

# **Divide and Conquer: Resolution of the 1996 Dispute Between American Airlines and the Colombian Civil Aviation Authority**

Erika P. Schultz\*  
Albert Schultz\*\*

## TABLE OF CONTENTS

I. Introduction.....	248
II. Antecedents.....	249
A. The Bilateral Agreement .....	249
B. U.S. Carrier Service to Latin America in the 1990's ...	250
C. The Colombian Market .....	250
III. The Players and Their Interests .....	252
A. American Airlines .....	252
B. Continental Airlines.....	252

---

\* Erika P. Schultz lends her international legal expertise and knowledge of the Latin American telecommunications markets to Forey Capital, a Denver based investments banking firm, which specializes in international cable television. She joined the firm in 1998 after completing an LLM degree in Comparative Law at the University of Denver where she graduated at the top of her class. Mrs. Schultz earned her JD with a specialty in telecommunications law at the Externado University in Bogata, Colombia where she finished in the top five percent of her class. She served briefly as Legal Advisor to the General Director of the Colombian Civil Aviation Administration before moving to the United States. Mrs. Schultz has continued her research in Latin American commercial law since joining Forey Capital. Two of her papers, on Joint Ventures and Arbitration in Latin America, have been published in the *Tulane Law Review*, and the *World Arbitration & Mediation Report*, respectively.

\*\* Albert Schultz earned a B.A. in Economics from the University of Chicago in 1985.

C. Department of Transportation .....	253
D. Federal Aviation Administration .....	253
E. The State Department.....	253
F. Robert Torricelli .....	254
G. The Colombian Civil Aviation Authority .....	255
H. Colombian Carriers .....	256
IV. Legal Maneuverings.....	257
A. American Airlines's Show Cause Order .....	257
B. The Colombian Government's Response .....	258
C. The Colombian Carriers' Response.....	260
D. Continental's Response .....	260
V. Negotiations .....	262
A. First Round .....	262
B. Second Round .....	264
C. Third Round .....	265
D. Fourth Round and Settlement.....	266
VI. How Colombia Won .....	267
A. Power .....	267
B. Culture .....	268
VII. War .....	270
VIII. Conclusion .....	271

I. INTRODUCTION

Let every eye negotiate for itself  
And trust no Agent.

(*Much Ado About Nothing*, II, i, 184)

Although Shakespeare was referring to affairs of the heart, his advice was appropriate for American Airlines ("AA") in its 1996 dispute with the government of Colombia over a New York City – Bogota route it proposed to open. What began as a purely legal controversy became a political conflict when AA sought to bring what it perceived as the U.S. government's overwhelming bargaining power to bear against the Colombian Civil Aviation Authority. AA trusted an agent to look after its affairs without thinking through the consequences. AA did not realize that U.S. involvement also invited the participation of additional, influential actors which diluted the government's concern for its interests. Beholden to many parties, the U.S. government proved an ineffective negotiator. Although AA eventually won its objective in the narrowest sense (Colombian permission to open the route), it limited possibilities for future expansion while allowing its rivals increased access to the market for air travel between the two countries.

## II. ANTECEDENTS

## A. THE BILATERAL AGREEMENT

The commercial air relationship between Colombia and the United States is governed by a bilateral agreement, signed on October 24, 1957. The agreement's governing principle is that of mutual reciprocity; the U.S. would authorize a Colombia to U.S. route, and the Colombian government would approve a U.S. to Colombia route.

The articles of agreement which were in contention during the 1996 dispute are the following:

**Article 3**

Air services on a specified route may be inaugurated by an airline or airlines of one contracting party at any time that the contracting party has designated such airline or airlines for that route and the other contracting party has given the appropriate operating permission. In accordance with article 4, a contracting party shall be obliged to concede the authorization, but it could require evidence to prove capacity from the carriers.<sup>1</sup>

**Article 8**

The contracting parties must offer an equal and fair opportunity for the air carriers of both contracting parties in any route covered by this Agreement.

**Article 9**

For the performance of one or the other of the contracting parties' airlines, in the main routes described in this agreement, the interests of the airlines of the other party shall be taken into account so that the services which the carrier offers in whole or part of the same route shall not be unnecessarily affected.

**Article 10**

The air services which are offered to the public by airlines which operate in accord with this agreement shall be closely adapted to the needs of the public for those services.

In Article 12, the bilateral agreement provides for formal arbitration as a possible dispute resolution mechanism, however, arbitration was never considered in the 1996 dispute.<sup>2</sup> Arbitration's use in air transport regulation is extremely rare because it is an expensive and time-consuming process.<sup>3</sup>

---

1. Bilateral Agreement on Air Transportation, Oct. 24, 1957, U.S.-Colom., art. 3-4, 14 U.S.T. 429, 1964 [hereinafter *Bilateral Agreement*]. "Each contracting party has the right to deny, revoke, or sanction another contracting party's carriers in regard to operation authorizations." *Id.*

2. Interview with Abel E. Jimenez, General Director of the Colombian Civil Aeronautics Authority (Jan. 5, 1998) [hereinafter *Jimenez Interview*].

3. International Civil Aviation Organization, Doc. 9626, Manual on the Regulation of International Air Transport, § 2.3, at 3 (no date) [hereinafter *ICAO*].

## B. U.S. CARRIER SERVICE TO LATIN AMERICA IN THE 1990's

In the 1990's, due to strengthening economies led by increasingly stable governments and liberalized markets, Latin America was one of the world's fastest-growing aviation markets. Between 1990 and 1995, the total passenger market between the U.S. and Latin America grew from 14.8 million to 21 million per year.<sup>4</sup> In 1995, 12.5 million passengers from Latin America visited the U.S., and that figure was expected to double by the year 2000.<sup>5</sup> A Boeing forecast put revenue passenger mile (RPM) growth at 5.7 percent per annum, starting with 49.1 billion in 1996.<sup>6</sup>

Miami handled approximately seventy percent of passenger traffic to the region, and about eighty percent of the freight.<sup>7</sup> However, about seventy percent of both passenger and cargo traffic going to Miami was forwarded to beyond.<sup>8</sup> Other airports became increasingly important.<sup>9</sup>

The biggest change in U.S. service to the region occurred early in the decade when AA bought Eastern's routes and United bought Pan Am's. Both airlines used Miami as their Latin American gateway. As traffic built, however, both airlines added routes beyond Miami. AA started service out of Dallas-Fort Worth and New York, while United used New York's JFK, Los Angeles, and San Francisco. Continental, which already served Mexico and Central America, began service to South America in 1991 out of Houston and Newark, significantly avoiding Miami. By 1996, Continental was serving 17 countries and 30 markets in Latin America. The airline planned to continue expanding until 1998 when it would serve virtually every major South American city.<sup>10</sup>

Latin American carriers did not share in market growth to the same extent. Many carriers were stymied by their countries being placed on Category II status in the FAA's International Aviation Safety Assessment Program; this status prevented the countries from increasing traffic or starting new service into the U.S. In 1996, six Latin American countries were Category II: Bolivia, Colombia, Ecuador, Guatemala, Peru, and Venezuela.<sup>11</sup>

## C. THE COLOMBIAN MARKET

Colombian international passenger traffic more than doubled in the

---

4. Douglas W. Nelms, *Stalking Southern Wealth*, AIR TRANSP. WORLD, Mar. 1997, at 55.

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.* at 55-56.

10. *See id.* at 56.

11. *See id.*

ten years prior to the dispute.<sup>12</sup> The greatest expansion took place between 1991 and 1996; all indications were that the market would continue to grow.<sup>13</sup> Travel to and from the U.S. also grew, albeit more slowly than the total.<sup>14</sup> As a result, U.S. traffic as a percentage of the total fell from 45.8 in 1985 to 39.3 in 1995.<sup>15</sup>

In 1996, the Colombian market in terms of passengers carried was about evenly divided between U.S. and Colombian carriers. This was a decrease from the 57 percent of the market historically enjoyed by Colombian carriers and was much less than the peak of 70 percent achieved by the Colombians in 1989.<sup>16</sup> U.S. carriers gradually pushed the Colombians out, and gobbled up the small market share which was enjoyed by carriers flagged in third countries.

Bogota – Miami was the most important route on the eve of the dispute; it accounted for more than one third of the seats offered and almost half of the passengers flown.<sup>17</sup> The next two important markets were Miami-Cali and Miami-Barranquilla.<sup>18</sup> Routes from Bogota to New York, Los Angeles, and Houston rounded out services offered in 1995.<sup>19</sup> Average load factors ranged from 48.7 (Bogota – Houston) to 57.5 (Bogota – Miami). U.S. carriers offered more seats, but carried fewer passengers than Colombian carriers.<sup>20</sup> This may be due to higher fares charged by U.S. carriers.

The event prompting the controversy which unfolded between AA and the Colombian Civil Air Authority in 1996, took place in 1995 - Continental Airlines applied to serve the Newark – Bogota market (with onward service to Quito). Continental served the Houston – Bogota market since 1993,<sup>21</sup> but the newly proposed route greatly expanded the carrier's relative position in the U.S. – Colombia market. In what was generally seen as a purely strategic decision to block Continental, AA decided to serve the New York – Bogota market as well. In fact, AA operated that route for less than a year (from December 1992 to August 1993) before abandoning it as unprofitable.<sup>22</sup> According to the Colombian Civil Air

---

12. See *infra* Chart 1.

13. *Id.*

14. *Id.*

15. *Id.*

16. See *infra* Chart 2.

17. See *infra* Chart 3.

18. *Id.*

19. *Id.*

20. *Id.*

21. Interview with Hector H. Rios, Chief, Office of Air Transport, Colombian Civil Aeronautics Authority (Jan. 5, 1998) [hereinafter Rios Interview].

22. See *id.*

Authority, AA lost the right to the route by ceasing to operate it,<sup>23</sup> however, the airline could reapply for the route by taking the steps required by Colombian regulations (Continental had fulfilled all requirements in its application for the Newark – Bogota route). AA felt that, by the terms of the bilateral agreement, it was entitled to resume route operations at any time, without completing any bureaucratic requirements.<sup>24</sup> This was the crux of the initial legal dispute between AA and the Colombian government.

### III. THE PLAYERS AND THEIR INTERESTS

#### A. AMERICAN AIRLINES

AA was unwilling to fulfill the Colombian administrative requirements to reopen the route because the time lost by complying with the procedures would allow Continental to gain the initiative in the struggle.<sup>25</sup> AA probably felt that it could bring enough U.S. political pressure on Colombia that Colombia would quickly yield. AA counted on support from the White House because it was a large contributor to President Clinton's campaigns.<sup>26</sup>

During the dispute, American Airlines had a dominant position in the Latin American market.<sup>27</sup> AA had just formed an extensive code-sharing pact with the El Salvador-based TACA consortium of airlines to take advantage of U.S.-Central America Open Skies.<sup>28</sup> Ironically, while AA pushed for sanctions, it also talked to Colombian carrier AVIANCA about establishing a code-sharing alliance.

#### B. CONTINENTAL AIRLINES

While American Airlines was well positioned in Latin America, Continental Airlines was just getting started. Continental, which flew to Bogota from Houston, received Colombian permission to begin Newark-Bogota service in June 1996.<sup>29</sup> Continental sought approval for daily passenger, cargo, and mail service on Boeing 757-200s from Newark to Quito, Ecuador via Bogota.<sup>30</sup> The Houston-based carrier, which did not

23. Aeronautic Operations Manual [Manual de Operaciones Aeronauticas] 1996 (Colom.).

24. Mead Jennings, *Latin Tie-ups for American (American Airlines)*, AIRLINE BUS., Aug. 1, 1996, at 7.

25. See Jimenez Interview, *supra* note 2.

26. See *id.*

27. Nelms, *supra* note 4, at 56.

28. See Jennings, *supra* note 24, at 7.

29. Lisa Burgess & Michele Kayal, *U.S. Considers Halting Avianca NY Flights*, J. COM., June 25, 1996, at 1B.

30. Frances Fiorino, *Colombia Beckons*, AVIATION WK. & SPACE TECH., May 27, 1996, at 15.

have a strong foothold in the Latin American market, worked to strengthen its position.<sup>31</sup> Part of Continental's plan was to develop Newark International Airport into a South American gateway.<sup>32</sup> For example, Continental was also planning to sign a code-sharing pact with TACA.<sup>33</sup>

#### C. DEPARTMENT OF TRANSPORTATION

The public objective of the Department of Transportation (DOT) was to honor the bilateral agreement between the U.S. and Colombia. The DOT, however, was primarily interested in advancing the interests of U.S. passenger and cargo carriers. Secretary of Transportation, Federico Pena, said: "[W]e will make every effort to resolve this dispute through further negotiations, but are prepared to impose sanctions if we cannot."<sup>34</sup> DOT was however, generally impartial when the interests of two U.S. carriers conflicted.

#### D. FEDERAL AVIATION ADMINISTRATION

Colombian airlines serving the U.S. market were required to meet the Federal Aviation Administration's (FAA) mandatory security and safety regulations. Since 1995, Colombian airlines faced restrictions on their operations to the United States since the FAA categorized Colombia as Category II.<sup>35</sup> This prevented Colombian airlines from adding to their fleets or expanding routes to the U.S.<sup>36</sup>

#### E. THE STATE DEPARTMENT

The U.S. Department of State, which provided the head negotiator in the dispute, coordinated the positions of the DOT and FAA, and attempted to satisfy political pressures brought to bear by U.S. senators and members of Congress. In addition, it had to protect the interests of other U.S. passenger and cargo carriers while advocating for AA.<sup>37</sup> The Department's head negotiator, Edward O'Donnell, Jr., hammered out differences within his own team in order to present a united front to the

---

31. See Burgess & Kayal, *supra* note 29.

32. Letter from Robert Torricelli, Member of Congress, Congress of the United States, to Ernesto Samper, President of Colombia (June 26, 1996) [hereinafter Torricelli Letter I].

33. Michael A. Dornheim, *Continental Shares with Latin America*, AVIATION WK. & SPACE TECH., Jan. 22, 1996, at 15.

34. U.S. Department of Transportation News, DOT Proposes Sanctions Against Colombian Carrier (July 5, 1996) <<http://www.dot.gov/affairs/index.htm>>.

35. See Jimenez Interview, *supra* note 2.

36. See *id.*

37. PAUL S. DEMPSEY, LAW AND FOREIGN POLICY IN INTERNATIONAL AVIATION 167 (1987).

Colombian delegation.<sup>38</sup> The United States delegation was composed of 14 members representing government agencies, airlines, cargo carriers, airports, and the Air Transport Association of America.<sup>39</sup>

#### F. ROBERT TORRICELLI

Representative Robert Torricelli of New Jersey was the politician who was most effective in putting pressure on the U.S. delegation. Many of Torricelli's constituents worked either for Continental Airlines or Newark Airport.<sup>40</sup> The Colombian government saw Torricelli as protector of Continental Airlines, with the power to effectively lobby against imposition of sanctions on Colombia.<sup>41</sup> The Colombian Commercial Office in Washington quickly recognized Torricelli's potential to help. On June 27, 1996, in a letter to Civil Air Director General, Abel Enrique Jimenez, the Office wrote:

It is necessary to begin contact with Representative Torricelli, who is running for the Senate from the state of New Jersey this year. If the Congressman is interested, he could apply pressure that could help us to avoid sanctions as he has pull with the White House. It is important to find out how interested he is in defending Continental Airlines. We have already begun to approach his aides.<sup>42</sup>

In fact, Torricelli initiated the contact by writing to Colombian President Ernesto Samper.<sup>43</sup> Torricelli argued that any Colombian counter-sanctions applied to Continental would only serve to reward AA for its intransigence by eliminating a rival from the New York City – Bogota market.<sup>44</sup> Torricelli explicitly suggested that the government of Colombia sanction AA by halting its Miami – Bogota flights (undoubtedly, Torricelli's letter was not coordinated with his esteemed colleagues from Florida).<sup>45</sup> However, Colombian Commercial Office Director, Nicolas Lloreda Ricaurte, wisely told Torricelli's staffers that, to avoid widening the conflict, any Colombian counter sanctions would have to be imposed on the same route which was the source of the dispute.<sup>46</sup> This kept pres-

---

38. See Jimenez Interview, *supra* note 2.

39. Colombian Civil Aeronautics Authority, Official Minutes of Aug. 19-22, 1996 Meeting Between Representatives of the Colombian and United States Governments [hereinafter Round Four].

40. See Rios Interview, *supra* note 21.

41. See *id.*

42. Letter from Nicolas Lloreda, Director, Colombian Commercial Office, to Abel E. Jimenez, General Director, Colombian Civil Aeronautics Authority (June 27, 1996) [hereinafter Lloreda Letter I].

43. See Torricelli Letter I, *supra* note 32.

44. See *id.*

45. See *id.*

46. See Lloreda Letter I, *supra* note 42.

sure on Torricelli.

In the same letter to Samper, Torricelli assured the Colombian president that he would talk to the DOT in order to find a quick resolution to the impasse between the two countries, but only if Colombia did not sanction Continental. Torricelli met Secretary of Transportation, Federico Pena, and requested him to abstain from sanctioning Colombia.<sup>47</sup> Pena stated that he would delay the imposition of sanctions for a few weeks, but emphasized that the U.S. considered it important to enforce the rights and obligations contained in the bilateral agreement.<sup>48</sup> The delay played into Colombia's hands by giving its delegation time to maneuver and increase pressure on the U.S. delegation.<sup>49</sup>

#### G. THE COLOMBIAN CIVIL AVIATION AUTHORITY

The primary publicly-stated goal of the Colombian Civil Air Authority was to enforce its interpretation of the bilateral agreement and Colombian law.<sup>50</sup> The Authority did not want to approve AA's proposed route until AA complied with Colombian legal norms to apply for the route.<sup>51</sup> Politically, the Authority could not collapse under pressure from AA and the U.S. government and approve the route without AA's satisfying the legal requirements. The Authority was also clear about its responsibilities to defend the interests of Colombian carriers - a goal more important than the primary public goal.

In addition, the Authority likely saw an opportunity to score a political victory for itself, as well as Colombia. 1996 represented a low point in bilateral Colombian - U.S. relations.<sup>52</sup> The U.S. government had just "decertified" Colombia's performance in the struggle against narcotraficking, thus disqualifying it for certain types of aid.<sup>53</sup> The Department of State also revoked the visa of the Colombian president, Ernesto Samper, whom the U.S. government suspected of having received a \$6 million campaign contribution from the Cali cartel.<sup>54</sup> Many Colombians took

---

47. Letter from Nicolas Lloreda, Director, Colombian Commercial Office in Washington, to Abel E. Jimenez, General Director, Colombian Civil Aviation Authority, (July 1, 1996) [hereinafter Lloreda Letter II].

48. *See id.*

49. *See id.*

50. Colombian Civil Aeronautics Authority, Official Minutes of Apr. 23-25, 1996 Meeting Between Representatives of the Colombian and United States Governments [hereinafter Round One].

51. *Id.*

52. *Reunion Crucial para las Aerolineas Colombianas*, Economicas de el Colombiano, July 16, 1996, at 1 <<http://www.latinexpo.com/@elcolombiano/9607/16/m2006.htm>>.

53. *Id.*

54. *See* Katherine Culbertson, *U.S. Revokes Colombian President's Visa*, OIL DAILY, July 12, 1996, at 31.

these measures as affronts to national pride. The Civil Air Authority probably felt that defending Colombian sovereignty from U.S. attacks would restore a measure of national pride and boost institutional prestige.

#### H. COLOMBIAN CARRIERS

The Colombian carriers' goal during the dispute was to preserve their current access to the U.S. market and perhaps to exploit the controversy obtained to expanded access.<sup>55</sup> At the time, Aerovias Nacionales de Colombia S.A. (AVIANCA) was serving the New York - Bogota market with daily non-stop flights, plus intermediate stop service on a less frequent basis.<sup>56</sup> AVIANCA was also serving the Miami - Bogota market non-stop with daily flights, as well as some additional one-stop service.<sup>57</sup> Aerolineas Centrales de Colombia (ACES) was serving the Miami - Bogota market with daily non-stop flights and one additional frequency three times a week.<sup>58</sup>

The two Colombian carriers each had one representative named to the Colombian delegation.<sup>59</sup> However, neither representative attended the talks, preferring to trust the president of the Colombian air carriers' association, Manuel Leal Angarita, to speak for them.<sup>60</sup> Leal stuck to a hard line and criticized the moderation of the Colombian team.<sup>61</sup> He even accused the chief Colombian negotiator, Civil Aviation Director General Jimenez, of cowardice for not unilaterally abrogating the bilateral agreement.<sup>62</sup> An abrogation would have served the interests of the Colombian carriers in the short run. In the absence of an agreement, commercial aviation between the U.S. and Colombia would be governed only by the principal of strict reciprocity which would limit the growing presence of U.S. carriers in the market. In the long run, however, lack of an agreement would severely retard the growth of the market overall – with less profits for all carriers.

---

55. See Rios Interview, *supra* note 21.

56. *Colombia Demandara el Convenio Aereo con E.U.*, *Economicas de el Colombiano*, Jul. 16, 1996, at 1 <<http://www.latinexpo.com/@elcolombiano/9606/25/m2000.htm>>.

57. *Id.*

58. *American Airlines v. AVIANCA, ACES, and the Government of Colombia*, No. 96-1315, 1996 DOT Av. Lexis 400, at 3 (July 5, 1996) [hereinafter *Order to Show Cause*].

59. See Round One, *supra* note 50.

60. See Rios Interview, *supra* note 21.

61. See *id.*

62. See *id.*

## IV. LEGAL MANEUVERINGS

## A. AMERICAN AIRLINES'S SHOW CAUSE ORDER

The 1996 dispute formally began when AA, which was unsuccessful in getting Colombian approval to begin New York-Bogota service, tried to pressure the Colombian government through the U.S. regulatory system. On April 26, AA filed a complaint with DOT, alleging that Colombia was violating the bilateral agreement by refusing to permit the carrier to operate daily flights from New York to Bogota (and beyond to Quito, Ecuador), which AA proposed to resume on June 1.<sup>63</sup> AA filed the complaint under 49 U.S.C. section 41310 against AVIANCA, ACES, and the Government of Colombia.<sup>64</sup> By this order, AA sought to have sanctions imposed on one or both Colombian carriers in order to prohibit daily non-stop service between New York or Miami and Bogota.<sup>65</sup> AA cited Article 3 of the bilateral agreement between the United States and Colombia:

Air services on a specified route may be inaugurated by an airline or airlines of one contracting party at any time that the contracting party has designated such airline or airlines for that route and the other contracting party has given the appropriate operating permission.<sup>66</sup>

(Note that AA failed to quote the rest of Article 3 which reads: "In accordance with article 4, a contracting party shall be obliged to concede the authorization, but it could require evidence to prove capacity from the carriers.")<sup>67</sup>

By filing, AA turned the legal controversy into a political controversy. In contrast with the usual practice of U.S.-flag carriers facing discrimination in a foreign market,<sup>68</sup> AA made little attempt to resolve the matter informally with the Colombian Civil Aviation Authority. AA went to the DOT without even seeking recourse in the Colombian courts, a move which inflamed Colombian resentment and nationalistic sentiment.<sup>69</sup>

The Government of Colombia indicated publicly that AA would not be permitted to resume its service. The Government of Colombia, AVIANCA, and ACES filed formal answers in response to AA's complaint.<sup>70</sup> Continental Airlines filed a legal brief requesting that any sanctions be

---

63. See *American Airlines*, 1996 DOT Av. Lexis 400, at 1.

64. See *id.*

65. See *id.*

66. See *id.*

67. See *id.*

68. See DEMPSEY, *supra* note 37, at 167.

69. See Jimenez Interview, *supra* note 2.

70. See *American Airlines*, 1996 DOT Av. Lexis 400, at 2.

deferred.<sup>71</sup> AA and the Regional Business Partnership (representing the Newark airport) filed replies.<sup>72</sup> After consideration of all comments filed, the DOT approved AA's complaint by Order 96-5-42, issued May 29, 1996.<sup>73</sup> The DOT found that the bilateral provisions were violated and that Colombia's failure to permit AA to operate "constituted an unjustifiable or unreasonable restriction on access of an air carrier to a foreign market."<sup>74</sup>

The Department of Transportation attempted to resolve the issue through contacts with the Colombian Civil Air Authority, but the efforts were unsuccessful. Due to the refusal of Colombia to authorize AA to serve New York - Bogota, supposed violations of the bilateral agreement, and the apparent inability to resolve the dispute through negotiations, the Department of Transportation tentatively decided to take appropriate countermeasures. The DOT based such possible sanctions upon Section 41310 which permits the Secretary of the DOT to take actions in the public interest.<sup>75</sup>

The public interest was defined by the DOT as the impositions of sanctions against AVIANCA or ACES in the New York - Bogota or the Miami - Bogota market.<sup>76</sup> Such action was to take effect on July 15, 1996.<sup>77</sup>

#### B. THE COLOMBIAN GOVERNMENT'S RESPONSE

The government of Colombia, after receiving notification of the DOT's decision, initially considered not responding.<sup>78</sup> It thought that a sovereign state should not have to reply to the administrative action of a foreign agency.<sup>79</sup> After consulting with the Colombian Embassy in Washington, and U.S. lawyers retained by Colombia,<sup>80</sup> the Civil Aviation Authority filed an objection reiterating that the government of Colombia had not violated the Air Transportation Agreement.<sup>81</sup> Moreover, the Colombian government reaffirmed that it never denied an authorization to

---

71. Objections of Continental Airlines, Inc. before the Department of Transportation, *American Airlines v. AVIANCA, ACES, and the Government of Colombia*, 2-7 (No. 96-1315) (1996) [hereinafter *Objections*].

72. *See id.*

73. *See* Order to Show Cause, *supra* note 58.

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.*

78. *See* Jimenez Interview, *supra* note 2.

79. *See id.*

80. Letter from Dick Mathias, Attorney of Zuckert, Scoult & Rasenberger, L.L.P., to Juan Emilio Posada, President of ACES (June 25, 1996) [hereinafter *Mathias Letter*].

81. Comments by the government of Colombia before the Department of Transportation, *American Airlines v. AVIANCA, ACES* (1996) (No. 96-1315) [hereinafter *Comments*].

AA of the New York - Bogota route, but rather AA had never complied with the proper procedures provided under Colombian laws and regulations to renew service.<sup>82</sup>

The Colombian government said that the tentative sanctions would render the United States in violation of the provisions of the Air Transportation Agreement between the two countries.<sup>83</sup> The use of unilateral sanctions would be contrary to the spirit of cooperation that characterized commercial aviation negotiations between the two countries.

The Colombian government further expressed that it would be forced to retaliate proportionately, against either the U.S. airlines operating in Colombia, or with respect to any of their routes.<sup>84</sup> The Colombian government indicated that sanctions would be applied to Continental at Newark.<sup>85</sup> This would enlist the airline's and airport's political influence and public sympathy.<sup>86</sup> Focusing on the New York/Newark market allowed Colombia to emphasize its position: Colombia had one carrier (AVIANCA) flying to the market and the U.S. could have one as well, but two U.S. carriers would drive AVIANCA out of the market.<sup>87</sup> The Colombian government also stated that if a solution were not found, the possibility of annulling the Air Transportation Agreement would be considered,<sup>88</sup> as provided under Article 15 of the Bilateral Agreement.<sup>89</sup>

The government also pointed out that as long as Colombia continued to be designated an FAA Category II country, Colombia could not obtain operating permits for new services.<sup>90</sup> Thus, AA's initiation of a new service would unfairly affect the market conditions faced by Colombian air carriers, creating additional imbalance.<sup>91</sup> Despite its strong opposition to the Show Cause Order, the Colombian Government was willing to continue with further negotiations.<sup>92</sup>

---

82. *Reunion Crucial para las Aerolineas Colombianas*, ECONOMICAS DE EL COLOMBIANO, July 16, 1996 at 1 <<http://www.sistecol.com/@elcolombiano/9607/16/m2006.htm>>. American Airlines abandoned this route for more than three years because it was no longer profitable. *Id.* Moreover, in April 1996 American Airlines did not participate in a bid offered by the Colombian government to resume the route again. *Id.*

83. *See id.* at 2.

84. *See id.*

85. *See Jimenez Interview*, *supra* note 2.

86. *See Mathias Letter*, *supra* note 80, at 1.

87. *See id.* at 2.

88. *See id.*

89. *See Bilateral Agreement*, *supra* note 1. Article 15 provides that any of the contracting parties may at any moment notify the other of its intention to terminate the agreement. *Id.* Such notification must be sent to the International Civil Aviation Organization. *Id.* In case that such notifications have effect, the bilateral agreement will terminate one year after the receiving of such notification. *Id.*

90. *See Jimenez Interview*, *supra* note 2.

91. *See Comments*, *supra* note 81, at 4.

92. *See id.* at 5.

## C. THE COLOMBIAN CARRIERS' RESPONSE

AVIANCA lobbied for the unilateral abrogation of the bilateral agreement. It felt that a return to tit-for-tat reciprocity in routes served its interests better than any agreement that the Civil Air Authority could negotiate with the U.S.<sup>93</sup>

## ACES

ACES learned that its inclusion as a potential target of sanctions in DOT's Show Cause Order arose only because DOT's lawyers recommended that ACES be named since "it would look right from a legal standpoint" to name both carriers.<sup>94</sup> It was understood that officials in the DOT were considering sanctions only against AVIANCA, not ACES.<sup>95</sup> As a result, ACES was not legally active in the case.<sup>96</sup>

Besides the Colombian airlines, the Colombian export guild expressed concerns due to the possibility of air sanctions. Jorge Ramirez, president of the National Export Association (ANALDEX) stated that in the event of sanctions, perishable goods for export would suffer irreparable damages.<sup>97</sup> Moreover, most goods exported to Europe by plane went via Miami.<sup>98</sup> The United States was the first commercial partner with Colombia, and in 1995 the sale of goods to that country reached \$3.5 million (34 percent of the total Colombian exports).<sup>99</sup> In addition, 30 to 50 flights with Colombian flowers are sent to the U.S. daily.<sup>100</sup>

## D. CONTINENTAL'S RESPONSE

After the Colombian government objected to the order, Continental Airlines also filed an objection. Continental opposed the sanctions proposed by the DOT on the following grounds:

- a. DOT actions would jeopardize U.S.-flag competition in the U.S.-Colombia market. Colombia also allowed Continental to institute daily New York – Bogota - Quito service, and allowed American International Airways to initiate Miami-Bogota all cargo service.
- b. AA would do whatever necessary to protect its dominance of the

93. See Rios Interview, *supra* note 21.

94. See Mathias Letter, *supra* note 80.

95. See *id.*

96. See *id.*

97. *Exportadores, Preocupadas ante Sanciones Aereas*, ECONOMICAS DE EI COLOMBIANO, July 9, 1996, at 1 <<http://www.sistecol.com/@elcolombiano/9607/09/m2001.htm>>.

98. David Scanlan, *U.S. May Prohibit Some Colombian Airline Flights*, BLOOMBERG BUS. NEWS, July 5, 1996 <<http://www.latino.com/biz/0706bf.html>>

99. See *id.* at 2.

100. Letter from Maria I. Patino, President of Asocolfores, to Abel E. Jimenez, General Director, Colombian Civil Aeronautics Authority (June 6, 1996) [hereinafter Maria Letter].

Miami-Bogota market. AA already operated more weekly frequencies than both Colombian carriers combined.

- c. AA's non-stop New York - Bogota service was abandoned three years ago because it was uneconomic. How could the flight now be considered economic with an additional carrier serving the New York market daily? The DOT should not facilitate predation by risking Continental and AVIANCA's services in support of AA's sudden and targeted entry. "If the beneficial consumer impact of low cost new entry, especially in disciplining fares and filling service voids, is too important to permit predation to undermine it in domestic markets, the same principle should also apply in international markets."
- d. Colombian airlines was already precluded from increasing services to Colombia, although AA added a daily frequency at Miami, Continental added a daily frequency at Newark, and additional U.S.-flag cargo operations were permitted. Since Colombian carriers' flights are already constrained, the DOT ought to reconsider its proposal to reduce their flights by an additional daily frequency. Restraining Colombia invites retaliation.
- e. If the U.S. imposed sanctions on AVIANCA's JFK service and Colombia retaliated by sanctioning Continental's Newark-Bogota service, AA's goal of eliminating competition at the New York/Newark gateway would be achieved. Thus, public interest would not be served, and passengers traveling between U.S. and Colombia would be forced to pay high prices for scarce seats on American flights at Miami.
- f. Instead of imposing sanctions on AVIANCA flights at New York, the DOT ought to impose sanctions at Miami, where thirty-five weekly non-stop Colombia flights are offered by American, fourteen by ACES, and twenty-three by AVIANCA, not counting additional one-stop services. Even if Colombia imposed counter-sanctions, Miami would continue to receive substantial Bogota service as well as substantial service from other Colombian points, while New York/Newark would risk the loss of all non-stop Bogota service if counter-sanctions were imposed.
- g. The DOT proposed sanctions effective on July 15, ignoring the evident inconvenience to passengers during the peak summer season. Rather than creating chaos for the traveling public and forcing Colombia to countermeasures than further negotiations, the DOT sought to postpone the implementation of sanctions for at least 30 days after issuing a final order to allow the governments to meet and attempt to reach a satisfactory compromise.<sup>101</sup>

---

101. See *Objections*, *supra* note 71.

## V. NEGOTIATIONS

## A. FIRST ROUND

In February 1996, before the DOT's decision, but faced with possible action by the DOT in the near future, the Colombian government requested a formal consultation with its U.S. counterpart under the provisions of the bilateral agreement.<sup>102</sup> The first meeting between representatives of Colombia and the U.S. took place in Washington D.C. from April 23, 1996 to April 25, 1996.<sup>103</sup>

The Colombian government requested the meeting and submitted an agenda beforehand, however, the U.S. government requested the inclusion of several additional points of interest. These included: (1) the possibility of opening new routes between the two countries (the U.S. wanted to open Medellin); (2) establishing code sharing agreements between airlines; and (3) adopting an article for flight operations of non-scheduled or charter airlines.<sup>104</sup> As is typical in these circumstances,<sup>105</sup> the Colombians found U.S. attempts to introduce new issues without allowing time to prepare counter-views objectionable. Attempting to ameliorate the effect,<sup>106</sup> the Colombian delegation responded that it was not prepared to deal with these issues, however, it could take note of them after its agenda was addressed.<sup>107</sup>

The Colombian delegation then presented its analysis of the current situation of the air transportation between the two countries, reaching the following conclusions:

- 1) There was a growing tendency of U.S. airlines to dominate the Colombian market in comparison to the weak position of Colombian airlines operating in the U.S. market. The trend would accentuate the imbalance that already existed.
- 2) It was impossible for the new flying points sought by the U.S. airlines to generate enough demand to make Colombian airline participation economically viable.
- 3) The air traffic effectuated by U.S. airlines under the sixth freedom was not permitted under the Air Transportation Agreement between the two countries.
- 4) According to the "route schedule", flights may not operate in a triangular route, via points south of Colombia, thereby omitting the exer-

---

102. See Round One, *supra* note 50.

103. *Id.* See also Bilateral Agreement, *supra* note 1. Article 11 provides that in any given moment the contracting parties may solicit a consultation meeting in order to discuss the interpretation, application, or amendment of the Bilateral Agreement. *Id.*

104. See Round One, *supra* note 50.

105. See ICAO, *supra* note 3, at 8, § 2.1.

106. See *id.*

107. See Round One, *supra* note 50.

cise of the third freedom right.<sup>108</sup>

The Colombian delegation also proposed that services which U.S. carriers offered to Colombia would freeze for a period of three years, thus allowing Colombian carriers to catch up and restore balance in the market.<sup>109</sup>

The U.S. delegation replied that it could not accept the proposal because it was inconsistent with the U.S. policy of promoting free markets and permitting private companies to develop their own commercial interests.<sup>110</sup> The U.S. counter-proposed that it would freeze the total capacity of U.S. carriers on the New York (including Newark) – Bogota route if Colombia was prepared to give landing rights to two U.S. airlines on that route.<sup>111</sup> It added that although sixth freedom and triangular routing operations were not specifically addressed in the bilateral agreement, they represented internationally accepted commercial practice.<sup>112</sup>

The Colombian Delegation offered some additional minor concessions, but did not accept the operation of two U.S. airlines on the New York – Bogota route.<sup>113</sup> From the Colombian delegation's point of view, it was not possible to authorize all new services requested by the U.S. since it would not conform to the provisions of Article 9 and 10 of the agreement, and because of the negative effects Colombian airlines would suffer.<sup>114</sup> Since an agreement was not reached, both delegations declared interest in recessing and continuing when appropriate.<sup>115</sup>

In private meetings, the Colombian delegation tried to push for a limitation on capacity as a key to future agreement.<sup>116</sup> The existing bilateral agreement only limited routes. The Colombians pointed to Chile, Argentina, and Peru as countries with whom the U.S. accepted capacity limitation.<sup>117</sup> While the U.S. delegation guardedly accepted the potential acceptance of a capacity limitation, it said that to accept a limitation, Colombia would have to: (1) approve landing rights for both Continental and AA on the New York – Bogota route; (2) authorize air cargo service by American International Airways and Fine Air; and (3) allow Federal Express and UPS to operate their air courier services in Colombia. This was a non-starter for Colombia. When it was clear that the first round would end in failure, the Colombian delegation demanded a memoran-

---

108. *See id.* at 1-3.

109. *See id.* at 3.

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

116. *See* Rios Interview, *supra* note 21.

117. *See id.*

dum of consultations which included a statement of failure.<sup>118</sup>

### B. SECOND ROUND

After the DOT's decision, delegations from the U.S. and Colombia met in Washington again from June 18-21, 1996.<sup>119</sup> The U.S. Delegation expressed appreciation because Colombia authorized Continental Airlines and American International Airways to operate in the Colombian market.<sup>120</sup> Nevertheless, the U.S. Delegation asserted the bilateral right of other U.S. carriers to operate in Colombia, such as American Airlines in the New York-Bogota-Quito route planned for initiation on July 1, 1996, and Federal Express and Fine Air as cargo carriers.<sup>121</sup> In response, the Colombian Delegation stated that if such requests were presented in accordance to Colombian norms and regulations, they would be considered according to Articles 8, 9, and 10 of the Bilateral Agreement.<sup>122</sup>

The Colombian delegation expressed its discontent because of possible sanctions against Colombian airlines by the DOT.<sup>123</sup> Moreover, in 1995, the Colombian airlines froze their operations in the U.S. due to the classification of Colombia as a category II country by the Federal Aviation Administration (FAA).<sup>124</sup> Such a categorization, said the Colombian delegation, constituted a unilateral restriction, not provided for in the Agreement.<sup>125</sup> It also made it impossible for the Colombian carriers to expand services or fleet. Thus, since Colombian carriers did not have equal opportunity to expand in the U.S., it was unthinkable to expand U.S. carrier services in the Colombian market.<sup>126</sup>

The Colombian delegation also emphasized that the judicial complaint made by AA did not have firm legal basis because the airline had not performed the Colombian legal procedure in order to get an authorization to start operations.<sup>127</sup> With the intention of reaching an agreement, the Colombian delegation indicated that it was willing to authorize

118. *See id.*

119. *Economicas de El Colombiano*, Colombia Demandara el Convenio Aereo con E.U. (June 25, 1996), <<http://www.sistecol.com/@elcolombiano/9606/25/m2000.htm>>.

120. Colombian Civil Aeronautics Authority, Official Minutes of June 18-21, 1996 Meeting Between Representatives of the Colombian and United States Governments [hereinafter Round Two].

121. *Id.*

122. *See id.* at 3.

123. *See id.*

124. *See id.*

125. *See* Bilateral Agreement, *supra* note 1. The Colombian Delegation supported this allegation on the basis of a possible violation of Article 8 of the Air Transportation Agreement. *Id.* Article 8 provides that the contracting parties must offer it an equal opportunity for the airline carriers of both contracting parties in any route in which they may operate. *Id.*

126. *See* Round Two, *supra* note 120, at 3.

127. *See id.*

AA in the Bogota - New York route, as long as the U.S. accepted a freezing of the U.S. carriers' capacity.<sup>128</sup> The U.S. delegation responded that freezing the capacity would not resolve the problem of Colombian classification under category II, because the U.S. policy insulated air security issues from commercial issues.<sup>129</sup>

Again, since an agreement was not reached, both delegations willed to continue further negotiations when deemed appropriate.

### C. THIRD ROUND

After the second round, the Colombian Civil Air Authority decided to abrogate the bilateral agreement if there was no movement during the third round.<sup>130</sup> Civil Aviation Chief Jimenez secured Colombian president Samper's permission to cancel the agreement (Samper was upset because the U.S. just cancelled his visa).<sup>131</sup>

The U.S. government attempted to find other Colombian institutions with whom it could negotiate and which could intervene on its behalf with the Colombian delegation.<sup>132</sup> The Americans tried the Colombian Embassy in Washington, and the Colombian Trade Minister, Morris Harf.<sup>133</sup> Both told the Americans that only Jimenez had legal competence to handle international civil aviation negotiations.<sup>134</sup> The U.S. government could not bypass Jimenez because the cancellation of Samper's visa probably precluded a cordial meeting of minds.

The two delegations met in Washington again from July 16-19, 1996.<sup>135</sup> During this round, since many proposals were discussed without settlement, the U.S. Delegation requested a suspension of the negotiation. They did so at the request of Secretary of Transportation Federico Pena.<sup>136</sup> The U.S. government promised to carefully review all proposals discussed. Department of Transportation sources stated that negotiations were suspended to review the Colombian proposal, and because of the TWA flight 800 accident.<sup>137</sup>

---

128. *See id.*

129. *See id.* at 4.

130. *See* Jimenez Interview, *supra* note 2.

131. *See* Rios Interview, *supra* note 21.

132. *See id.*

133. *See id.*

134. *See id.*

135. *Colombia Demandara el Convenio Aereo con E.U.*, *ECONOMICAS DE EI COLOMBIANO*, July 16, 1996 <<http://www.sistecol.com/@elcolombiano/9606/25/m2000.htm>>.

136. Colombian Civil Aeronautics Authority, Official Minutes of July 16-19, 1996 Meeting Between Representatives of the Colombian and United States Governments [hereinafter Round Three].

137. *Colombia y E.U. reanudan las Negociaciones Aereas*, *ECONOMICAS DE EI COLOMBIANO*, July 26, 1996, at 1 <<http://www.latinexpo.com/@elcolombiano/9607/26/v2008.htm>>. The TWA flight 800 crashed off in 1996 near to the coast of Long Island, New York.

During the ensuing week, Colombia suspended operations of LAC, a Colombian carrier, for safety violations, even though it suffered no accidents.<sup>138</sup> This bolstered the Colombian argument for its removal from FAA category II status.<sup>139</sup>

#### D. FOURTH ROUND AND SETTLEMENT

Perhaps sensing that the U.S. delegation might show more flexibility if removed from the insistent political pressures in Washington, the Colombian government suggested that talks reconvene in the historic Colombian city of Cartagena.<sup>140</sup> The U.S. delegation suggested Miami instead, and the fourth round was held in Miami from August 19 to August 22, 1996.<sup>141</sup> This time the talks were successful.

The agreement allowed American Airlines to resume direct flights between New York - Bogota and allowed Colombian airlines to add seven new flights a week on the same route as long as Colombia improved its safety designation.<sup>142</sup> The agreement was reached under the following grounds:

The following dispositions will apply to combined services of passengers and cargo, exclusive service of cargo and any route authorized under the Annex II of the bilateral agreement of 1956:

1. Neither the United States, nor Colombia will increase the number of airlines related to combination of cargo and passengers or number of frequencies including "extra sections" until 1 March 1999, except:
  - a) AA will have the right to operate three new weekly frequencies from New York - Bogota, according to Annex II of the agreement. At its selection, AA will also have the right to transfer four weekly frequencies of its current Bogota - Miami flights to the New York - Bogota route.
  - b) One Colombian airline or airlines designated by the Colombian government will have the right to operate seven weekly frequencies, according to Annex II of the Agreement. Six of these frequencies might be freely utilized in any of the authorized routes. One of the seven frequencies must be used only in the New York - Bogota route.
2. Neither the United States nor Colombia will increase the number of enterprises in the regular services of cargo, which are operating or are authorized as of August 22, 1996, except:
  - a) From September 1, 1998, an additional operator appointed by U.S. will have the right to operate regular cargo services in any of the routes authorized under Annex II of the agreement.

---

138. See Rios Interview, *supra* note 21.

139. See *id.*

140. See *id.*

141. See Round Four, *supra* note 39.

142. *Colombia, American Airlines Agreement Reached*, DOW JONES INT'L NEWS, Aug. 23, 1996, at 1.

- b) An additional operator appointed by Colombia will have the right to operate regular exclusive services of cargo in any of the routes authorized under Annex II of the agreement. From September 1, 1998, a second additional operator designated by Colombia will have the right to operate regular exclusive services of cargo in any of the routes authorized under Annex II of the agreement.
3. Neither U.S. nor Colombia will impose additional restrictions in frequency or capacity respect to the carriers that are operating regular cargo services.
4. Both parties could authorize by mutual assent additional increments of capacity than those established under these dispositions in order to attend special market situations.<sup>143</sup>

## VI. HOW COLOMBIA WON

The resolution of the crisis was a victory for Colombia. AA received the landing rights it sought, plus three additional frequencies, however, it limited its own future growth in Colombia as well as the growth of other U.S. carriers.<sup>144</sup> Colombia was compensated with seven additional frequencies.<sup>145</sup> Colombia sweetened its victory by gaining permission for two new cargo carriers to fly to the U.S. compared to one new U.S. cargo carrier allowed to fly to Colombia under the agreement.<sup>146</sup> The Colombian triumph was heralded by the press as a victory for the Civil Aviation Authority and country as a whole.

Following is an analysis of Colombia's success from three viewpoints: power, culture, and war.

### A. POWER

Although the U.S. seemingly enjoyed overwhelming power over Colombia, this was not the case. The U.S. rejected linkages when it refused the Colombian proposal to include the FAA's classification of Colombia as a category II country. It, therefore, could not use its influence over Colombia in spheres beyond the bilateral civil aviation. This was tactically sound, but strategically unwise. In any case, as a result of the narcotics de-certification controversy, many appropriate coercive measures were already applied by the U.S. to Colombia.

Many advantages which the U.S. usually counts on in aviation disputes<sup>147</sup> did not apply in this case. The U.S. market represented a significant but declining portion of Colombia's international flights. The

---

143. See Round Four, *supra* note 39.

144. See *id.*

145. See *id.*

146. See *id.*

147. See DEMPSEY, *supra* note 37, at 171-74.

market was almost shared evenly between the U.S. and Colombian carriers, with the Colombians slowly losing ground. The tourist sector, of little importance to Colombia's overall economy, would be little hurt by a suspension of air services because most foreign tourists were from Europe or other Latin American countries. The U.S. did not enjoy the same geographic leverage it did when negotiating with European countries. Land access to Colombia from surrounding countries is difficult because of mountainous terrain, poor roads, non-existent railroads, and security concerns. A U.S. traveler could fly to Caracas, Venezuela on a U.S. carrier and then switch to a Venezuelan or Colombian flight to Bogota. But a Colombian could just as easily take AVIANCA to Mexico and then a Mexican or U.S. carrier to the U.S.

In reality, it was Colombia that had power in the negotiations. Since the bilateral agreement was signed in 1956, the U.S. slowly built up an advantage over Colombia in terms of routes, flights, and frequencies offered. The U.S. had more to lose. Colombia, on the other hand, had the best alternative to a negotiated agreement<sup>148</sup> - abrogation of the bilateral agreement, and a return to strict reciprocity. Although total U.S. - Colombia traffic would fall considerably under this scenario, Colombia's share of what remained would increase. More importantly, Colombian carriers would charge passengers a lot more money, as demand would grow even as supply was cut. As mentioned above, AVIANCA lobbied for abrogation of the agreement because it saw the economic possibilities.

In fact, when negotiations appeared stagnant during the third round of talks, the Colombian Civil Aviation Authority seriously considered abrogation. Director Jimenez prepared to issue an ultimatum if the U.S. did not prove more flexible.<sup>149</sup>

## B. CULTURE

Different nations negotiate with different styles. Those styles are shaped by the nation's culture, history, political system, and place in the world. Of course, each international negotiation has its own set of substantive issues and each individual negotiator is distinctive. But a better understanding of each nation's particular style can strengthen the ability of the United States to negotiate a better deal.<sup>150</sup>

The quote above comes from an official U.S. State Department study. It applies to all negotiations between nations, in particular, the importance of national cultural differences in international air negotia-

---

148. ROGER FISHER & WILLIAM URY, *GETTING TO YES*, *passim* (1991).

149. See Jimenez Interview, *supra* note 2.

150. HANS BINNENDIJ, *NATIONAL NEGOTIATING STYLES* 5 (1987).

tions is also recognized.<sup>151</sup>

The Colombian negotiators did an excellent job of identifying American cultural traits which could be manipulated during the course of talks. They focused on the American sense of quantification, time, and fair play.

The Colombian team arrived at the first round of talks with charts, graphs, and tables. Colombian negotiators were able to make their points in figures.<sup>152</sup> The U.S. side also had statistics, but was taken aback by the thoroughness of the Colombian presentation. Normally, U.S. delegations are better prepared than their interlocutors in terms of research and hard data. By surprising the U.S. team, the Colombians seized the initiative and established the pace of future discussions.

In addition, by eschewing rhetoric, the Colombian team appealed to the American sense of quantification:

[A] fundamental aspect of the American view lies in the stress placed on concreteness . . . . To the American, the essential quality is measurability. The world to him is seen as having dimensions that can be quantified . . . . The quantification of the world and experience is deeply ingrained in the American.<sup>153</sup>

The Colombians also used the American sense of time to their advantage. For Americans, "Time is Money," and lack of progress equals failure and worthlessness.<sup>154</sup> The Colombians understood that as talks dragged on, the U.S. team would feel pressure to make concessions to get negotiations moving. Negotiators would feel pressure from themselves, as well as U.S. organizations. AA wanted landing rights before the summer travel season passed. Continental feared uncertainty during the same season, and Torricelli wanted a victory to show New Jersey voters before November elections. The Colombian delegation was under no such pressure. After all, negotiations were conducted under the status quo of air services between the two countries, and it was the U.S. that sought a change.

The Colombians also constantly appealed to the American sense of "fair play." The Colombian team returned repeatedly to the contention that Colombia did not deny AA's application to renew its route. Instead, Colombia insisted that AA follow proper procedures, and stated that AA was not "playing by the rules." Since the Americans accepted the Colombian team's statistical demonstration of Colombian carriers' market weakness, they were in an awkward position to demand concessions. The

---

151. See DEMPSEY, *supra* note 37, at 171.

152. See Jimenez Interview, *supra* note 2.

153. EDWARD C. STEWART, AMERICAN CULTURAL PATTERNS 68 (1985).

154. See *id.* at 38-39.

Colombians continually pointed to differences in routes served, seats offered, and frequencies maintained. The U.S team found it difficult to beat up on the underdog: “[T]he inclusion of the other person’s weakness inside the rule so that “fair play” included in it a statement of relative strength of the opponents and it ceased to be fair to beat a weak opponent.”<sup>155</sup>

## VII. WAR

War is used as a metaphor for all types of conflict. AA’s CEO Robert Crandall reportedly runs his airline like a military campaign.<sup>156</sup> It is useful to examine the U.S. and Colombian negotiators’ performance from the viewpoint of classic military principles.

The Principles of War were first elaborated by British Major General J.F.C. Fuller from his country’s experiences during the First World War.<sup>157</sup> Though modified slightly in subsequent years, the Principles stand the test of time. Of the nine Principles now recognized by the U.S. Army, three have particular significance for the 1996 controversy: *Offensive*, *Economy of Force*, and *Unity of Command*.

The Principle of *Offensive* states “seize, retain, and exploit the initiative.”<sup>158</sup> The Colombians did this well. They seized the Americans during the first meeting with a well-prepared, quantitative analysis of the situation which defined the basis for future discussions. The Colombian team also arrived at all meetings with a new proposal for discussion. By always introducing new proposals, the Colombian team kept the U.S. team off balance, in a reactive rather than proactive mode. The Americans, in contrast, stated their demands in the first round of talks and essentially reiterated the same demands in later talks. The Americans never gained the initiative.

*Economy of Force* means that a commander should put to use all resources and energy necessary to achieve the main objective.<sup>159</sup> Only then should surplus resources be allocated to secondary efforts. During negotiations, the Colombian team focused on the main issue - passenger carrier routes and frequencies. The American team, on the other hand, divided attention between passenger and cargo issues. The reasoning behind the U.S. delegation’s strategy may have been to identify and focus on aspects of common interest which could form a base for agreement

---

155. See *id.* at 57.

156. *American Airlines Loses its Pilot*, THE ECONOMIST, Apr. 18, 1998, at 58.

157. Department of the Army, *Field Manual 100-5, Headquarters*, Appendix A at 173 (May 1986).

158. *Id.*

159. *Id.*

while de-emphasizing areas of conflict.<sup>160</sup>

The biggest U.S. failure was under the principle of *Unity of Command*. Apart from the brief disagreement between Civil Aviation Chief Jimenez, and Air Transport Association Delegate Leal, the Colombian team worked closely, and well, together. For example, ACES' legal counsel in Washington, the law firm of Zuckert, Scoutt, and Rasenberger, provided advice to the company which was passed to the negotiators and incorporated in the overall Colombian strategy.<sup>161</sup>

The U.S. team had to respond to many different interests and political pressures. The Colombians were quick to exploit these divisions. The Colombian Commercial Office urged Jimenez, on June 27, 1996, to maintain the Colombian *Unity of Command* and disrupt the American. The letter reads, "[I]t is imperative to maintain a strict coordination in contacts that the Colombian government makes with its U.S. counterpart and U.S. airlines."<sup>162</sup> The letter further suggests making contacts with Continental, Torricelli, and Federal Express to recruit them as allies and make sure that the U.S. front was fragmented.<sup>163</sup>

#### VIII. CONCLUSION

American Airlines opened a can of worms by taking its dispute with Colombia to the DOT. Suddenly many interested parties, some inimical to American's interests, had input on American's regulatory relationship with Colombia. The Colombians saw an opportunity and proceeded to *Divide and Conquer*.

---

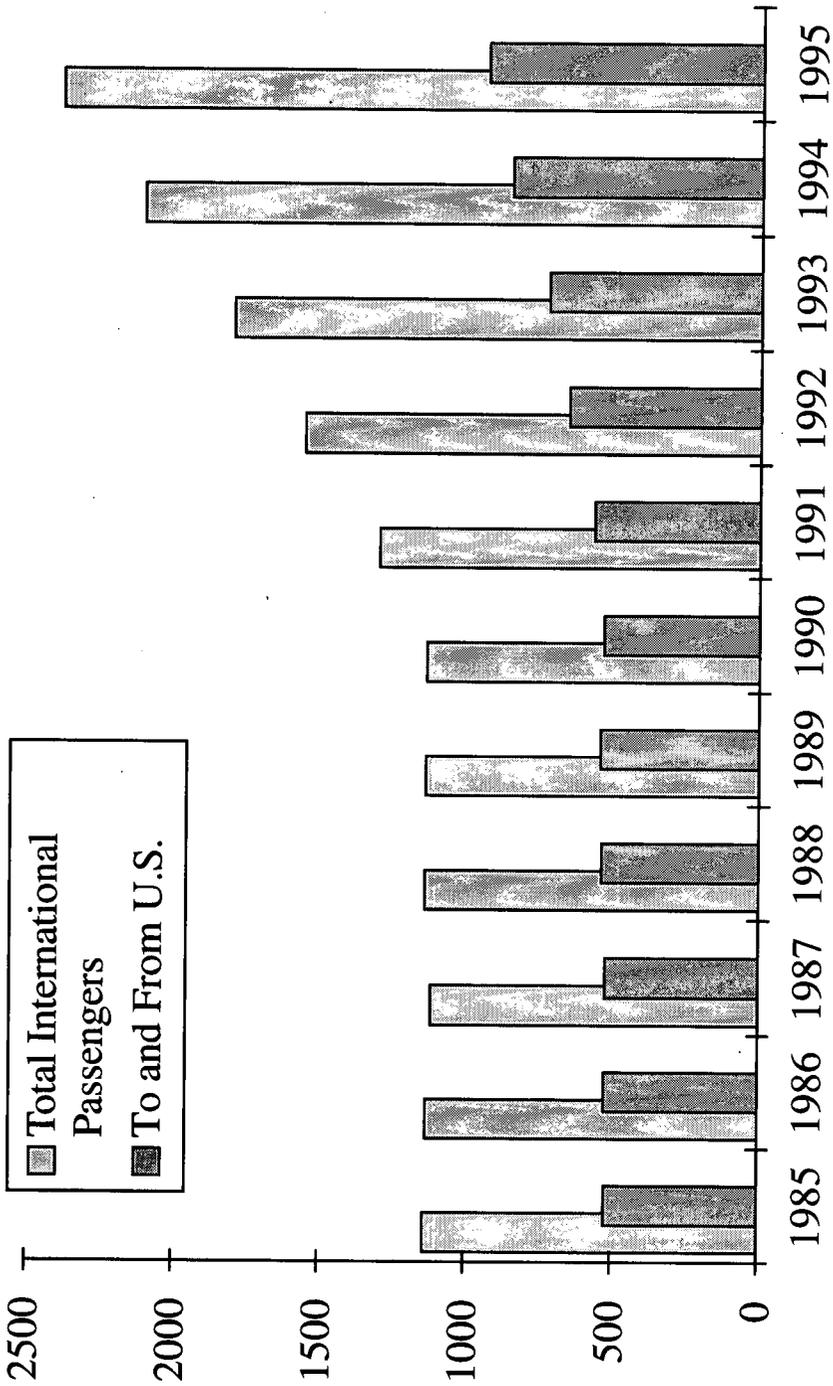
160. See ICAO, *supra* note 3, at 7.

161. See Mathias Letter, *supra* note 80.

162. See *id.*

163. See *id.*

CHART 1. COLOMBIAN INTERNATIONAL AIR TRAFFIC (IN THOUSANDS)



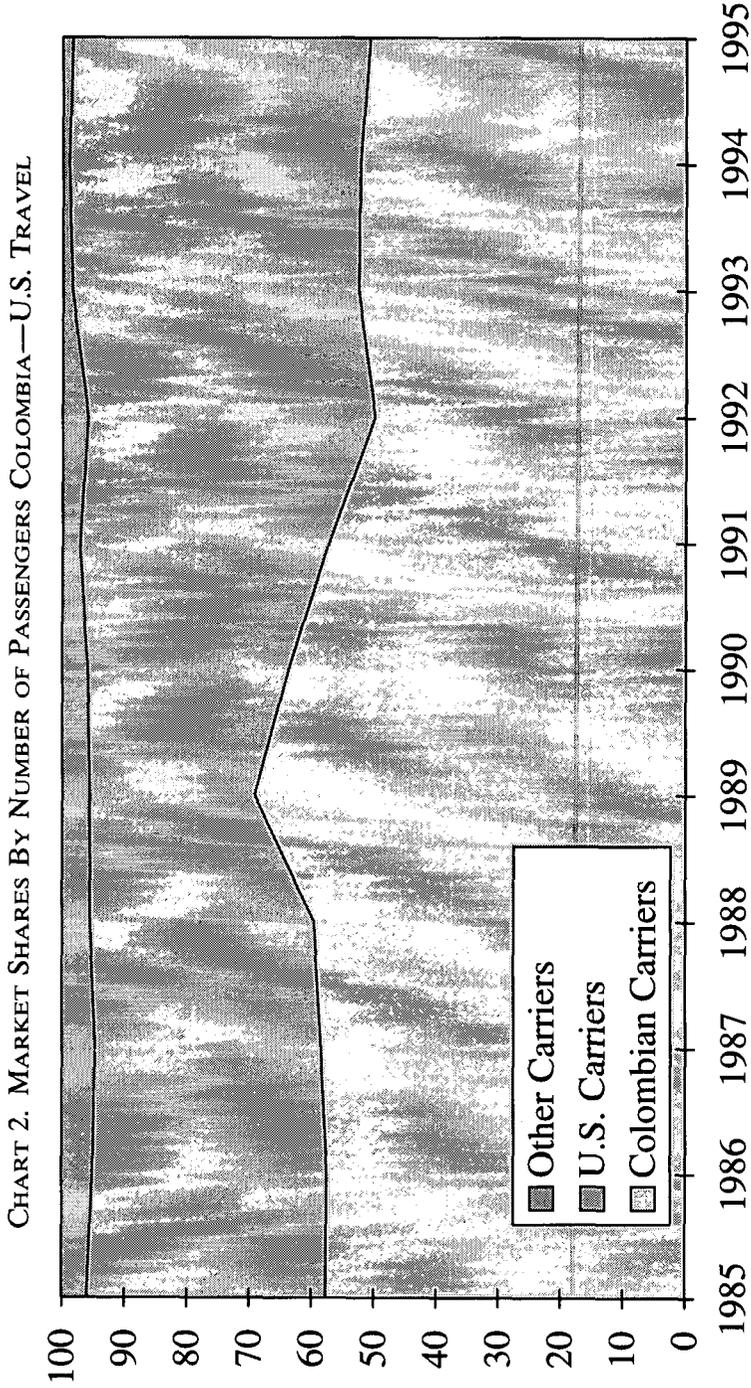


CHART 3. SEAT UTILIZATION BY ROUTE (IN THOUSANDS) 1995

