

Notes

The Ins and Outs of IATA: Improving the Role of the United States in the Regulation of International Air Fares

It is a settled principle of international law that the sovereignty of a state extends throughout the airspace directly above its territory.¹ In the exercise of this sovereignty one of the conditions commonly imposed upon the operating rights of foreign aircraft is that for commercial flights, these aircraft must charge fares acceptable to the host coun-

1. B. CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 3 (1962); M. McDUGAL, H. LASSWELL & I. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* 254 (1963). See generally W. WAGNER, *INTERNATIONAL AIR TRANSPORTATION AS AFFECTED BY STATE SOVEREIGNTY* (Brussels 1970).

The principle of state sovereignty over the airspace above national territories was extensively debated prior to World War One. At this time the French were the principal advocates of "freedom of the air," with Great Britain the leading spokesman for air sovereignty. Even at this early stage of aeronautical development, proponents of "freedom of the air" bore the burden of persuasion in the debate. Implicit in efforts to achieve international agreement on freedom of the air was the notion that there was some sort of existing sovereign authority over national airspace which, until relinquished, would allow a state to exclude foreign aircraft from its airspace. Thus an International Conference on Air Navigation was convened at Paris in 1910 in the hope that it would lead to a convention giving air transport the international rights of access then desired by the French. After the Paris Conference foundered on the sovereignty issue, European states, including France, began explicitly to assert sovereignty over national airspace. See L. TOMBS, *INTERNATIONAL ORGANIZATION IN EUROPEAN AIR TRANSPORT* 4-6 (1936); C. CHRISTOL, *TRANSIT BY AIR IN INTERNATIONAL LAW* 72-74 (1944). Following the First World War, the countries of continental Europe wanted no part of "freedom of the air." The British reversed their earlier position but now found no support for proposals to limit air sovereignty. The Paris Peace Conference ultimately gave rise to the first multilateral proclamation of the principle of air sovereignty, the Convention for the Regulation of Aerial Navigation, Oct. 13, 1919, [1922] G.B.T.S. No. 2, 11 L.N.T.S. 173. See O. LISSITZYN, *INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY* 366 (1942).

Although the United States was a signatory, the United States did not ratify the Paris Convention. The first official assertion of the United States' sovereignty over its airspace came in the Air Commerce Act of 1926, § 6(a), ch. 344, § 6(a), 44 Stat. 572 (repealed 1958). The first multilateral affirmation of the principle of air sovereignty which the United States did ratify was the Pan American Convention for Commercial Air Navigation, Feb. 20, 1928, 47 Stat. 1901 (1933), T.S. No. 840. The latest multilateral convention ratified by the United States which is declarative of air sovereignty is the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180 (1948), T.I.A.S. No. 1591. The Federal Aviation Act of 1958, 49 U.S.C. §§ 1301 ff. (1970) (originally enacted as Pub. L. No. 85-726, 72 Stat. 731), re-enacted the Air Commerce Act's declaration of air sovereignty as § 1108(a), 72 Stat. 798, 49 U.S.C. § 1508(a) (1970).

The settled international law of national sovereignty over *airspace* should not be confused with the much less certain rights of a state regarding the *outer space* above its territory. See generally J. COOPER, *EXPLORATIONS IN AEROSPACE LAW* (I. Vlasic ed. 1968); M. McDUGAL, ET AL., *supra*. For the difficulties in distinguishing between airspace and outer space, see M. McDUGAL, ET AL., *id.*, at 33-35, 244.

The Ins and Outs of IATA

try. Disputes as to the proper fares to be charged for such flights have been resolved through an international legal process, under which the great majority of the world's scheduled international air carriers determine their own rates. These airlines negotiate tariff agreements which fix the price of air travel on most international routes. The central institution of this system is the International Air Transport Association (IATA).²

In recent months, the instability of IATA tariff agreements and the inability of IATA to arrive expeditiously at new tariff agreements have led to speculation that IATA may be on the verge of internal collapse.³ Heartened by such a prospect are the consumer advocates who have long attacked IATA as a cartel dedicated to the preservation of artificially high fares at the expense of the travelling public.⁴ Yet both the prophets and the proponents of IATA's demise have failed to consider adequately whether all forms of regulation of air fares can be avoided, and if not, what sort of alternative regulatory apparatus would be more desirable than IATA.

This Note accepts the present international legal process for regulat-

2. In 1970 IATA airlines carried 89.2 per cent of total world scheduled traffic, flew 87.1 per cent of the world's scheduled passenger-kilometers and 93.2 per cent of world scheduled freight ton-kilometers. As of Nov. 18, 1971, there were ninety active member airlines of IATA and sixteen associate member airlines. 39 IATA BULL. 60, 128-29 (1971).

3. For reports of IATA's problems in the summer and fall of 1971, see N.Y. Times, June 1, 1971, at 1, col. 1; *id.*, June 4, 1971, at 70, col. 7; *id.*, June 5, 1971, at 57, col. 3; Wall St. J., June 9, 1971, at 23, col. 3; N.Y. Times, June 11, 1971, at 1, col. 6; *id.*, June 12, 1971, at 1, col. 4; *id.*, June 15, 1971, at 85, col. 1; Wall St. J., June 15, 1971, at 14, col. 4; *id.*, June 16, 1971, at 34, col. 1; *id.*, June 17, 1971, at 6, col. 2; *id.*, June 18, 1971, at 7, col. 3; N.Y. Times, June 18, 1971, at 78, col. 6; *id.*, June 20, 1971, § 4, at 3, col. 1; Wall St. J., June 22, 1971, at 5, col. 2; *id.*, June 23, 1971, at 38, col. 1; *id.*, June 24, 1971, at 6, col. 3; N.Y. Times, June 24, 1971, at 79, col. 3; Wall St. J., June 25, 1971, at 10, col. 1, and at 18, col. 4; N.Y. Times, June 27, 1971, § 5, at 26, col. 1; Wall St. J., June 28, 1971, at 6, col. 2; N.Y. Times, June 30, 1971, at 82, col. 1; *id.*, July 1, 1971, at 84, col. 4; *id.*, July 3, 1971, at 50, col. 1; *id.*, July 4, 1971, § 4, at 19, col. 6; *id.*, July 11, 1971, § 10, at 35, col. 1; *id.*, July 18, 1971, § 10, at 31, col. 1; *id.*, Aug. 1, 1971, § 1, at 51, col. 1; *id.*, Aug. 5, 1971, at 66, col. 1; *id.*, Aug. 7, 1971, at 48, col. 5; *id.*, Aug. 8, 1971, § 10, at 4, col. 6; *id.*, Aug. 12, 1971, at 66, col. 5; *id.*, Aug. 13, 1971, at 1, col. 1; *id.*, Aug. 14, 1971, at 50, col. 6; *id.*, Aug. 15, 1971, § 4, at 5, col. 1; *id.*, Sept. 16, 1971, at 1, col. 2; *id.*, Sept. 22, 1971, at 14, col. 1; *id.*, Sept. 23, 1971, at 1, col. 7; Wall St. J., Sept. 27, 1971, at 4, col. 2; N.Y. Times, Sept. 28, 1971, at 78, col. 4; *id.*, Oct. 17, 1971, § 10, at 27, col. 1; *id.*, Nov. 20, 1971, at 62, col. 4; Wall St. J., Nov. 22, 1971, at 9, col. 3.

Summaries of the 1971 IATA crisis may be found in Hoffman, *The Great Air Fare War and What It Means to You*, N.Y. Times, Dec. 5, 1971, § 10, at 1, col. 1, and in S. REP. NO. 92-593, 92d Cong., 2d Sess. 12-16 (1972), reprinted in 118 CONG. REC. S2460-61 (daily ed. Feb. 24, 1972).

4. The attack began with the dissent to the Civil Aeronautics Board's decision to approve American air carriers' participation in IATA. IATA Traffic Conference Resolution, 6 C.A.B. 639, 646 (1946) (Member Lee, dissenting). See note 68 *infra*. The Aviation Consumer Action Project, affiliated with Ralph Nader, recently filed a suit seeking to overturn this original acceptance of IATA by the CAB. Civil Action No. 2188-71 (D.D.C., filed Nov. 1, 1971). See N.Y. Times, Nov. 2, 1971, at 41, col. 1.

The "cartel" label as applied to IATA was discussed at length in *Hearings on Monopoly Problems in Regulated Industries before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 84th Cong., 2d Sess., ser. 22, pt. 1, at 1048-54 (1957). Cf. note 119 *infra*.

ing air fares as a relatively successful means of resolving disputes among sovereign states in an orderly, non-coercive manner. By affording an informal forum for the settlement of conflicts over economic practices in an industry of vital importance to most states, IATA provides a mechanism for the compromise of national interests without the appearance of compromising national integrity. While the existing system operates in some respects disadvantageously to the United States, significant improvements can be made within the IATA context. Ameliorative measures affecting the American role within IATA would avoid the risks inherent in unilateral efforts to "deregulate" international air transport: interruptions of air service, politicization of the regulatory process through the assumption of the price-fixing function by governments as an officially diplomatic task, and consequent burdens on trade and communications.

To be sure, IATA agreements serve to insulate IATA members from price competition and many forms of service competition. But this insulation from competition is not in itself at odds with American public policy, for domestic American airlines are similarly protected. The protection of domestic carriers has been linked, however, with protection of the public interest by a responsible governmental agency. Through the comprehensive powers vested in the Civil Aeronautics Board (CAB), commercial aviation within the United States has been subjected to strict economic regulation.⁵ Congress has not chosen, however, to exercise its right under international law to give the CAB similarly comprehensive powers to protect and promote the public interest by setting fares in international commercial aviation. Furthermore, of all major aeronautical states which participate in IATA's rate-making process, only the United States delegates the role of spokesman for the public interest to privately owned airlines.⁶

American participation in IATA has thus lacked the imprimatur of governmental authority necessary for the American public interest in economical air fares to be given fair consideration. Growing consciousness of American impotence in the international fare-setting

5. The Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (repealed 1958), created the Civil Aeronautics Authority (CAA). The CAA became the CAB pursuant to Reorganization Plan No. IV, 54 Stat. 1234, transmitted to Congress on April 11, 1940, by President Roosevelt under the authority of the Reorganization Act of 1939, ch. 36, 53 Stat. 561. No change in the CAA/CAB's powers of economic regulation was involved. Reorganization Plan No. IV, § 7(b), 54 Stat. 1235. The Federal Aviation Act of 1958, 49 U.S.C. §§ 1301 ff. (1970), re-enacted the economic regulatory provisions of the 1938 Act "virtually without substantive change," in the words of a CAB staff attorney. Lindsey, *The Legislative Development of Civil Aviation 1938-1958*, 23 J. AIR L. & COM. 18, 33 (1962).

6. See note 111 *infra*.

The Ins and Outs of IATA

process has prompted Congress to pass the 1972 amendment⁷ to the Federal Aviation Act,⁸ enabling the CAB to disapprove fares of international airlines. While this remedial legislation should enhance American influence within IATA, it is disturbing that Congress discarded a preferable alternative—empowering the CAB itself to prescribe international air fares.⁹

This Note will examine the legislation which was before the Congress and analyze the role the CAB can and should play in establishing international air fares. After placing IATA in its historical context, the politics of IATA will be explicated and it will be shown that the United States has been placed at a disadvantage in IATA negotiations because of deficiencies in the powers of the CAB. Following a discussion of the need for continued regulation of international air fares, Congress' choice between alternative means of enhancing American influence within the regulatory process will be criticized and the optimal role of the CAB delineated.

I. Evolution of an International Legal Process for the Regulation of Air Fares

A. *Origins in Europe and the United States*

The International Air Transport Association is a reincarnation of the International Air Traffic Association, which was formed in 1919 and terminated by the Second World War.¹⁰ An institution such as the old IATA was essential to the development of scheduled air service in Europe. The small size of the European states meant that any flight of sufficient length to provide significant economies of time over surface transportation was almost certain to cross national boundaries. As a consequence, no European country could develop its civil aviation industry primarily within a domestic market.¹¹ Commercial aviation was to be almost synonymous with international aviation. More-

7. Act of March 22, 1972, Pub. L. No. 92-259, 86 Stat. 95, 1972 U.S. CODE CONG. & AD. NEWS 806; see pp. 1135-36, 1146-49 *infra*.

8. 49 U.S.C. §§ 1301 ff. (1970).

9. S.2423, 92d Cong., 1st Sess. (Aug. 4, 1971), referred to as the CAB draft of S.2423, or "paragraph (e) powers." See p. 1146 ff. *infra*.

10. S. COHEN, IATA: THE FIRST THREE DECADES 14, 78 (1949).

11. This was the single most important difference between Europe and the United States in their respective development of airlines. The continental span of the United States could encompass an efficient air transport system within a single sovereign jurisdiction. Cf. notes 20-22 *infra*. Compare H. SMITH, AIRWAYS (1942), with R. HIGHAM, BRITAIN'S IMPERIAL AIR ROUTES 1918 to 1939 (1960) and S. WHEATCROFT, THE ECONOMICS OF EUROPEAN AIR TRANSPORT (1956).

over, the trans-national nature of the European air commerce market meant that no one state had plenary jurisdiction to regulate the economics of air transport. Yet the struggle to recover from the destruction and dislocation of resources caused by World War I bred sharp economic rivalries among the European governments.¹² This friction inhibited recognition of a common interest in commercial aviation and prevented cooperative, inter-governmental regulation of European air transport. The carriers themselves thus assumed responsibility for the concerted action necessary to promote commercial aviation through the establishment of uniform conditions of carriage and the rationalization of routes and schedules.

Although unable to affirm a common interest in the development of commercial aviation, European governments were quick to employ civil air transport to advance their individual national interests. Within a few years of the Armistice of 1918, extensive government ownership and subsidization of the major national airlines had become the norm in Europe. The colonial empires of the victorious Grand Alliance powers had emerged from the First World War intact. Aviation promised to provide speedy communication between the imperialist countries and their colonies. As a means of gaining and maintaining influence, the civil air power of any one country threatened the imperial security of the others; hence, the European governments viewed commercial aviation more as an instrument of state than a profit-making business, and plowed immense amounts of capital into its development.¹³ Direct subsidies to the national carriers flying intra-European routes became routine.¹⁴ By the mid-twenties, the imperial routes began to inch across the map, first over the Mediterranean, then on to Asia and Africa.¹⁵

For those without empires, there was South America. Private German capital began setting up airlines within South America as early as 1920. Within six years, the German government had assumed control of most of these lines, and Germany pushed forward vigorously to

12. See generally R. SONTAG, *EUROPEAN DIPLOMATIC HISTORY 1871-1932*, at 305-22 (1933); E. CARR, *THE TWENTY YEARS' CRISIS 1919-1939*, at 54-60 (1964 ed.).

13. O. LISSITZYN, *supra* note 1, at 137-99.

14. See, e.g., R. HIGHAM, *supra* note 11, at 39-75; L. TOMBS, *supra* note 1, at 31-33. Once subsidization became the norm, it also became a necessity for survival. No unsubsidized carrier could weather the predatory tactics of the subsidized lines. See R. HIGHAM, *supra*, at 44-45. For a table listing the amounts of subsidy paid to civil aviation by principal aeronautical countries during the years 1933-1936 see Appendix III, *BRITISH AIR MINISTRY, 1936 REPORT ON THE PROGRESS OF CIVIL AVIATION 136-42* (1937).

15. R. DAVIES, *A HISTORY OF THE WORLD'S AIRLINES 170-86* (1964); R. HIGHAM, *supra* note 11 *passim*; J. STROUD, *ANNALS OF BRITISH AND COMMONWEALTH AIR TRANSPORT 23-175* (1962).

The Ins and Outs of IATA

establish a network of German-financed airlines serving the intra-continental South American air transportation market.¹⁶

Pan American was the only American international airline of the inter-war period,¹⁷ and its development paralleled the European model in many respects. The company was first formed in 1927, as an American rival to the German aviation interests in South America, which seemed to threaten the Canal Zone.¹⁸ Pan Am's subsequent Clipper service across the Pacific received strong support from the Navy.¹⁹ Most important of all, PAA received a subsidy from the government which not only went uninterrupted by the scandal which terminated domestic airline subsidies in 1934,²⁰ but was also far in excess of that received by any domestic American air carrier.²¹

16. W. BURDEN, *THE STRUGGLE FOR AIRWAYS IN LATIN AMERICA* 11-13, 38-46 (1943).

17. Pan American actually consisted, for tax purposes, of three separate operating corporations controlled by a single holding company. All of these operations, plus Pan American-Grace Airways (of which Pan Am and the Grace Steamship Company each owned one half) are referred to in this Note as "Pan American," "Pan Am," or "PAA." For Pan Am's corporate structure during this period, see G. GOODMAN, *GOVERNMENT POLICY TOWARD COMMERCIAL AVIATION* 81 (1944).

18. H. SMITH, *AIRWAYS ABROAD* 10-14 (1950); M. JOSEPHSON, *EMPIRE OF THE AIR* 43, 51 (1944).

19. H. SMITH, *supra* note 18, at 34.

20. The Army carried all domestic air mail in the United States until 1926. The Air Mail Act of 1925, ch. 128, 43 Stat. 805, allowed private airlines to bid for air mail contracts for the first time. Five years of confusion followed as various schemes for compensating air mail carriers were tried out, at a time when air mail was the only significant source of revenue for the domestic airlines. Finally, President Hoover's Postmaster General Walter F. Brown acquired in the Watres Act of 1930 near dictatorial powers to control air mail contracts. Act of April 29, 1930, ch. 223, 46 Stat. 259. Brown quickly set about hammering out an efficient route system. Through forced mergers and the manipulation of contract requirements so as to exclude bids by small operators, the "Big Four" trunk carriers extant today, United, Eastern, TWA, and American, emerged with most of the air mail contracts.

When an investigation chaired by Senator (later Justice) Hugo Black uncovered the full extent to which Postmaster General Brown had pushed his discretion, see *Hearings before a Special Comm. on Investigation of Air Mail and Ocean Mail Contracts*, U.S. Sen., 73d Cong., 2d Sess. (1933), New Dealers were quick to attack Brown's actions as typical of the high-handedness with which the Republicans had sold the little man down the economic river to Depression. Amid charges of collusion and a "spoils conference," all domestic air mail contracts were cancelled by Roosevelt's Postmaster General, James A. Farley. By executive order later backed up by statute, the Army reassumed its earlier responsibility for the carriage of air mail. Exec. Order No. 6591, Feb. 9, 1934; Act of March 27, 1934, ch. 100, 48 Stat. 408. See generally H. SMITH, *supra* note 11 *passim*; S. RICHMOND, *REGULATION AND COMPETITION IN AIR TRANSPORTATION* 4-6 (1961); C. RHYNE, *THE CIVIL AERONAUTICS ACT ANNOTATED* 20-23 (1939).

21. Until passage of the Civil Aeronautics Act, there was no explicit segregation of federal subsidy payments from federal air mail payments generally. The extent to which federal mail contracts were implicitly subsidizing the airlines was usually calculated on the basis of the difference between government receipts and government expenditures on air mail. See J. FREDERICK, *COMMERCIAL AIR TRANSPORTATION* 240 (1942). On this basis, Pan American and its jointly-held subsidiary, Pan American-Grace, see note 17 *supra*, received \$47,202,000 in subsidy for the eleven fiscal years July 1, 1929-June 30, 1940. The total subsidy received by all American domestic airlines for the same period was \$59,852,000. During this time, the domestic airlines flew some eight times the passenger-miles that Pan Am did. Although the average mail payment per mile flown by Pan Am decreased forty-three per cent between 1930 and 1940, it was still in 1940 three times the amount paid per mile to domestic carriers. W. BURDEN, *supra* note 16, at 116-17.

The disruptions of domestic aviation in 1934 touched off four years of congressional debate over the proper role of the government in the regulation of civil aviation.²² The culmination of this debate was the Civil Aeronautics Act of 1938,²³ which subjected the domestic air transport industry to a comprehensive program of economic regulation. The cornerstone of this regulation was plenary governmental control over rates charged for air transportation.

In 1938, the limited range of commercial aircraft made long-distance international service dependent on a network of refuelling stations. Transatlantic service had not yet been inaugurated. No foreign airline provided regular service to the United States.²⁴ The severe competition of foreign airlines which Pan American encountered in South America was confined within that intra-continental market, beyond the jurisdiction of the United States government.²⁵

For these reasons, the Civil Aeronautics Act of 1938 focussed almost exclusively on the manifold problems of the domestic air carriers. Provision was made for licensing Pan American, and for controlling entry into the market (and American airspace) of those international air carriers, both foreign and American, which might seek operating

22. The Army's resumption of responsibility for the air mail proved disastrous, and was abandoned two months later after the deaths of twelve pilots and a four-fold increase in the cost per mile to the government for the movement of mail. H. SMITH, *supra* note 11, at 251, 255-57.

This fiasco allowed Roosevelt's opponents to regain the political initiative. Brown's policies had obviously produced a measure of national benefit as well as private profits. Both sides were mollified by the Air Mail Act of 1934, ch. 466, 48 Stat. 933, which repealed existing legislation and awarded regulatory powers over air mail carriers to three agencies. The Post Office was to award contracts and determine routes and schedules; the Interstate Commerce Commission was to adjust the contracted rates of compensation when necessary; and the Department of Commerce was to provide technical regulation.

It soon became apparent that air mail was no longer an effective means for controlling the development of commercial aviation. Passenger and freight revenue provided in 1938 nearly twice as much income for domestic air mail carriers as did mail payments themselves. C. RHYNE, *supra* note 20, at 2. The route system created by Postmaster General Brown was endangered by competitors which siphoned off passenger revenue from mail carriers, contrary to the favored policy of "internal" subsidization whereby the passenger revenue on heavily-travelled routes was expected to reduce the cost of mail service on lightly-travelled routes. See, e.g., S. RICHMOND, *supra* note 20, at 73-74, 154-58. An amendment to the Air Mail Act, Act of Aug. 14, 1935, ch. 530, 49 Stat. 614, sought to limit competition for passenger revenue among mail carriers, but failed to reach airlines without mail contracts. The severity of the competition led the major airlines themselves to be active lobbyists for the comprehensive regulation of domestic air transportation established by the Civil Aeronautics Act of 1938. See generally C. RHYNE, *supra* note 20, at 6-7, 41-65, 189-220; F. THAYER, AIR TRANSPORT POLICY AND NATIONAL SECURITY 16-18 (1965). See also Westwood & Bennett, *A Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterward*, 42 NOTRE DAME LAWYER 309 (1967).

23. Ch. 601, 52 Stat. 973 (repealed 1958).

24. See *Hearings on H.R. 9738 (To Create a Civil Aeronautics Authority) before the House Comm. on Interstate and Foreign Commerce, 75th Cong., 3d Sess. 40-41, 376 (1938)*.

25. W. BURDEN, *supra* note 16, at 16-17, 60-61. *Hearings on S. 3659 (Civil Aviation and Air Transport) before a Subcomm. of the Senate Comm. on Interstate Commerce, 75th Cong., 3d Sess. 11 (1938)*.

rights in the future.²⁶ On the crucial question of government control over the rates of international carriers, however, action was deferred pending further study.²⁷ For the moment, international airlines were left to their own economic devices.²⁸

26. Entry into the market was controlled through §§ 401 and 402, 52 Stat. 987-92 (superseded by 49 U.S.C. §§ 1371 and 1372 (1970)), see p. 1134 *infra*. Pan American's continued operating rights were assured by a "grandfather clause," § 401(e), 52 Stat. 988.

27. § 404(c), 52 Stat. 993. See *Hearings on S. 3760 (Civil Aeronautics Authority) before a Subcomm. of the Senate Comm. on Commerce, 75th Cong., 3d Sess. 2-3 (1938)*.

28. One commentator has persuasively argued that the uneasy symbiosis of the Thirties between Pan American and the United States government provided the pattern for American policy on international aviation after the Second World War. According to F. THAYER, *supra* note 22, at 33-37, the scenario was as follows:

In the mid-1920's, American military officials became alarmed at the mounting German influence in South America, and in particular at the operations of the German-controlled Colombian airline, SCADTA, which operated in proximity to the Panama Canal. Consultations with the Post Office revealed that in lieu of any American bids, a contract for Latin American mail might go to SCADTA. The officers managed to interest some entrepreneurs in forming an airline for Latin American operations, and the Post Office obligingly denied the Colombian airline's request for a contract. Pan American was the first of several airlines to be organized for the exploitation of the South American market. By obtaining exclusive landing rights from Cuba, Pan Am obtained a pre-eminent position, and when the Air Mail Act was amended in 1930 to give the Postmaster General near-plenary power over air mail routes, see note 20 *supra*, PAA was established as the only American overseas carrier. With occasional aid from the State Department, Pan Am built up an extensive system of traffic rights throughout Latin America. This reinforced its monopoly position as the only American international airline, so that it could submit bids for air-mail contracts at the highest legal rate and fear no competition. PAA's exclusive rights in Latin America and the Roosevelt Administration's concern for its Good Neighbor Policy insulated Pan Am from the repercussions of the air mail scandal of 1934, when all domestic airline contracts were cancelled as collusive. Its position secure in South America, Pan Am turned to the Pacific region for the next extension of its route network, this time receiving substantial support from the Navy.

Under the "grandfather clause" of the Civil Aeronautics Act, Pan Am as an existing air carrier was granted the right to a certificate of public convenience and necessity upon a *pro forma* showing of its prior operations. The Roosevelt Administration did not like Pan Am's monopoly status in American overseas aviation, but the grandfather clause and Pan Am's stranglehold on foreign landing rights shielded the airline from any immediate steps to introduce competition into the international air transport field. While Administration spokesmen were attacking Pan Am publicly, the advent of the Second World War in Europe forced secret government funding of Pan Am's Latin American operations, through which some fifty airports were built or improved, for later use as the principal network for channeling aircraft and supplies to Great Britain via Africa and Portugal. The Government also financed Pan Am's acquisition of German interests in various South American airlines.

In the midst of this covert support of PAA, an American shipping company organized a competing transatlantic carrier, American Export Airlines (AMEX). Pan Am had obtained a certificate for Atlantic service to England in 1938, along both a northerly Canadian route and a southern route via Lisbon. Soon after service was inaugurated in 1939, the war sealed off Britain, but the Lisbon route continued to offer access to Continental Europe. Portugal was ready to grant traffic rights to a second airline, and AMEX's application for a certificate was seized upon by the CAB and the Administration as an initial step in breaking the Pan American monopoly.

Given the existing traffic to Europe, however, a second airline was not commercially justified. Increased air-mail payments would therefore be essential to support both Pan Am and a competitor on the transatlantic route. Pan Am succeeded in marshalling its congressional allies and defeating the requisite appropriations, halting AMEX's planned operations and handing Roosevelt a bitter political defeat. As a result, the Administration was to keep one eye open throughout the war for the opportunity to end Pan American's monopoly when peace returned.

B. *The Chicago Conference*

The Second World War brought to sudden maturity the long-haul, land-based transport aircraft. The flying boats of prewar international aviation were relegated to patrol duty, and were replaced as transports by four-engined airplanes designed for the long distance flights necessary to supply Allied forces and bomb Axis countries.²⁹ With its newly developed range and power, aviation was clearly destined to be a major force in the postwar world, from a commercial as well as a military perspective.³⁰ To establish the legal underpinnings for a global air transport system, the United States convened an International Civil Aviation Conference in Chicago on November 1, 1944.³¹

The United States advanced a convention creating virtually total "freedom of the air" through a multilateral exchange of the so-called "Five Freedoms."³² The scheduled carriers of parties to the treaty would have nearly unrestricted rights of commercial operation to and through all other parties. Economic decisions as to fares, frequencies, and routes would be left to the discretion of airline managements, sub-

29. F. THAYER, *supra* note 22, at 49-50; John A. Miller, *Air Diplomacy: The Chicago Civil Aviation Conference of 1944 in Anglo-American Wartime Relations and Postwar Planning*, at 51, 59-62, March, 1971 (unpublished Ph.D. thesis in Yale University Library).

30. *Id.* at 78.

31. *Id.* at 177. Fifty-two countries sent voting delegates to the Conference. In addition, two nations were represented by non-voting observers. 1 U.S. DEP'T OF STATE, PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE 13, 119 (1948) [hereinafter cited as *Chicago Proceedings*]. The Soviet Union was invited, but recalled its delegation as it was en route to Chicago, allegedly because of the participation of three neutral countries, Spain, Portugal, and Switzerland, whom the Soviets accused of having had Axis sympathies. R. THORNTON, INTERNATIONAL AIRLINES AND POLITICS 22 (1970); W. O'CONNOR, ECONOMIC REGULATION OF THE WORLD'S AIRLINES 29 (1971).

32. The International Air Transport Agreement setting forth the Five Freedoms appears in *Chicago Proceedings*, *supra* note 31, at 179. The considerations leading to the American position are explored in Miller, *supra* note 29, at 86-114. For a look at some of the ambiguities of the International Air Transport Agreement see W. O'CONNOR, *supra* note 31, at 42-45. The International Air Transport Agreement, which was in effect briefly between the United States and a few other states, *cf.* note 42, *infra*, defined as follows the "Five Freedoms," which have since become a basic part of air transport jargon:

Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:

- (1) [*Transit*] The privilege to fly across its territory without landing;
- (2) [*Technical stop*] The privilege to land for non-traffic purposes;
- (3) [*Out-bound traffic stop*] The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;
- (4) [*In-bound traffic stop*] The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses;
- (5) [*External traffic stop*] The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.

With respect to the privileges specified under paragraphs (3), (4) and (5) of this section, the undertaking of each contracting State relates only to through services on a route constituting a reasonably direct line out from and back to the homeland of the State whose nationality the aircraft possesses.

International Air Transport Agreement, Dec. 7, 1944, art. I, § 1, 59 Stat. 170 (1945), E.A.S. No. 448.

ject to whatever conditions were placed upon their operating rights by their own governments. Since the CAB had no power to control international fares, American international airlines would thus be subject to no economic regulation whatsoever.³³

The United States saw this delegation of economic decisions to the airlines as the international embodiment of the American free enterprise system. Ease of entry and competitive pricing would allow the market efficiently to match supply and demand. Other nations were not blind to the fact that this competitive model reflected more the myth than the reality of the American air transport industry. True, the tremendous growth of American domestic aviation during the thirties had been financed by private capital, but air mail contracts had provided concealed operating subsidies.³⁴ The comprehensive regulatory scheme of 1938 had not only controlled entry into the domestic airline business but had provided rate regulation as well, to the great relief of existing airlines, which had become locked into so-called "uneconomic" rate wars.³⁵

More than this gulf between the theory and practice of American "free enterprise" aviation policy served to make the lofty internationalism of the United States' call for "freedom of the air" ring hollow. The United States possessed in 1944 a competitive advantage in commercial aviation of overwhelming magnitude. The United States had not only a huge surplus of transport equipment poised to enter the international air transport market,³⁶ but also thousands of experienced pilots already familiar with the routes to be flown.³⁷ For the Europeans, with devastated economies and obsolete equipment, a com-

33. Aside from CAB certification to fly a particular route, see note 26 *supra*.

34. Cf. note 21 *supra*. The federal government also expended through 1940 some \$126,468,000 on the maintenance and construction of domestic airway facilities. W. BURDEN, *supra* note 16, at 116.

35. Cf. note 22 *supra*.

36. The aircraft and airline industries of most of Continental Europe had, of course, fallen into Nazi hands. Britain, by agreement with the United States, had concentrated on fighter production. The United States had in turn channelled its aircraft industry primarily into the production of bombers and transports. Miller, *supra* note 29, at 64, 76; THORNTON, *supra* note 31, at 23. DAVIES, *supra* note 15, at 239, admits the disparate emphases of American and British wartime aircraft production, but denies the existence of any agreement to that effect. *But cf.* A. JACKSON, 1 BRITISH CIVIL AIRCRAFT 1919-1959, at 121 (1959); H. SMITH, *supra* note 18, at 70.

37. Through a complex military-civilian airlift system (motivated in part by the Roosevelt Administration's continuing desire to open the international market to American competitors of Pan Am (cf. note 28, *supra*)), American domestic airlines had joined Pan American in setting up and flying global routes under military contracts to supply Allied forces. F. THAYER, *supra* note 22, at 49-55; H. SMITH, *supra* note 18, at 63-91; L. ZACHAROFF, THE WORLD'S WINGS 7-8 (1946). Pan American saw the threat to its position, and bitterly opposed Roosevelt's "Freedom of the Air" policy at Chicago. See Cone, *International Air Transportation*, in VITAL PROBLEMS OF AIR COMMERCE 17 (L. Zacharoff ed. 1946).

petitive market would have meant extinction of their aviation capabilities.

As the prewar subsidy battles of the imperial airlines had shown, anti-competitive devices were to the Europeans an accepted method for protecting national interests. The European position, as articulated by the British, was accordingly to demand an international regulatory authority with powers to control rates, routes, and schedules as a prerequisite to the surrender of sovereign control over national airspace.³⁸ Such an international agency would uphold the economic and security interests of each nation by apportioning the available traffic among national carriers so as to ensure the coordinated development of each state's aviation capability.³⁹

There was nearly unanimous accord at Chicago on the propriety of a reciprocal grant of the rights (1) to fly over a country without stopping and (2) to stop for fuel or servicing without picking up or discharging passengers and freight. These so-called First and Second Freedom rights⁴⁰ were exchanged through signature of the International Air Services Transit Agreement.⁴¹ Due to the regulatory demands of the Europeans, the Conference was unable to reach general agreement on the exchange of so-called Third, Fourth, and Fifth Freedom rights.⁴² These traffic rights permit a given country to provide air service *from* that country to a second country and from the second country back *to* the first country (Third and Fourth Freedoms), and for the first country's airline to provide air service from

38. Speech of Lord Swinton, chairman of the United Kingdom delegation, *Chicago Proceedings*, *supra* note 31, at 63-67. The Canadians drew an explicit parallel to the CAB's domestic jurisdiction. Speech of C.D. Howe, head of the Canadian delegation, *id.* at 67-74. See generally W. O'CONNOR, *supra* note 31, at 20-29; Miller, *supra* note 29, at 115-45.

39. The British and their allies at Chicago were not without bargaining power. The United States' technological advantages were offset by British and European geo-political advantages. By a concerted denial of landing rights to American airlines, the Europeans could lock the United States out of the transatlantic air transport market—the United States would have no "Third and Fourth Freedom" traffic to Europe. The Europeans could meanwhile serve the transatlantic market through Canada. Moreover, the British together with the Commonwealth countries could provide round-the-world service on an "All-Red" route, red being the color traditionally used in atlases to designate territory under British dominion. Should the Commonwealth countries join Britain and Europe in an American boycott, no rival American global air service would be possible because the need for fuel as well as "Fifth Freedom" traffic made long-haul air routes dependent on a good number of intermediate landing spots. See R. THORNTON, *supra* note 31, at 28-29.

40. Cf. note 32 *supra*.

41. Dec. 7, 1944, 59 Stat. 1693 (1945), E.A.S. No. 487.

42. Cf. note 32 *supra*. The International Air Transport Agreement was signed by only a few minor countries besides the United States. Following the Bermuda Conference, *see* pp. 1114-17 *infra*, and the Senate's ratification of the Convention on International Civil Aviation, *see* note 43 *infra*, the United States denounced the International Air Transport Agreement on July 25, 1946, effective July 26, 1947. Department of State Press Release No. 510 (July 25, 1946), 3 AV. L. REP. ¶ 26,300, at 22,728 (June 9, 1958).

The Ins and Outs of IATA

the second country to third countries (Fifth Freedom). Recognizing "that it is desirable to promote early development in this field [of international aviation] during a transitional period, in order to obtain practical experience for giving effect to more permanent arrangements at a later date," the Final Act of the Chicago Conference sought to outflank the impasse over economic regulation by providing a standard form for "provisional" agreements exchanging Third, Fourth, and Fifth Freedom rights on a bilateral basis.⁴³

C. *The Resurrection of IATA*

The final meeting of the prewar IATA had, in 1938, elected Pan American Airways as its first North American member, and in recognition of the coming era of transatlantic air service had scheduled its next meeting for New York in September, 1939.⁴⁴ The outbreak of war ended IATA operations, but many of the officials of its Continental members congregated in London and attached themselves to the various governments in exile established there.⁴⁵ Many of these businessmen-cum-bureaucrats attended the Chicago Conference as delegates and advisors, and when the economic stalemate among governments became apparent, they arranged a meeting of airline operators in Chicago immediately after the formal Conference adjourned.⁴⁶ Several of the American domestic airlines, having expanded into the international field through their wartime airlift operations, were among the thirty-four airlines represented at this convocation.

A conference in Havana in April, 1945, approved Articles of Association which extended membership in the reconstituted International Air Transport Association to any scheduled international carrier flying the flag of a member state of the newly formed International Civil

43. *Chicago Proceedings*, *supra* note 31, at 127-29. Except on the issue of economic controls, the Chicago Conference was a splendid success. A Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180 (1947), T.I.A.S. No. 1591 (effective April 4, 1947), set up technical standards for aerial navigation, and created the International Civil Aviation Organization (ICAO), a multi-level body for the promotion of international aviation. A Provisional International Civil Aviation Organization (PICAO) was established by executive agreement to perform the duties of the ICAO until such time as the Convention on International Civil Aviation was ratified as a treaty. Interim Agreement on International Civil Aviation, Dec. 7, 1944, 59 Stat. 1516 (1945), E.A.S. No. 487.

The ICAO is empowered to "study any matters affecting the organization and operation of international air transport, including the international ownership and operation of international air services on truck routes . . ." Convention on International Civil Aviation, art. 55(d), 61 Stat. 1197 (1947), T.I.A.S. No. 1591, at 22. The ICAO has nevertheless eschewed participation in the international legal process for regulating air fares. See K. PILLAI, *THE AIR NET* 122-36 (1969). See generally T. BUERGENTHAL, *LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION* (1969).

44. S. COHEN, *supra* note 10, at 77.

45. *Id.* at 79-80.

46. *Id.* at 80.

Aviation Organization (ICAO).⁴⁷ These Articles established as the aim of IATA the development of international commercial aviation in cooperation with the ICAO. The unwritten assumption of the carriers involved was that IATA would resume its prewar function of providing a forum for "informal" price-fixing and divisions of the market.⁴⁸ This intention was made explicit when IATA voted unanimously in October 1945 to set up regional "Traffic Conferences."⁴⁹ These conferences consider and act upon "all international air traffic matters . . . particularly the following:— . . . fares, rates and charges for passengers and cargo; [and] schedules . . ." ⁵⁰ Actions are dependent upon the unanimous agreement of all carriers operating in a given region.⁵¹

It was not immediately apparent whether such unanimity would be forthcoming from the airlines any more than from the governments themselves. In October, 1945, Pan American announced plans to drop its North Atlantic fares by nearly thirty per cent.⁵² The ensuing uproar in Great Britain and France made it clear that these governments would insist on some form of rate control in international aviation.⁵³ In December, 1945, when IATA was incorporated in Montreal—the site of ICAO—it was still unclear what role IATA would play in providing this control.⁵⁴

D. *The Bermuda Bilateral*

The United States and Great Britain met in Bermuda in January 1946 to work out a bilateral air services agreement.⁵⁵ This was to be the first significant "provisional"⁵⁶ agreement pending multilateral

47. *Id.* at 102; *cf.* note 43 *supra*.

48. S. COHEN, *supra* note 10, at 64.

49. *Id.* at 82; IATA Traffic Conference Resolution, 6 CAB 639, 640 (1946). The Conferences were originally nine in number, but were reduced to the present number of three within two years. S. COHEN, *supra* note 10, at 87; IATA Traffic Conference Resolution, 9 CAB 221 n.4 (1948).

50. *Provisions for the Regulation and Conduct of the IATA Traffic Conferences*, art. IV, § 1(ii), (iii) INTERNATIONAL AIR TRANSPORT ASSOCIATION, RULES & REGULATIONS 55 (8th pub. 1966), reprinted in A. CHAYES, T. EHRLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS, DOCUMENTS SUPPLEMENT 274-77 (1968).

51. *Id.* at art. VII, § 1. For descriptions of the mechanics of IATA tariff negotiations see Gazdik, *Rate-Making and the IATA Traffic Conferences*, 16 J. AIR L. & C. 298 (1949); Koffler, *IATA: Its Legal Structure—a Critical Review*, 32 J. AIR L. & C. 222, 224-27, 230-32 (1966). See also the book and articles by S. Ralph Cohen, former Public Relations Officer of IATA, cited in note 117 *infra*.

52. The proposed reduction was from \$375 (one way) to \$275. H. SMITH, *supra* note 18, at 251-52.

53. *Id.*

54. S. COHEN, *supra* note 10, at 82.

55. Air Services Agreement with the United Kingdom of Great Britain and Northern Ireland, Feb. 11, 1946, 60 Stat. 1499 (1946), T.I.A.S. No. 1507 [hereinafter cited as *Bermuda bilateral*].

56. *Cf.* p. 1113 *supra*.

The Ins and Outs of IATA

accord on the exchange of traffic rights,⁵⁷ and was destined to serve as a model for most subsequent bilateral agreements to which the United States has been a party.⁵⁸ In return for Britain's retraction of its demand at Chicago for controls on the number of flights each party could offer over a particular route, the United States agreed to economic regulation under the auspices of IATA.⁵⁹

Under the Bermuda bilateral, the IATA "rate conference machinery," consisting of negotiation among the carriers, was given primary responsibility for setting fares, subject to virtually unrestricted rights of disapproval by the aeronautical authorities of either government.⁶⁰ A detailed procedure was set up to deal with "open-rate"

57. Proposals for multilateral air service agreements continued to abound, and provoked much discussion, until interest waned after 1953. See W. O'CONNOR, *supra* note 31, at 49-85.

58. Bilateral air transport agreements to which the United States is a party are collected at 3 AV. L. REP. ¶ 26,305 (Aug. 18, 1971). About three-quarters of these, including those with nearly every major country except the Soviet Union, are "Bermuda-type" agreements. See *Hearings on H.R. 1716, H.R. 6400, and S. 1540 (Rates and Practices in Foreign Air Transportation—1964) before the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. 30 (1965)*. The Bermuda bilateral and the others which followed it until 1948 were composed of the form language set forth for bilaterals by the Final Act of the Chicago Conference, see p. 1113 *supra*, plus an "Annex" which contained the provisions concerning routes and rate controls which had been the substantive subject-matter of the bilateral negotiations. Thus it was the Annex to the Bermuda bilateral, *cf.* note 60 *infra*, which became the model for subsequent bilaterals. By 1948 the Bermuda Annex had become so much the norm, insofar as it solved the problem of rate control through delegation of rate-making competence to IATA, that the provisions of the Annex concerning IATA were incorporated by the United States into a new "form" for bilateral air service agreements which the United States has used since 1948. This new "form," sometimes referred to as the "Bermuda form," replaced the provisional "Chicago form" recommended by the Chicago Conference. Under the "Bermuda form," the Annex or Schedule is reserved for provisions assigning routes or otherwise dealing with matters negotiated *de novo* with each separate bilateral partner of the United States. Thus the crucial paragraphs (e) and (f) which appear in § II of the Annex to the Bermuda bilateral, see note 60 and p. 1116 *infra*, appear in Article 11 of the "Bermuda form" of bilateral used since 1948. The "Chicago" and "Bermuda" forms are reprinted at 3 AV. L. REP. ¶¶ 26,306 and 26,307 (June 9, 1958). The specific bilateral usually cited as exemplifying the "Bermuda form" is the Air Transport Agreement with the Fed. Rep. of Germany, July 7, 1955, [1956] 1 U.S.T. 537, T.I.A.S. 3536.

The fact that the Bermuda bilateral itself, *supra* note 55, is the "Chicago" form with an Annex added hardly eases the confusion surrounding bilateral nomenclature. This Note refers to both the "Chicago form" of bilateral with a Bermuda-type Annex, and the so-called "Bermuda form" of bilateral which has been used since 1948 as "Bermuda-type" bilateral air service agreements. There is one significant "Chicago form" bilateral still effective which, because it was entered into before the Bermuda conference, is not of the "Bermuda-type." This is the bilateral with Iceland, *cf.* note 105 *infra*.

59. See Address by George P. Baker, chairman of the United States delegation to the Bermuda Conference, McGill University, April 18, 1947, reprinted in part in I. A. CHAYES, T. EHRLICH & A. LOWENFELD, *INTERNATIONAL LEGAL PROCESS* 498-99 (1968).

60. The form of the Bermuda bilateral is as follows: the fourteen articles of the bilateral are mainly procedural, and follow the form recommended for bilateral agreements by the Chicago Conference. See p. 1113 and note 58 *supra*. The most important provisions of the bilateral are contained in the Annex. Section I of the Annex provides that the exchange of air traffic rights in the Annex is made "in full accord and compliance with the principles recited and agreed in the Final Act of the [Bermuda] Conference." See note 66 *infra*. Section III specifies the routes exchanged by the parties, subject to amendment under § IV. Section V specifically invokes the capacity principles of the Final Act. See note 66 *infra*. The critical question of rate regulation is dealt with in § II.

situations, which might result either from IATA carriers failing to reach an agreement or governmental disapproval of an IATA tariff agreement. The United States undertook "to use its best efforts" to secure for the CAB powers under American municipal law to fix and suspend rates for international aviation comparable to those exercised by the Board over domestic aviation.⁶¹ Until such time as the legislation was obtained, however, in the event that either government was dissatisfied with a proposed new rate, the objecting government could act under paragraph (f) to prevent that rate from going into effect.⁶² Under the alternative paragraph (e),⁶³ which was to be effective once the CAB had been given the power to set international rates, a government dissatisfied with a rate proposed by the other government dur-

The only arguable restriction on the plenary power of either party to disapprove an IATA agreement is posed by the vague language of paragraph (h), *see* note 65 *infra*. According to paragraph (f), the sanctions there allowed until paragraph (f) is supplanted by paragraph (e) are conditioned on nothing more than "one of the Contracting Parties [being] dissatisfied with any new rate proposed."

61. *Bermuda bilateral*, *supra* note 55, Annex, § II, paragraph (i).

62. *Bermuda bilateral*, *supra* note 55, Annex, § II, paragraph (f):

Prior to the time when such power may be conferred by law upon the aeronautical authorities of the United States, if one of the Contracting Parties is dissatisfied with any new rate proposed by the air carrier or carriers of either Contracting Party for services from the territory of one Contracting Party to a point or points in the territory of the other Contracting Party, it shall so notify the other prior to the expiration of the first fifteen of the thirty day period referred to in paragraph (c) above, and the Contracting Party shall endeavour to reach agreement on the appropriate rate. In the event that such agreement is reached each Contracting Party will use its best efforts to cause such agreed rate to be put into effect by its air carrier or carriers. It is recognised that if no such agreement can be reached prior to the expiration of such thirty days, the Contracting Party raising the objection to the rate may take such steps as it may consider necessary to prevent the inauguration or continuation of the service in question at the rate complained of.

63. *Bermuda bilateral*, *supra* note 55, Annex, § II, paragraph (e):

In the event that power is conferred by law upon the aeronautical authorities of the United States to fix fair and economic rates for the transport of persons and property by air on international services and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board at present is empowered to act with respect to such rates for the transport of persons and property by air within the United States, each of the Contracting Parties shall thereafter exercise its authority in such manner as to prevent any rate or rates proposed by one of its carriers for services from the territory of one Contracting Party to a point or points in the territory of the other Contracting Party from becoming effective, if, in the judgment of the aeronautical authorities of the Contracting Party whose air carrier or carriers is or are proposing such rate, that rate is unfair or uneconomic. If one of the Contracting Parties on receipt of the notification referred to in paragraph (c) above is dissatisfied with the new rate proposed by the air carrier or carriers of the other Contracting Party, it shall so notify the other Contracting Party prior to the expiration of the first fifteen of the thirty days referred to, and the Contracting Parties shall endeavour to reach agreement on the appropriate rate. In the event that such agreement is reached each Contracting Party will exercise its statutory powers to give effect to such agreement. If agreement has not been reached at the end of the thirty day period referred to in paragraph (c) above, the proposed rate may, unless the aeronautical authorities of the country of the air carrier concerned see fit to suspend its operation, go into effect provisionally pending the settlement of any dispute in accordance with the procedure outlined in paragraph (g) below.

The Ins and Outs of IATA

ing an "open-rate" situation would be nonetheless obligated to allow the proposed rate to go into effect, pending arbitration.⁶⁴

The British motive in pressing for rate-fixing powers for the CAB was apparently a feeling that the CAB could be trusted more than Pan American to be "reasonable" in fixing "fair and economic" rates.⁶⁵ Until the CAB received its expanded powers, the British reserved the right of summary action against rate wars instituted by American carriers. As a sign of good faith, Britain would rely on the CAB's discretion once it had obtained full rate control powers.⁶⁶

The Bermuda Agreement contemplated that IATA normally *would* reach agreement on fares, and furthermore, that these fares *would* be approved by the governments whose carriers negotiated them. The reservation by states party to Bermuda-type agreements of the power to disapprove IATA tariff agreements was supposed to insure that IATA would conscientiously consider all nations' interests in the course of its fare deliberations. The provisions of paragraphs (e) and (f), by preserving sovereign powers to regulate fares directly, were expected to keep IATA "honest" but were not designed as practical means for habitual rate-setting by governments disgruntled with IATA. A central problem since Bermuda is that the CAB has not only been

64. Under *Bermuda bilateral*, Annex, § II, paragraph (g), either party can submit a dispute over a proposed rate to the ICAO for arbitration, whether or not the rate has provisionally gone into effect under paragraph (e) or (f). Although the ICAO's response is termed an "advisory report," each government pledges to "use its best efforts under the powers available to it to put into effect the opinion expressed in such report." Once the CAB obtains the rate-fixing power which will invoke paragraph (e), *see* pp. 1149-52 *infra*, the ICAO's report would have a mandatory effect on the CAB, at least so long as § 1102 of the Federal Aviation Act remains in effect: "In exercising and performing [its] powers and duties under this Act, the Board . . . shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any other [sic] foreign country or foreign countries . . ." 49 U.S.C. § 1502 (1970).

65. The invocation of paragraph (e) is contingent on the CAB's receiving the same powers "to fix fair and economic rates" for international services that it now has for domestic services. Paragraph (h) provides that "the rates to be agreed in accordance with the above paragraphs shall be fixed at reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit and the rates charged by any other air carriers." *Bermuda bilateral*, *supra* note 55, Annex, § II, paragraph (h).

66. As a second *quid pro quo*, Britain refrained from demanding explicit controls of schedules and capacity, *see* p. 1115 *supra*. The Final Act of the Bermuda Conference did speak, however, of a "fair and equal opportunity" for both countries' carriers to operate flights between the two countries (Third and Fourth Freedom traffic) and an "understanding" that capacity on flights proceeding on to third countries (Fifth Freedom traffic) was to be limited to the legitimate requirements of long-haul, through service and would not attempt to divert traffic from local or regional services. Final Act of the Civil Aviation Conference, held at Bermuda, 15th Jan. to 11th Feb., 1946, §§ 4, 6, 60 Stat. 1512 (1946). The capacity principles of the Final Act were incorporated by reference in *Bermuda bilateral*, *supra* note 55, Annex, §§ I and V, *cf.* note 60 *supra*. These capacity principles were incorporated in Articles 8 and 10 of the "Bermuda Form" bilateral in use since 1948, *cf.* note 58 *supra*. Their ambiguity has remained potentially troublesome. *See, e.g.,* McCarroll, *The Bermuda Capacity Clauses in the Jet Age*, 29 J. AM L. & COM. 115 (1963).

left without the international rate powers required to invoke paragraph (e), but it has not even possessed, until very recently, the authority to exercise on behalf of the United States the rights of summary action allowed under paragraph (f).⁶⁷

E. *The Chandler Fare Crisis*

The Board announced its approval of American carriers' participation in IATA immediately after the adjournment of the Bermuda Conference,⁶⁸ and after some initial reluctance, it began routinely to

67. See p. 1145 *infra*.

68. The IATA resolution of October 1945 establishing the Traffic Conference system, see p. 1114 *supra*, was filed with the CAB pursuant to § 412 of the Civil Aeronautics Act, ch. 601, 52 Stat. 1004 (1938) (superseded by 49 U.S.C. § 1382 (1970)), see p. 1135 *infra*. Although the decision was not announced until a week after the close of the Bermuda Conference, IATA Traffic Conference Resolution, 6 CAB 639 (1946), the three members of the Board who attended the Bermuda negotiations had decided to approve the IATA resolution prior to the Bermuda Conference, *id.* at 646 n. 12 (dissenting opinion). In granting tentative approval to American carriers' participation in IATA for one year, the Board emphasized its understanding that IATA's price-fixing would not extend to the allocation of schedules or capacities—the same understanding which the American delegation at Bermuda had reached with the British. *Id.* at 640-41 *cf.* note 59 *supra*.

The decisions filed by the Board reflect with considerable prescience the conflicting values and abuses which IATA has displayed throughout the subsequent quarter century. The three veterans of Bermuda, Chairman Pogue and Members Ryan and Branch, placed heavy reliance in their majority opinion on the unanimity rule of the Traffic Conference as a guarantee of each carrier's ultimate freedom of action. Rather wishfully, they assumed that "an open rate situation may, and indeed should, exist if the rate proposals advanced at any conference are unreasonable or economically unsound and are not properly related to the reasonably attainable costs of the air carriers," *id.* at 645.

The majority members of the Board also contended that their legitimization of the anti-competitive conference system was consistent with congressional intent. Section 412, they argued, obviously contemplated agreements between competitors, and was drawn from the similar provision in the Shipping Act of 1916 which had empowered the pertinent federal regulatory agency to approve or disapprove such agreements. The Board could therefore see "no indications of reversal of [the] national policy thus revealed in the provisions of the Shipping Act and the Civil Aeronautics Act with respect to the rate conference method." *Id.* at 642. The fatal flaw in the analogy to shipping conferences, however, is that by customary accommodation, if not by right under international law, merchant ships of all nations can generally gain access to foreign ports. See M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 99, 103-17 (1962). Thus "tramp" shippers who refuse to conform to conference rates structures are not usually excluded from the international shipping trade by foreign governments interested in preserving certain price levels. See generally Note, *Rate Regulation in Ocean Shipping*, 78 HARV. L. REV. 635-38 (1964). Under the accepted doctrine of national sovereignty of territorial airspace, airlines which persist in exercising their freedom of action by vetoing conference rates or withdrawing from IATA may be denied entry into pro-IATA countries. See p. 1102 *supra*. Thus the IATA conference system could be expected to be much more cohesive and comprehensive than the shipping conference system, where "tramp" steamers were an accepted fact of life.

In partial recognition of this fact, the majority noted that the present American carriers were flying into Great Britain and France at government-proclaimed rates. IATA Traffic Conference Resolution, 6 CAB 639, 642 (1946). Given the limited powers of the Board, whatever influence the Board and American air carriers could exert through IATA was the only alternative (short of suspending transatlantic air service) to accepting unilateral rate control by foreign governments. Noting foreign fears of rate wars and international subsidy battles, the Board declared that controlled competition was the keystone of the public interest as defined by the Civil Aeronautics Act, *id.* 643-44, and concluded that the IATA conference system could not, at least initially, be held to be

The Ins and Outs of IATA

approve IATA tariff packages.⁶⁹ Fares remained high and government subsidies were essential for all carriers.⁷⁰

Persistent demands by American carriers for lower fares led in 1952 to the inauguration of tourist class service across the North Atlantic, at about seventy per cent of the first class fare.⁷¹ This sparked a substantial growth in passenger traffic,⁷² and by 1955 the American air-

contrary to this concept of the public interest. In closing, the Board asked for the full regulatory power over international aviation contemplated in the Bermuda agreement as the only way "to meet with full effectiveness the problems that will arise in international air transportation." *Id.* at 646.

A vigorous dissent by the sole member of the Board not in attendance at Bermuda, Member Lee (one seat on the Board was then vacant, *see* 6 CAB II (1946)), attacked the Board's order as "an abandonment of the basic American economic principle of competition." IATA Traffic Conference Resolution, 6 CAB 639, 649 (1946). In his view, the conference system's unanimity rule would insure that fares were adjusted to the highest rather than the lowest-cost carrier. *Id.* at 649-50. The threat of a suspension of traffic rights would convince any over-aggressive competitor that he would do better to pocket his higher profit margins than to disrupt the whole system. In view of the Board's own disclaimer of "effective influence" over rates, and the apparently secret nature of IATA's proposed Traffic Conferences, adequate review of IATA agreements would be impossible. IATA's promises of reduced rates in time had to be discounted by the fact that insulation from price competition discourages aggressive management. IATA would place a premium on wasteful non-price competition while reducing incentives to come up with cost-cutting innovations. *Id.* at 655.

The dissent conceded that the fare controls of the British and French were perfectly legitimate acts of air sovereignty. *Id.* at 657. IATA could not, however, be expected to modify these expressions of national interests. Adequate powers to deter predatory practices by American carriers were vested in the Board through its control of subsidy payments and route awards. *Id.* at 660. The provision in the Bermuda bilateral for appeal to the PICA0, *see* notes 43 and 64 *supra*, was sufficient protection against unilateral British rate-making. 6 CAB 639, 661 (1946). This potentiality for inter-governmental arbitration, claimed the dissent, made IATA unnecessary. The IATA conference system appeared to offer no advantages in persuading the Europeans to lower transatlantic fares, and sanctioning IATA would only allow price-fixing on other routes to countries which had not yet felt it necessary to assert their sovereignty over air fares. *Id.* at 658.

69. Following the approval of the Traffic Conference machinery, the Board refused to approve the first tariffs produced by the IATA Traffic Conferences, on the grounds that no showing was made of the proposed fares' relation to the economic cost of providing air transportation. The Board declared that, lacking such information, it could not approve the fares. Resolutions of North Atlantic Traffic Conference, 6 CAB 845 (1946). The Board's problem arose from the fact that § 412 of the Civil Aeronautics Act, ch. 601, 52 Stat. 1004 (1938) (superseded by 49 U.S.C. § 1382 (1970)), required it to approve the tariff agreement if "it does not find [the agreement] to be adverse to the public interest," *see* p. 1135 *infra*, yet the Act's definition of the public interest included "the promotion of adequate, economical, and efficient service by air carriers at reasonable charges . . ." ch. 601 § 2(c), 52 Stat. 980 (1938) (superseded by 49 U.S.C. § 1302 (c) (1970)), *cf.* note 161 *infra*. The Board conditioned continued approval of the Traffic Conference system on IATA's providing the Board with the minutes of these Traffic Conferences. Resolutions of North Atlantic Traffic Conference, 6 CAB 845, 848-49 (1946). This show of procedural scruples proved to have little substance, however. Despite IATA's continued failure to provide economic data or to show that such data were considered in the fare-setting process, the Board periodically extended its approval of the Traffic Conferences, IATA Traffic Conference Resolution, 9 CAB 221 (1948), and made its approval final in 1955, CAB Order No. E-9305, June 15, 1955. The failure of the Board to enforce its initial requirement that IATA provide the Board with economic data to justify its tariff agreements forms the Eighth Cause of Action in the Aviation Consumer Action Project's complaint against the CAB, *see* note 4 *supra*.

70. *See* Keyes, *The Making of International Air Fares and the Prospects for their Control*, 30 J. AIR L. & COM. 173, 175-81 (1964).

71. *See, e.g., id.* at 176-77; S. WHEATCROFT, *supra* note 11, at 136-38.

72. M. STRASZHEIM, *THE INTERNATIONAL AIRLINE INDUSTRY* 119-20 (1969); K. PILLAI, *supra* note 43, at 61.

lines were operating their transatlantic routes at a profit, exclusive of subsidies.⁷³

The CAB chose this setting to attempt for the first time to force fares down through rejection of proposed IATA tariffs. The Board's refusal to approve a first-class fare hike effective in the spring of 1956 brought cries of impending chaos from European governments and resulted in the Board's retreat.⁷⁴ The CAB's call for more economical service was answered by IATA after an interval lengthy enough to prove that IATA acted of its own volition. High density economy class fares, nearly thirteen per cent below existing tourist rates, were introduced over the North Atlantic two years after the 1956 debacle. This class proved so popular that tourist service was phased out.⁷⁵

From 1948 through 1962, passenger traffic across the North Atlantic increased nearly 1000 per cent.⁷⁶ First-class traffic actually decreased, however, so that ninety-one per cent of the 1962 traffic moved in economy class.⁷⁷ The CAB made clear, prior to IATA's autumn 1962 Traffic Conference in Chandler, Arizona, that the obviously elastic economy class market should be cultivated by lower fares.⁷⁸ IATA responded by cutting in half the existing ten per cent discount on round trip tickets, thus effectively raising the cost of air transportation for most travelers.⁷⁹

The CAB disapproved this fare increase, noting the acute over-

73. M. STRASZHEIM, *supra* note 72, at 176.

74. The fare agreements reached by IATA in the fall of 1955 called for a ten per cent increase in first-class fares on North Atlantic and transpacific routes, without any reduction in tourist fares. The Board attacked what it felt to be the covert subsidization of luxurious first-class service by artificially high tourist rates. While approving North Atlantic tourist rates through December of 1956, with a strong argument for their reduction after that time, it disapproved the proposed first-class fares. Pan American World Airways, et al., IATA Agreements, 23 CAB 275 (1956). Foreign governments expressed shock at the Board's action, which came less than two months before the fares were to go into effect. The Board responded by temporarily approving the first-class fares through September 1956—the end of the summer peak travel season. See 1 A. CHAYES, ET AL., *supra* note 59, at 514. The Board's chairman subsequently justified this change of heart as a necessary sign of the Board's good faith. *Hearings on Monopoly Problems, supra* note 4, at 326.

75. M. STRASZHEIM, *supra* note 72, at 120; R. DAVIES, *supra* note 15, at 459.

76. M. STRASZHEIM, *supra* note 72, at 272, table C-2.

77. *Id.* The first-class fare New York to London, which by British edict had been \$375 in 1946, *cf.* note 52 *supra*, fell to \$325 in 1948, then rose to \$500 in 1962. The economy fare in 1962 was \$270. *Id.* at 273, table C-3.

78. See, e.g., 1960 CAB ANN. REP. 19; 1962 CAB ANN. REP. 19. See also *Hearings on S. 1539 and S. 1540 (International Air Transportation Rates) before the Senate Comm. on Commerce*, 88th Cong., 1st Sess., Ser. 15, at 13 (1963).

79. See generally 1 A. CHAYES, ET AL., *supra* note 59, at 524-75. The full ninety-one per cent of transatlantic traffic moving in economy class was not affected by the reduction in the round-trip discount, because many economy class seats were filled by passengers travelling on special group or excursion tickets. Nevertheless, the C.A.B. found that some forty-six per cent of total transatlantic traffic and fifty-nine per cent of total transpacific traffic was adversely affected by the round-trip discount reduction. Order E-19385, March 18, 1963, 38 CAB 1063, 1064.

capacity problems on the Atlantic routes caused by the precipitate conversion of major carriers to jet equipment and deciding that higher fares would only compound this problem.⁸⁰ American carriers were still making a slight profit across the Atlantic, and having received no information whatsoever as to the financial condition of foreign airlines, the Board was unable to conclude that existing fares were uneconomical.⁸¹

The European carriers had, in fact, suffered heavy losses in the immediate aftermath of conversion to jets,⁸² and European governments protested the CAB's action vehemently.⁸³ Great Britain claimed the right under paragraph (f) of the Bermuda bilateral to prevent American planes from entering Britain unless they charged the Chandler fares.⁸⁴ The CAB "advised" American carriers to continue to grant the full, pre-Chandler round-trip discounts.⁸⁵ The British thereupon threatened to impound any American aircraft entering Britain with passengers paying less than the Chandler fares.⁸⁶ The other European countries remained united in support of Great Britain, likewise invoking the powers left them under paragraph (f) of their respective Bermuda-type bilateral air service agreements with the United States to decree that the Chandler fares were the only lawful fares which could be charged for flights entering their countries from the United States.⁸⁷ The Board disregarded the British threats for two nervous days, during which the American airlines continued to charge the old IATA rates,

80. Order E-19294, Feb. 12, 1963, 38 CAB 1068, 1070-71.

81. *Id.* at 1069 n.2; Order E-19385, Mar. 18, 1963, 38 CAB 1063, 1064 (reaffirming the Board's decision, tentatively expressed in Order E-19294, *supra* note 80, to disapprove the IATA tariffs argued upon at the Chandler Traffic Conference).

82. R. DAVIES, *supra* note 15, at 530; S. WHEATCROFT, AIR TRANSPORT POLICY 101-02, 114-16 (1964); R. THORNTON, *supra* note 31, at 1964.

83. See I A. CHAYES, ET AL., *supra* note 59, at 536-40.

84. See p. 1116 *supra*; cf. note 210 *infra*.

85. Letter from Robert Murphy, vice-chairman of the CAB, to Willis Lipscomb, vice-president of Pan American World Airways, Inc., in I A. CHAYES, ET AL., *supra* note 59, at 540.

86. Testimony of Abram Chayes, Legal Advisor to the Dep't. of State, *Hearings on S. 1539 and S. 1540, supra* note 78, at 33-34. The British required American carriers to charge the Chandler fares by amending the carriers' operating permits to make operating authority conditional on the charging of the Chandler fares. Any flight entering Britain with passengers paying sub-Chandler fares was thus illegal, at least under British domestic law. Senator Magnuson, chairman of the Senate Commerce Committee, thought it significant that the British acted by the indirect means of amending American carriers' operating permits. The Senator avowed that the British had positive rate-making statutes which they might have used. *Hearings on S. 1539 and S. 1540, supra*, at 5. Senator Magnuson's conclusion that British use of the indirect method of fixing rates through amendment of operating permits legitimized retaliatory American action under § 402 of the Federal Aviation Act, 49 U.S.C. § 1372 (1970), cf. note 93 *infra*, failed to take account of the relative powers of the American and British judiciary in reviewing administrative orders, and of the liberal rules of American courts relative to foreign citizens' standing to sue. See testimony of Alan Boyd, then Chairman of the CAB, *Hearings on S. 1539 and S. 1540, supra*, at 11; cf. letter of Chairman Boyd to Sen. Magnuson, *id.* at 111-12.

87. *Hearings on S. 1539 and S. 1540, supra* note 78, at 34.

before acknowledging that it was powerless under the municipal law of the United States to exercise paragraph (f) powers or to compel American carriers to adhere to any given fare.⁸⁸ The carriers promptly complied with the Chandler fare agreement, while the CAB set about explaining its failure to Congress.

F. *The Midsummer Flights Dream*

The Chandler fare crisis coincided with the release of President Kennedy's Statement of International Air Transport Policy.⁸⁹ In accordance with that policy, and in response to the manifest impotence of the CAB vis-à-vis IATA and other governments, White House-drafted bills giving the Board international rate-making powers were promptly introduced in both houses of Congress.⁹⁰ Unfortunately, the hearings held on the bills in both the Senate⁹¹ and the House⁹² tended to concentrate on the short-term problem of what could have been done to avoid the American capitulation over the Chandler fares, rather than on the more fundamental issue of how to represent more adequately the American public interest in the IATA fare-setting forum.

There was much debate over the Board's power to suspend foreign air carriers' permits in retaliation for the threatened detention of American aircraft.⁹³ The CAB and the State Department expressed

88. *Id.* at 29-30.

89. Statement on United States International Air Transport Policy, White House Press Release, April 24, 1963, reprinted at 30 J. AIR L. & COM. 76 (1964).

90. S. 1540, 88th Cong., 1st Sess. (1963); H.R. 6400, 88th Cong., 1st Sess. (1963). The White House letter of transmittal appears in *Hearings on S. 1539 and S. 1540, supra* note 78, at 129.

The original Foreign Rate Study required of the CAA, the precursor of the CAB (*see* note 5 *supra*), by the Civil Aeronautics Act (*see* note 27 *supra*) concluded that pending the acquisition of more "practical experience with rates in foreign air transportation" there was no "immediate need for the Federal Government to further regulate the rates, fares, and charges of air carriers engaged in foreign air transportation . . ." CIVIL AERONAUTICS AUTHORITY, REPORT OF INVESTIGATION AUTHORIZED UNDER AUTHORITY OF CIVIL AERONAUTICS ACT OF 1938, H.R. Doc. No. 478, 76th Cong., 2d Sess. 15 (1939). Four years later, the Board first requested international rate powers, 1942 CAB ANN. REP. 14 (1943). The request was repeated in 1944 CAB ANN. REP., and, with the exception of the C.A.B.'s annual report for 1966, has been reiterated annually since the 1946 CAB ANN. REP. *See also* *Hearings on H.R. 1716, H.R. 6400, and S. 1540, supra* note 58, at 38.

91. *Hearings on S. 1539 and S. 1540, supra* note 78.

92. *Hearings on H.R. 1716, H.R. 6400 and S. 1540, supra* note 58.

93. *See, e.g., id.* at 24, 68-69, 89-90; *Hearings on S. 1539 and S. 1540, supra* note 78, at 3-18, 44, 56. Some argued that § 402(f) of the Federal Aviation Act, 49 U.S.C. § 1372(f) (1970), gave the CAB an indirect but potent means of controlling foreign rates. That section provides, in part, that "[a]ny permit issued under the provisions of this section may, after notice and hearing, be altered, modified, amended, suspended, canceled, or revoked by the Board whenever it finds such action to be in the public interest." 49 U.S.C. § 1372(f) (1970). The American scheduled carriers have long maintained that the Board has wide latitude in using § 402(f), and have used this argument to blunt legislative efforts to give the CAB explicit rate powers. *See* Statement of Stuart Tipton, President

The Ins and Outs of IATA

their firm belief that such ad hoc action would not have been lawful under either the Board's delegation of power from the Congress or under the inherent power of the President, though many Senators rejected these disclaimers of authority.⁹⁴

Congressional efforts to register disapproval of the Administration's conduct resulted in the demise of the international rate powers bills. Senatorial pique took the form of deleting provisions for executive review of CAB international rate orders; once this action was taken White House support for the measure waned and, having passed the Senate, the bill died in House committee.⁹⁵

Having failed once again to secure international rate-making power, the CAB began developing in the mid-sixties a different means of bringing pressure to bear on IATA. Non-scheduled "supplemental" carriers specializing in charter flights began to make major gains in the total transatlantic market after the charter industry was reorganized in 1961.⁹⁶ Through lax enforcement of the affinity rules governing charter flights, the Board encouraged the growth of the supplementals'

of the Air Transport Association, *Hearings on H.R. 1716, H.R. 6400, and S. 1540, supra* note 58, at 68, 89-90. Former Chairman Boyd of the CAB, however, read § 402(f) as conferring the very narrow powers of quashing "destructive" behavior "inimical" to American interests and felt that a dispute about what was a reasonable rate, such as was involved in the Chandler fare crisis, was not within the compass of § 402(f)'s suspension power. *Hearings on S. 1539 and S. 1540, supra*, at 8. Chairman Boyd's position is the more defensible, for the decision of the Congress in 1938 not to give the Board foreign rate powers would seem to mandate a conservative reading of the Board's powers under § 402(f). See Note, *Regulation of International Aviation*, 75 HARV. L. REV. 575, 584-85 (1962). In any event, the passage of Pub. L. No. 92-259, see pp. 1135-36 *infra*, has rendered the dispute moot.

94. *Hearings on S. 1539 and S. 1540, supra* note 78, at 18-19, 44.

95. As introduced, S. 1540 provided for presidential approval of any order by the CAB setting international air fares. S. 1540, 88th Cong., 1st Sess., § 2(b) (1963) reprinted in *Hearings on S. 1539 and S. 1540, supra* note 78, at 133. After first reporting S. 1540 favorably, S. REP. No. 473, pt. 1, 88th Cong., 1st Sess. (1963), the Senate Commerce Committee issued a revised report in which S. 1540 was amended to exclude executive review, S. REP. No. 473, pt. 2, 88th Cong., 1st Sess. (1963). Although this move was presented as an effort at sparing the President a needless technical task, *id.* at 1, the amendment was apparently intended to serve primarily as an expression of Congressional disfavor with the Administration's "soft" line during the Chandler fare crisis. Interview with a member of the Senate Commerce Committee staff, Oct. 19, 1971.

As amended, S. 1540 passed the Senate, 109 CONG. REC. 22790 (Nov. 26, 1963). The removal of provision for executive review from S. 1540, plus the confusion caused by President Kennedy's assassination the day after S. 1540 as amended was reported out of Committee, cut off further White House support for the measure. After S. 1540 died in committee in the House, fruitless efforts were made to revive the bill in the next Congress. H.R. 465, 89th Cong., 1st Sess. (1965); S. 907, 89th Cong., 1st Sess. (1965). See *Hearings on H.R. 465 (International Air Fares) before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st Sess., ser. 89-25 (1965).

96. Act of July 10, 1962, Pub. L. No. 87-528, 76 Stat. 143. See generally K. PILLAI, *supra* note 43, at 153-64; *Hearings on Air Fares and Charter Service before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess., ser. 91-80, at 193, 273 (1970). For the history of charter activity prior to the 1962 Act, see Goldklang, *Transatlantic Charter Policy—A Study in Airline Regulation*, 28 J. AIR L. & COM. 99 (1962); Note, *Supplemental Air Transportation—Public Law 87-528*, 28 J. AIR L. & COM. 453 (1962); and S. RICHMOND, *supra* note 20, at 85-93.

market share.⁹⁷ In 1966, the Board authorized the supplementals to operate inclusive Tour Charters, which allowed travel agents to charter an aircraft and sell tickets to the general public as part of a vacation package of transportation, accommodations, and tourist services.⁹⁸ This boon to the supplemental industry was bitterly contested by the scheduled carriers, and the Court of Appeals for the Second Circuit ruled that the Board had exceeded its powers.⁹⁹ The Board was vindicated by Congress, however, which in 1968 amended the Federal Aviation Act to explicitly authorize supplemental carriers to operate Inclusive Tour Charters.¹⁰⁰ In addition to its support for American

97. The competition, both economic and political, between the scheduled carriers and the supplemental carriers is extremely bitter. *See, e.g., The Airlines Move Toward Mass Travel*, BUS. WEEK, Feb. 26, 1972, at 49. The CAB, subject as it is to the whole range of federal administrative procedure law, already finds virtually every decision it makes affecting the balance between the "skeds" and the "non-skeds" challenged in court by the class of carrier adversely affected. *See also* Pilson, *The Exemption Provision of the Civil Aeronautics Act: The Problems Inherent in the Exercise of "pure" Administrative Power*, 29 J. AIR L. & COM. 255 (1963). Thus spokesmen for the CAB can admit publicly to a pro-supplemental "tilt" only at the peril of eating their words in court. One such public admission came from CAB Chairman Alan S. Boyd after the Chandler fare crisis, when the CAB was anxious to establish its *bona fides* as a low-fare advocate:

[O]f course, we are encouraging charters to the extent we can. We are trying to draw a line, so we don't have the charters operate to an extent that they damage our regular route carriers. We don't want that.

But we are trying to use the charters as a means of bringing down the fares. It is one method that the Board had adopted and has pursued to accomplish lower fares.

Hearings on S. 1539 and S. 1540, supra note 78, at 28.

There is thus little but inferential evidence that the Board has been consciously lax in its enforcement of charter flight affinity rules. All it will admit publicly is that it is woefully understaffed to enforce adequately the convoluted affinity rules, which prescribe the qualifications and procedures which a given group of travellers must satisfy in order to charter an aircraft. *See* 14 C.F.R. Parts 207, 208, 212, and 214 (setting forth separate sets of charter regulations for, respectively, U.S. scheduled air carriers, U.S. supplemental air carriers, foreign scheduled air carriers, and foreign charter air carriers). Prior to April 6, 1971, the charter regulations set forth at 14 C.F.R. Parts 207, 208, 212, 214, and 295 were not even consistent. *See* Notice of Proposed Rule Making, May 8, 1970, 35 Fed. Reg. 7587 (proposing to repeal Part 295 and make the remaining parts substantially identical, *adopted*, Jan. 29, 1971, 36 Fed. Reg. 2482 et seq.). The CAB's complaints that it is unable rather than unwilling to enforce these charter rules, *see, e.g., Hearings on Air Fares and Charter Service, supra* note 96, at 43, must be read in the light of the fact that the CAB itself promulgated the unenforceable rules. As the furor over "black market" charters has mounted, spurring the CAB to take selective action against a few violators, *see, e.g., N.Y. Times*, Aug. 31, 1971, at 66, col. 1; *id.*, Sept. 18, 1971, at 57, col. 1; *Wall St. J.*, Sept. 20, 1971, at 11, col. 5; *N.Y. Times*, Oct. 9, 1971, at 62, col. 5, the CAB has proposed revising its charter regulations so as to remove the affinity requirement for groups who charter an aircraft six months or more prior to departure. This proposal has been received very favorably by the charter industry, and seems indicative of the Board's underlying sympathies. *See* Advance Notice of Proposed Rule Making, Jan. 29, 1971, 36 Fed. Reg. 2514 (1971); Notice of Proposed Rule Making, Dec. 30, 1971, 37 Fed. Reg. 222 (1972).

98. Supplemental Air Service Proceeding, Docket No. 13,795, Order No. E-23350, March 11, 1966. Regulations governing Inclusive Tour Charters were issued as 14 C.F.R. Part 378, 31 Fed. Reg. 4779 (1966). *See* K. PILLAI, *supra* note 43, at 164-65.

99. *Pan American World Airways, Inc. v. C.A.B.*, 380 F.2d 770 (2d Cir. 1967), *aff'd* by an equally divided Court *sub nom.* *World Airways, Inc. v. Pan American World Airways, Inc.*, 391 U.S. 461 (1968) (per curiam).

100. Act of Sept. 26, 1968, Pub. L. No. 90-514, 82 Stat. 867. The CAB's regulations issued pursuant to the Act have imposed limitations on the types of ITC flights which the charter

The Ins and Outs of IATA

charter airlines, the Board has also been liberal in granting permits to the increasing number of foreign charter carriers seeking operating rights to the United States.¹⁰¹

Helped by fortuitous factors as well as the scheduled carriers' own mistakes, the charter operators have in the past two years become a serious problem for IATA.¹⁰² The first signs of cracks in the IATA edifice came in the spring of 1971, when SABENA, the Belgian national airline, announced reduced youth fares for the peak summer travel season. The Belgian government, which owns over half of SABENA's stock, took advantage of the standard clause in IATA tariff agreements permitting a carrier to break such an agreement upon the orders of its flag government.¹⁰³

As was demonstrated by the Chandler fare crisis, successful European resistance to American fare reductions is dependent on European unanimity.¹⁰⁴ The relative proximity of the gateway cities of Europe insures that, should one nation reduce fares on its flag carrier for the

carriers may offer. See 14 C.F.R. Part 378 (1971). The Senate recently held hearings on proposed legislation which would remove most of these restrictions. See S. 3513, 92d Cong., 2d Sess. (1972) and N.Y. Times, May 7, 1972, § 5, at 29, col. 1.

101. See Testimony of Secor D. Browne, Chairman of the CAB, *Hearings on Air Fares and Charter Service*, *supra* note 96, at 8.

102. Three factors besides the CAB have helped the charter operators gain strength. First, the winding down of American military activity in Southeast Asia reduced the demand for chartered troop-carrying airliners. Military traffic had been the staple of the major American supplemental carriers during the middle sixties, serving to finance the transition of the supplementals to jet equipment. *Hearings on Air Fares and Charter Service*, *supra* note 96, at 193, 269, 273. As military traffic decreased, this equipment was released to serve the transatlantic charter market. Friedlander, *The New Low Air Fares v. Bureaucracy*, N.Y. Times, July 11, 1971, § 10, at 35, col. 1. This extra capacity drove down transatlantic charter fares, attracting legions of charter passengers. *Hearings on Air Fares and Charter Service*, *supra*, at 323-24; N.Y. Times, June 1, 1971, at 1, col. 1.

Second, scheduled airline managements repeated their errors of a decade earlier, purchasing new 747 aircraft with the same unseemly haste that marked the introduction of jet equipment in the late fifties. See S. WHEATCROFT, *supra* note 82, at 94. These efficient new jumbo jets made existing jet equipment redundant, causing a glut of old jets on the used aircraft market. See, e.g., Altschul, *Which Way for the Airlines?*, BARRON'S, March 6, 1972, at 5, 19. These jets have been snapped up by charter operators at bargain prices; while not as efficient as jumbo jets when both carry full loads, a fully-filled chartered "old" jet offers per passenger costs far below a half-filled jumbo jet. Comparative cost data for jumbo and standard jets appear in *Hearings on S. 2423 (Regulation of Rates and Practices of Air Carriers and Foreign Air Carriers) before the Subcomm. on Aviation of the Sen. Comm. on Commerce*, 92d Cong., 1st Sess., ser. 92-40, at 233-34 (1972). See also IATA Cost Committee Report, *Hearings on Air Fares and Charter Service*, *supra* note 90, at 61-119.

Third, the recession of the American economy has decreased traffic growth, especially on the transatlantic routes, so severely that the new 747's have not been able to profit from their increased efficiency because of under-utilization. The excess capacity caused by more 747 seats and less American traffic have made the scheduled airlines that much more vulnerable to diversions of traffic by the supplementals. See *Hearings on S. 2423*, *supra*, at 196-97.

103. For Belgium's majority control of SABENA, see, e.g., *Hearings on S. 2423*, *supra* note 102, at 183. The exculpatory clause is discussed in N.Y. Times, June 1, 1971, at 1, col. 1.

104. Cf. pp. 1121-22 *supra*.

flight from the United States to its capital, the other states will follow suit or see a substantial diversion of traffic from their own airline and airports. As long as rough equality prevailed in regard to the fortunes or misfortunes of the European lines, European solidarity persisted. The impact of the charter boom did not fall equally, however. London, Paris, and Amsterdam got their share of charters, but few went to Brussels. A few miles away, however, Luxembourg received thousands of tourists as the European terminal of cut-rate Icelandic Airlines.¹⁰⁵ The squeeze was apparently strong enough to convince the Belgian government that severe measures were necessary to gain a bigger share of the gateway city business for Belgium. On April 27, 1971, SABENA gave the CAB thirty days' notice of a round-trip fare of \$200 (\$220 peak season) from New York to Brussels, for those aged twelve to twenty-nine. Existing IATA fares ranged from \$596 return economy class to \$357 for the lowest cost excursion ticket. By midsummer SABENA's fare had been matched by all the scheduled transatlantic carriers.¹⁰⁶

This latest wrinkle was added to an already convoluted IATA fare structure which attempts to underbid the charter airlines for the excursion market while maintaining inflated fares for the captive market of short-term travelers.¹⁰⁷ The discord over the summer youth fares precipitated a stormy six weeks' IATA Traffic Conference in Montreal. The revised IATA fare agreement which emerged from Montreal was then vetoed by the German national airline, Lufthansa, which denounced the latest promotional fares as too low and too complex.¹⁰⁸

105. Icelandic Airlines, the only non-IATA scheduled airline crossing the North Atlantic, was founded in 1944 as a private venture. Iceland and the United States signed a bilateral air services agreement in 1945, prior to the Bermuda Conference. Air Transport Services Agreement with Iceland, Jan. 27, 1945, 59 Stat. 1464, E.A.S. 463. Icelandic Airlines has thus been able to serve the United States without adhering to IATA prices, despite years of harassment by European governments and the scheduled airline lobby within the United States. Icelandic's sole European friend has been Luxembourg, which gathers a share of the European tourist trade through service as Icelandic's gateway city. Icelandic has usually keyed its prices to IATA's, offering about a ten per cent discount, which, considering the location served within Europe and the older equipment which Icelandic used to operate, served to keep Icelandic profitable but did not threaten the existence of any IATA carriers. Icelandic's service disadvantages have been minimized in recent years by Icelandic's acquisition, along with the charter carriers, of the surplus jets sloughed off by the major scheduled carriers, *cf.* note 102, *supra*. The improvement in Icelandic's service has led to new efforts to limit its operating rights to the United States. Although the bilateral agreement with Iceland still stands, threats of its renegotiation served to win Iceland's assent to a limitation on Icelandic Airlines' capacity to 2.5 per cent of total United States-Europe scheduled capacity. *Modus vivendi* affected by exchange of notes, June 24, 1970, [1970] 2 U.T.S. 1363, T.I.A.S. No. 6894. See generally M. STRASZHEIM, *supra* note 72, at 53-55; R. DAVIES, *supra* note 15, at 459.

106. N.Y. Times, June 1, 1971, at 1, col. 1; *id.*, June 20, 1971, § 4, at 3, col. 1; *id.*, July 3, 1971, at 50, col. 1.

107. See S. REP. NO. 92-593, 92d Cong., 1st Sess., at 15 (1972).

108. N.Y. Times, Aug. 13, 1971, at 1, col. 1. See generally Hoffman, *The Great Air Fare War and What It Means to You*, N.Y. Times, Dec. 5, 1971, § 10, at 1, col. 1.

The Ins and Outs of IATA

Lufthansa then proposed even lower but less restrictive fares which carried consumer favor while provoking charges of predatory pricing from Lufthansa's American competitors.¹⁰⁹ After months of anticipation, tourists' hopes of a fare bonanza were frustrated by an intra-IATA compromise which eliminated some restrictions on the promotional fares while retaining the existing disparity between the cost of the general and promotional fares.¹¹⁰

This retained disparity suggests that the entire fracas turned on finding the best means of eliminating the CAB-fostered charter carriers and returning the scheduled carriers to their earlier pricing hegemony. As long as cheap charter flights remain the only effective means of depressing IATA fares, IATA carriers may again decide to seek the quick elimination of charter carriers through the temporary introduction of below-cost, "predatory" fares. Already the cracks papered over by the 1971 IATA compromise have shown signs of reemerging, again in the form of fares designed to lure away the charters' summer staple, the youth market.¹¹¹

II. The Dysfunctional Interaction of IATA and the CAB

A. *The Politics of IATA*

The International Air Transport Association was initially given rate-making competence in order to protect European airlines from the low fares which only American airlines could economically offer.¹¹² The expectation at Bermuda was that the CAB would obtain international rate-making authority for itself, insuring that any deviation of IATA from its intended function could be reviewed at a political level.¹¹³ The failure of Congress to grant such authority to the CAB has allowed IATA to continue to set rates which bear little apparent relation to the economic cost of providing air transport, long after the United States has disavowed the short-term policy of economic protection which secured American agreement to IATA in 1946.¹¹⁴ This situation is best

109. *Hearings on S. 2423*, *supra* note 102, at 14, 59, 213.

110. *Wall St. J.*, Nov. 22, 1971, at 9, col. 3.

111. *See* *Wall St. J.*, March 6, 1972, at 2, col. 3; Friedlander, *The Politics of Youth Fares*, *N.Y. Times*, April 23, 1972, § 10, at 39, col. 1. Also, some IATA carriers are rumored to be engaged in under-the-counter discounting of blocks of seats on scheduled flights. Wholesale travel "consolidators" resell these seats individually to the general public. Interview with a staff member of the Senate Commerce Committee, May 12, 1972.

112. *See* pp. 1111, 1114 *supra*.

113. *See* p. 1117 *supra*.

114. *See* Statement on United States International Air Transport Policy, *supra* note 89; Statement of International Air Transportation Policy, White House Press Release, June 22, 1970, reprinted at 36 *J. AIR L. & COM.* 651 (1970). *See also* *Hearings on H.R. 1716, H.R. 6400, and S. 1540*, *supra* note 58, at 217.

illustrated by a quarter-century's experience with IATA pricing policies across the North Atlantic, the most lucrative international aviation route in the world. Although the European air carriers have achieved the size and operating efficiency necessary for effective competition with American carriers, corresponding reductions in the overall cost of air transportation have not been realized,¹¹⁵ despite repeated calls for lower fares by the United States government.¹¹⁶

Although IATA likes to refer to itself as a private trade organization, working out fare agreements through apolitical compromises among business-minded airlines,¹¹⁷ this characterization is only partly true. With the major exception of the United States carriers, most major international airlines are wholly or predominantly government-owned.¹¹⁸

115. For figures on the relative efficiency of American and foreign international carriers, see M. STRASZHEIM, *supra* note 72, at 167-68; K. PILLAI, *supra* note 43, at 59. The level of IATA fares across the Atlantic is discussed at note 128, *infra*. Transpacific fares are discussed at note 122, *infra*.

116. See, e.g., 1966 CAB ANN. REP. 28; For CAB demands for transpacific rate reductions, see, e.g., 1969 CAB ANN. REP. 25.

117. See S. COHEN, IATA: THE FIRST THREE DECADES 96 (1949):

"[M]uch of IATA's effort has had to be spent upon unglamorous and unrewarding matters. The spectacular achievements of air transport have been those of its member airlines: none of IATA's accomplishments have ever created great public excitement and, probably, little that IATA may do in the future will cause much more. . . ."

IATA's great importance, therefore, lies in the fact that it has been the vehicle of . . . joint effort. As such, it has served, rather than controlled. It has admitted no politics . . ."

Mr. Cohen was writing as Public Relations Officer of IATA. After yet another decade of IATA, Mr. Cohen, again in his official capacity, was ready to admit that IATA might occasionally become entangled in politics—but only when external political forces interfered in IATA's otherwise business-oriented negotiations. See Cohen, *Crisis in the Conferences*, 27 J. AIR L. & COM. 150, 152-54 (1960):

To be quite precise, the airlines meet in the [Traffic] Conferences to work out recommendations for fares and rates to be charged on international services. These recommendations have no force in themselves: they must be carried back by airlines to their own governments for individual review and approval before they can become effective.

The airlines are not necessarily in the Conference because they want to be, but because their governments insist that international fares and rates be governmentally agreed and realize that the airlines must have a voice in framing them

Fare negotiations . . . involve a wide variety of factors. There is not only the cost of providing the service. One must also take into account the cost of selling it, the traditional charges of competitive means of transport and the commercial risks of promotional pricing. On these factors and many others like them managements stake their own heads, their stockholders' money and their companies' existence. Most governments have felt strongly that these are outside the proper competence of the ordinary civil service and have therefore delegated the task of working out the patterns of fares and rates to the airlines in the Conference. But they retain the right to review and disapprove—which they exercise in the public interest. Make no mistake—IATA Conferences may propose, but governments dispose.

. . . It has been said that the Conference system throttles competition: actually, it gives competition a chance to work itself out on paper, instead of through the costly methods of the marketplace

See also Cohen, *Confessions of a Former IATA Man*, 34 J. AIR L. & COM. 610 (1968).

118. See R. THORNTON, *supra* note 31, at 8 table 1; Statement of Knut Hammerskjöld, Director-General of IATA, Appendix B, in *Hearings on S. 2423*, *supra* note 102, at 181.

The Ins and Outs of IATA

The fact that government ownership is the norm in the international airline industry has two principal effects on the expression of national interests in international aviation. First, with government capital at stake, the development of national commercial air power is viewed by most states not in terms of the well-being of an entire system, but rather in terms of the financial fortunes of a specific carrier. Second, the representatives of this specific carrier at IATA Traffic Conferences will in effect be government spokesmen.

The essential function of de facto government participation in IATA Traffic Conferences has been the suppression of IATA's economic behavior *qua* cartel in favor of political behavior in the manner of a multilateral conference of governments. IATA is an imperfect cartel¹¹⁹ whose agreements are subject to the veto of any scheduled carrier authorized to operate by an ICAO member country.¹²⁰ This circumstance should make agreement on tariffs contingent on the economic viability of the rates proposed in the tariff agreement for every carrier concerned. As a matter of rational, profit-maximizing economic behavior, the insistence by an inefficient airline on high fares should provoke an open-rate situation. Efficient carriers would propose low fares designed to increase their share of the available traffic by driving the inefficient carrier out of business, while simultaneously reaching previously untapped portions of the air transportation demand curve. The inefficient carrier's veto would prevent IATA agreement on these low fares, but in the absence of IATA agreement the efficient carriers would file their low fares individually.

Acting on its own, the government whose inefficient carrier was thus attacked might choose to underwrite its inefficiencies through subsidies, or at least to exercise its paragraph (f) powers by setting the fares

119. See W. JORDAN, AIRLINE REGULATION IN AMERICA 5-6, 226-33 (1970). Essential to an economic understanding of IATA is the fact that the Traffic Conferences confer monopoly powers over prices upon what is otherwise an oligopoly. While the price of a service is fixed among its principal suppliers, total revenues are not allocated among suppliers according to any agreement but are instead left to non-price market forces. That is, while price competition is eliminated, other forms of competition remain to affect the distribution of revenue among the carriers. IATA has sought to control some forms of non-price competition, such as in-flight food and entertainment, but other forms of competition, such as advertising, frequencies and schedules of flights, and the type of aircraft used have remained beyond IATA's control. See F. THAYER, *supra* note 22, at 288-93; K. PILLAI, *supra* note 43, at 66. The most effective forms of non-price competition have proven to be frequent flights and advanced-design aircraft. The combination of additional flights and larger, faster aircraft has created a persistent problem of overcapacity. F. THAYER, *supra*, at 291-92; M. STRASZHEIM, *supra* note 72, at 105-07. This excess capacity, by lowering the "load factor" or percentage of seats filled per flight, raises the proportionate share of the costs of a flight which each passenger must pay. Thus IATA may tend to maximize revenue without maximizing profit, because average costs are increased by the imperfect nature of the cartel.

120. See p. 1114 *supra*.

for flights directly to and from its own territory—its Third and Fourth Freedom traffic—at a level high enough for its carrier to survive on that traffic alone. In practice, however, states with nationally owned international airlines have strengthened their positions through more complex alignments of power within IATA. Those states with a common interest in thwarting IATA's economic behavior have implicitly agreed to act in concert should an open-rate situation actually materialize. This concerted action allows a state to protect its high fare policy during an open-rate situation not only by setting the price of its individual Third and Fourth Freedom traffic, but also by controlling the price of its Fifth Freedom traffic—traffic which never actually crosses its own borders. By pooling their sovereign prerogatives to fix the legal fares at which commercial flights may enter and leave each of their countries individually, contiguous states can effectively control the price of air transportation to or through any one of their number. Absent such agreement, their individually-set, artificially inflated Third and Fourth Freedom fares would be subject to fatal collateral attack from a neighboring country which might allow lower fares to be charged on *its* Third and Fourth Freedom traffic.¹²¹

While the IATA bloc technique may be available to others,¹²² it is

121. Any country has a sovereign right to set fares on flights leaving or entering it—Third and Fourth Freedom traffic. But such a right may not confer much effective power over rates if passengers can fly much more cheaply into a contiguous state and then cross into the high-fare country. Thus if state *A* wants to maintain a high fare on the route *C* to *A*, and has not agreed to do otherwise its bilateral air service agreement with *C*, *A* can prescribe and enforce under its municipal law the fare to be paid for air travel from *C* to *A*. Neighboring state *B* may also have air service from *C*, though perhaps at a much lower rate. Unless *A* cares to set the rate for transit from *B* to *A* equal to the difference in the rates charged for travel *C* to *A* and *B* to *A*, or to institute a taxing system which has the same effect, most traffic from *C* to *A* will flow *C* to *B* to *A*. If, however, *A* can control the fare on route *C* to *B*—a route which if flown by *A*'s airline is a Fifth Freedom route for *A*—*A* can enforce its *C* to *A* fare policy.

The easiest way for *A* to control the *C* to *B* fare is to make a deal with the government of *B*. By co-ordinating their regulation of their respective routes *C* to *A* and *C* to *B*, *A* and *B* can achieve their mutual rate regulation goals. Of course, unless their aims are identical, *A* and *B* will have to compromise to some extent. Were such compromises elevated to the formality of agreements binding under international law, thereby placing restraints on the sovereign discretion of both *A* and *B* in setting rates on their direct routes from *C*, this negotiation of a compromise fare would be a quintessentially diplomatic task. Yet such compromises, albeit in informal form and with independent rights of action preserved through an exculpatory clause allowing a government to order its carrier to bolt the IATA fare agreement, *see* p. 1125 *supra*, are the *raison d'être* of IATA Traffic Conferences. The unanimity displayed by IATA states in opposition to American disapproval of IATA fares suggests that, at least vis-a-vis the United States, IATA itself functions as a multilateral conference of governments.

122. Transpacific rates have, in the CAB's opinion, been too high for a decade or more. *See Hearings on H.R. 465, supra* note 95, at 27, 39; *Hearings on S. 2423, supra* note 102, at 18. Because no contiguous states with air service to the United States border on those countries principally served by the transpacific routes—Japan, Australia, Hong Kong—high fare countries such as Japan have been able to enforce their fare policies through control of the fares on flights directly to and from their countries, without

the Europeans who have perfected this means of resisting American low fare initiatives. The United States is particularly vulnerable to such collective action because of its anomalous position as (1) the source of by far the greatest number of IATA passengers,¹²³ (2) the one major nation without de facto government representation within IATA, and (3) a nation which has not provided under its own municipal law any means of setting fares for its own Third and Fourth Freedom traffic. American affluence enables great numbers of United States citizens to travel abroad. America's ancestry encourages great numbers of Americans to vacation in Europe. This has made the North Atlantic route the most lucrative in international aviation.¹²⁴ The United States has been liberal in granting access to this traffic:¹²⁵ nineteen IATA carriers serve the route.¹²⁶ In spite of consequent problems of over-capacity,¹²⁷ fares on the route have generally remained at uneconomically high levels,¹²⁸ providing concealed subsidization of for-

having to secure Fifth Freedom protection through IATA. *Cf.* note 175 *infra*. However, as advocates of high fares in the face of American resistance, the major aeronautical countries of the Pacific basin have always sided with the European countries in transatlantic fare disputes.

123. R. THORNTON, *supra* note 31, at 59 table 5.

124. M. STRASZHEIM, *supra* note 72, at 43, 177; R. DAVIES, *supra* note 15, at 472.

125. See F. THAYER, *supra* note 22, at 78-79; see also R. DAVIES, *supra* note 15, at 457, figure 75 and table 39.

126. K. PILLAI, *supra* note 43, at 58.

127. F. THAYER, *supra* note 22, at 292.

128. The rash of promotional fares in recent years has done little to lower the level of basic fares—economy and first class fares without time or package-deal limitations. As of 1964, only thirty-four per cent of North Atlantic traffic was tourist travel. The remaining sixty-six per cent was a "captive market" of private and business travellers who lacked the flexibility to conform to the stringent requirements of IATA promotional fares. See K. PILLAI, *supra* note 43, at 62-64. *But see Hearings on S. 2423, supra* note 102, at 208 (testimony of Najeeb Halaby, former President of Pan American, estimating eighty per cent tourist traffic and twenty per cent "non-discretionary" traffic). These "captive" travellers have had to pay the basic fares. Since IATA carriers are extremely secretive about their operating costs, see *id.* at 53-60, *cf.* note 69, *supra*, it is impossible to determine whether IATA basic fares are economic in the sense of providing a "fair return" over costs in terms of a percentage of invested capital. Of course, these costs alone would not reveal the reasonableness of IATA fares, for the costs themselves are increased by IATA-fostered inefficiency. *Cf.* notes 68 and 119 *supra*. The basic disagreement between the CAB and foreign governments has been whether lower fares, by providing an incentive for cost-cutting while attracting more passengers, would increase the net revenues of most airlines. The CAB's "low fare philosophy," which American carriers claim they share, see *Hearings on S. 1539 and S. 1540, supra* note 78, at 54, *but cf.* note 207, *infra*, is supported by a comparison of basic IATA fares with basic fares for domestic American routes of similar distance, flown by similar aircraft. See R. THORNTON, *supra* note 31, at 208-10 tables 11-13, and K. PILLAI, *supra* note 43, at 109-11. See also Statement of K.G.J. Pillai, Executive Director, Aviation Consumers Action Project in *Hearings on S. 2423, supra* note 102, at 225-32.

Present fares support the finding in R. THORNTON, *supra* at 211, that IATA fares are generally higher than comparable domestic fares in the United States. The travel agent's boast that it is now cheaper to fly from the East Coast of the United States to Europe than it is to California is true only of the highly restrictive and seasonal excursion fares which the transatlantic carriers have adopted to meet the charter carriers' competition.

As of May 1, 1972, the basic (one-way, coach class, without seasonal variations) fare for the 2704 miles from Boston to San Francisco, the longest domestic trunk route, was

eign carriers. Some carriers apparently feel that they could not profit from the increased traffic which would be created by lower North Atlantic fares.¹²⁹ American carriers, the traditional leaders in excess capacity on this route,¹³⁰ have had the most incentive to generate traffic growth through lower fares. Nevertheless, they have had only moderate success. European carriers have generally remained united in opposition to lower fares, especially lower *basic* fares,¹³¹ and as government-controlled carriers, they have had the threat of a multilateral Fifth Freedom price fix to back them up.

European unity is essential in this regard—due to the facility of

\$157.41 (plus \$12.59 federal tax), yielding to the carrier 5.82 cents per mile. The basic fares (one-way, economy class) for the 3456 miles from New York to London on an IATA carrier were \$242.00 (\$295.00 peak season), for a cost of 7.00 (8.54 peak season) cents per mile, despite the fact that the longer length of the London flight allowed the fixed costs incident to a flight of any length to be pro-rated across twenty-five per cent more miles flown than on the San Francisco flight. An excursion traveler who happened to be going to London for more than twenty-eight but less than forty-six days, and who otherwise could conform his plans to the sixteen lines of fine print in the OFFICIAL AIRLINE GUIDE, might indeed fly to London and back for \$240.00, at a cost of only 3.47 cents per mile, unless he was traveling during the peak summer season, when he would have to pay \$313.00, or 4.53 cents per mile. The excursion fare from Boston to San Francisco and return, requiring a stay of seven to thirty days and not permitting travel on Fridays or Sundays from two in the afternoon to twelve midnight, was a year-round \$236.11 (plus \$18.89 federal tax), or 4.37 cents per mile.

The differential found by Professor Thornton for transpacific fares remains extremely high. For the 3460 miles from Anchorage to Tokyo, it cost, effective May 1, 1972, \$375.00 one-way economy, or 10.84 cents per mile. There were no seasonal variations for either the basic fare or the excursion fare of \$544.00 round trip, requiring a stay of fourteen to twenty-one days, at a cost of 7.86 cents per mile. On the longer and more heavily traveled San Francisco-Tokyo route, the one-way economy fare was \$417.00, or 8.10 per mile for the 5149 mile trip. The round trip excursion fare of \$709.00 cost 6.88 cents per mile.

These fares and milages were compiled from OFFICIAL AIRLINE GUIDE, May 1, 1972 (North Amer. ed.) at 17 (excursion restrictions), 19 (mileage), and 565 (fares); OFFICIAL AIRLINE GUIDE, May 1, 1972 (International ed), at 8 (excursion restrictions), 439, 819, and 825 (fares and mileage). Cf. R. THORNTON, *supra* at 210 table 13.

129. Among the inefficiencies which may deter some airlines from agreeing to American low fare initiatives are deficiencies of scale, see R. THORNTON, *supra* note 31, at 110-17, or the burden of providing service on strategic but uneconomic routes. See *id.* at 42, 121, 132; *Hearings on H.R. 1716, H.R. 6400, and S. 1540, supra* note 58, at 217.

High fares also provide a net foreign exchange benefit to foreign countries by keeping down the currency outflow which would follow from expanded travel to North America by foreign nationals. Across the Atlantic, for instance, Americans have for the last decade constituted between sixty and seventy per cent of the passengers, while American airlines have carried less than fifty per cent of total transatlantic passengers. See *Hearings on S. 2423, supra* note 102, at 13, and the figures given in *Hearings on S. 1539 and S. 1540, supra* note 78, at 99, and *Hearings on S. 3197 and S. 3198 (Strengthen U.S.-International Air Transportation) before the Aviation Subcom. of the Senate Commerce Comm.*, 89th Cong., 2d Sess., ser. 89-60, at 15-16, 19 (1966). The high fares which make transatlantic air travel unnecessarily costly to Americans also serve, because of generally lower income levels, to deny such travel altogether to many Europeans. Although lower fares might entail no loss of profit to airlines because of the additional traffic generated, they would alter the proportion of non-Americans purchasing air transportation by making international air travel available for the first time to the European middle class.

130. See the figures given in Order E-19294, Feb. 12, 1963, 38 CAB 1068, 1070.

131. See S. REP. No. 95-593, 92d Cong., 2d Sess. 15 (1972). Basic fares are those for the cheapest class of travel, usually designated as "economy class," unencumbered by restrictions on time of travel or length of stay. For most purposes the basic fare can be considered the cheapest one-way fare between two cities.

intra-European transportation, any one major government allowing its carrier to join with the North American carriers in providing low-rate service during an open-rate situation would create a considerable diversion of traffic from the other European carriers.¹³² As long as no European country appears ready to give ground, however, the American carriers have remained chary of provoking an open-rate situation by vetoing IATA tariff agreements.¹³³ The long-haul operations of the American carriers in particular are economically dependent on Fifth Freedom traffic picked up in Europe.¹³⁴ Under the Bermuda agreement this traffic is subject to vague restrictions.¹³⁵ Should an American carrier veto a rate agreement, retaliatory restrictions might be attempted—a risk which deters American carriers from pressing without restraint for lower general transatlantic fares so long as their overcapacity represents merely unrealized profits rather than actual losses.¹³⁶

B. *Present Powers of the CAB*

As currently constituted, the international legal process for the regulation of air fares operates to the disadvantage of the United States. This disadvantage has been caused in large part by the impotence of the CAB in the international arena. Although the dichotomy between the Board's domestic and international powers to protect the American public interest was only tentatively established in 1938,¹³⁷ it has remained a dead hand on American international aviation policy ever since.¹³⁸

The prototypical Bermuda bilateral was predicated on the Board's receipt of international powers commensurate with its existing plenary authority over domestic air transportation. The implications of this feature of our international airline rate-setting agreements can

132. See Thornton, *Power to Spare: A Shift in the International Airline Equation*, 36 J. AIR L. & COM. 673, 676 (1970).

133. See K. PILLAI, *supra* note 43, at 70-72.

134. M. STRASZHEIM, *supra* note 72, at 208-09.

135. See note 66 *supra*. See also *Hearings on H.R. 1716, H.R. 6400, and S. 1540, supra* note 58, at 28-29.

136. This was the case in 1963. The revenue figures for American carriers published by the CAB in its order making final its disapproval of the Chandler fares show a low but not a losing rate of return for the transatlantic route. Order E-19385, March 18, 1963, 38 CAB 1063, 1064. This may account for the failure of the American carriers to veto the Chandler fares at the Traffic Conference.

137. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (repealed by Federal Aviation Act of 1958, 49 U.S.C. 1301 ff. (1970)). See also pp. 1108-09 *supra*.

138. Cf. note 95 *supra*. Rep. John F. Kennedy of Massachusetts introduced H.R. 2911, 81st Cong., 1st Sess. (1949), which would have given the CAB international rate powers. For a discussion of H.R. 2911, its companion bill S. 237, and earlier, equally unsuccessful efforts at giving the CAB international powers, see *Hearings on H.R. 4032, H.R. 2911, and H.R. 3940 (Civil Aeronautics Act Amendments) before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 81st Cong., 1st Sess. 21-84 (1949)*.

best be appreciated by examining the powers of the CAB both before and after the 1972 amendment¹³⁹ to the Federal Aviation Act.¹⁴⁰ As in the Bermuda agreement itself, attention will be directed to the contrast between the Board's domestic and international powers.¹⁴¹

Persons undertaking to provide transportation by aircraft as a common carrier are classified as "air carriers" and "foreign air carriers" according to whether they are citizens of the United States or not.¹⁴² Air carriers may operate only by virtue of a "certificate" issued by the Civil Aeronautics Board.¹⁴³ The Board must find the air carrier "fit, willing, and able to perform such transportation properly, . . . and that such transportation is required by the public convenience and necessity"; otherwise it must deny the issuance of a certificate.¹⁴⁴ Foreign air carriers must operate under a "permit"¹⁴⁵ which the Board may issue if it finds the carrier "fit, willing, and able properly to perform . . . [foreign] air transportation" and finds that "such transportation will be in the public interest."¹⁴⁶

While both air carriers and foreign air carriers are required to file with the Board "tariffs showing all rates, fares, and charges for air transportation between points served by it,"¹⁴⁷ and must adhere to these tariffs,¹⁴⁸ only air carriers providing domestic air transportation had a duty prior to the 1972 amendment, "to establish, observe, and

139. Act of March 22, 1972, Pub. L. No. 92-259, 86 Stat. 95, 1972 U.S. CODE CONG. & AD. NEWS 806. See also pp. 1135-36, 1146 *infra*.

140. Pub. L. No. 85-726, 72 Stat. 731, 49 U.S.C. §§ 1301 ff. (1970).

141. For clarity, this Note contrasts the CAB's powers over "domestic" as opposed to "foreign" or "international" air transportation. More precisely, the Act divides what is here termed "domestic" air transportation into two categories. "Interstate air transportation" denotes transportation by aircraft as a common carrier between any two points in the United States, except for air transportation within a single state not passing through the airspace of any place outside thereof. "Overseas air transportation" refers to air transportation between the United States and any Territory or possession thereof, or between any two Territories or possessions. "Foreign air transportation" is any transportation wholly or partly by aircraft between the United States and any place outside of the United States. 49 U.S.C. §§ 1301(a), (b), (c) (1970). While the Board has full power to set fares to be charged for "interstate" air transportation, the Board's power over "overseas" air transportation is limited to the prescription of just and reasonable minimum and maximum fares. 49 U.S.C. § 1482(d) (1970). This curious provision, now anachronistic, was part of the compromise in 1938 between those who wanted to give the Board equal foreign and domestic powers, those (including the airlines) who wanted the Board to have no foreign rate powers, and those who thought the Board's foreign powers should be modeled after those of the Maritime Commission. See C. RHYNE, *supra* note 20, at 125-126. References in this Note to the Board's "domestic" powers are to its powers over "interstate" air transportation.

142. Unless otherwise noted, the initial section number refers to the Federal Aviation Act, Pub. L. No. 85-726, 72 Stat. 731 (1958). §§ 101(3), (19), 49 U.S.C. §§ 1301(3), (19) (1970).

143. § 401(a), 49 U.S.C. § 1371(a) (1970).

144. § 401(d)(1), 49 U.S.C. § 1371(d)(1) (1970).

145. § 402(a), 49 U.S.C. § 1372(a) (1970).

146. § 402(b), 49 U.S.C. § 1372(b) (1970).

147. § 403(a), 49 U.S.C. § 1373(a) (1970).

148. § 403(b), 49 U.S.C. § 1373(b) (1970).

The Ins and Outs of IATA

enforce just and reasonable individual and joint rates, fares, and charges”¹⁴⁹ Air carriers providing foreign air transportation and foreign air carriers were required only to refrain from subjecting “any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue prejudice or disadvantage in any respect whatsoever.”¹⁵⁰

Before the 1972 amendment, the Board’s control over international tariffs was limited to ordering the removal of “unjustly discriminatory, or unduly preferential, or unduly prejudicial” tariffs.¹⁵¹ The Board’s only influence over non-discriminatory international air fares was derived from its duty to approve or disapprove any contracts or other working agreements between an air carrier and any other air carrier, foreign air carrier, or other common carrier, including agreements for the establishment of fares. All such agreements must be filed with the Board,¹⁵² which must approve those which “it does not find to be adverse to the public interest, or in violation of [the Federal Aviation] Act.”¹⁵³

As amended on March 7, 1972, the Federal Aviation Act now holds all air carriers and foreign air carriers generally to the same duty “to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges”¹⁵⁴ The Board is empowered to suspend for up to one year proposed or existing tariffs for foreign air transportation, and upon a finding that such fares are unjust or unreasonable or discriminatory, the Board may cancel such tariffs and prevent their use.¹⁵⁵ Should a foreign government seek to prevent an American air carrier from charging the tariffs which the American carrier has filed with the CAB, the Board is now empowered summarily to suspend the tariffs of the foreign government’s own airline, and to order the foreign air carrier to charge the same fares as the American air carrier which

149. § 404(a), 49 U.S.C. § 1374(a) (1970).

150. § 404(b), 49 U.S.C. § 1374(b) (1970).

151. § 1002(f), 49 U.S.C. § 1482(f) (1970). This limited power to remove discrimination allowed the Board to enforce § 404(b), 49 U.S.C. § 1374(b) (1970), which enjoins air carriers and foreign air carriers from discrimination or prejudice in relation to “any particular person, port, locality, or description of traffic” Although it was never put to judicial challenge, the Board felt that § 404(b) did not permit it to regulate the general rate levels of international airlines. See *Hearings of H.R. 465, supra* note 95, at 47.

152. § 412(a), 49 U.S.C. § 1382(a) (1970).

153. § 412(b), 49 U.S.C. § 1382(b) (1970). The Board’s approval immunizes the carriers party to the approved agreement from liability under the antitrust laws. § 414, 49 U.S.C. § 1384 (1970).

154. Pub. L. No. 92-259, § 3(a), Federal Aviation Act § 404(a)(2), 49 U.S.C. § 1374(a) (2) as amended.

155. Pub. L. No. 92-259, § 3(a), Federal Aviation Act §§ 1002(j)(1)&(2), 49 U.S.C. §§ 1482(j)(1)&(2) as amended.

flies the same route.¹⁵⁶ The operating authority of both foreign and American air carriers is expressly conditioned upon these carriers' obedience to the Board in the exercise of its new powers.¹⁵⁷

The Board's power to *set* fares is still restricted to domestic air services. After notice and hearing, the Board is empowered, upon a finding that prevailing rates are unjust or unreasonable, to fix the lawful rates to be charged for domestic air transportation.¹⁵⁸ In determining lawful rates, the Board is directed to consider, along with such other factors as the promotion of aviation and the financial health of the carriers concerned, "[t]he need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service"¹⁵⁹ The Board's rate-making power is buttressed by the power to suspend for up to 180 days any new tariff proposed for domestic air transportation, while hearings are held to determine the lawfulness of the proposed tariff.¹⁶⁰

The denial of the CAB's repeated requests that this fare-setting power be extended to cover foreign air transportation has severely handicapped the Board in seeking to promote with equal vigor the public interest in both domestic and international air services.¹⁶¹

156. Pub. L. No. 92-259, § 3(a), Federal Aviation Act § 1002(j)(3), 49 U.S.C. § 1482(j)(3) *as amended*.

157. Pub. L. No. 92-259, § 3(a), Federal Aviation Act § 1002(j)(4), 49 U.S.C. § 1482(j)(4) *as amended*. Were the Chandler fare crisis to occur today, *see* pp. 1120-22 *supra*, the CAB could stalemate British moves to force American carriers to charge a given rate by using § 1002(j)(3), *supra* note 156, to require that British aircraft charge the fares favored by the American carriers and the CAB. When a foreign government orders its carriers to lower its rates without forcing other airlines to comply (since the market will force them to match the lower fare anyway), as happened with SABENA in the spring of 1971, *see* p. 1126 *supra*, the Board could act under § 1002(j)(1), *supra* note 155, to suspend the new tariffs pending a hearing on its lawfulness under the duty to observe "just and reasonable" fares newly imposed upon foreign air carriers by § 404(a)(2), *supra* note 154.

158. § 1002(d), 49 U.S.C. § 1482(d) (1970).

159. § 1002(e)(2), 49 U.S.C. § 1482(e)(2) (1970).

160. § 1002(g), 49 U.S.C. § 1482(g) (1970).

161. In delegating to the CAB the economic regulation of commercial aviation, Congress set forth a broad mandate to the Board for the promotion of the public interest:

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

The Ins and Outs of IATA

While the Board has been able actively to promote the public interest in the domestic arena, making judgments as to the public benefit of given fare levels and ordering fares to be set accordingly, in protecting the public interest in the international sphere the Board's role is essentially passive.¹⁶² It can offer opinions as to the possible public detri-

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

§ 102, 49 U.S.C. § 1302 (1970).

In giving the Board the power to set domestic air fares, Congress directed the Board to take into consideration, among other factors:

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient air carrier service.

§ 1002(e), 49 U.S.C. § 1482(e) (1970).

In exercising the suspensive powers over rates in foreign air transportation granted it by the 1972 amendment to the Federal Aviation Act, the Board has been directed to consider these same five factors, plus a sixth: "whether such rates will be predatory or tend to monopolize competition among air carriers and foreign air carriers in foreign air transportation." Pub. L. No. 92-259, § 3(a), Federal Aviation Act §§ 1002(j)(5)(A)-(F), 49 U.S.C. §§ 1482(j)(5)(A)-(F) *as amended*.

162. This active-passive dichotomy in the application of the Board's public interest function begins with the initial application for authority to operate a given service on a given route. Section 401 (49 U.S.C. § 1371 (1970)) conditions the Board's issuance of a certificate to an air carrier (including one seeking operating authority for international service) on an affirmative finding that such service "is *required* by the public convenience and necessity." (Emphasis added.) *See* p. 1134 *supra*. Section 402 (49 U.S.C. § 1372 (1970)), on the other hand, conditions the grant of a permit to a foreign air carrier on a finding merely that the proposed service "will be in the public interest." *See* p. 1134 *supra*. This contrasting use of the terms public "necessity" and public "interest," and "required by" as opposed to "will be in," seems to impose on the Board a duty to scrutinize the applications for certificates by air carriers more rigorously than the permit applications of foreign air carriers.

The practical effect of this disparity is increased by the decision in *Ashbacher Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945), which held that two applicants for a single radio station license were each entitled to be heard before a decision was made. The *Ashbacher* doctrine has been held applicable to CAB proceedings for the issuance of an operating certificate for a given route under § 401. *Delta Airlines v. CAB*, 228 F.2d 17 (D.C. Cir. 1952). By insuring a full and scrupulous consideration of the public interests affected by the issuance of an operating certificate, the *Ashbacher* doctrine may well redound to the public benefit when domestic air services are involved. When international services are pending, however, an opposite result ensues. The laxer standards and diplomatic *fait accompli* inherent in the granting of § 402 permits to foreign air carriers vis-à-vis the lengthy proceedings required for the issuance of a § 401 certificate allow foreign airlines to "get the jump" on American carriers in serving new markets. Thus effective competition, declared by Congress to be one of the primary components of the public interest in air transportation, *supra* note 145, is adversely affected by the contrasting statutory powers and administrative practices under the two sections. *Cf. Hearings on S. 3197 and S. 3198, supra* note 129, at 16-17.

Air carriers caught in *Ashbacher's* embrace in their competition for § 401 certificates over a new foreign air route have been unable to turn *Ashbacher* to their advantage by extending its scope to include foreign air carriers. *Ashbacher* has been held inapplicable to a § 402 proceeding involving a foreign air carrier who seeks operating authority for a route similar to that at issue in a § 401 proceeding, even though both proceedings concern petitions for operating authority over the same route. *See Pan American-Grace Airways, Inc. v. CAB*, 342 F.2d 905, 909 (1965), *cert. denied*, 380 U.S. 934 (1965); *Pan American*

ment of existing fares; it can appeal to IATA for the adoption of its international fare policies. But even with the recent addition of suspensive powers over rates in foreign air transportation, the Board is unable to take the initiative in changing international fare levels. To paraphrase an IATA spokesman, the Board can still dispose of only those fares which the airlines themselves have chosen to propose.¹⁶³

III. Improving the Role of the United States in the Regulation of International Air Fares

A. *Retention of the Existing Regulatory Apparatus*

In the light of the current, growing disenchantment of scholars and businessmen alike with the efficacy of transportation regulation,¹⁶⁴ the best remedy to the United States' disadvantageous position in the existing system for regulating international air fares might seem to be complete withdrawal from that system pursuant to a unilateral policy of "deregulation." No attempt is made here to evaluate the desirability of regulation in terms of economic theory. It will be shown, however, that due to the political constraints on the international air transportation market, a unilateral American policy of deregulation would prove counterproductive to American interests.

World Airways v. CAB, 392 F.2d 483, 490 n.9 (1968). For comments by a member of the CAB, see Gilliland, *The Role of the Civil Aeronautics Board in Licensing Foreign Air Carriers*, 32 J. AIR L. & COM. 236, 239 (1966). Nor is the dichotomy diminished by the Board's power under § 416 (49 U.S.C. § 1386 (1970)) to exempt air carriers from the lengthy § 401 certification proceedings, for § 416 has been narrowly construed by the courts. See, e.g., cases cited, *Hearings on S. 3197 and S. 3198*, *supra* note 129, at 2-3.

Once service is initiated on international routes, the Board's promotion of the public interest in economical air fares is still stifled by passive powers of regulation. The control over tariff agreements vested in the Board by § 412 (49 U.S.C. § 1382 (1970)), *see* p. 1135 *supra*, has proven to be of little real force or effect. First, the disapproval of an agreement requires a finding that the agreement is actually adverse to the public interest. Thus, the Board cannot disapprove agreements which are of limited public benefit, even when it feels a more beneficial agreement could and should have been adopted. Second, the actual effect of disapproval under this section of the Act is minimal. As far as the Board is concerned, air carriers and foreign air carriers are free to file whatever rates they care to following disapproval of an IATA tariff agreement, and foreign governments have been quick to set fares themselves if fares begin to fall during such an "open-rate" period. See *Hearings on Air Fares and Charter Service*, *supra* note 96, at 53. An antitrust action against air carriers which continue to fly at the same rates following the Board's disapproval of a rate agreement under § 412 is theoretically possible, but this sanction has never been employed. See *Hearings on H.R. 465*, *supra* note 95, at 30. Finally, the suspensive power over foreign air fares given the Board by the 1972 amendment is still a basically passive power, since the Board cannot prescribe new rates to replace those it rejects as "unjust or unreasonable."

163. See Cohen, *Crisis in the Conferences*, *supra* note 117.

164. See, e.g., W. JORDAN, *supra* note 119; Comment, *Is Regulation Necessary? California Air Transportation and National Regulatory Policy*, 74 YALE L.J. 1416 (1965); *A Case for Grounding the CAB*, FORTUNE July 1971, at 66; Editorial, *Room to Maneuver*, WALL ST. J., Sept. 20, 1971, at 12, col. 1; *The Regulators Can't Go On This Way*, BUS. WEEK, February 28, 1970, at 60.

The Ins and Outs of IATA

As the examination of the evolution of a regulatory system for international civil aviation revealed, a multiplicity of factors enter into each state's calculation of its public interest in international aviation. Among the interrelated and occasionally countervailing elements which constitute the public interest are economic, military, and diplomatic factors.¹⁶⁵ History has shown that, because of these interests and

165. Included in the economic category are the desire of consumers for low fares, the desire of investors for a "fair return," and the need of the national economy for a comprehensive route system and competent service. See K. PILLAI, *supra* note 43, at 3, 32-33; S. WHEATCROFT, *supra* note 82, at 46-48. The general value to the national economy of international commercial aviation prevents characterization of these economic factors as merely private (investor) interests versus the public (consumer) interest. As Congressman Kuykendall of Tennessee put it: "No matter what public group comes in here and talks about the public interest, it is not in the public interest to have regulated international and interstate transportation go broke." *Hearings on Air Fares and Charter Service, supra* note 96, at 403.

In a free enterprise economy, financial "health" for air carriers is presumed necessary to the maintenance of air services. When the government owns a direct interest in its flag carrier, as is true of most international airlines, the public stake in the balance sheet of the carrier is even clearer. Whether ownership and control of an international airline is private or public, the flag states involved have invariably preferred to subsidize losing carriers rather than allow them to succumb to the vicissitudes of international competition. See, e.g., S. WHEATCROFT, *supra* note 82, at 114-18, 183-85 (describing the recapitalization of BOAC by the British government following BOAC's accumulated loss of £ 80.1 million by the end of the fiscal year 1963).

In addition to the economic factors directly related to the profitability of an airline, several subsidiary economic factors may figure in the public interest equation. Employment levels in the airline industry, and in the airframe manufacturing industry as well, must be considered. See, e.g., F. THAYER, *supra* note 22, at 184-85. Employment will be related to other considerations besides providing jobs for a state's citizens; as a source of skills and technological capability, aeronautical industries may be maintained even when they are uneconomic. See R. THORNTON, *supra* note 31, at 101-05. The British have been the most notorious nation for sacrificing the economic well-being of their carriers, and their ability to operate on lower fares, so as to support the national airframe manufacturing industry. See R. WORCESTER, *ROOTS OF BRITISH AIR POLICY 164-78 (1966)*; *COMM. OF INQUIRY INTO CIVIL AIR TRANSPORT, BRITISH AIR TRANSPORT IN THE SEVENTIES 195-99 (1969)*; M. STRASZHEIM, *supra* note 72, at 23. Britain's belligerence during the Chandler fare crisis can be attributed to BOAC's chronic need for higher fares to offset the losses it incurred in purchasing prematurely obsolete British equipment instead of American-made long-haul jets. Cf. S. WHEATCROFT, *supra*. The problem seems likely to arise again should BOAC and Air France be ordered by their respective governments to purchase the Concorde SST irrespective of its commercial viability.

The military factor is a further aspect of the national interest in financially "healthy" carriers. Military planners see well-staffed and equipped civil airlines as a transport reserve. See generally F. THAYER, *supra* note 22, *passim*. Defense strategists will accordingly support policies which maximize the number of civilian transport aircraft and their availability to the military. In balancing the value of such policies against the cost, the military may well discount costs which are paid out of commercial revenues or consumer pockets instead of the national defense budget.

Both economic and military factors may merge into the diplomatic category. National airlines are vehicles of prestige and propaganda, carrying on the maritime tradition of "showing the flag." O. LISSITZYN, *supra* note 1, at 56-57. International airlines may be not only major foreign exchange earners in their own right, see W. O'CONNOR, *supra* note 31, at 94; R. THORNTON, *supra*, at 92-101, but may also stimulate the development of trade with countries they serve. M. STRASZHEIM, *supra*, at 9-16. Moreover, international airlines function as foreign policy poker chips. Concessions on routes or fares may be traded off for advantages gained in other spheres of foreign affairs.

American acquiescence in high fares and the award to many foreign-flag carriers of lucrative routes to and from American cities has been a covert form of financial aid to co-operative allies, free from the recurring review to which congressionally appropriated aid is subject. Such "foreign aid" has been used to secure American military bases on for-

the correspondingly high value nations place on airline ownership and operation, governments will not allow their airlines to live or die at the mercy of market forces.¹⁶⁶

The Chicago Conference,¹⁶⁷ the Chandler fare crisis,¹⁶⁸ and the European subsidy battles of the 1920's and 1930's¹⁶⁹ exemplify three strategies available to protectionist countries for the frustration of an American deregulation offensive. The first strategy, the sort displayed at Chicago, is a boycott of air service with the United States by a group of contiguous countries. The "Third World" of today can, like war-torn Europe a quarter-century ago, successfully condition access to its airspace on protection for its airlines. The artificially high fares necessary on routes to underdeveloped countries for the economic survival of these countries' airlines may be the "price" charged for inclusion of these nations within a global route network. The United States should rationally agree to pay this price, through the acceptance of rate regulation, so long as the cost in the form of inflated fares does not exceed the benefit of the resultant air service.

The United States interest in deregulation stems primarily from an ability as a wealthy, technologically-advanced nation to support the efficient airlines necessary for successful competition in a free air transportation market. But also a function of wealth and industrialization are the indirect benefits, aside from those values accruing directly from airline operation and ownership, of participation in a comprehensive network of global air service. These indirect benefits, realized in terms of expedited trade and communications, flow disproportionately to prosperous countries like the United States. Thus the loss of these indirect benefits would inflict greater damage on the United States than it would on the underdeveloped countries which might boycott air service should the United States seek to deregulate international rates.

The absolute cost of such a boycott would thus be greatest for the United States. The relative cost might be higher for the boycotting countries, however, because they have fewer resources with which to

eign soil. A classic instance of using air routes to keep a NATO ally smiling was the award of routes to New York and Houston to the Dutch national carrier KLM in 1957. See F. THAYER, *supra*, at 78-79; R. THORNTON, *supra* at 99. See also *Hearings on S. 1539 and S. 1540, supra* note 78, at 24; Edles, *IATA, The Bilaterals, and International Aviation Policy*, 27 FED. BAR J. 291, 298 (1967). Strategic considerations have not caused a "tilt" solely in the favor of IATA countries. The value of American air bases in Iceland has been credited with deterring the State Department from renegotiating the United States bilateral air service agreement with Iceland, which permits Icelandic Airlines to serve the United States and Europe at sub-IATA rates. M. STRASZHEIM, *supra* at 54-55; *cf.* note 105, *supra*.

166. See, e.g., pp. 1106, 1107, 1114 *supra*.

167. See pp. 1110-13 *supra*.

168. See pp. 1120-22 *supra*.

169. See p. 1106 *supra*.

absorb the costs which a boycott would generate. Although this circumstance might make a battle by attrition against a boycott seem economically rational for the United States, political factors must also be taken into account. Politicization, within both the boycotting countries and the world arena, could artificially prolong the boycott. The governments of the boycotting countries might find it politically impossible to capitulate and stay in power; given that the United States would have provoked the boycott by withdrawing from IATA in pursuit of deregulation, rival great powers would probably appear with offers to subsidize the cost of the boycott.¹⁷⁰ Thus the United States might find itself faced with rising barriers to re-entry into the boycotting countries even if it capitulated to those countries' claims for the regulation of air fares.¹⁷¹

A second caveat to the economic wisdom of the United States' seeking to prevail against such a boycott is posed by the contradiction between the effects of such a policy and the supposed purpose of foreign aid programs. Foreign aid seeks to foster economic growth in the developing world by compensating for and seeking the elimination of some of the underdeveloped countries' disadvantages in the world trade market.¹⁷² The admission implicit in foreign aid is that this market's allocation of resources, however efficient, is inequitable. It might well lend the appearance of bad faith, if not inconsistency, to American foreign aid if the United States were to undertake a program of aiding

170. Such a subsidy could take two forms. Direct payments in cash, goods, and services could seek to redress the harm inflicted on the boycotting countries' economies. More likely, however, would be the provision of alternate air service, linking the boycotting countries to a route network radiating from the friendly power. The underdeveloped countries' participation in this alternate air service would be subsidized by the intervening power, seeking to establish its own sphere of aeronautical influence. Cf. R. THORNTON, *supra* note 31, at 152-53 (describing a Soviet attempt to achieve aeronautical pre-eminence among new African nations).

171. Should the United States withdraw from IATA, thereby provoking a boycott of the type hypothesized here, most American bilateral air service agreements would have to be renegotiated. The Bermuda-type bilateral is predicated on IATA's primary rate-setting competence, see pp. 1115-16 *supra*, and it would hardly be honorable for the United States to decide to begin disapproving all IATA tariff agreements without announcing this change of policy in advance and giving the stipulated one year's notice for denunciation of its Bermuda-type bilaterals. See, e.g., Air Services Agreement with the United Kingdom, Feb. 11, 1946, art. 13, 60 Stat. 1503, T.I.A.S. 1507 ["Chicago form," cf. note 58, *supra*]; Air Transport Agreement with the Fed. Rep. of Germany, July 7, 1955, art. 16 [1956] 1 U.S.T. 540, T.I.A.S. 3536 ["Bermuda form," cf. note 58 *supra*].

It would thus be quite difficult to "call off" an unsuccessful deregulation initiative. By contrast, when Britain threatened to end American landing rights during the Chandler Fare Crisis, she was acting *within* her rights under the Bermuda bilateral agreement. *But see* note 210 *infra*. When her grievance was satisfied, she could return to the status quo ante. American efforts to achieve the United States' air fare goals outside of the IATA framework would be based on economic power and sovereign prerogatives, not negotiated rights, and there would thus be no guarantee that a restoration of air service could be had solely at the United States' initiative.

172. See, e.g., C. KINDLEBERGER, *ECONOMIC DEVELOPMENT* 361-79 (2d ed. 1965).

economic development in a country while simultaneously attacking one of its efforts at industrialization, its national airline.¹⁷³

Current attacks on IATA are often premised, however, on the modern equivalency of European and American industrial power.¹⁷⁴ While the boycott strategy would be inappropriate, Europe could respond to American withdrawal from IATA with the same strategy employed during the Chandler fare crisis. Acting multilaterally, the European governments could write into their municipal law the tariffs which would have been incorporated in an IATA tariff agreement.¹⁷⁵ For the United States to respond to this by itself setting fares for its Third and Fourth Freedom traffic with Europe would be an admission of defeat in its effort at deregulation.¹⁷⁶ When multiple sovereigns con-

173. Although creation of a national airline may not be an optional use of economic resources, national airlines have a psychological value which cannot lightly be dismissed. See W. O'CONNOR, *supra* note 31, at 96. Arguments that the use of higher fares to subsidize airline ownership and operation by modernizing nations is an inefficient allocation of foreign aid resources may fail to take this non-quantifiable factor sufficiently into account. Cf. K. PILLAI, *supra* note 43, at 17-18. Second, the spillover benefits of airline operation into other sectors of the economy are also difficult to calculate but are nevertheless significant. See note 165, *supra*. Third, it may be unwise to end air fare "foreign aid" without any assurances that the same amount of aid will be channelled into other sectors of the economies of underdeveloped countries. A final consideration is whether a paternalistic attitude toward underdeveloped countries which insist on entering the international airline business is prudent, even if warranted by the fact that such investments may be an inefficient allocation of the countries' resources. Years of "dollar diplomacy" may have engendered suspicion of American economic advice.

174. Given the wealth of modern Europe, disruption of air service in retaliation for American withdrawal from IATA is therefore unlikely to be instigated by the Europeans, for it would inflict no disproportionate injury on the United States vis-à-vis Europe. Moreover, the relaxation of Cold War tensions and the gradual realignment of super-power politics into a tripartite contest for Third World sympathies have reduced the need for American economic concessions to Europe in return for NATO support. A dispute over airline fares with a European government seems unlikely to push such a state to the brink of revolution. Indeed, it has been suggested that, in view of the flow of wealth accompanying the yearly horde of American tourists abroad, the United States should consider employing the boycott strategy itself to induce compliance with American deregulatory demands. See K. PILLAI, *supra* note 43, at 142-143.

175. This strategy is also available to some non-European countries too wealthy to have a bargaining advantage in a boycott. Japan, for instance, has long sought to maintain high fares on transpacific routes. Cf. note 123, *supra*. Because of Japan's island geography, Japan needs no multilateral "Fifth Freedom" protection. Thus Japan has been able to achieve its fare policies by simply setting fares under its own law whenever the CAB disapproves a transpacific IATA rate agreement. Following CAB disapproval of IATA's transpacific rates in 1963, an "open-rate" situation prevailed for four years, during which American carriers continued to fly at the 1963 rates. See 1967 CAB ANN. REP. 35; 1968 CAB ANN. REP. 50-51. An "open-rate" situation again arose in 1969, and again no reductions in fares occurred. See 1969 CAB ANN. REP. 25.

176. In order to set rates on its Third and Fourth Freedom traffic, Congress would have to grant the CAB the international rate powers advocated by this Note. Having finally armed itself with international rate-powers, it would be extremely foolish for the United States to then denounce its bilateral agreements, cf. note 171, *supra*, and withdraw from IATA, at the very moment when provisions in our bilaterals conducive to lower fares have at last become effective. See p. 1150 *infra*. In any case, the United States would be at a disadvantage in a rate-setting contest with Europe, absent accord with Canada and Mexico, because we would not have the collateral "Fifth Freedom" protection which the Europeans have in the past secured through their unanimity in confrontations with the United States. See pp. 1129-30 *supra*.

The Ins and Outs of IATA

trol access to the marketplace, one state's attempting to legislate a "free" market is futile. The resulting mass of ad hoc legislation would burden air transport in as costly a fashion as IATA's price-fixing, without IATA's offsetting advantages of a low political profile and integrated tariffs.

A third strategy for sabotaging an American attempt at deregulation would follow the pattern of the European subsidy battle between the First and Second World Wars. Even when used merely to underwrite inefficiencies and thereby to preserve a carrier's "competitive position," subsidies distort the market.¹⁷⁷ The intra-European subsidy battles of the inter-war years offer historical evidence that subsidies can be used as predatory as well as compensatory devices. In the current context of privately-owned American carriers, it would be a relatively simple and short-term matter for a single state to start a subsidy battle through the introduction of below-cost fares, and then await the collapse of the American carriers. The United States could and probably would join the subsidy battle to support American carriers, but this would lead to the inequity of all American taxpayers subsidizing a low-fare bonanza for the minority of Americans who would actually travel abroad. Because all states would have to join the battle or lose their airlines, the cumulative cost of a subsidy battle may be greater than the costs generated by regulation.

The availability of these strategies for frustrating a unilateral American policy of deregulation places regulation in its proper perspective as a political necessity. Regulation of air fares functions as a means of "buying" access to much of the international commercial aviation market. As long as the present system of sovereign political jurisdictions remains the central feature of international law, many air transport markets will be open only to non-price competition.

Accepting the need for regulation presents the question of the form which the regulatory process should assume. Some commentators have proposed a system of direct intergovernmental negotiation of air fares.¹⁷⁸ This Note has sought to demonstrate that much of the bar-

177. When subsidized airlines keep flying instead of going bankrupt, they create excess capacity. The passengers who fly on these carriers would, were the market allowed to prevail, have to fly on the unsubsidized carriers efficient enough to survive in a competitive market. This would raise the load factors of the unsubsidized airlines, lowering their average costs and allowing them to offer lower rates. Consequently, even where subsidies are paid merely to allow an airline to stay in the market and offer air transport at the "market price," this price, as set by the most efficient carriers, is still inflated due to the inefficiency imposed upon the whole system by the continued operation of the subsidized carriers.

178. *Id.* at 122-36; W. O'CONNOR, *supra* note 31, at 131 ff. See also Statement of Dr. K. Pillai, *Hearings on S. 2423*, *supra* note 102, at 230-31. Professor Thayer advocates re-

gaining within IATA is in fact intergovernmental. Insofar as political considerations dominate the economics of IATA, transferring IATA's regulatory role to an officially diplomatic organization would promise little improvement in IATA pricing policies. A far more likely result of such a mechanism would be the aggressive assertion of sovereignty into a delicate bargaining process.¹⁷⁰ This Note therefore advocates exploiting the advantages of IATA, and minimizing its abuse of the American public interest in lower air fares, through a more potent means of representing American interests within IATA.

B. *Alternative Means of Enhancing American Influence within IATA*

A campaign to enhance American influence within IATA must proceed along two fronts. First, some assurance must be gained that claims for the protection of the American public interest will be *articulated* within IATA, and second, provision must be made for the political sanctions necessary to insure that such claims are *effectuated* in the face of resistance from other IATA members.

The articulation of the American public interest could perhaps be

organization of American-flag international airlines into three regional, quasi-public international airlines, each being the sole United States flag airline in its area of operation. See F. THAYER, *supra* note 22, at 304-06; Thayer, *Air Transport Policy: A Crisis in Theory and Practice*, 36 J. AIR L. & COM. 661 (1970). Professor Thornton urges a tougher bargaining posture for United States air route negotiations, but within the existing IATA rate-setting structure. Foreign support for American goals within IATA would be one of the concessions sought through tighter controls on access to the lucrative American air travel market. See R. THORNTON, *supra* note 31, at 241-42; Thornton, *Power to Spare: A Shift in the International Airline Equation*, 36 J. AIR L. & COM. 673 (1970). Dr. Straszheim likewise advocates better United States bargaining within the IATA framework, but specifically rejects vesting the CAB with international rate-setting powers. See M. STRASZHEIM, *supra* note 72, at 206-20.

179. While IATA fare-setting is rife with political factors, international air transportation as a service and a livelihood for millions has remained remarkably free of entanglements with the day-to-day strife of modern "public" politics. Intrusions of political hostilities into the airline industry, such as the hijackings of airliners by Arab guerrillas, provoke a nearly universal chorus of denunciation. Except during outright war, airlines pass daily between states separated by bitter political disputes, providing a welcome resource of communication and a vivid illustration of the possibilities of peaceful coexistence. Thus while sovereign claims to territorial airspace are implicit within the whole air transport system, under prevailing conditions these claims are not rattled along with the other sabres in the sovereign closet. While airlines and air routes are the subject of intensive, long-term bargaining, they are not commonly used as means for short-term sanctions or reprisals.

Air fares are, however, negotiated and renegotiated much more frequently than air routes, and are much more interdependent. The publicity surrounding these recurrent negotiations would not be conducive to the understatement of sovereign claims to control of the national air. Fare policies articulated in an inter-governmental conference, once widely publicized, might be backed up with threats of exclusion from national airspace of those who disagreed. Dependable air service over a global route network could easily be eroded by the ebb and flow of political influence and alliances. These dangers can be avoided by preserving the airline-to-airline facade of the existing rate regulatory process, while nevertheless securing better representation for American interests in the covert political process which underlies the otherwise commercial atmosphere of fare negotiations.

The Ins and Outs of IATA

most forcefully achieved through the nationalization of the United States' flag airlines. American representation within IATA would thus become a governmental function, with consequent political responsibility. Adequate alternatives exist, however, which serve the goal of protecting American interests from abuse by IATA without confusing the issue of reforming IATA with the more complex problem of the advisability of national ownership of major industries.

These alternatives involve legislation granting the CAB sufficient regulatory authority over international aviation to allow the Board to utilize effectively the provisions of the Bermuda-type bilateral air service agreement.¹⁸⁰

The principal problem with the Bermuda-IATA system from an American perspective has been Congress' failure for twenty-six years to pass the legislation necessary for the United States to take advantage, consistent with its own municipal law, of the Bermuda bilateral's reservation of sovereign rights of action under international law. Thus when the CAB has in fact disapproved an IATA agreement, it has found itself unable "to prevent the inauguration or continuation of the service in question at the rate complained of,"¹⁸¹ as allowed by paragraph (f).¹⁸² Implementation of paragraph (f) by suspending the operating rights of foreign air carriers required specific statutory delegation of such "paragraph (f) powers" from the Congress to the CAB. This delegation was not effected until March 22, 1972.¹⁸³

Throughout the years when it was unable to take advantage of paragraph (f), the CAB campaigned for the powers which would activate paragraph (e) of the Bermuda bilateral. These powers "to fix fair and economic rates for the transport of persons and property by air on international services and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board at present is empowered to act with respect to such rates for the transport of persons and property by air within the United States,"¹⁸⁴ would bring paragraph (e) into effect in place of paragraph (f) for *all* signatories of Bermuda-type bilaterals. This would allow the CAB to prescribe the proper rates for American international airlines while simultaneously creating a binding obligation upon other governments to allow these airlines to serve their countries at the CAB-set rates. But because the

180. See pp. 1115-17 *supra*.

181. Annex, § II, paragraph (f), *Bermuda bilateral*, *supra* note 55. See note 62 *supra*.

182. See p. 1118 and note 162 *supra*.

183. Act of March 22, 1972, Pub. L. No. 92-259, 86 Stat. 95, 1972 U.S. CODE CONG. & AD. NEWS 806.

184. Annex, § II, paragraph (e), *Bermuda bilateral*, *supra* note 55. See note 63 *supra*.

CAB has not had the powers which would invoke paragraph (e), other states have remained free to fix international air fares themselves and to reject fares they disapprove of, with the sovereign abandon permitted under paragraph (f).¹⁸⁵ Unlike paragraph (e), which allows a state to set rates only for its own airlines, the continued regime of paragraph (f) has allowed foreign governments to prescribe the legal fares American airlines must charge on international flights to and from the United States. The CAB's prolonged lack of the "paragraph (f) powers" necessary to retaliate in kind against such rate-setting by foreign governments has rendered it impotent in past international fare disputes.

As concern over the possibility of a rate war on the North Atlantic route mounted during the summer and fall of 1971, the CAB sent to the Congress a draft bill presenting the Board's view of the powers it required to protect the public interest in international aviation. Introduced in the Senate as S. 2423,¹⁸⁶ hearings on the bill were held on October 19-21, 1971.¹⁸⁷ During these hearings spokesmen for the Administration supported the American scheduled airlines in their advocacy of an alternative draft bill. The substance of the Administration-industry proposal was substituted for the language of the CAB version in the amended draft of S. 2423 which was reported out of committee in January¹⁸⁸ and passed by the Senate on February 24, 1972.¹⁸⁹ Immediately after the Senate hearings in October, a companion bill to S. 2423 was introduced in the House.¹⁹⁰ The House passed this bill on March 1, 1972,¹⁹¹ and proceeded to amend and pass the Senate bill so that it conformed exactly to the House version.¹⁹² S. 2423 as amended by the House was then passed by the Senate on March 7, 1972,¹⁹³ and signed into law as Pub. L. No. 92-259 by President Nixon on March 22, 1972.¹⁹⁴

185. See *Hearings on S. 2423*, *supra* note 102, at 37-39.

186. S. 2423, 92d Cong., 1st Sess. (Aug. 4, 1971).

187. *Hearings on S. 2423*, *supra* note 102. The author of this Note attended the hearings and appeared as a witness on October 20, 1971. Portions of this Note were incorporated in the author's prepared statement to the Subcommittee, *id.* at 101-08.

188. S. REP. NO. 92-593, 92d Cong., 2d Sess. (Jan. 24, 1972).

189. 118 CONG. REC. S2457 (daily ed. Feb. 24, 1972).

190. H.R. 11416, 92d Cong., 1st Sess., (Oct. 21, 1971). Having been amended in committee so as to contain language virtually identical to that of S. 2423 as passed by the Senate, the House bill was reported out of committee on the same day that S. 2423 passed the Senate. H. REP. NO. 92-854, 92d Cong., 2d Sess. (Feb. 24, 1972).

191. 118 CONG. REC. H1636 (daily ed. March 1, 1972).

192. *Id.* The differences between H.R. 11416 as passed by the House and S. 2423 as passed by the Senate were the presence in the House bill of § 3(b), amending the table of contents of the Federal Aviation Act to conform to the amended powers of the CAB, and the presence in the Senate bill of a § 5 providing that the bill would take effect upon enactment.

193. 118 CONG. REC. S3467 (daily ed. March 7, 1972).

194. 118 CONG. REC. D314 (daily ed. March 24, 1972).

The Ins and Outs of IATA

The CAB draft of S. 2423 was a "paragraph (e)" bill.¹⁹⁵ By giving the CAB the same authority to set and suspend rates in foreign air transportation that it currently has for domestic air transportation, it would at last have made operative paragraph (e) of the Bermuda bilaterals. Spokesmen for the White House and for the American carriers strongly opposed the CAB draft precisely for this reason. By vesting the CAB under municipal law with plenary rate-making powers over international aviation and thereby invoking paragraph (e), the CAB draft would have denied to the United States under international law the right to prevent new fares from being put into effect by foreign carriers. Uppermost in the minds, and the testimony, of the opponents of the CAB draft were Lufthansa's threats to bolt IATA and initiate a North Atlantic rate war. Those opposing the CAB draft simply wanted Congress to allocate authority for retaliation against what was widely seen as a predatory price policy.¹⁹⁶ The amended draft of S. 2423 which was enacted into law followed this recommendation. The legislation was confined to a grant of paragraph (f) powers.¹⁹⁷

195. CAB orders affecting international rates were to be reported to the President, but were not made subject to his approval. In its provision for international rate powers and its excision of Executive review, the CAB draft was similar to S. 1540 of the 88th Congress, as passed by the Senate. See notes 90 and 95, *supra*. The CAB draft of S. 2423 contained a novel provision, however. Section 6 would have allowed the Board "in its discretion and without a hearing" to suspend for up to one year the tariffs of a foreign air carrier and to force such foreign air carrier to charge the same rates as charged by American air carriers for the same route. Foreign air carrier adherence to such orders of the Board would be a condition of continued operating authority for such foreign air carriers to serve the United States. This provision for summary action by the Board would not have impinged on paragraph (e), because the draft specifically stated in § 8 that nothing in the bill should be deemed inconsistent with § 1102 of the Federal Aviation Act, 49 U.S.C. § 1502 (1970), which directs the Board to carry out its duties consistent with any international obligations assumed by the United States. The new "fallback" powers would have insured protection of the United States' public interest should another country renounce or ignore its air service agreement with the United States. In such a crisis, the Board could take immediate action against such country's air carriers without having to wade through the administrative procedures and endure the inevitable delays in order to revoke a foreign air carrier permit under § 402 of the Federal Aviation Act, 49 U.S.C. § 1372 (1970). Cf. note 93 *supra*.

196. See, e.g., Statement of Bertram Rein, Dep. Ass't. Sec., Dep't. of State, *Hearings on S. 2423*, *supra* note 102, at 35, 40; Statement of Stuart Tipton, President of the Air Transport Association, *id.* at 200.

197. The Air Transport Association (ATA), the trade association of the scheduled American airlines, advanced a dusted-off copy of the bill which they had submitted to the 88th Congress as a rival to the White House's S. 1540. See Statement of Stuart Tipton, President of ATA, Oct. 21, 1971 (mimeo. copy distributed at the Hearings on S. 2423 on file at the Yale Law Journal); cf. S. 1539, 88th Cong., 1st Sess. (1963). This ATA draft provided for the suspension of any proposed or existing tariffs of foreign or American air carriers which the Board found contrary to the public interest. A list of public interest factors included in the proposal would have limited the Board's suspension power to unjust or unreasonable tariffs, as determined according to the characteristics of the service in question. The length of suspension was limited to one year, and the fares to be charged by carriers whose tariffs were suspended were to be the fares in effect prior to the suspended fares.

The Administration did not present its own draft at the Senate hearings, although it promised to do so later. Statement of Charles Baker, Ass't. Sec. Dep't. of Transportation,

Public Law No. 92-259, in this emphasis on the recent phenomenon of a threatened rate war, ignores the historical problem of IATA's reluctance to heed American requests for *lower* basic fares. Just two days before Lufthansa's ephemeral fares were denounced by ashen-

Hearings on S. 2423, supra note 102, at 119. The Department of Transportation's bill was introduced in the House on Nov. 16, 1971, as H.R. 11825, 92d Cong., 1st Sess. (1971). *See* H.R. REP. NO. 92-854, 92d Cong., 2d Sess. 15-16 (1972). The Administration proposal sought to achieve the same ends as the ATA proposal, albeit through somewhat more elaborate language.

The amended draft of S. 2423 reported out of the Aviation Subcommittee to the full Committee on Commerce followed the Administration and industry recommendations that legislation be confined to paragraph (f) powers. S. 2423, 92d Cong., 1st Sess., Comm. Print (Nov. 17, 1971). The Subcommittee draft contained several refinements of the ATA draft, however. The ATA has maintained since 1963 that no further legislation was necessary to establish the authority of the Board to act under § 402 of the Federal Aviation Act, 49 U.S.C. § 1372 (1970), to revoke the operating rights of foreign air carriers whose governments have acted prejudicially to American carriers. This broad reading of § 402 is probably incorrect. *See* note 93 *supra*. Thus, Section 3 of the Subcommittee draft provided that Board orders affecting rates must be obeyed by air carriers and foreign air carriers as a condition to their continued rights to operate in the United States. The Subcommittee draft also avoided the problem of litigation over administrative procedures during a crisis by retaining the "fallback" powers of summary action proposed by the CAB (in addition to paragraph (e) powers) in its draft of S. 2423. Moreover, the Subcommittee expanded somewhat the suspensive powers proposed by the ATA. While the ATA would have limited the CAB to the power to suspend unjust or unreasonable fares for up to one year, the Subcommittee draft provided for a one year suspension during which the Board might, after hearing, order the *cancellation* of the suspended fare. The grounds for suspension under the Subcommittee bill are the unjustness or unreasonableness of the fare. The Subcommittee language in this regard was somewhat stricter than the ATA's. The ATA draft predicated suspension on the Board's determination that the suspended fare was "inconsistent with the public interest." This connotes the "passive public interest" test under existing § 412 of the Federal Aviation Act, 49 U.S.C. § 1382 (1970), *see* pp. 1135, 1136-38 *supra*. By contrast, the Subcommittee bill placed an affirmative duty on air carriers and foreign air carriers to establish just and reasonable fares, and made suspension of a fare a preliminary to an inquiry as to its lawfulness. The language and procedure of the Subcommittee draft thus made the suspensory process regarding fares in foreign air transportation substantially the same as that for fares in domestic air transportation, with the exception that the Board has no power to prescribe the lawful fare in foreign air transportation. In short, the Subcommittee draft seemed to allow the Board to scrutinize international fares much more closely than would the ATA draft with its vaguer "public interest" mandate. Finally, the CAB draft provided for no Executive review. Although ostensibly this omission was because CAB fare orders are "technical" matters with which the President need not be bothered, it in fact represented the pique of the Board and Congress with, first, presidential "softness" during the Chandler fare crisis, and second, the political wrangling during successive administrations concerning the award of new transpacific routes. *See Hearings on S. 2423, supra*, at 27; *cf.* p. 1123 *supra*. The Administration objected strenuously to any bill which failed to provide for Executive approval of CAB rate actions. *Hearings on S. 2423, supra* note 96, at 35, 110. The Subcommittee responded to the President's claims of constitutional power to review CAB rate orders with an innovative provision reflecting congressional distrust of past usage of executive review in aviation matters. Section 2 of the subcommittee draft sought to foreclose constitutional objection by making CAB orders suspending or rejecting rates subject to the President's *disapproval*. A Presidential decision to disapprove a CAB order would have had to have been announced within ten days of the Board's submission of the order to the White House, and to have been accompanied by a *written statement* "explaining in detail the reason or reasons for disapproval." *Cf. Hearings on S. 2423*, at 99.

The full Senate Committee on Commerce, in reporting S. 2423 to the floor, S. REP. NO. 92-593 (Jan. 24, 1972), made only one significant change in the Subcommittee draft. Executive review was limited to ten days' right of disapproval, but no written explanation of such disapproval was required. The President was, however, required to find "that disapproval is required for reasons of the national defense or the foreign policy of the United States . . ." This language was retained in the version which became law.

The Ins and Outs of IATA

facéd airline presidents appearing before the Senate Commerce Subcommittee which held hearings on S. 2423,¹⁹⁸ the chairman of the CAB had emphasized to the subcommittee that the Board's long-term problem remains obtaining lower fares from IATA.¹⁹⁹ The paragraph (f) powers which are now law do not meet this problem for two reasons.

First, paragraph (f) was framed to protect the status quo. Its sanctions are available only against *new* rates. As long as the sanctions authorized by paragraph (f) are not exceeded, a fare dispute will lead to stalemate, with fares maintained at existing levels. This is no accident. In 1946 the British feared Pan American World Airways much more than they did the United States government, which might be trusted to have some concern for a faithful ally.²⁰⁰ The *raison d'être* for the alternative paragraphs (e) and (f) was to allow the British to maintain their post-war high fares until such time as the CAB, rather than Pan American, would be setting the rates for American carriers. Thus, while paragraph (f) powers for the CAB will afford some protection to the American public interest in aberrant situations where the CAB is seeking merely to retain the existing fare structure against proposals for a fare hike, paragraph (f) is useless to the United States in its usual efforts to *lower* fares.

In contrast, paragraph (e) obligates the parties to Bermuda-type bilaterals to allow proposed fares to go into effect pending arbitration.²⁰¹ Given the high comparability of air transport services, such that any significant difference in price will create a substantial diversion of traffic,²⁰² paragraph (e) has a built-in bias toward lower fares. A party proposing a new, higher fare poses no threat to a party which does not see the need for a price increase; on the other hand, a party proposing

198. *Hearings on S. 2423, supra* note 102, at 212, 239-40.

199. *Id.* at 27.

200. *See* p. 1117 *supra*.

201. *See* note 63 *supra*.

202. As between airlines flying similar equipment between the same cities, the comparability of the service offered is total save for differences in scheduling, in-flight amenities, ethnic appeal, and the chances for a safe arrival. Times of departure are not subject to any current controls, and so many flights tend to be scheduled at the same time. The experience with the introduction of tourist class in 1952 and economy class in 1953 shows that the air transport consumer's preference for lower price is strong enough to overcome even significant differences in comfort and service during the flight. *See* p. 1120 *supra*; M. STRASZHEIM, *supra* note 72, at 119-20. Ethnic appeal has proven to be a strong competitive force for choosing between equal-fare airlines, but it is doubtful that this refinement of service competition could stem the diversion induced by price competition. Relative safety records might influence the expert's choice of airlines, but the average consumer has little access to the pertinent statistics, and the airlines themselves refuse to capitalize on each other's tragedies because of the spillover effect of each individual airline's mishaps on the reputation of the air transport industry as a whole. For a review of the more limited diversion of traffic which price competition can achieve when routes and equipment are *not* totally comparable, *see* note 105 *supra*.

a lower fare will force the other party to match its price pending arbitration.²⁰³

This low fare bias under paragraph (e) would create an incentive for high fare airlines to cope with low fare initiatives within IATA rather than risk a temporary open-rate situation. Under paragraph (f), however, a single airline might not hesitate to veto an IATA agreement contemplating lower fares, for that airline's flag state knows that it can, in the absence of a mutually acceptable IATA tariff, prevent the inauguration of service at the lower rate, at least on routes serving the objecting state. Moreover, this advantage to high fare advocates is magnified when such countries act in geographically contiguous concert.²⁰⁴ Under paragraph (e), however, the leverage would be reversed. If agreement within IATA were sabotaged or an IATA agreement were governmentally disapproved, high fare states would have no further lawful means to prevent lower fares from taking effect short of general diplomatic pressure. Their wisest course of action would be to salvage what concessions they could within IATA.²⁰⁵

Second, paragraph (f) powers not only inhibit the effectuation of American low fare policies, but they leave even their articulation within IATA to the whim of American carriers. American carriers satisfied with a high fare status quo are immune from CAB sanctions because of the purely suspensive nature of paragraph (f) powers. Since prescriptive rate powers are denied to the CAB, there is no way of insuring that American carriers will press for lower fares within IATA.²⁰⁶

203. The low-fare bias of paragraph (e) exists notwithstanding the provision for arbitration. Much of the disagreement between the CAB and foreign governments may be traced to differing expectations about the effect of reduced fares on carriers' net revenues. See note 128 *supra*. Paragraph (e), by allowing lower rates to remain in effect pending arbitration, would permit empirical study of the effect of lower rates. This data would either win support for the CAB's economic theories or force the Board to re-examine the assumptions underlying its "low-fare philosophy." Moreover, the arbitration proceedings could well prove quite lengthy. The prospect of the CAB setting lower fares for American carriers, and paragraph (e)'s guarantee of their effectiveness throughout a lengthy period of arbitration, maintains the potency of paragraph (e) in its principal role of increasing the incentives for intra-IATA agreement on lower fares.

204. See p. 1130 *supra*.

205. The restraints of paragraph (e) are basically self-imposed, however, and there is always the danger that a petulant state may simply disavow its obligations under a bilateral agreement. Or, a state might simply terminate its bilateral agreements on one year's notice. See note 171 *supra*. Since some regulation of air fares is necessary, it is incumbent upon countries desiring generally lower fares to "bargain in good faith," and not to seek to establish indirectly a "free enterprise" price of air travel by lowering air fares until only the most efficient and well-capitalized carriers can afford to operate. Paragraph (e) should thus be used to encourage negotiated reductions under the aegis of IATA, rather than to force reductions down the throats of recalcitrant countries on the theory that the literal language of paragraph (e) will restrain such countries from taking reprisals.

206. A difficult question of construction would arise if the Congress were to grant the CAB power to fix rates for foreign air transportation for American carriers only.

The Ins and Outs of IATA

In contrast, invoking paragraph (e) by authorizing the CAB to set international rates would enable the Board to moderate the intra-IATA behavior of American carriers.²⁰⁷ As the United States seeks a suitable stasis between coercion and concession, there is a constant danger that the public interest may diverge from the interests of the American international carriers. A certain amount of discretion is the price of using the IATA forum, with its attendant benefits of nominally apolitical regulation and overtly voluntary compliance. But too large a measure of discretion cannot be accepted. If the CAB were armed with paragraph (e) powers, the Board's suggestions of desirable fares, expressed in advance of IATA conferences, would carry much more weight than they do at present. These guidelines, while ideally not so rigid as to be binding on the Board when the resultant IATA fare package is submitted for approval, would serve to inhibit American carriers from pursuing goals within IATA markedly at odds with the Board's concept of the public interest. So long as the Board cannot set the American carriers' fares for them, these carriers may continue to acquiesce in unacceptable proposals at IATA conferences.²⁰⁸

Would this serve to invoke paragraph (e)? Short of a "compromise" consenting to the jurisdiction of the ICJ or a referral to the ICAO for arbitration, there is no way of getting an authoritative answer. This in itself would be the cause of much confusion; a compounding problem would be the fact that no real effort to resolve the ambiguity would probably be made until a crisis arose. An additional complication is the fact that, since such legislation would affect virtually all air service bilateral agreements to which the United States is a party, the ambiguity could not be resolved through negotiations with just one bilateral partner.

207. Cf. Keyes, *supra* note 70, at 188-89.

208. The following dialogue is revealing in this respect. Congressman Samuel Devine of Ohio: "In your statement of purpose you say you want to help the U.S. carriers to bring down their rates. . . Do you think they have ever made an effort to bring down the rates without assistance from your Board?" Chairman Alan Boyd of the CAB: "No, sir; I am generalizing here . . . This could be an unfair statement. Certainly I want to make it very clear that in my judgment Pan American, particularly, has been historically a low-fare advocate on the Atlantic. However, as far as the Pacific is concerned, referring specifically to Pan American and Northwest, who are our two carriers certificated to operate across the Pacific, we are firmly of the opinion that we got a real song and dance routine from those carriers in connection with what was involved in the Athens Conference last year when we urged them strongly to try to bring about some reductions in the economy-class services across the Pacific." *Hearings on H.R. 465, supra* note 89, at 26-27.

The need for some means of public control over the fare positions articulated within IATA may become especially acute if American carriers should come to believe that they must support high fares due to rising labor costs. Anxiety over high American labor costs was recently voiced by the president of Trans World Airlines, see *Hearings on S. 2423, supra* note 102, at 214, and a senior official of Pan American has stated that primarily because of wage inflation, his company cannot afford to fly as cheaply as some foreign carriers. Interview with John Champion, Senior Director—IATA, Pan American World Airways, Inc., May 5, 1972.

Even if these fears are justified and the American airlines' historic position as low cost carriers vis-à-vis foreign airlines is being reversed, cost-heavy American carriers should not be allowed to represent solely their own interests at IATA traffic conferences. Permitting American carriers to use the IATA mechanism to preserve their competitive position through inflated fares is tantamount to establishing an industry-operated tariff

Finally, even if the new law were more responsive to the long-term problem of securing lower fares, it would still be inferior to implementing paragraph (e) powers. The new law invites confrontation. Under the terms of paragraph (f) resort to sanctions precedes multi-lateral arbitration. By this retrogressive system of dispute settlement, the swords of sovereign intransigence are allowed to cross. Yet, once blood has been drawn, the likelihood that pleas of international law and public order will be heeded is at its nadir. One has only to review the debates, in press and parliament, which took place in Britain and the United States during the Chandler fare crisis to gain a feeling for how bitter relations can become between otherwise friendly nations when air fares become an issue and paragraph (f) is implemented.²⁰⁰ As the mutual sanctions of the parties lead to stalemate, the danger of escalation mounts. Considerations of domestic politics and international prestige may make the issue of air fares recede into the background while jingoism takes hold. The fact that paragraph (f) conferred upon the parties a right to take certain actions under international law may be forgotten as the emotions evoked by paragraph (f) sanctions lead to reprisals not authorized by international law.²¹⁰

Paragraph (e), on the other hand, holds out the promise of peaceful and orderly international dispute settlement procedures. Both paragraphs allow for arbitration under the auspices of ICAO of fare disputes which cannot be settled within IATA or by diplomatic negotiation between the parties.²¹¹ But the atmosphere of restraint created

commission. Economic protectionism should be a matter of public policy—not private agreement. Furthermore, there is a danger that if they are left untrammelled in the positions they take within IATA, the American international carriers, with IATA's aid, will make the public pay for management's mistakes. See generally Cordtz, *Pan Am's Route Across the Sea of Red Ink*, FORTUNE, Jan. 1972, at 78.

209. See, e.g., 1 A. CHAYES, ET AL., *supra* note 59, at 541-49.

210. For instance, Britain's determination in 1963 to use her paragraph (f) rights of action led her to play somewhat loosely with the language of paragraph (f). That provision applies only when "one of the Contracting Parties is dissatisfied with any new rate proposed by the air carrier or carriers of either contracting Party . . ." *Bermuda bilateral*, *supra* note 49, Annex, § II, paragraph (f) (emphasis added). This language would not seem to allow the British to impound American aircraft for flying at the old rates specified in the expired IATA agreement which the Chandler agreement had been intended to replace. The issue was complicated by the fact that the Chandler dispute revolved around the amount of the discount to be given for return tickets, not around the base fare upon which the round-trip discount was calculated. Nevertheless, the American carriers proposed nothing new, and asserted a right to keep flying at the old fare and the old discount. It is likely that the British government was aware of the weak legal ground for punitive action against American carriers, but felt that paragraph (f)'s policy of national self-help legitimated belligerent action despite the limitation imposed by a careful reading of paragraph (f)'s text.

211. The arbitral procedure is set out in paragraph (g) of § II of the Annex to *Bermuda bilateral*, *supra* note 55. Although the ICAO's response is termed an "advisory report," once the CAB obtained paragraph (e) powers, the report would have a mandatory effect on the United States. See note 64 *supra*. By definition, a Board with paragraph (e)

The Ins and Outs of IATA

by paragraph (e)'s prohibition of sanctions pending arbitration would probably be far more conducive to a mutual submission to arbitration than the belligerent posturing produced by paragraph (f).²¹²

In sum, legislation such as the CAB draft of S. 2423 would be much more useful in promoting the American public interest and world public order than the amended version of S. 2423 which has become law. The CAB draft would have encouraged lower fares, insured responsible conduct by American carriers, and fostered the peaceful resolution of disputes. Nevertheless, the 1972 amendment to the Federal Aviation Act does serve to end thirty-four years of congressional inertia—the legislative proposals conceived during past air fare crises have all withered in one committee womb or another. The enactment of Pub. L. No. 92-259 at least signals congressional willingness to deal with the international air fare regulatory system, and as such bears a promise of more useful legislation to follow.

powers would have the power to prescribe rates for United States' air carriers, *see* note 63 and pp. 1145-46 *supra*, and so would be bound to set the fare decided upon by the ICAO's arbitral tribunal.

212. The ICAO has heretofore played a very minor role in solving disputes arising under bilateral air service agreements. *See* T. BUERGENTHAL, *supra* note 43, at 174-97. The combination of (1) initial IATA rate-making responsibility, (2) paragraph (e)'s freedom to inaugurate service at lower rates should IATA's rate-making prove unacceptable, and (3) appeal to the ICAO should any state abuse the low-rate freedom permitted by paragraph (e), would seem to offer both the ultimate political accountability desired by commentators who favor direct inter-governmental rate-setting, *see* note 178 *supra*, and the insulation from day-to-day political disruption which IATA currently affords, *cf.* note 179 *supra*.