Article 10 of the Agreement shall be deleted and the texts set out in Attachment 1 hereto shall be substituted therefor.
(b) The Memorandum of Understanding between the two Governments on airport user charges, signed at Washington on 6 April 1983, will cease to have effect.
(c) On 11 March 1994, the Government of the United Kingdom shall pay to the Government of the United States of America and the Government of the United States of America shall accept the sum of United States $29,500,000.00 (twenty-nine million, five hundred thousand United States dollars).
(d) On 11 March 1994, representatives of the Governments of the United States of America and the United Kingdom shall discontinue the Heathrow Arbitration by filing with the Heathrow Arbitral Tribunal a joint notification to that effect pursuant to Rule 24(1) of the Tribunal's Rules of Procedure. The Governments of the United States of America and the United Kingdom shall regard as fully and finally settled all claims of the Government of the United States of America relating to user charges imposed at Heathrow Airport in the period up to and including 31 March 1994. The effect of this final settlement is that the United States Government shall no longer pursue any claims against the Government of the United Kingdom relating to the user charges imposed at Heathrow Airport in the period up to and including 31 March 1994, and shall regard those claims as permanently extinguished.
(e) The Government of the United Kingdom hereby irrevocably withdraws the request made in its Embassy's Note No. 87 of 13 October 1993 that the dispute concerning the compliance by the Government of the United States of America with its obligations under Article 10 of the Agreement should be referred to arbitration under Article 17 of the Agreement. The Governments of the United Kingdom and the United States of America shall regard as fully and finally settled all claims of the Government of the United Kingdom relating to United States Government compliance with Article 10 of the Agreement in the period up to and including 31 March 1994. The effect of this final settlement is that the Government of the United Kingdom shall no longer pursue any claims against the Government of the United States of America relating to United States Government compliance with Article 10 of the Agreement in the period up to and including 31 March 1994, and shall regard those claims as permanently extinguished.

(f) In relation to the charges imposed upon U.S. airlines at Heathrow Airport in the future:

(i) the current differential between the peak and off-peak international passenger charges shall be phased out in four substantially proportionate instalments over the period 1 April 1995 to 1 April 1998, so that this differential is entirely eliminated as from 1 April 1998;

(ii) a peak international passenger charge shall not be re-introduced before 1 April 2003 or, provided that the planning permission for Heathrow Airport's Terminal 5 is granted before 1 April 2003 and construction has begun before that date, the date on which the first phase of Terminal 5 is opened for commercial use, whichever is the later;

(iii) there is no current intention to re-introduce a peak international passenger charge after the date established in sub-paragraph (ii) above, and in any event the present policy is to introduce changes to the pricing structure at Heathrow Airport on a gradual basis after consultation with users;

(iv) there shall be no change in the relative levels of landing, passenger and parking charges at Heathrow Airport, whilst peak international passenger charge is being phased out in accordance with sub-paragraph (i) above;

(v) there is no current intention to change the relative levels referred to in sub-paragraph (iv) above, after the peak international passenger charge is phased out;

(vi) the level of charges for parking shall not be increased relative to the level of total user charges, at least until the date established in sub-paragraph (ii) above;

(vii) a weight-related element in peak period landing charges shall not be re-introduced, and that part of off-peak landing charges attributable to aircraft weight shall not be raised relative to the overall level of off-peak landing charges, at least until the date set out in sub-paragraph (ii) above;

(viii) there is no current intention to depart at any time in the future from the principle that no distinction shall be made as to sources of revenue, including duty-free sales and other commercial revenues, in computing revenues that contribute to the rate of return on assets at Heathrow Airport; and

(ix) there shall be made available to U.S. airlines designated under the Agreement (or any successor air services agreement) and operating to Heathrow Airport at least the information set out at Attachment 2 hereto.

(g) The Government of the United Kingdom shall issue such directions as may be necessary under section 30(3) of the Airports Act 1986 (or any successor law or regulation) to require that, in relation to the user charges imposed at Heathrow Airport, BAA pic (or any successor operator of Heathrow Airport) shall carry out the commitments set out at (i), (ii), (iv), (vi), (vii), and (ix) of paragraph (f) above.

(h) The Government of the United Kingdom shall institute a system whereby the United Kingdom Civil Aviation Authority ("CAA") shall report annually, before 31 December, to the United Kingdom's Department of Transport on the user charges imposed and financial performance at each of BAA's South-East airports. The Department of Transport shall, for each of the three years 1994–1996 inclusive, and to the extent possible given the confidential nature of some of the information likely to be given to CAA by BAA pic, report on those matters to the United States Government.

(i) The Government of the United Kingdom shall, where necessary to comply with its obligations under Article 10 of the Agreement, as set out in Attachment 1 hereto, use its powers under the Airports Act 1986 or any successor law or regulation.

(j) In relation to user charges at United States airports imposed upon United Kingdom airlines operating under the Agreement (or any successor air services agreement):

(i) The Government of the United Kingdom notes that the Government of the United States of America operates a system whereby airport sponsors in the United States must give certain assurances if they receive grants from the Federal Government. Before giving approval for an airport sponsor to use funds from the Airport and Airway Trust Fund for the purposes of airport or airway development, the United States Secretary of Transportation must obtain specific written assurances from the airport sponsor. These assurances include the obligation to make the airport available for public use on fair and reasonable terms and without unjust discrimination.

(ii) The Government of the United Kingdom notes that any such assurances remain in force for the useful life of the approved project, regardless of whether the airport operator thereafter

receives further grants from the Federal Government, and that all airports to which United Kingdom designated airlines currently operate scheduled services under the Agreement are currently subject to such assurances.

(iii) The Government of the United Kingdom notes that, on 10 December 1993, the United States Secretary of Transportation wrote, *inter alia,* to the Chairman of the Airports Council International—North America (copy at Attachment 3) setting out the policy of his Department to take a more active role in the airport-airline relationship, where needed. This letter provided for the Department, *inter alia*:

- to offer its good offices to facilitate resolution of a dispute that airports and airlines, despite all reasonable efforts, have been unable to resolve between themselves;
- where reasonable grounds are shown, to commence an investigation in response to a complaint, and if warranted by the facts following the investigation of a complaint, to suspend payment of existing or future grants to the airport concerned and/or to issue cease and desist orders and obtain the assistance of the United States District Court to enforce such orders;
- to reserve its authority to begin proceedings without waiting for a formal complaint if an airport rate increase appears unreasonable. These proceedings may range from conducting informal inquiries and issuing information requests to instituting formal investigations, including compelling testimony and issuing document subpoenas.

(iv) The Government of the United Kingdom notes that, as part of the policy enunciated in the letter at Attachment 3, the existing administrative regulations governing investigation and enforcement of airport compliance are to be reviewed. In this review, the Government of the United Kingdom expects the Government of the United States of America to have regard to its international obligations in determining whether it is necessary to propose any revisions to streamline that process and enhance its effectiveness.

(v) The Government of the United Kingdom notes that airports in the United States are required to give an assurance that all revenues generated by the airport are used for the purposes allowed in Section 51 l(a)(12) of the Airport and Airway Improvement Act

of 1982, as amended. The Government of the United Kingdom expects the Government of the United States of America to have regard to its international obligations in any review of this requirement.

(vi) The Government of the United Kingdom notes the undertaking of the Government of the United States of America regarding United States Government encouragement of airport-airline consultations set forth in Attachment 4.

(vii) The Government of the United States of America believes its current system enables it to discharge its obligations to the Government of the United Kingdom under Article 10. The United States Government recognizes that, under Article 10(4), this or another system must be in effect to safeguard users from charges that do not meet the criteria of Article 10.

(k) The Government of the United States of America shall give a report to the Government of the United Kingdom on each occasion on which any material change is made in the policies described in paragraphs (i), (ii), (iii), and (v) of paragraph (j) above within three years of the date of this Note.

(l) The mechanisms provided for in Articles 16 and 17 of the Agreement (or the consultations and arbitration provisions in any successor air services agreement between our Governments) shall apply to any dispute concerning the implementation, interpretation or application of, or compliance with, the provisions of the agreement between the Government of the United States of America and the Government of the United Kingdom brought into force by this Note and Your Excellency's affirmative Note in reply.

If the foregoing is acceptable to the Government of the United States of America, I have the honour to propose that this Note and Your Excellency's Note in reply confirming its acceptability shall constitute an agreement between the Government of the United Kingdom and the Government of the United States of America, which shall enter into force on the date of Your Excellency's Note in reply.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

Robin Renwick

DOCUMENT 27

The Delegation Lists at Attachment 1 to this Memorandum of Consultations carried for the first time the heading "US-UK Liberalization Talks", and the political impetus towards further liberalization is evident both in the Memorandum itself, and in the letter from Dr Brian Mawhinney, UK Secretary of State for Transport, at Attachment 3. However, the practical effect of the draft Exchange of Notes at Attachment 2 is quite limited.

Memorandum of Consultations

Delegations representing the Government of the United Kingdom and the Government of the United States of America met in Washington from 1 to 2 June 1995. Delegation lists are at Attachment 1.

The delegations reached agreement on the amendments to the Air Services Agreement between their two countries which appear at Attachment 2 and which will enter into force upon an Exchange of Notes. The delegations stated that their aeronautical authorities intend to apply the provisions of the attached text on the basis of comity and reciprocity, pending the Exchange of Notes, once all outstanding applications for the approval of code-sharing arrangements permitted by the Agreement have been granted. The United States delegation assured the United Kingdom delegation that all outstanding applications for the approval of code-sharing arrangements permitted by the Agreement will be granted by the relevant US authorities within seven days hereof.

The two delegations reached the understanding, during the course of the consultations, that although Annex 2 (Capacity on the North Atlantic) will not apply to the services permitted under UK Route 1A and US Route 1A, the principles set out in Article 11 and other provisions of the Agreement will continue to apply to the operation of these services.

Both delegations confirmed that they should seek to liberalise cargo, charters and pricing aspects of the air services arrangements between their two countries, as well as access to government financed traffic; and to negotiate additional "very limited and balanced" access at Heathrow and/or Gatwick airports, as set out in the letter of 23 May 1995 from Dr. Mawhinney to

Secretary Pena (appended as Attachment 3 and which is released by mutual agreement of the two governments). To this end they undertook to hold intensive meetings at least monthly between now and the end of September. A preparatory meeting will be held later this month, and a plenary meeting will be held July 17–21 in London. Dates for the further meetings will shortly be set. Both sides agreed to adhere to this schedule and to make every effort to complete this negotiation expeditiously.

For the Delegation of the
United Kingdom
Anthony J Goldman
Chairman

For the Delegation of the
United States of America
James R. Tarrant
Chairman

Washington
5 June 1995

Attachment 2

Draft Exchange of Notes

Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning modifications to the UK/US Air Services Agreement.

Excellency,

I have the honour to refer to discussions which took place on June 2, 1995 between representatives of our two Governments relating to modifications to the Air Services Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America of 23 July 1977, as amended ("the Agreement").

As a result of those discussions, and in accordance with Article 18 of the Agreement, I have the honour to propose that:

The proposals fell into two Parts. Part I amended the text of the Agreement itself. Paragraphs 1 and 2 added US Route 1A and UK Route 1A to Annex 1 of the Treaty (Part II), making unrestricted provision for services between any US gateway and any point in the UK other than London Heathrow or Gatwick.

Paragraphs 3–6 revised the provisions for code-sharing in paragraphs 10–11 of Annex 1 Section 5 of the Treaty, and added new provisions in paragraphs 12–13. See texts in Part II.

Part II made provision within the Agreement for a second US airline to serve the gateway route segment Chicago-London on US Route 1, and for a UK airline to serve London-Philadelphia on UK Route 1, in both cases with temporary capacity limitations.

Attachment 3

Department of Transport
London
23 May 1995

The Hon. Federico Pena
US Secretary of Transportation

The Hon. Federico Pena,

I am pleased that our officials made good progress during their discussions in London on 11–12 May. I hope that agreement on Phase 1 of the negotiations can be concluded in early June in Washington. As we discussed during our several telephone calls earlier this month, we are both committed to a balanced way forward. A constructive aviation relationship, leading ultimately to full liberalisation, is in the interests of both the United Kingdom and the USA.

The immediate deal which we have been discussing brings benefits to the carriers and consumers both in the UK and the US. It will bring new services on London Heathrow-Chicago and London Heathrow-Philadelphia; new opportunities for carriers of both sides through code-sharing and regional liberalisation; and some access for UK carriers to Fly America traffic (equivalent opportunities are available already to US carriers in the UK market). We are agreed that rather than stopping at this

Phase 1 deal, we should proceed immediately to discuss other issues of mutual interest; cargo liberalisation, pricing liberalisation, charter liberalisation, a very limited balanced deal on access to London Heathrow and/or Gatwick, and further access to Fly America traffic. We can add to this agenda by mutual agreement.

I believe strongly that this incremental approach represents the best way forward, and will present developing opportunities for all our carriers in this important market.

I look forward to an opportunity to meet you personally when we are able to conclude the Phase 1 agreement.

Dr Brian Mawhinney
Secretary of State for Transport

Document 28

One final exchange of letters to resolve the Pittsburgh affair (Chap. 4). Baker replied on 3 April, confirming these understandings, subject to acceptance by the US, under Article 3 paragraph 5 of the Agreement, of the additional designation offered to the United Kingdom.

Department of State
Washington, DC
31 March 2000

Mr. A T Baker
Director of International Aviation Negotiations
Department of the Environment, Transport and the Regions
London SW1

Dear Tony,

Since last fall, we have been discussing an exchange of opportunities that would allow the restoration of nonstop service between Pittsburgh and London's Gatwick Airport. As a result of those discussions, the United States proposes:

The United States can select Pittsburgh as an additional U.S. gateway point for service to London's Gatwick Airport. For the purposes of applying the provisions of the U.S.-U.K. Air Services Agreement, Pittsburgh shall be considered as a point in column (A) of US Route 1.

The United Kingdom can select one additional U.S. gateway point or add an additional airline to an existing U.S. gateway for service to London's Gatwick Airport. For the purposes of applying the provisions of the U.S.-U.K. Air Services Agreement, if an additional U.S. point is selected, it shall be considered as a point in column (C) of UK Route 1.

Each Party can change its selected opportunity, with 60 days' notice to the other Party.

If the foregoing is acceptable to the United Kingdom, I further propose that, on the basis of an affirmative letter from you, our aeronautical authorities permit operations in accordance with the above provisions on the basis of comity and reciprocity, pending an exchange of notes amending the U.S.-U.K. Air Services Agreement.

Sincerely,
Thomas White
Acting Deputy Assistant Secretary of State for Transportation Affairs

Glossary

Glossary of Aviation Terms

Airport landing slots time slots allocated to an airline to an airline to take off or land at a congested airport (see also grandfather rights)

Air service agreements (ASAs) the Treaties under which States grant to one another the rights to carry passengers and cargo between their territories; they may be *bilateral ASAs* (between two States) or *multilateral ASAs* (more than two)

Anti-trust immunity (ATI) in the United States 'anti-trust' legislation is the body of laws designed to prevent anti-competitive collusion among companies. Where such arrangements are held to be in the public interest, they can be granted immunity from prosecution.

Beyond points see below under route schedule

Cabotage the reservation of commercial operations between points within a country for the exclusive use of its own airlines

Capacity strictly speaking, the number of seats which may be offered for sale on services between two points; frequency of service is often used as a working proxy for capacity.

Change of gauge is where a smaller aircraft is used for part of a multi-stop service.

Code-sharing every air service is given a unique code to identify it for safety reasons (for example BA 123 would be British Airways flight 123), but where airlines have entered into co-operative arrangements with one another the same flight may carry an identification code for

H. Stevens, *The Life and Death of a Treaty*,
https://doi.org/10.1007/978-3-319-65705-9

both airlines (for example BA 123/AA 456 might be the same aeroplane carrying BA passengers on flight BA 123 and American Airlines passengers on flight AA 456)

Combination air services carry both passengers and cargo; services carrying cargo only are called *All-Cargo services*

Comity and reciprocity some of the changes agreed in letters and memoranda of consultations (Part III) were to be applied on the basis of comity and reciprocity. Whereas formal amendments to the Treaty, once made, cannot be withdrawn without amending the Treaty, a change granted 'on the basis of comity and reciprocity' can be withdrawn if either Party feels that it is no longer justified by the other Party's willingness to show a corresponding degree of flexibility.

Contracting Parties are the Contracting Parties to an agreement, usually the two governments.

Designation under an Air Service Agreement each Party is entitled to 'designate' the airline(s) to operate the services.

Flag-carrier the airline designated to operate services under the authority of its national government

Freedoms See end of glossary

Gateways, gateway points airports available for international service

Gateway air segments a route from one gateway to another (e.g. Boston-London)

Grandfather rights airlines which have made regular use of a given landing slot in a summer or winter traffic season (see traffic seasons below) are normally entitled to use the same slot in the following summer or winter season

Hub-and-spoke services Many airlines carry their passengers between numerous points on their network by means of services offering multiple connections to one another at a central point (the hub)

Intermediate points see below under route schedule

Route schedule the list of routes, attached to an ASA, on which the airlines of the two parties may carry traffic. Each schedule has four columns—Column A and Column C for points in each of the two States party to the agreement, Column B for *Intermediate Points* in one or more third countries which may be served with traffic rights on journeys between the two States, Column D for *Beyond Points,* that is to say points in one or more third countries beyond the second State which may be served with traffic rights between the second country and the beyond point(s).

Scheduled and non-scheduled services scheduled services operate to a regular daily or weekly time-table; non-scheduled services operate at different times, usually to carry groups of passengers travelling together, for example to go on holiday

Tariffs covers the whole range of fares charged for the carriage of passengers

Traffic means passengers, mail and cargo carried by air for commercial purposes

Traffic seasons the summer traffic season runs from April to October, the winter season runs from November to March. Airlines often operate different summer and winter time-tables.

Operating Rights or Freedoms

The Freedoms of the Air are used to categorise the rights to fly between countries carrying traffic for commercial purposes. Bermuda 2 was mostly concerned with third and fourth freedom traffic carried between the UK and the USA, with limited provision for fifth freedom traffic.

First Freedom the right to fly over another state

Second freedom the right to land in another state for technical reasons, e.g. to refuel

Third freedom the right for the airline of one party to an agreement to carry traffic to the territory of the other party.

Fourth freedom the right to pick up traffic in the territory of the other party and carry it back to one's own country.

Fifth freedom the right to carry traffic between the territory of the other party and third countries named in the route schedule either as intermediate oar beyond points.

Sixth freedom the carriage of traffic from one country to another by way of the airline's own country. This is normally achieved by using the third and fourth freedom rights available under two separate agreements—for example British Airways might use its rights under agreements with France and the USA to carry traffic from Paris via London to New York. At the international level, the hub-and-spoke system is all about the carriage of such traffic.

Seventh freedom the same as the sixth freedom, but without the airline landing in its own country on its way between the two third countries. See the account of the Heathrow Succession negotiations in Chap. 4 for a very rare example of such rights being granted to UK airlines to carry traffic direct from points in Europe to points in the USA.

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