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Government of Iran

-to-

Covington & Burling

To legal services for the period August 15, 1969 through October 31, 1969, including research, analysis and study in connection with the preparation of an opinion letter dated September 11, 1969 discussing potential legal problems inherent in the administration of bilateral air service agreements.

OLD GOVERNOR
FUND
20% COMMISSION



September 4, 1969

NEW FILE MEMORANDUM

#12,865 -- Iran (Bilateral Aviation Agreements)

The Foreign Minister of Iran wishes to obtain revision of Iran's treaties with various governments covering the rights of their nationals to fly over and land in Iran. He has asked us to advise him with respect to this.

Peter Nickles is working on this in consultation with our other air experts.

John G. Laylin

September 11, 1969

Mr. Kiyomars Vazeen
Charge d'Affaires
Iranian Embassy
3005 Massachusetts Avenue, N.W.
Washington, D.C.

Dear Mr. Vazeen:

You have asked us for advice concerning the air transport agreements between the Government of Iran and several foreign countries. We understand that most of these air transport agreements are bilateral in nature and contain the customary Bermuda-type capacity clauses. In the past your government has viewed these clauses as permitting the airlines designated by other contracting countries complete freedom in determining the number of flights, the intermediate points to be served, and the type and capacity of aircraft to be utilized. Recently the Government of Iran has decided to adopt a policy of survey and predetermination of the schedules and capacity offered by foreign airlines serving Iran. You have asked us whether the Government of Iran can achieve this objective within the scope of its present air transport agreements.

Iran presently receives service by foreign air carriers from points as far distant as Tokyo, Brisbane, Bombay, London and New York. On the flights of most of these carriers, Iran is served as an intermediate point. The operations of Iran's own airline, Iran National Airlines, are more limited. First, it operates over routes within Iran. Second, it serves points nearby in the Far East such as Bombay, Kabul and Karachi. Third, it serves some points in the Middle East region such as Kuwait, Istanbul and Baghdad. Finally, it provides service between Iran and the major European cities of Hamburg, Frankfurt, London, Paris, Rome and Geneva. On

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these routes Iran National is apparently entitled to carry fifth and sixth freedom traffic in addition to traffic falling within the scope of the third and fourth freedoms.* Because of the popularity of Teheran and Abadan as intermediate stops on flights connecting Europe and the Far East, the foreign air carriers are scheduling increasing numbers of flights based largely on their carriage of traffic which is fifth freedom as to them, but which would be third or fourth freedom if carried by Iran National. The effect of the numerous frequencies offered by other air carriers is to reduce the amount of primary justification traffic available to Iran National below the amount to which it is entitled.

The capacity clauses contained in a typical Bermuda-air transport agreement generally take the following form:

- (1) There shall be fair and equal opportunity for the designated airlines of both Contracting Parties to operate the agreed services on the specified routes between their respective territories.
- (2) In operating the agreed services the designated airline of each Contracting Party shall take into consideration the interests of the designated airline of the other Contracting Party so as not to affect unduly the services which the latter provides on the whole or part of the same routes.

* Third freedom traffic is traffic emplaned by an airline in its own country and carried to another contracting country. Fourth freedom traffic is traffic emplaned by a carrier in another contracting country and carried to its own country. Fifth freedom traffic is traffic carried by an airline between the territory of a contracting country and the territory of another foreign country. Sixth freedom traffic is a special case of the fifth freedom, usually being defined as traffic carried by an airline from one foreign country to another such country via the country of which the airline is a citizen.

(3) The agreed services provided by the designated airlines of the Contracting Parties shall bear close relationship to the requirements of the public for transportation on the specified routes and each shall have as its primary objective the provision, at a reasonable load factor, of capacity adequate to meet the current and reasonably anticipated requirements for the carriage of passengers, cargo or mail originating in or destined for the territory of the Contracting Party which has designated the airline. Provision for the carriage of passengers, cargo or mail originating in the territory of the other Contracting Party and destined for third countries or originating in third countries and destined for the territory of the other Contracting Party shall be made in accordance with the general principle that capacity should be related to:

(a) the requirements of traffic originating in or destined for the territory of the Contracting Party which has designated the airline;

(b) traffic requirements of the area through which the airline passes, after taking account of other air services established by airlines of the states situated in the area; and

(c) the requirements of through airline operations.

While the language of these clauses does not expressly provide any machinery by which one of the contracting countries might limit or regulate the frequencies and capacities of the services offered by the designated airline of another contracting country, most nations operating under Bermuda-type air transport agreements have asserted to some degree a power of predetermination and survey. For example, Japan quite rigidly controls the frequencies of the designated airlines of countries with which it has Bermuda-type bilateral agreements. In 1962 the Civil Aeronautics Board of the United States

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proposed a regulation which would have required foreign air carriers to file their schedules in advance with that agency for approval. The stated purpose of these regulations was to permit the agency to restrict the schedules of any air carrier whose country of origin was similarly restricting the operations of United States flag carriers. See Foreign Air Carrier Permit Terms Investigation, Recommended Decision, Docket 12063, June 21, 1962.^{2/} The extent to which countries operating under Bermuda-type bilateral agreements have exerted control over schedules and frequencies can be appreciated by examining the statistics developed in that investigation. Those statistics show that twenty-three countries having such agreements with the United States have adopted a requirement of prior scheduled approval. *Id.* at 49. Thus, it has come to be generally accepted that some prior limitation on capacity and frequency can be imposed under a Bermuda-type air transport agreement.

Several techniques have been developed for controlling the operations of foreign air carriers under Bermuda-type agreements. Generally these techniques fall into two categories: first, are devices aimed at the number of schedules or amount of capacity air carriers of other contracting countries can offer on specific route segments, and second, are rules prohibiting the carriage of certain types of traffic or reserving that traffic for specific airlines.

Most countries have elected to proceed under the first approach. Thus, many countries require foreign airlines to submit statistics showing the origin and destination of passengers carried on all segments of flights serving that country. The usual justification for such a requirement is to enable the country to satisfy itself that the foreign airline in question is not placing undue reliance on the carriage of fifth freedom traffic. A second common technique is the one we have already mentioned, namely, to require foreign airlines to file their schedules for approval in advance. Several countries which have asserted this power have subsequently disapproved schedules and required a lesser number of flights. South Korea, for example, has indicated that it will reduce the number of schedules permitted to foreign air carriers as its own national airline becomes

^{2/} No final action has been taken with respect to this proposed regulation and it has never become effective.

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capable of providing greater service. A third technique which has been used to reduce the frequency of flights of a foreign airline (country B) to and from the country that is imposing the restriction (country A) to a third country (C) is to require it to limit the number of its flights between (A) and (C) to the number of its flights between (B) and (A). This technique has been applied by the United States. See Deutsche Lufthansa A.G., Order E-22851, September 22, 1965. Many countries have also imposed restrictions on the number of passengers foreign air carriers are permitted to carry on specific segments to or from their territory. A final approach, useful when a problem of overcapacity is perceived in the imminent transition from one type of equipment to another, such as the change from propeller-driven aircraft to jet aircraft or the impending transition from current generation jets to wide-bodied jets, such as the Boeing 747, is to invoke local safety regulations and prohibit use of such aircraft at the country's international airports. Thus, if Iran National is not planning to use jumbo jets in the next few years, the appropriate Iranian civil authority could conclude that the airports at Teheran or Abadan are not suitable for use by such large aircraft, citing such reasons as inadequate runway length or the excessive weight of the aircraft.

The second category of techniques mentioned above consists of those directed at limiting the traffic which airlines of other countries are permitted to carry, either as a means of limiting the frequencies they can feasibly offer on flights from their home country or to reserve the traffic for specific airlines. One approach used is to prohibit foreign air carriers from carrying fifth freedom traffic on segments beginning or terminating in the country imposing the restriction. A related technique which increases the effectiveness of a restriction against the carriage of fifth freedom traffic by foreign airlines is to define stopover traffic as local and thus not available to foreign air carriers for segments immediately beyond the country imposing the restriction. Another technique, now becoming more popular, is to create regional cabotage areas by agreement with other countries in the region, reserving the traffic within that area for the airlines of the contracting nations. Thus, Indonesia views traffic between Indonesia and Australia as reserved for the airlines of those two countries and has refused to grant rights to carry that traffic to airlines of other countries.

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With the rapid development of air transportation and the increasing number of nations having airlines that operate on an international scale, many countries have been faced with the problem now faced by Iran. With a few exceptions, most of these countries have not felt it necessary to terminate their Bermuda-type bilateral air transport agreements, but have developed techniques to handle the problems caused by excessive flights and capacity within the framework of their existing treaties. In this letter we have discussed briefly the techniques which have evolved. If there is a need for more detailed information on any or all of the methods discussed or a need for further examples of their application, please let us know.

Sincerely yours,

COVINGTON & BURLING

By: John G. Laylin

September 16, 1969

Mr. Kiyoonars Vazeen
Charge d'Affaires
Embassy of Iran
3005 Massachusetts Avenue, N.W.
Washington, D.C. 20008

Dear Mr. Vazeen:

Pursuant to the request forwarded with your letter of August 28th, we have prepared an opinion letter setting forth certain legal aspects with respect to administering and possibly modifying bilateral air service agreements. This is enclosed, dated September 11. The letter is technical and those in your Government charged with responsibility in this matter may wish, after studying the letter, to discuss with my partners and associates who are at home in this area of the law the points raised.

It appears that many, if not most, countries that have entered into the Bermuda-type of bilateral treaties in practice regulate the extent of the services by foreign airlines that may be rendered. They do this without formal amendment to their treaties. With this

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precedent we would caution against any thought of abrogating an existing treaty before exploring ways of accomplishing what is desired under the particular treaty as it now stands.

The advantages and disadvantages of such a practice, the risks of retaliation and collateral considerations were the subject of an extended investigation in the United States. The recommended decision of a hearing examiner of the Civil Aeronautics Board bearing on this matter is referred to in our opinion letter. In the belief that your colleagues would find it interesting and profitable to read this, I have had a copy made. This is enclosed.

We have also copied the decision of the United States Civil Aeronautics Board in the Lufthansa case which is referred to in the opinion letter. This, too, is enclosed.

If your colleagues wish to discuss the issues covered in the opinion letter or suggested by it, we will be happy to receive them at their convenience.

Sincerely yours,

John G. Laylin

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EXPORT-IMPORT BANK OF THE UNITED STATES

OCT - 6 1969

FOR IMMEDIATE RELEASE

September 30, 1969

EXIMBANK MAKES CREDIT OF \$8,997,200 TO GOVERNMENT OF IRAN FOR JET AIRLINERS

Authorization of an \$8,997,200 credit to the Imperial Government of Iran in favor of Iran Air, the country's flag airline, has been announced by Henry Kearns, Chairman and President of the Export-Import Bank of the United States. Proceeds of the credit will help finance the purchase by Iran Air of two Boeing 707 jet airliners, spare engines and related equipment and services for delivery early in 1970.

The two long-range jets will permit Iran Air to offer more competitive service on its western routes to Europe, thereby releasing its Boeing 727s for increased domestic and regional flights. Iran Air's four Boeing 727 aircraft were financed in part through two Eximbank loans authorized in 1965 and 1967.

The Boeing Company's participation in Eximbank's credit will amount to \$899,720; Iran Air has already made a downpayment of \$4,498,600. The balance of \$8,997,200 to meet the total cost of \$22,493,000 will be financed by a loan from another source.

The entire financed portion will be repaid in fourteen semiannual installments beginning in August 1970. Eximbank's credit bears interest at an annual rate of 6 percent on outstanding balances.