Prior to World War II, international aviation economic regulation was quite limited, consisting of a relatively small number of bilateral agreements between individual countries (or, in certain instances, between a country and an airline). Indeed, Pan American World Airways actually negotiated its own landing rights with several Latin American countries.

A. The International Convention on Civil Aviation (Chicago Convention)

Towards the end of World War II, over 50 countries agreed to meet to discuss development of an international aviation regime for implementation after the war was over. The meeting, which is known as the Chicago Convention, was held in late 1944 and reflected two opposing approaches to the regulation of international aviation. See Chapter 1 for a more extensive discussion of the events leading up to the Convention and the Convention itself.

The U.S. government advocated an “Open Skies” regime in which there would be little regulation of routes, capacity or rates. The vast majority of the other countries attending the Convention (led by the United Kingdom) were concerned about this approach, because the United States had built the greatest number of transport aircraft during the war that could be converted into commercial use relatively easily after the war. As a result of the inability to reach agreement on the terms of an international convention addressing the economic regulation of international air transportation, each country was left to negotiate a separate bilateral air transport agreement with each country that its airline(s) wished to serve. Included among the matters to be addressed in such agreements were routes, capacity, frequency and the like.

Bilateral agreements typically address the so-called “five freedoms of the air.” The first two freedoms are called transit rights: the “first” authorizes non-stop flights over the territory of a party and the “second” freedom authorizes a stop or stops for non-traffic (e.g., refueling) purposes in the territory of the party. The other three freedoms involve traffic rights: the “third” freedom involves the carriage of traffic from the home state to the state of the other party to the agreement's state; the “fourth” freedom involves the carriage of traffic from the other party's state to the home state of the carrier, and the “fifth” freedom involves the
carriage of traffic between the other party's state and third states along an agreed
upon route involving the home state. In “fifth” freedom situations, the authority to
operate must be affirmed by both the other party as well as any third state involved
in the service. Whether a “sixth” freedom (i.e., the carriage of traffic between
two foreign states via the home state of the carrier) exists, and how such sixth
freedom traffic should be counted under bilaterals with capacity provisions,
has always been controversial. Some countries take the position that sixth
freedom traffic is like fifth freedom traffic and should be counted in the same
manner that fifth freedom traffic is treated, and other countries assert that it is
simply a combination of third and fourth freedom traffic under two separate bilat-
eral agreements that can be carried without restriction by the home country
carrier.

Finally, mechanisms for setting rates for travel between the two countries were
also included in the agreements, with the understanding that the broad range of
rates necessary for international air travel would be developed in regional nego-
tiations held by airlines acting under the auspices of their international trade
organization, the International Air Transportation Association (or IATA as it has
become known over the years), which activity would be regulated and granted
anti-trust immunity by the U.S. Civil Aeronautics Board.

B. Evolution of U.S. Bilateral Air Transport Agreements

The initial U.S. bilateral agreement was negotiated in Bermuda during January
and February 1946 with the United Kingdom (which, because of the breadth of its
empire, permitted the United States to exchange valuable round-the-world traffic
rights). Given the fundamental differences in regulatory philosophy, which
existed between the United States and United Kingdom during the Chicago
Convention, it is remarkable that the two countries were able to reach an agree-
ment. Indeed, the resulting compromise was quite interesting, with the United
Kingdom abandoning its efforts to impose tight controls on capacity and fre-
quency and the United States abandoning its opposition to the control of interna-
tional rates. Included among the principles addressed in Bermuda I were ex post
facto (as opposed to prior) review of services offered by an airline, designation of
more than one airline (i.e., “airline or airlines”) to provide service over the agreed-
upon routes and governmental review procedures to regulate rates.

Bermuda I became the “model” for at least 50 post-war U.S. bilateral agree-
ments, continuing until the mid-1970s when two divergent forces came to bear on
the U.S. negotiating position. On the one hand, U.S. airlines were, with the intro-
duction of larger transatlantic jet aircraft in the later 1960s, insisting on greater
scheduled and charter service opportunities and less restrictive bilaterals. On the
other hand, the United Kingdom (and other countries as well) were increasingly
concerned about the growth of, and penetration by, U.S. airlines in international