Capacity Clauses, the Open Skies Policy of the United States and the Japan-United States Aviation Dispute over Capacity

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1. Introduction

Since 1995, the United States has been strongly advocating the open skies policy and has concluded open skies agreements with other States, both developed and developing. The most remarkable of the open skies is the abolition of the regulation of capacity, including the unlimited beyond right. On the other hand, between Japan and the United States, dispute over the interpretation, application and revision of the 1952 air agreement, particularly the capacity clause, was lasting for more than 20 years. It was one of the most serious disputes between the two States. On 30

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January 1998, Japan and the United States ended the long-term dispute by concluding a new Memorandum of Consultation.

This paper overviews, first of all, the open skies policy and agreement of the Unites States (Ch.2), followed by the status quo of the existing capacity clauses and the general perception of them(Ch.3). It is pointed out that the open skies policy and agreements of the Unite States has not become a global trend and it is still uncertain whether the concept of the open skies dominates the international aviation(Ch.4). Then, the Japan-Unites States Aviation Dispute over Capacity is examined from the point of international law and in view of the specific context. (Ch.5) The clear distinction between lex lata (the law as it stands today) and lex ferenda (the law as it should be tomorrow) is emphasized in order not to be dazzled by apparently beautiful name of open skies(Ch.6).

2. The United States Open Skies Policy and Agreements

A. The Announcement of the United States Open Skies Policy (1995)

In April 1995, the Minister of Transportation of the United States, Federico Pena, announced the Unites States International Air Transportation Policy Statement. The Statement sets the goal as fostering safe, affordable, convenient and efficient air service for consumers and mentions the U.S. objectives as follows ;

1. Increase the variety of price and service options available to consumers.
2. Enhance the access of U.S. cities to the international air transportation system.
3. Provide carriers with unrestricted opportunities to develop types of service and systems based on their assessment of marketplace demand.
   a. These opportunities should include unrestricted rights for airlines to operate international gateways by way of any point and beyond

to any point, at the discretion of airline management. Carriers should be able to pursue both direct service using their own equipment and indirect service through commercial relationship with other carriers.

b. Service opportunities should not be restricted in any manner, such as restrictions on frequencies, capacity or equipment, so that carriers may provide levels of service commensurate with market demand.

c. Carriers ability to set prices should also be unrestricted to create maximum incentives for cost efficiencies and to provide consumers with the benefits of price competition and lower fares.

d. These opportunities should apply not only to scheduled passenger services, but also to cargo and charter opportunities, because of growing importance to the worlds economy. We have long recognized the significant differences among these types of operations. In particular, air cargo services have specific qualities and requirements that are significantly different from the passenger market. We will continue to follow our long-standing policy of seeking an open, liberal operating environment to facilitate the establishment and expansion of efficient, innovative and competitive air cargo services.

4. Recognize the importance of military and civil aircraft resources being able to meet Defense mobilization and development requirements in support of U.S. defense and foreign policies.

5. Ensure that competition is fair and the playing field is level by eliminating marketplace distortions, such as government subsidies, restrictions on carriers ability to conduct their own operations and ground-handling, and unequal access to infrastructure, facilities, or marketing channels.

6. Encourage the development of the most cost-effective and productive air transportation industry that will be best equipped to compete in the global aviation marketplace at all levels and with all types of service :

a. Infrastructure needs should be addressed and unnecessary regulatory

barriers eliminated.

b. Privately held airlines have better incentives to reduce costs and respond to public demand. Therefore, as we have in the past, we will be supportive of governments wishing to privatize their airlines so that their privatization efforts will be successful .

c. Reduce barriers to the creation of global aviation systems, such as limitations on cross-border investments wherever possible.

In order to achieve these objectives, the U.S. pursue the following strategy: It proposes to advance the liberalization of air service regimes as far as our partners are willing to go, and to withhold benefits from those countries that are not willing to move forward. For countries that are not willing to advance liberalization of the market, the U.S. will maintain maximum leverage to achieve her procompetitive objectives. The U.S. can limit their airlines access to the U.S. market and restrict commercial relations with U.S. airlines. If aviation partners fail to observe existing U.S. bilateral rights, or discrimination against U.S. airlines, we will act vigorously, through all appropriate means, to defend our rights and protect our airlines.

B. The Open Skies Agreements with the United States

The first open skies agreement is said to be the 1992 Agreement between the United States and the Netherlands First of all, Article 11 of the 1978 Protocol (31 March 1978) deleted the second paragraph of the Article 10 (Bermuda 1 capacity clause) of the 1957 Agreement. Thus there was no quantitative limitation upon the recognized routes. Then, paragraph 9 of the Memorandum of Consultation on 4 September 1992 provided ; 2. Neither Contracting Party shall unilaterally limit the volume of traffic, frequency or regularity of services, or the aircraft type or types operated by the designated airlines of the other Contracting Party, except as may be required for customs, technical, operational or environmental reasons

under uniform conditions consistent with Article 15 of the Convention, and by the paragraph 12 of the Memorandum of Consultation, the route schedule was replaced and the following paragraph was added :

Each designated airlines may, on any or all flights and at its option: A. operate flights in either or both directions; B. combine different flight numbers within one aircraft operation; C. serve points on the routes in any combination and in any order (which may include serving immediate points as beyond points and beyond points as intermediate points) ; D. omit stops at any point or points ; E. transfer traffic from any of its aircraft to any of its other aircraft at any point on the route ; F. serve points behind any points in the territory with or without change of aircraft or flight numbers and may hold out and advertise such services to the public as through services; . Between June 1995 (shortly after the announcement of the open skies policy mentioned in 2-A) and June 1997, the United States concluded 23 open skies agreements. The agreements are with 6 States in Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, all in 1997), 11 States in Europe (Switzerland, Sweden, Norway, Luxembourg, Iceland, Finland, Denmark, Belgium, Austria, Czech Republic, Germany, the first 9 in 1995 and the last 2 in 1996), 4 States in Asia (Singapore, Brunei, Taiwan, Malaysia, all in 1997) and 1 State in the Middle East (Jordan, in 1996) and 1 State in Oceania (New Zealand, in 1997). without directional or geographic limitation and without loss of any right to carry traffic otherwise permissible under this Agreement ; provided, that the service must serve a point in the territory of the other Party designating the airline.

USIA Wireless File, 9 May 1997 and 25 June 1997. In the latter half of 1997, the United States concluded open skies agreements with Aruba, Chile, Romania and Netherlands Antilles. Therefore, the United States has so far 28 open skies agreements.

As to the formalities, these agreements are classified into the following two forms : one is the conclusion of a new agreement, the other is the amendment of the existing agreement.

Here, among the two dozens of agreements, capacity clauses of the 10 agreements with Western and Northern European States (except for the agreement with the Netherlands which was mentioned in footnote (i)) and the 4 agreements with Asian states are studied in depth. In addition, she concluded an open transborder agreement with Canada in February 1995. USIA Wireless File, 6 January 1998. The list of open skies agreements (including the dates of signature and entered into force) is shown below as Annex.

This list was given by Ms. Mary M. Brandt, Office of the Assistant Legal Adviser for Treaty Affairs, United States Department of States.

The author expresses his gratitude to Mr. Masukane Mukai, Japanese Representative to the ICAO, for sending copies of these Agreements. Among the 10 Agreements with European States, the Agreement with Germany were concluded in 1996, whereas the other 9 agreements were concluded in 1995. The 4 agreements with Asian States were concluded in 1997.

Among these 14 Agreements, those with Switzerland, Iceland, Singapore, Brunei, Taiwan and Malaysia (in chronological order) took the form of the conclusion of a new agreement, whereas the other 8, namely Agreements with Sweden, Norway, Luxembourg, Finland, Denmark, Belgium, Austria and Germany (again in chronological order) took the form of the revision of the existing Agreement. As to the Agreement with Germany, the 1955 Basic Air Agreement, 1989 Exchange of Notes and 1996 Protocol were combined into the Consolidated Air Agreement.

As to the former (conclusion of a new agreement), Article 11 paragraph 2 of each new Agreement, namely the capacity clause, provides ;

Each Party shall allow each designated airline to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the market place. Consistent with this right, neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the designated airlines of the other Party, except as may be required for customs, technical,

operational, or environmental reasons under uniform conditions consistent with Article 15 (Termination) of the Convention. Annex I of each Agreement provides for scheduled air transportation. Section 1 (Routes) are divided into two types. Those with Switzerland, Iceland and Taiwan provides (take the example of the Agreement with Switzerland) ;

A. Routes for the airline or airlines designated by the Government of the United States of America : From points behind the United States via the United States and intermediate points to a point or points in Switzerland and beyond.
B. Routes for the airline or airlines designated by the Government of Switzerland :

From points behind Switzerland via Switzerland and intermediate points to a point or points in the United States and beyond .

On the other hand, those with Singapore, Brunei and Malaysia makes a distinction as to the all cargo service(s). Take the example of the Agreement with Singapore :

A. Routes for the airline or airlines designated by the Government of the United States of America : 1. From points behind the United States via the United States and intermediate points to a point or points in Singapore and beyond. 2. For all-cargo service or services, between Singapore and any point or points.
B. Routes for the airline or airlines designated by the Government of Singapore : 1. From points behind Singapore via Singapore and intermediate points to a point or points in the United States and beyond . 2. For all-cargo service or services, between the United States and any point or points.

Section 2 (Operational Flexibility) is the same text as the correspondent paragraph in the 1994 Memorandum of Consultation between the United States and the Netherlands which was mentioned in footnote i.

As to the latter(revision of the existing agreement), the substantive content on capacity is almost the same as the former. The same provision as the Article 11 paragraph 2 of the new agreements cited above was

added in the revision of agreements with Sweden(revision of Article 10 by paragraph 11 (b)), Norway(revision of Article 10 by paragraph 11(b)), Denmark (revision of Article 10 by paragraph 11(b)), Austria (revision of Article 11 by paragraph 8 (2)), and Germany (Article 8 paragraph 2 of the new consolidated Agreement). On the history of the United States-Germany Air Agreement, see D. Barkowski and J.Byerly, Forty Years of U.S.-German Aviation Relations, Zeitscrift fur Luft- und Weltraumrecht, vol.46(1997), pp.3-45. As to the other 3 Agreements, the amendment is more simple .v Amendment to Article 11 of the Agreement with Luxembourg by paragraph 8 adds the following : Each Party shall allow each designated airlines to determine the frequency and capacity of the international air transportation it offers, based upon commercial consideration in the market place. Amendment of Article 5 of the 1980 Protocol with Finland by paragraph 16 provides: Neither Party shall require the filling of schedules, programs for charter plans or operational plans by airlines of the other Party for approval---. Deletion of Article 11 paragraph 2 of the Agreement with Belgium by paragraph 8. Annex 1 of each Agreement which provides for scheduled air transportation is the same as the Annex of the agreements with Switzerland, Iceland and Taiwan.

The model of these open skies Agreements can be found in the Model Bilateral Air Transport Agreement by the United States Government on 20 March 1995. International Legal Materials, vol.35(1996), pp.1479-1497. As to capacity clause, Article 11 paragraph 2 of the Model Agreement is the model and the above-mentioned Article 11 paragraph 2 of each new Open Skies Agreement has the completely the same text as this Model Agreement. In fact, paragraph 9 (2) of the 1992 Memorandum of Consultation between the United States and the Netherlands is the very prototype, which the capacity clause of the Model Agreement just followed.

3. The present Status and the General Perception of the Capacity Clauses

A. The Classification of Capacity Clause by the ICAO

ICAO published Digest of Bilateral Air Transport Agreements in 1988 and 1995. Doc 9511 and Doc 9511 Supplement(1995)

The document contains codified summaries of the main provisions of bilateral air transport agreements which are filed with ICAO and are listed in Aeronautical Agreements and Arrangements (Doc 9460) and annual supplements thereto up to the end of 1993. As to the capacity clauses, the document classifies them into 5 types ; [0] no capacity clause, [1] predetermination, [2] Bermuda I, [3] free-determination, [4]other (unclassifiable or hybrid of different types of capacity regime). According to the supplementary notes, characteristics of the three main types ([1][2][3]) are as follows .

[1] predetermination Here capacity is agreed prior to operations. Predetermination may take the form of a specified division of capacity or its existence may be concluded from the totality of provisions affecting capacity. For example, the capacity provision may be a Bermuda I clause but a separate provision may require consultation on or coordination of capacity or filing and approval of frequencies or schedules in advance (predetermination). Similarly, an otherwise Bermuda I agreement may state that the aeronautical authorities should jointly determine the practical application of the capacity principles. This implies their focusing on capacity ab initio, the essence of predetermination. If the capacity provision is not otherwise clearly one of predetermination or any other defined type, but requires that capacity increases be approved by the relevant authorities, the clause is categorized as predetermination.

[2] Bermuda I The principle, concepts and wording of the Bermuda I system of capacity control, as negotiated between the United

Kingdom and the United States in 1946, have been adopted widely in bilateral agreements. However, the adoption of Bermuda-type phraseology does not always signify acceptance of the practical application of Bermuda principle ; the parties may clearly intend to predetermine capacity. The reference files therefore classify as Bermuda I only those capacity arrangements which are purely Bermuda I in both their format and their functioning. The latter involves the essential features of capacity principles for airlines to follow and ab initio determination of capacity by each airline acting separately with intervention by the parties or their aeronautical authorities solely on an ex post facto review basis through consultative procedures. Where an agreement has both Bermuda phraseology and a provision, not necessarily in the capacity clause, that detracts from essential features, the reference file identifies it as one of the other possible types. On the other hand, a Bermuda I system may be reinforced by a clause prohibiting the unilateral restriction of capacity.

[3] Free-determination under this arrangement, the parties agree that neither shall unilaterally limit the volume of traffic, frequency, or regularity of service, or the aircraft type or types operated by the designated airlines of the other party, except as may be required for customs, technical, operational, or environmental reasons under uniform conditions consistent with Article 15 of the Convention. The clause may also commit each party to eliminate all forms of discrimination or unfair competitive practices adversely affecting the competitive position of the airlines of the other party. Although these principles were developed in the 1970s, some older agreements with the same basic capacity philosophy are also identified as free-determination. Doc 9511 Supplement (1995), EN-9,10.

The number of bilateral air agreements which Japan filed with ICAO up to the end of 1993 and therefore included in this Digest are 38. Among them, [1](predetermination) is 9 (agreements with Austria, Bangladesh,

Fiji, Finland, Lebanon, Spain, Sri Lanka, Turkish and USSR), [2](Bermuda I) is 21(Belgium, Brazil, Burma, Canada, Denmark, France, West Germany, Indonesia, Iraq, Italy, Malaysia, Netherlands, New Zealand, Norway, Philippines, Korea, Singapore, Sweden, Thailand, UK, USA), [3] (free-determination) is zero, [4](other) is 8 (Australia, Egypt, Greece, India, Kuwait, Mexico, Pakistan, Switzerland). The recent bilateral air agreements which Japan concluded have a following provision : Capacity to be provided by the designated airlines of the Contracting Parties in respect of the agreed services shall be agreed through consultation between the aeronautical authorities of both Contracting Parties --- . For example, Article10 paragraph 3 of the Japan-Brunei Darussalam Agreement (1993) and Article 10 paragraph 3 of the Japan-Nepal Agreement (1993).

On the other hand, the number of bilateral air agreements which the Unites States concluded up to the end of 1993 are 63. Among them, [1](predetermination) is 7 (agreements with Brazil, Cote dIvoire, Iceland, Iran Romania, USSR and Yugoslavia), [2](Bermuda I) is 31 (Burma, Canada, Chile, CzechoSlovakia, Columbia, Cuba, Denmark, Dominica, Ecuador, France, Hungary, Indonesia, Italy, Japan, Lebanon, Liberia, Malaysia, Mexico, Morocco, New Zealand, Nigeria, Panama, Paraguay, Korea, South Africa, Spain, Switzerland, Trinidad and Tobago, Uruguay, Venezuela, Zaire), [3] (free-determination) is 12 (Austria, Barbados, Belgium, Finland, West Germany, Israel, Jamaica, Jordan, Luxembourg, Netherlands, Singapore, Thailand), [4](other) is 11(Australia, Bolivia, Egypt, Fiji, India, Norway, Pakistan, Portugal, Sweden, Syria, UK), [0](no capacity clause) is 2(Ireland, Turkish).

It has to be pointed out that this Digest has the following deficiencies. Firstly, it is somewhat outmoded because it neither covers the most recent agreements since 1994 nor some important (side) agreements are not filed with ICAO. Secondly, Denunciation of the agreements are not considered in this file, either. Thirdly, even the capacity clause which considers load factor is curiously classified as [2](Bermuda 1). For example, the Japan-Singapore Agreement (1967) is classified as [2]. The first sentence of paragraph 3 of Article 5 provides ; The agreed services

provided by the designated airlines of the Contracting Parties shall bear a close relationship to the requirements of the public for transportation on the specific routes and shall have as their primary objective the provision, at a reasonable load factor, of capacity adequate to current and reasonably anticipated requirements for the carriage of passengers, cargo and mail originating from or destined for the territory of the Contracting Party which has designated the airline. Fourthly, the classification lacks the independent category on Bermuda. The 1977 United States-United Kingdom Agreement (the prototype Bermuda) is classified as [4](other). The 1977 US-UK Agreement has three different types of provision on capacity, namely Article 11 paragraph 3(Bermuda I capacity clause), Article 11 paragraph 4(capacity clause considering load factor) and Annex 2 on North Atlantic Route (predetermination). Thus, surely it is a hybrid. But it deserves to classify as an independent category.

The recent trend of the air agreements with the United States is, of course, open skies agreement which is classified as [3](free-determination), whereas the trend of agreements with Japan is [1](predetermination). It has to be admitted that the percentage of [3] is still very small and far from world trend. According to Mr. John Gunther of ICAO whom the author interviewed on 5 September 1995, among the air agreements, the share of [1] (predetermination) is about 55%, [2] (Bermuda I) is about 25%, whereas [3] (free-determination)is only about 1%.

B. The GATS Annex on Air Transport Services

The General Agreement on Trade in Service (GATS) of 15 December 1993 is one of the results of the Uruguay Round . The essence of GATS is to provide most-favoured nations (MFN) treatment as a general obligation and to provide market access (MA) and national treatment (NT) as specific commitments. MFN, MA and NT are not known in the air transport services. These concepts are not compatible with existing air transport regime based on bilateral air agreements which grant freedoms of the air

reciprocally as a privilege. If these concepts have to be applied in the air transport services, the existing regime has to be completely changed. No State is ready for such a revolution, Even the Unites States is not ready for opening cabotage, which is required if NT is applicable. Therefore, as far as air transport services are concerned, these general rules provided by GATS are not applicable. The Annex on Air Transport Services provides : 2 The Agreement, including its dispute settlement procedures, shall not apply to measures affecting, (a) traffic rights, however granted : or, (b) services directly related to the exercise of traffic rights, except as provided in paragraph 3 of this Annex. 3 The Agreement shall apply to measures affecting: (a) aircraft repair and maintenance services, (b) the selling and marketing of air transport services; (c) computer reservation system (CRS) services. 5. The Council for Trade in Services shall review periodically, and at least every five years, developments in the air transport sector and the operation of this Annex with a view to considering the possible further application of the Agreement in this sector.

Thus, traffic rights including capacity to be provided (paragraph 6(d) of the Annex) is still and will for the time moment be regulated by existing bilateral agreements.

C. The Fourth World Wide Air Transport Conference(1994)

On the 50th anniversary of ICAO, it convened the Fourth World-Wide Air Transport Conference on International Air Transport Regulation from 23 November to 6 December 1994. Doc 9644 AT Conf/4.

On market Access, the Secretariat presented a paper to the effect that parties would grant each other access(unrestricted route, operational and traffic) rights for use by designated air carriers, with cabotage and so called Seventh Freedom rights exchanged optionally. AT Conf/4-WP/7 However, this draft was not accepted among the participating States. The Conference concluded that : 2.2.6.1. (d) There was broad support gradual, progressive, orderly and safeguarded change towards market access which

ensure participation, adaptation and regulatory flexibility and allow international air transport to respond and adjust to market forces. However, there is no global commitment to full market access at this stage of air transport development and States which choose to use the full market access arrangements set out in paragraph 2.2.3.1. would do so in full recognition of the risks, opportunities and potential benefits. With respect to the progressive liberalization of market access each state would ultimately make its own rational choice as to the degree and pace of liberalization, on a case by case basis and in the light of its particular circumstances, needs and objectives and any broader net economic and other benefits that may be attainable. A starting point for the gradual evolution of broader market access might be the progressive introduction of liberalization at the sub-regional or regional level.

As to the future regulatory process and structure, the Conference concluded that 3.4.1. (a) Bilateralism and multilateralism can and do co-exist and can each accommodate different approaches to international air transport regulation. (b) In view of the disparities in economic and competitive situations, there was no prospect in the near future for a global multilateral agreement on the exchange of traffic rights. (d) The primacy principle, whereby existing rights would be respected in the evolution of future regulatory arrangements should be recognized. This does not preclude renegotiation and, if necessary, any re-balancing of air services agreements, where the parties so agree.

In a word, the Conference proved that the open skies policy is far from general trend.

D. The First Regional Cooperation Forum for International Air Transport in Asia and Oceania(1996)

The First Meeting of Regional Cooperation Forum for International Air Transport in Asia and Oceania was convened from 31 January to 1 February 1996 in Kyoto, Japan. Representatives from the civil aviation

authorities and airlines of 13 States in Asia and Oceania Region attended the Forum. It was only a regional forum and notbamboo curtain as the United States might have feared because she was not invited. The Summary of Proceedings on the prospect of regulatory framework is in complete accordance with the conclusion of the Fourth World Wide Air Transport Conference. It reads ; As shown in the conclusion of ICAO World Wide Air Transport Conference in Montreal from 23 November to 6 December 1994, it is recognized that in view of the disparities in socio-economic and competitive situations in the world there is no prospect in the near future for a global multilateral agreement for the exchange of traffic rights. However, at regional level, it is possible that bilateralism and multilateralism can co-exist and can each accommodate different approaches to international air transport regulation. Within the existing international air transport regulatory system, the measures to expand and foster international air transport including, for example, the gradual, progressive, orderly and safeguarded change in international air transport regulation should be pursued within the region on the basis of fair and equitable opportunity for all countries.

The stance of the Participant States toward open skies policy is not uniform. Among them, Singapore and Malaysia concluded the open skies Agreements with the United States in 1997.

E. The Japanese View on Introduction, Executive Summary and Policy Recommendation of The OECD Project on International Air Transport (1997)

In January 1997, The OECD Project on International Air Transport published its report entitled The Future of International Air Transport Policy : Responding to Global Change. Policy recommendation of the report includes the followings ;

An important means of attaining the objective described above is the further liberalization of the international air transport markets. Liberalization in terms of capacity freedoms, fare freedoms and market access freedoms has gradually been taking place within the existing bilateral agreements and in the framework of regional groupings, but given the challenges confronting international aviation, further development and extensions will be required. At the global level, the institutional setting for international aviation is predominantly bilateral. This system has shown its practical strength and flexibility, but its functioning could impede the development of the sector in the long run. While there is a case for moving toward a liberal multilateral regime, the reality is that this is unlikely in the short and medium term. Hence, the further evolution sill be mainly based on the bilateral system. It is, therefore, recommended that : - The process of liberalisation regarding capacity, tariffs and market access be further encouraged. There should be greater transparency in bilateral agreements. In particular, the use of confidential agreed minutes should be minimised. (pp.16-17)

Against this report, Japan gave the following view ; We believe that the majority of the countries in the world share our view as evidenced in the conclusion of the ICAO World Wide Air Transport Conference in 1994 which was reached by a consensus of the 137 countries represented there. 1. It is the current bilateral system that has brought about the dramatic development in international air transportation, having coped with great economic, social or technological changes and having enhanced consumers interests. This system is functioning effectively and there is no persuasive reason to believe that unexpected upheavals will occur, which is the current system, that has adapted to such great changes as the oil crisis and the emergence of jet airlines and wide body airplanes, cannot adjust to. The current bilateral system has shown the flexibility to accommodate the geographical characteristic and the social and economic conditions of a given market. 2. Liberalization has merits, but surely it is not defect free. Hasty liberalization without safeguards generally has a tendency towards cut-throat competition, which may, in some cases, even press air carriers to cut indispensable safety expenditures, and towards the creation of

monopolies or oligopolies, and, in the international air transport market, towards aggravation of unlevel competitive conditions and loss of effective participation of companies. 4. The framework of international aviation should be decided by related sovereign countries, and we are not opposed to liberalizing the market based on a mutual agreement between the related countries. However, one country should never impose liberalization which is apt to create a monopoly or oligopoly and has a risk of loss of effective participation in international air transport of the other side, while leaving a vast domestic market reserved to the national carriers of one side intact, thereby creating an unlevel playing field. 7. It is certain that capacity constraints in major international airports will

Paragraph 2 is particularly applicable in the outcome of the deregulation of the US domestic air market under Carter Administration. Paragraph 4 is, needless to say, the criticism of the reality of the US open skies policy. Paragraph 7 is particularly applicable to the Narita (New Tokyo International) Airport.

4. Appraisal of the Open Skies Policy and Agreements

From the above-mentioned considerations, it can be pointed out that the open skies policy and agreements are far from global trend, even if it is a American one. Needless to say, each State can choose its own air transport policy. Air transport is something different from other sectors of trade in service because it is closely linked to the State sovereignty which is accorded to each territorial air. Basic concepts of GATS such as market access and MFN are foreign in international air transport service. The international community needs more time to have the open skies universally spread. If the real rather than the pseudo open skies policy is pursued, domestic air market (cabotage) has to be opened as well. However, the Unites States has no intention to open it at all. Surely, Art. 7 of the Chicago Convention reserves to the territorial State the exclusive right of cabotage. But the right can be renounced In this case, cabotage has to be

open to all other States with no-discriminative basis. To grant cabotage only to a State or to some States is in contravention with the said Article.

The asymmetrical outcome of adoption of the open skies policy and agreements has to be considered. The Open skies policy and agreements are favorable to the two extremely different types of States, namely those which have no or very small domestic air market (like Singapore and the Netherlands) on the one hand, and those which have a huge domestic air market (like the United States). If the open skies agreements are concluded with one of these States, the other contracting State is placed in a relatively unfavorable position.

Those States which support the open skies policy and agreements are not far from opportunist. Singapore and the Netherlands are both supporters of the open skies. However, these two States wont conclude the open skies agreement with each other.

In the international air transport, every State is and can be a utilitarian. This is the reality and no other State can blame non- open skies policy. As to the Discussion in the framework of APEC, see Dong Chun Shin, Multilateralism in APEC: The Case of Air Transport Services, paper presented at the First Asia Pacific Transport Conference: International Transport Liberalization, 5-6 December 1997 in Seoul. Dr. Shin points out that notwithstanding the APEC principle of WTO-consistency, APEC is not likely to follow the path taken by the WTO regarding air transport services is more flexible in taking some measures as to multilateral liberalization of air transport services than the WTO. (p.11)

5. The Characteristics of the Japan-United States Aviation Dispute over Capacity

On this subject-matter, see Masao Sekiguchi, Does the so-called excessive exercise of the beyond right by the Northwest Airlines of the

US violate the Japan-US Air Agreement ? (in Japanese), Hogaku Ronshu(Kowazawa University),No.51(1995), pp.1-41, Kazunori Ishiguro, The U.S.- Japan Trade Friction on International Airline Services (1952-1997)(in Japanese), 1997. Kazuhiro Nakatani, The Japan-U.S. Aviation Disputes and International Law (in Japanese), Kuho (Journal of Air Law), No.37(1996), pp. 83-132.

A. The Facts and Essence of the Long -Term Dispute

Japan concluded a Bermudatype air agreement with the Unites States in 1952.

Contrary to other sectors, the Unites States has been winning the capacity share game against Japan. As to the third and fourth freedom (Japan-United States route) is concerned, the share of the United States carriers is 65.9 % in the number of passengers (7,240,000 passengers) and 54.4 % in the amount of cargoes(247,000 tons). As of July 1995, The Unites States carriers fly 410 round trips between the two States, while Japan carriers fly 183 round trips. The fifth freedom (beyond right) is totally asymmetrical. In 1994, the share of the United States carriers is 99.7 % in the number of passengers (1,440,000 passengers) and 99.4 % in the amount of cargoes (71,000 tons). Japan has been alleging that the cause of the capacity disparity is due to the unequal arrangements. According to Japan, therefore, the equal opportunity has to be assured as a matter of priority and naturally before negotiating the open skies agreement. We have to confirm that the Japanese opinion is not a result-oriented one, which she has been negating in the trade in goods negotiation with the United States.

Article 12 of the Agreement provides: The agreed services available hereunder to the public shall bear a close relationship to the requirements of the public for such services and shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which the airline providing such services is a national and the

countries 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 specific routes shall be applied in accordance with the general principles of orderly development to which both Contracting Parties subscribe and shall be subject to the general principle that capacity should be related ; (a) To traffic requirements between the country of which the airline is a national and the countries of ultimate destination of the traffic; (b) To the requirements of through airline operation ; (c) To the traffic requirements of the area through which the airline passes after taking account of local and regional services .

The revised Schedule in 1972 provides ; (A) An airline or airlines designated by the Government of Japan shall be entitled to operate air services on each of the air routes specified via intermediate points, in both directions, and to make scheduled landings in the United States of America at the points specified in this paragraph: (1) From Japan to Honolulu, San Francisco, and : (a) New York and beyond New York to Europe (including the United Kingdom) and beyond. * (b) beyond to Mexico and Central America. ** (2) From Japan to Honolulu and Los Angels and beyond to South America. ** (3) From Japan via Anchorage to New York. (* Any flight operating established from Japan which makes a scheduled landing at New York, and any flight operating westbound to Japan which makes a scheduled departure from New York, must make a scheduled stop at San Francisco. ** Passengers, cargo, and mail destined for or originating at points beyond the United States may not make a stopover or be picked up or discharged at United States points on these routes.)

(B) An airline or airlines designated by the government of the United States of America shall be entitled to operate air services on each of the routes specified, in both directions, and to make scheduled landings in Japan at the points specified in this paragraph : (1) From the United States via North Pacific to Tokyo, Osaka and Naha and beyond. (2) From

the United States via Central Pacific to Tokyo, Osaka and Naha and beyond . (other than Japan-Micronesia Routes)

There was a big controversy over the capacity limitation of the fifth freedom as a matter of the interpretation of the Article 12 of the Agreement. Japan has been of the view that, as the traffic between the United States and the countries of the ultimate destination of the traffic(namely beyond points like Seoul, Hong Kong or Bangkok) is primary and the beyond traffic between Japan and these points are not primary, the number of passengers or the quantity of cargoes loaded in Japan and unloaded in beyond points(and vice versa) has to be less than 50% of all the beyond traffic. On the contrary, the Unites States has been insisting that there is no such quantitative limitation upon the fifth freedom. The difference over the extent of the beyond rights led to the countermeasures (or its threat) by each contracting party against the alleged breach of the Agreement by the other party since 1993.

It seems that the maxim ut res margis valeat quam parent(= the parties are assumed to intend the provisions of a treaty to have a certain effect and not to be meaningless Robert Jennings and Arthur Watts (ed.), Oppenheim s International Law (9th ed, 1992), Vol.1, p.1280.) requires an interpretation that there exists a certain limitation(if not 50%) upon the enjoyment of the fifth freedom. In addition, with respect to the interpretation of the primary objective of Art.12, both the US Government and a US airline did admit the restraint of fifth freedom rights therein and the inconsistency of the US airlines beyond operations with the principles of the Article. Namely, the letter of Mr. J.Shane, Assistant Secretary, US DOT, dated January 21,1992, addressed to Vice Minister for Transport,Japan reads; I am aware that the traffic statistics during the first two months of this developmental period show an extremely high proportions of Osaka-Sydney carriage. In our view, the level of fifth freedom carriage reported thus far would not appear to be consistent with the principles set forth in Article 12. The letter of Mr. G.Greenwald,

Chairman of United Airlines, dated April 7, 1995, addressed to Minister for Transport, Japan reads; I also want you to know that United is aware of the terms of article 12 of the U.S.-Japan Air Service Agreement, and of our obligations thereunder. As you know, we have been working to reduce the level of local traffic on our flights beyond Tokyo. Ministry of Transportation, Basic Position on Japanese Side in Japan-US Passengers Air Talks (June 27, 1996),

Therefore, applying the general principle of estoppel or admission, it is reasonable to consider that the US can no longer insist its tough position on the interpretation of the Art.12 of the agreement.

B. The Unequal Elements of the Japan-United States Agreement

The Japan-United States Air Agreement of 1952 has been regarded as one of the last unequal treaties in force between the two countries. We can find the following three unequal elements when we read not only the agreement itself but also the schedule and a side agreement.

Firstly, the schedule permits the unequalness as concerns the beyond right. The schedule does not specify any beyond points which United States airlines operate air services from Japan. Thus, theoretically, they can fly to any beyond points to the extent that the enjoyment of the fifth freedom is not inconsistent with Article 12 of the Agreement. On the other hand, Japanese airlines have to be subject to the following unfavorable conditions when they enjoy the fifth freedom, namely air services from the United States to beyond points. [A] They have to land at San Francisco when they enjoy fifth freedom from New York to Europe and beyond. [B] They can enjoy the fifth freedom from San Francisco to Mexico and Central America, but they cannot load or unload passengers and cargoes at San Francisco (only technical landing is permitted there). [C] The fifth freedom from Los Angels to Brazil (Rio de Janeiro and Sao Paulo) was not permitted until 1982, when JAL could

operate only 2 flights per week., the only exercise of the fifth freedom by the Japanese carriers. Upon geographical and socioeconomic considerations, it is of no doubt that the value of the beyond routes (Asia Pacific routes) enjoyed by the United States is far bigger than that enjoyed by Japan.

Secondly, there exists a secret side agreement of 1959. It allows the US incumbent carriers to increase of the number of flights as concerns the existing routes subject to only ex post facto review . Other carriers, namely Japanese carriers (both incumbent and non-incumbent) and US non-incumbent carriers, do not have such a privilege. These carriers have been subject to predetermination when they want the increase of flights. In this sense, it is not accurate to say, as a matter of practice, that only ex posto facto review is applied as the 1952 Agreement is a Bermuda I type .

Thirdly, among the designated carriers, there are some categories. Incumbent carriers have a wide range of operational rights. The number of the US incumbent carriers are 3 (Northwest, United and Federal Express), while that of the Japanese is only 1(Japan Air Lines). In addition to the that, the US incumbent carriers are in a more advantageous position as mentioned above. Other designated carriers, namely non-incumbent carries or so-called MOU carriers, can operate as far as the Memoranda of Understandings (in 1982, 1985, 1989 and 1996) provides. They include ANA, NCA, JAA and JAS on the Japan side, and Continental Micronesia, Delta, American, UPS on the U.S. side.

C. The New Agreement

On 30 January 1998, Japan and the United States reached a new accord in the form of the Memorandum of Consultation. It is not a open skies agreement, although a liberal one. They include the following;

1 Two Japanese non-incumbent carriers, ANA and NCA, becomes incumbent carriers. Thus, the number of Japanese incumbent carriers

becomes the same as that of the US.

2 The number of non-incumbent passengers carriers will become 5(stating from 2000), and they can operate 70 more flights (plus transfer from the flights having been operated by incumbent carriers, Japan 61 and the US 20) per week.

3 As to the exercise of beyond rights by passengers flights, a new standard is introduced. Namely, if the number of all-through passengers are more than 25% of the passengers in the beyond route, and if the number of passengers multiplied by the flight distance between Japan and the US route is bigger than the multiplied number in the beyond route, then the exercise of beyond rights is permitted. As for the cargoes services, no such quantitative limitation is imposed upon the exercise of the fifth freedom and the cargoes flights can enjoy the beyond rights freely.

4 As to the codesharing, Japanese carriers and US carriers can codeshare freely with one another (e.g. United-ANA), freely in principle with third country carriers(e.g. United-Thai, ANA-Lufthansa), upon a certain condition among themselves (Northwest-Continental, JAL-JAS).

5 Charter operations will increase in two years from current 400 flights to 600 flights per year stating from 2000 and in five years to 800 flights.

6 Although the double approval system in pricing is maintained, the US and Japan agreed to meet by May 1998 to consider further steps to liberalize pricing.

7 This accord lasts for 4 years. A new negotiation for liberalization is resumed after 3 years.

The Japanese Foreign Minister Keizo Obuchi pronounced a statement on 31 January on the General Accord of the Civil Air Transport Agreement between Japan and the U.S.A., which reads as follows;

1. I welcome the general accord reached today, January 31, on the new

frame for the implementation of the Civil Air Transport Agreement between Japan and the United States of America, and express the greatest respect for the efforts of those concerned in this long-standing negotiation on both sides. 2. Though there is some work left to be done on drafting of the final document, I hope that the aviation authorities of the two countries will sign the document as soon as the conditions are arranged. 3. This general accord will greatly improve the fair and equal opportunities between the two countries airlines which have long been in issues, and it will also make it possible to take certain measures toward the liberalization of the Japan-U.S. aviation relationship. The Civil Air Transport Agreement between Japan and the U.S.A. of 1952, therefore, will be smoothly implemented. 4. The accord means another settlement of the bilaterally important separate economic issues, and, I believe, is a considerable achievement for the management of Japan-U.S. economic and other relations on a stable basis.

This general accord is something revolutionary because it has finished the long-term dispute between the two countries and it has rectified the unequal elements contained in the 1952 Agreement. At the same time, it is remarkable that a new standard has been introduced as to the beyond capacity. The standard is nothing but a political compromise. It is a possible, if not an orthodox, interpretation of the Article 12 of the Agreement . It should be regarded as its de facto revision.

6. Conclusion

Firstly, as pointed out in Chapter 3, there have been and will be some types of the capacity clauses. Open skies agreement is only but a choice. The new Accord between Japan and the United States can give a precedent that the open skies agreement is not the only answer to solve aviation disputes and regulate air services between developed countries . Concerning this point, it is remarkable that France and the U.S. reached a

new agreement on 8 April 1998. On 4 May 1992, France denunciated the 1946 agreement (Bermuda I type) . The new agreement is not a open skies agreement, either. The fifth freedom the U.S. carriers can enjoy is rather restrictive.

Secondly, as to the extent of the beyond rights under the capacity clause like Article 12 of the 1952 Japan-United States Air Agreement, the distinction between lex lata(as a matter of interpretation of the existing rule) and lex ferenda (as a matter of policy to make a new rule) should be made clear and these two should not be confused with each other. If we interpret the Article 12 of the 1952 Japan-US Agreement, it is a reasonable (if not the only) interpretation to consider that the 50% standard is applied as concerns the beyond capacity, as is mentioned in Chapter 5. State practices by third States support the idea that there exists a certain quantitative limitation on the beyond rights. Even within the European Communities, exercise of the beyond rights was limited, namely 30 % (first package in 1987, Art8 para.1) and 50 %(second package in 1990, Art. 8 para1(b)) each. The third package in 1992 abolished the quantitative limitation on beyond rights. Australia insisted the 50% standard in 1993, when it had an aviation dispute with the US. This points should be continued for future (potential) disputesin the world.

Thirdly, the new Accord (and a open skies agreement) does not solve all the problems.

The most serious one is how to allocate slots in busy airports, like the Narita Airport. Between Japan and the US, both government leave the allocation to carriers in accordance with the IATA guidelines. However, the European Union alleges that the US gets special treatment on Narita slots. At any rate, transparency is very important in the allocation. Otherwise, there might happen another new dispute concerning the allocation of slots.

[ANNEX] OPEN SKIES AIR TRANSPORT SERVICES AGREEMENTS

COUNTRY	DATE OF SIGNATURE	ENTERED INTO FORCE
[EUROPE]		
Netherlands	October 14, 1992	May 11, 1993
Luxembourg	June 6, 1995	
Finland	June 9, 1995	June 9, 1995
Austria	June 14, 1995	August 1, 1995
Iceland	June 14, 1995	October 12, 1995
Switzerland	June 15, 1995	September 27, 1996
Denmark	June 16, 1995	June 16, 1995
Norway	June 16, 1995	June 16, 1995
Sweden	June 16, 1995	June 16, 1995
Belgium	September 5, 1995	
Czech Republic	September 10, 1996	
Germany	May 23, 1996	
[ASIA]		
Jordan	November 10, 1996	November 10, 1996
New Zealand	June 18, 1997	June 18, 1997
Brunei Darussalam	June 20, 1997	June 20, 1997
Malaysia	June 21, 1997	June 21, 1997
Singapore	April 8, 1997	April 8, 1997
[CENTRAL AMERICA]		
Costa Rica	May 8, 1997	
El Salvador	May 8, 1997	
Guatemala	May 8, 1997	
Honduras	May 8, 1997	
Nicaragua	May 8, 1997	December 5, 1997
Panama	May 8, 1997	