To the Graduate Council:

I am submitting herewith a dissertation written by Omar B. Edrees entitled "Attitudes of U.S. International Airlines Towards the U.S. International Air Transport Policy as Reflected by the Various Bilateral Agreements, and the Possible Implications." I recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Business Administration.

Frank L. Hendrix, Major Professor

We have read this dissertation
and recommend its acceptance:

Accepted for the Council:

Vice Chancellor
Graduate Studies and Research

A

ATTITUDES OF U.S. INTERNATIONAL AIRLINES TOWARDS THE U.S. INTERNATIONAL AIR TRANSPORT POLICY AS REFLECTED BY THE VARIOUS BILATERAL AGREEMENTS, AND THE POSSIBLE IMPLICATIONS

A Dissertation

Presented for the

Doctor of Business Administration

Degree

The University of Tennessee, Knoxville

Omar B. Edrees

June 1980

3041697

Copyright by Omar B. Edrees, 1980
All Rights Reserved

DEDICATION

I dedicate this work, with the utmost of my respect, to HRH

SULTAN BIN ABDULAZIZ

in acknowledgment of the significant progress experienced by Saudi aviation, both civil and military, under HRH's dedicated administration and leadership.

June/1980

Colonel

Omar B. Edrees

Omar B. Edrees

الاهداء

أهدى هذا العمل مع أجل
إحترامي إلى حضرة صاحب
السمو الملكي الأمير :
سلطان بن عبد العزيز
إعترافا بما حققه الطيران
السعودي، مدنيا وعسكريا،
من تقدم ملحوظ تحت
إدارته و قيادته المخلصتين.

شعبان/١٤٠٠هـ

العقيد

عمر برهان إدريس

ACKNOWLEDGMENTS

Despite the fact that this research is a purely personal effort, it would not have been possible without the assistance of many people. First and foremost, I wish to express my gratitude to the members of my dissertation committee for guiding my work, rendering assistance and advice when needed, and for permitting me to retain my own writing style without requiring the often unavoidable alteration. They are Dr. Gary N. Dicer, Professor of Transportation and Head of the Department of Marketing and Transportation; Dr. Frank L. Hendrix, Chairman of the dissertation committee and Professor of Transportation; Professor Gerald P. J. McGinley, Professor in the College of Law; and Dr. G. D. Jerry Sentell, Professor of Marketing. Thanks also go to Dean Francis Chamblin and his staff for their friendly assistance; and to Sandy Fletcher for a job well done.

A blanket credit is also due to all airlines and airline associations, executives who participated in the survey of attitudes, and those who granted me brief interviews.

Appreciation is also due to many U.S. government officials including the following: James Atwood of the DOS and Marvin Cohen and Elizabeth Bailey of the CAB for responding to my correspondence. Special appreciation goes to John Flynn of the DOT and Richard O'Melia and Michael Levine, formerly of the CAB, for granting me brief and informal interviews; and also to David Kirstein and Franklin McDermott, both of the CAB, for their significant assistance in providing me with updated data to keep me abreast of the dynamics of air transport.

Finally, my very, very special gratitude to my cousin Sheik Mustapha Edrees for his support and encouragement throughout the program, and my deep appreciation to my wife Aziza, my daughter Dina, and my son Sabig for being patient with me during the tense moments and the time I spent away from home for the purpose of this research.

ABSTRACT

The Bermuda II event came at a time when American airlines were experiencing numerous problems, including anticompetitive practices abroad, restrictions of their scheduled operations by some foreign governments, and declining profits. The purpose of this research is to test the hypothesis that such a situation was bound to create an air of dissatisfaction on the part of the airline industry toward the U.S. International Air Transport Policy and to show both how that policy affected the airlines and their reactions to it.

The research traces the historical background of events leading up to the policy; describes the shift in policy from a closed skies philosophy to an open skies attitude; and examines the multilateral and bilateral efforts which characterized U.S. air transport relations during the Bermuda I era. The analysis then moves to the shift in policy following the Bermuda II event to the campaign for an open skies regime through the use of a liberal approach in bilateralism.

Also treated in detail is the Bermuda Formula, which lasted a little over thirty years and governed almost all U.S. bilateral relations until its denouncement by the United Kingdom. This discussion is followed by an analysis of certain important legal, constitutional, and regulatory aspects of the bilaterals and brief analyses of some of the significant bilaterals. Also presented is a profile of the U.S. international airlines and a discussion of their value to the nation in periods of both peace and war and their roles in the Civil Reserve Air Fleet (CRAF).

The author relied heavily upon air journals for much of the current information and few, but new, data were gleaned from personal correspondence, personal interviews, and attendance at recent (1979 and 1980) public meetings and air transport conferences.

The major findings of the research verify that there is a significant air of dissatisfaction among the airlines toward the U.S. International Air Transport Policy for numerous reasons. The last chapter provides a sample of current reactions of many U.S. and foreign airlines and government officials to the new policy, showing, in general, an unfavorable attitude towards both domestic deregulation and the open skies regime.

Basing his assumptions upon data collected through research, personal interviews, and first-hand observation, the author has provided sets of recommendations concerning air policy to the U.S. government, the airline industry, and foreign concerns, all directed towards the proposal for changing attitudes to achieve their desired individual and national interests.

TABLE OF CONTENTS

CHAPTER		PAGE
I.	PROLOGUE	1
	An Overview	1
	Need for the Study	7
	Declining Share of the Market	10
	Declining Number of Chartered Passenger Flights	10
	Increasing Cost Elements	11
	Scope and Limitations	14
	Purpose	17
	Verifying the Hypotheses	18
	Plan of Study	19
	Chapter II: The Policy	20
	Chapter III: The Bilaterals: The Bermuda Formula	21
	Chapter IV: The Bilaterals: Legal and Other Considerations	22
	Chapter V: The Bilaterals: Significant Agreements	22
	Chapter VI: The Airlines	23
	Chapter VII: The Attitudes	24
	Chapter VIII: Epilogue	24
	Methodology	25
	Initial Contact	25
	Instrumentation Design	25
	Data Collection	26
II.	THE POLICY	28
	Introduction	28
	The Pre-Bermuda I Period (1903-1946)	28
	Technological Development and Growth	29
	U.S. Government Actions and International Events	30
	The Policy	31
	The Bermuda I Period (1946-1976)	42
	The Period Covering the Truman Administration	43
	The Period Covering the Eisenhower Administration	48
	The Period Covering the Kennedy and Johnson Administrations	52
	The Period Covering the Nixon and Ford Administrations	55
	The Post-Bermuda I Period (1976-)	60
	Executive Policy	61
	Legislative Policy	61
	CAB Policy	62
	Foreign Action	65
	Summary and Conclusions	66
	Summary	66
	Conclusions	69

CHAPTER PAGE

III. THE BILATERALS: THE BERMUDA FORMULA 72
Introduction 72
The Pre-Bermuda I Agreements 74
Unilateral Relations 74
Limited Bilateral Accords. 76
The Formula 78
Background 78
The Bermuda I Agreement. 81
The Formula. 86
Problems and Threats 91
Prospects 98
Summary. 101

IV. THE BILATERALS: LEGAL AND OTHER CONSIDERATIONS. 104
Introduction 104
International Factors. 105
The Treaty 106
Other International Elements 111
Constitutional Considerations. 114
Regulatory Considerations. 121
The CAB. 121
The President. 129
Procedural Considerations. 130
Formation of the Bilaterals. 130
Negotiation of Bilaterals. 133
Summary. 135

V. THE BILATERALS: SIGNIFICANT AGREEMENTS. 137
Introduction 137
Control of the Air: The U.S.-U.S.S.R. Agreement . . . 138
Departure from the Bermuda Formula 138
The International Aspect 145
The Regulatory Aspect. 149
The Procedural Aspect. 150
Denouncing the Bermuda Formula: The Bermuda II Agreement. 151
Denouncing the Formula 153
The Legal Aspect 165
Rate Control 173
The Regulatory Aspect. 173
The Procedural Aspect. 174

CHAPTER PAGE

V. (Continued)

Quid Pro Quo vs. Liberal 175
Quid Pro Quo 176
Liberal. 177
Summary and Conclusions. 182
Summary. 182
Conclusions. 183

VI. THE AIRLINES 185
Introduction 185
The Airlines' Profile. 185
The System and Its Statistics. 186
The Value of the Airlines. 203
The Airlines' Case 207
Summary and Conclusions. 208
Summary. 208
Conclusions. 210

VII. THE ATTITUDES. 211
Introduction 211
The Survey 212
The Hypotheses 215
The Respondents. 218
The Airlines 218
The Associations 220
The Sample 221
The Responses. 223
The Analysis 224
The Criteria 224
The Verification 226
Comments 227
Summary of the Findings. 235
Areas Showing No-Dissatisfaction 235
Areas Showing Dissatisfaction. 237
Summary and Conclusions. 242
Summary. 242
Conclusions. 244

VIII. EPILOGUE 246
Introduction 246
Developments and Update. 247
The Policy 248
The Bilaterals 262
The Airlines 267
The Attitudes. 286
Reactions to the New Policy. 289
Domestic Deregulation. 290
Open Skies 306

CHAPTER PAGE

VIII. (Continued)

Reflections 325
Open Skies 326
Other Policy Issues 340
CAB Criticized 347
Implications 353
The Policy and Its Makers 353
The Attitudes 366
Recommendations 368

BIBLIOGRAPHY 375

APPENDICES 386
APPENDIX A. MILESTONES IN AVIATION LEGISLATION AND HISTORY 387
APPENDIX B. UNITED STATES POLICY FOR THE CONDUCT OF INTERNATIONAL AIR TRANSPORTATION NEGOTIATIONS 396
APPENDIX C. FREEDOMS OF THE AIR 402
APPENDIX D. SURVEY QUESTIONNAIRE 404
APPENDIX E. TALLY OF RESPONSES 410
APPENDIX F. TABULATION OF RESPONSES IN PROPORTIONS (PERCENTAGE) 415
APPENDIX G. VERIFICATION OF HYPOTHESES 421
APPENDIX H. SUMMARY OF ANALYSIS 426
APPENDIX I. ATTITUDES: POST SURVEY EFFORTS 427
APPENDIX J. INTERNATIONAL AIR TRANSPORTATION COMPETITION ACT OF 1979 436

VITA 451

LIST OF TABLES

TABLE		PAGE
I-1.	Profit Measures: Airlines vs. Manufacturing (1971-1975).	9
I-2.	Cost Increases vs. Airline Fares, Second Quarter 1976 Compared to 1972.	11
VI-1.	International and Territorial Revenue Passenger Miles (000) (For 12 Months Ending February 28, 1979).	190
VI-2.	International and Territorial Revenue Ton Miles (000) (For 12 Months Ending February 29, 1979) . . .	192
VI-3.	International, Territorial and Domestic Revenue Passenger Miles (000) (For 12 Months Ending February 28, 1979)	193
VI-4.	The Forbes Yardsticks, 1978 of International and Territorial Airlines (Rankings Among 1006 Companies)	194
VI-5.	All-Cargo, All Services Revenue Ton Miles (000) (For 12 Months Ending February 28, 1979)	197
VI-6.	All-Cargo, International Revenue Ton Miles (000) (For 12 Months Ending February 28, 1979)	197
VI-7.	All-Cargo, All Services Revenue Passenger Miles (000) (For 12 Months Ending February 28, 1979) . . .	198
VI-8.	All-Cargo, International Revenue Passenger Miles (000) (For 12 Months Ending February 28, 1979) . . .	198
VI-9.	International Civil Cargo Airlift Procurement by DOD Revenues, FY 1960-FY 1978	205
VIII-1.	DOD Commercial Peacetime Airlift Procurement-- Years Ending September 30, 1977, 1978, and 1979 Overseas Airlift (MAC) (Long and Short Range)	283
VIII-2.	CRAF: Summary of Segments	287
VIII-3.	CRAF Capabilities.	288
G-1.	Verification of Hypotheses	421

CHAPTER I

PROLOGUE

A. An Overview

Whatever policy the U.S. adopts in connection with international air transport service will have an impact on the U.S. economy as a whole and, in particular, on certain U.S. entities whose interests will be significantly influenced one way or another by such policy. Of those entities, the following may be mentioned: airport operators, international pilot associations and other performers and labor groups, aircraft and related equipment manufacturers, U.S. international airlines, cities, states, final consumers such as shippers and passengers, other international air service agents, etc.

This research will be concerned mainly with the attitudes of U.S. international airlines towards the policy and possible resulting implications.

The term "policy" as used in this research will embrace the actions of the U.S. government as a whole, namely the executive and the legislative branches, in addition to the Civil Aeronautics Board (CAB).

It became evident in 1947 upon the ratification of the 1944 Chicago Conference[1] that air transport services between the various

---

[1]This conference (hereinafter referred to as the 1944 Chicago Convention or Conference) was ratified by the necessary twenty-six states on April 4, 1947. See Robert M. Kane and Alan O. Vose, Air Transportation, 5th edition (Dubuque, Iowa: Kendall/Hunt Publishing Company, 1975), p. 143.

countries shall be handled largely through bilateral, rather than multilateral, air transport agreements. In fact, bilaterals have formulated the basic framework of U.S. international air transport relations with other countries as stated in all executive policy statements of the various administrations since the mid-50's to the present.[2]

The term "bilateral" will refer to both restrictive and liberal agreements and those that are considered neither too restrictive nor too liberal, and will mean air transport bilateral agreement unless otherwise indicated.

The history of bilaterals was basically set in motion by one of the five documents produced by the 1944 Chicago Conference and first implemented by the famous 1946 Bermuda Agreement, which recently has been given the title Bermuda I.[3] In spite of the controversy created by Bermuda I, entered into between the U.S. and the U.K., and in spite of the congressional hearings and the tremendous amounts of literature which were generated on the so-called restrictive provisions of that bilateral, Bermuda I was considered for more than thirty years a

---

[2]More elaboration on U.S. policy will be provided in Chapter II.

[3]For the official title of Bermuda I, see U.S., Department of State, Air Services Agreement Between the United States of America and the United Kingdom of Great Britain and Northern Ireland, Treaties and Other International Acts Series (TIAS) 1597, Department of State Publication 2565 (Washington, D.C.: U.S. Government Printing Office, 1946), title page. This agreement was signed at Bermuda on February 11, 1946, and had since been amended in points of detail by exchanges of notes. Because the U.K. was not a party to the Transport (or Five Freedoms) Agreement, the Bermuda Plan varies in some respect from the original Transport Agreement Plan. See P. B. Keenan, A. Lester and P. Martin, editors, Showcross and Beaumont on Air Law, 3rd edition,

standard and a model bilateral for many subsequent U.S. bilaterals with other countries, and was also referred to in bilateral relations between third countries. Historically, bilaterals aimed at providing economically convenient routes and privileges for the airlines. However, they became more complex, and as competition for bigger shares of the markets increased, so did the difficulty in reaching totally acceptable bilaterals, especially with countries whose commercial air fleets had grown and those who had control over significant markets and gateways to significant markets such as the United Kingdom. Consequently, the interests of the airlines have ceased to be the sole and most important issue in bilateral negotiations. In fact, even high policy which bears little direct relationship with air transport service, may also enter into the picture at times and may become a decisive factor.

Bermuda I was amended several times to accommodate the interests of both the U.S. and the U.K., especially those of the U.K. Even with such amendments to Bermuda I, the U.K. has several times given unilateral interpretation to the provisions of Bermuda I to accommodate provisions the British called fair and just. However, by 1976, the time seemed ripe for the U.K. to denounce the Bermuda I Agreement and served notice[4] to the U.S. government, citing five major contentions, briefly listed as follows:

---

vol. I, 1966. More elaboration on the Bermuda I Agreement as it will be called henceforth, and the bilaterals in general, will be found in Chapters III through V.

[4]The letter of denunciation of Bermuda I was dated June 27, 1976. See testimony by Alan S. Boyd, U.S. chief negotiator in Bermuda II Agreement hearings before the House of Representatives. Such hearings will be referred to and discussed in later chapters.

1. Bermuda I became unsatisfactory and out of date in many respects.

2. The U. S. enjoyed more benefits under Bermuda I than the U.K.

3. A more equitable balance of benefits over the North Atlantic was needed.

4. Capacity provisions had to be redefined.

5. Tariff provisions proved unworkable.

Because such contentions were in accord neither with the U.S. general economic policy that places emphasis on competition and the forces of the market nor the recent drive in domestic air transport to lessen governmental controls and to avoid monopolistic impacts, the disparity between the goals of the two countries seemed great. Thus negotiations to reach a new bilateral have stumbled many times, causing a division, and magnifying the division between the member agencies of the U.S. negotiating team on procedural grounds. Those problems and the threat of stoppage of service, plus possible worsening of relations between the two leading countries in air transport, led to the decision of stepping up the level of representation in the negotiations to Heads of States. The Bermuda II Agreement was finally entered into by the two countries in July 1977, just before service between the two countries and beyond came to a halt. It is argued that Bermuda II did accommodate the British contentions in one way or another.

The signing of Bermuda II established a basis for the deviations from the so-called long-established Bermuda Principle, famous for its unrestricted capacity provisions and multiple designations, and gave rise

to a possible new era and trend of restrictive bilateral agreements which were bound to jeopardize the interests of U.S. international airlines, as voiced by many, including the airlines themselves. Bermuda II was and still is the subject of a great deal of controversy from all levels of U.S. interested entities, including certain agencies of the U.S. government.

The observatory role of the U.S. international airlines through representation by the Air Transport Association of America (ATA) in Bermuda II proved to be extremely deficient, and a call for a more constructive role was voiced.

Hearings on the Bermuda II Agreement held both by the House and by the Senate reflected great dissatisfaction not only with the provisions of Bermuda II but also with the procedures of its negotiations, raising grave concerns over the entire process of negotiating bilaterals and the validity of such bilaterals as executive agreements rather than treaties which require approval by Congress.

In order to absorb the shock created by Bermuda II, the U.S. government took measures to introduce remedies and solutions to the problems. Of those measures, the following are worthy of mention:

1. Declaring on several occasions that Bermuda II provisions will stand alone as unrepresentative of U.S. policy in future bilaterals.

2. Taking an extremely hard line in standing by such declarations in outstanding bilateral negotiations, especially with countries such as Japan, which felt that the restrictive concept in Bermuda II must also be adapted in the new bilateral with the U.S.

3. Entering into other bilateral agreements with other countries, agreements that are characterized as very liberal and in accord with U.S. free enterprise policy with minimum government intervention. The Dutch[5] and the Israeli Agreements[6] are considered as such and were aimed at attacking the restrictive principles outlined in Bermuda II, with good timing.

4. Issuing a new policy statement that is claimed to be so precise and to the point with guidelines for future bilateral negotiations, denunciation of the restrictive Bermuda II concepts, and praising liberal bilaterals such as the Israeli Agreement which permits a great deal of opportunity for competition by the airlines of both states.

It is important to note that the 1978 policy statement is entitled "U.S. Policy for the Conduct of International Air Transportation Negotiations" rather than merely "U.S. International Air Transportation Policy" as the previous statements were entitled. This distinction stems from the realization of, and the emphasis on, the process of negotiations as the basis and foundation that should lead to the success of reaching acceptable bilaterals that are more in tone with the overall policy of the U.S. It is also important to note that this new policy statement did not specifically spell airlines' interests but greatly implied and emphasized consumers' interests, shippers' and travellers',

---

[5]The Dutch Agreement, signed on March 31, 1978, relating to an agreement between the U.S. and Netherlands on air transport entered into in 1957.

[6]This protocol relating to the U.S.-Israel Air Transport Agreement of 1950 was entered into before the 1978 policy statement was announced and was expressly mentioned in President Carter's letter on the policy statement.

rather than the wide public interest which could embrace airlines' interests. It is felt that by the attempt to focus on competitive objectives, final consumers' interests are best served, and by serving final consumers' interests, those who are paying for the service, the interests of all concerned are served, including the airlines'. This concept of serving consumers' interests rather than public interests, a question which was raised at the public hearing[7] in connection with the then proposed policy, has been met with some concern on the part of some of the airlines believing that such policy attitude might lead to the neglect of the airlines' interests. Whether it is public interest or consumers' interest that the policy is aimed at, or whether it is a restrictive agreement or a liberal agreement that the government enters into with other countries, the crux of the matter is what it means to the particular airline translated into dollars and cents. This is bound to create varieties of attitudes by the airlines, as they may feel it will affect their performance.

B. Need for the Study

In order to understand and justify the need for the study and before attempting to assess the attitudes of the U.S. international airline industry in this new era of bilaterals, both restrictive and liberal, it seems appropriate to discuss briefly the current situation of the airlines and the problems they are currently facing which are

---

[7] This hearing was conducted at DOT in Washington, D.C., on June 27, 1978.

liable to give particular shape to their behaviors and attitudes towards the U.S. policy and how they relate to it.

U.S. international airlines are currently facing several problems and are experiencing several difficulties which may be briefly summarized as follows:

1. Foreign anticompetitive practices abroad, for which the 1974 Fair Competitive Practices Act (FCPA)[8] was legislated to remedy such practices and was implemented several times in this concern. However, there are still many problem areas that remain unsolved such as discriminative airport user and handling charges.[9]

2. Restrictions of U.S. international airlines scheduled operations by foreign governments for which Economic Regulation 213 (ER213) was implemented by the CAB several times against the carriers of such countries in retaliation to their unwarranted restrictive practices.[10]

3. Decreasing profits due to the above problem areas and due to several other reasons of which the following are mentioned:

---

[8]Public Law 93-623.

[9]For instances of actions taken under the FCPA, see Civil Aeronautics Board reports for certain fiscal years: CAB Report to Congress, FY 1976 (Washington, D.C.: U.S. Government Printing Office), pp. 102-111; and CAB Report to Congress, FY 1977, pp. 105-116.

[10]Economic Regulation 213 enables the CAB, subject to the President's approval, to control the scheduled operations of foreign air carriers to the U.S. in situations where a foreign government restricts the scheduled operations of U.S. international airlines. See CAB Report to Congress, FY 1976, p. 80, also for instances of invoking such regulation.

a. Declining share of the market, especially in the North Atlantic.

b. Declining number of chartered passenger flights.

c. Increasing cost elements.

These shall be briefly explained below.

Due to one of the limitations of this research, hard profit figures on U.S. international air operations could not be obtained. However, since domestic air operations are not expected to be financially worse than international, and since most of the U.S. international airlines have domestic operations, it is safe to take domestic air operations figures as a profit measure for U.S. international air operations.

To illustrate the problem of decreasing profits of U.S. airlines, one measure of comparison seems to suffice at this time. Table I-1 shows certain selected measures of financial performance of U.S. airlines vs. U.S. manufacturing between 1971 and 1975:

TABLE I-1

PROFIT MEASURES: AIRLINES VS. MANUFACTURING (1971-1975)

	Profit as Percent of Equity	Profit as Percent of Investment	Profit as Percent of Revenues
U. S. Manufacturing	12	9.1	4.7
U.S. Airlines	3.5	1.4	1.1

Source: Air Transport Association of America (ATA), Airlines' Financial Performance, 1976-1977: A Look at Earnings and Needs, p. 9.

This low profit margin (1.1% of revenues) is clear indication of the problematic situation which is being faced by the airlines. It is also a signal to anticipated difficulties that they may face in the process of procuring capital which is estimated to rise from a total of $21.8 billion in 1975 to $94.4 billion in the year 2000.[11]

Following are some details on the reasons for decreasing profits for U.S. international airlines.

Declining Share of the Market

Even though U.S. flag share of the total air passenger travel between the U.S. and other countries has increased from 50.1% to 50.3%, it is still a decline from 1972 share of 54.5%.[12]

In fact, U.S. flag carrier market share of U.S. citizens' travel also shows a decline in almost all segments of the international air transport markets.[13]

Declining Number of Chartered Passenger Flights

The number of non-scheduled passenger flights declined from 22,060 flights in 1974 to 21,329 in 1975 or 3.3%.[14] This, however,

---

[11] Air Transport Association of America (ATA), The U.S. Airline Industry from 1977 to 2000. Statement to the National Transportation Policy Study Commission, Washington, D.C., June 1977, p. 6.

[12] CAB Report to Congress, FY 1977, Exhibit 6, p. 94.

[13] See CAB Report to Congress, FY 1977, Exhibit 8, p. 95.

[14] See CAB Report to Congress, FY 1976, p. 95.

was not the case between 1963 and 1971, when non-scheduled traffic was on the rise.[15]

Increasing Cost Elements

While airline fares (expressed in average revenues per passenger mile) increased only 29%, other cost elements and indexes have shown much higher ratios as indicated in Table I-2, which follows.

TABLE I-2

COST INCREASES VS. AIRLINE FARES, SECOND QUARTER 1976 COMPARED TO 1972

Cost Category	Airline Jet Fuel	WPI	Airline Employee Compensation	CPI	Airline Fare
Cost Increases in Percentage	161	53	40	35	29

Source: Air Transport Association of America (ATA), Airline Financial Performance 1976-1977: A Look at Earnings and Needs, p. 43.

In fact, the increases in individual airlines' cost items between 1967 and 1976 was a very drastic problem, especially when compared to the modest increase in the average airline fares.

It was reported that since 1967 overall unit costs in the airline industry increased 111%, and that labor unit costs increased 134%, landing fees are up 169%, and fuel costs are up 213%. This is compared

[15] Air Transport Association of America, Economics of Air Transport: An Overview. Air Transport Association of America, Washington, D.C., 1973, p. 7.

to an increase of only 45% in the average airline fare based on revenue per passenger mile.[16] Naturally the recent increase in fuel cost makes the problem much more drastic.

In spite of the improvements shown in recent reports, it is felt that the above problems facing U.S. international airlines are bound to cause some concern and, consequently, lead to some dissatisfaction with the U.S. policy in this area which may have contributed to such problems. Some bilaterals, especially those restrictive ones, are bound to complicate the problems even more. The restrictive Bermuda II, for example, has added to the above problems and is bound to aggravate the situation. The most significant provisions in Bermuda II that are bound to influence the economic and noneconomic operation of some U.S. international airlines are as follows:

1. Restrictions on multiple designation of U.S. flag carriers.

2. Restrictions on frequencies and thus capacities on the North Atlantic and certain Pacific operations.

3. Limitations on beyond points or fifth freedom traffic for U.S. airlines.

To make it worse for U.S. international airlines, the process of negotiations that took place in Bermuda II had proved that the observatory role of the airlines in such a process is just plain ineffective. In fact, the recent trend shown by U.S. policy makers to establish the new policy guidelines for negotiating air transport bilaterals seems to shift from the historical swaps of routes for the airlines of the

---

[16] ATA, The U.S. Airline Industry from 1977 to 2000, op. cit., p. 4.

negotiating states to a focus on consumers' interests which is viewed and voiced by some airlines as not necessarily a synonym of airlines' interests.

IATA's practice of fixing international fares seems to cause concern on the part of U.S. international airlines, plus the fact that it has always been under attack by the U.S. government, especially the CAB. More elaboration on IATA's activities will be provided in later chapters.

The contention that the problems of the airlines are the result of bad management rather than of the policy and the bilateral set-up has been investigated in earlier research efforts and has been proved invalid. In this respect, Strom argues the following:

> The inability of the United States carriers to compete effectively in the North Atlantic market is not due to managerial inefficiency, but is to a large extent due to the manner in which markets are traded when bilateral agreements are negotiated.[17]

Although the approach to bilateral negotiations, in recent years, does not solely rely on the strategy of trading markets, as will be treated in later chapters, the fact is that the airline industry is expected to be concerned over the policy and the bilateral set-up which may have contributed to the problems of the airlines in the international markets. This concern by the industry over the policy and the bilateral set-up has been voiced and could be implied from the effect of the policy on the industry's net performance. This concern, however, has never

---

[17]Harold Kjell Strom, "The North Atlantic Air Transport Market--A Study of the American Competitive Position." Dissertation, University of California, Los Angeles, 1964, p. XVIII. (Microfilmed by University Microfilms, Inc., Ann Arbor, Michigan, 1977.)

been defined or verified in a scientific or empirical manner. The need thus arises to define and verify such contentions of concern so that attention might be drawn to them, as will be explained below under Purpose.

It is important, however, to note that the effect of bilaterals are not uniform on the various airlines, and that even a restrictive bilateral may be welcomed by some airlines because it may have given them a share of a certain market that they did not have before, while to others a loss is unavoidable.

C. Scope and Limitations

As mentioned above, the U.S. policy on international air transport has an impact on various U.S. entities. However, this research work shall deal only with such impact on U.S. international airlines as would be reflected by the existing literature and by the results of the survey. Those airlines are as follows:

1. U.S. Scheduled Carriers

Even though the 1977 CAB report to Congress indicated a total of twenty U.S. certificated airlines which served seventy-six countries, it is felt that the overall traffic operation of some of these carriers is not significant enough to justify enlarging the scope of the research beyond reason. Only U.S. scheduled carriers that are members of the Air Transport Association of America (ATA) shall be included in this research. These are as follows:

A. All Cargo

1. Airlift International

2. Flying Tiger Line

3. Seaboard

B. International and Territorial[18]

1. American

2. Braniff International

3. Continental

4. Delta

5. Eastern

6. National

7. Northwest

8. Pan American

9. Trans World

10. United

11. Western

2. U. S. Supplemental (or charter only) Carriers[19]

The 1977 CAB Report to Congress mentioned eight of such carriers that held certificates for international charter operations. However, because of the unstable condition of this category of airlines,

---

[18]United is not categorized as International and Territorial, but it is important to include it in the research survey for reasons explained in Chapter VI.

[19]Because of the undesirable connotation attached to the term "supplemental," this category of carriers is referred to now as "charters." In fact, it has been argued that the term "supplemental" should be removed from the dictionary. More elaboration on this topic will be given later in Chapter VIII. See Department of State, International Aviation Symposium: Final Report, January 30 to February 2, 1979, prepared by the Onyx Corporation, Washington, Atlanta and Boston.(hereinafter cited as DOS, International Aviation Symposium). Discussion by Edward Driscol, President (NACA), p. 162.

we will mention here only those that have current international operations leaving the elaboration and updating of their situation to Chapter VI where the changing nature of their roles in the system will also be included.

The following supplementals are considered significant:

1. Capitol
2. Evergreen International
3. Rich International
4. Trans International
5. World Airways

The two national airlines' associations, ATA and NACA, will also be included in the survey.

The scope of this research shall also be limited by the fact that some data and statistics concerning the operation of U.S. international airlines may not be obtained due to their confidential nature and the desire not to publicize it to prevent giving an edge to foreign airlines who do not make similar data public.

As to the scope of aspects to be treated in this work, those that have no or little effect on the economic operation of U.S. international airlines, and those that are considered too technical such as air worthiness, aviation security, custom duties, etc., shall not be dealt with.

Aspects of bilaterals and the policy that will be considered in this research may be put into three distinct categories:

1. General and Economic Aspect--having the most crucial effect on the operation of U.S. international airlines such as tariffs, routes, capacities, designations, points beyond, etc.

2. Policy and Procedural Aspects--will include the roles of the U.S. government and the U.S. international airlines in the negotiating process.

3. Legal/Constitutional Aspects--will embrace two major points:

   a. Who regulates U.S. international air operations

   b. The character of bilaterals as executive agreements

These aspects will be dealt with both in the survey of the literature and in the survey of airlines' attitudes.

D. Purpose

The purpose of this research is to examine how the U.S. policy and the various bilaterals have influenced the attitudes of the airlines, resulting in an atmosphere of dissatisfaction. The research will first aim at identifying the main lines of the policy and the bilateral set-up, in addition to explaining why the assessment of the attitudes of the airlines is essentially important to the making of U.S. policy on international air transport. The second and most important aim of the research is, of course, to assess the attitudes of the airlines in an attempt to verify the central proposed hypothesis of their dissatisfaction with the policy.

The third and last aim of the research is to arrive at the possible implications of such dissatisfaction if verified, and to propose some personal recommendations as an objective observer and researcher. The hope, of course, is that the research assists in identifying the direction of future policy and bilaterals and the possible impact on the operations of U.S. international airlines.

As was indicated above, the main purpose of the research is to assess the attitudes of the airlines for the verification of the central hypothesis of dissatisfaction with the policy. An elaboration on this point is appropriate at this time.

The proposed central and main hypothesis is as follows: the airline industry feels that the U.S. policy on international air transport is generally unsatisfactory.

In order to verify this main hypothesis of dissatisfaction, the researcher must choose a combination of the major policy issues involved which must maintain a balance between coverage and the reality of the difficulty involved.

The choice of issues to be covered by the survey and the development of the individual hypotheses will depend on the outcome of the pre-testing process, as will be discussed below under Methodology and later in Chapter VII. In general, however, the coverage of policy issues should include areas such as the formation of policy, the bilateral set-up, the role of the airlines in the negotiation process, and several other miscellaneous issues.

In summary, in addition to achieving the main purpose indicated above, the research will also attempt to arrive at certain implications and recommendations based on both the findings of the research and the personal experience of the researcher.

E. Verifying the Hypotheses

The verification of the main hypothesis of dissatisfaction and the other individual supportive hypotheses will be utilized through

the use of simple and direct proportions of the responses leaning toward the two major categories of responses, i.e., agreement and disagreement.

It is feared that it might be an impossible task to have the whole population respond to the survey, due to the difficulties associated with the nature of the research, as will be discussed later in Chapter VII, and because of the small size of the population of U.S. international airlines. It becomes evident that the use of sophisticated statistical methods, such as inferences, is totally out of place and unnecessary.

The basic criteria for the verification of the hypotheses, thus, would have to be based on the use of simple proportions, as the percentage method, of each category of the two major types of responses.

For valid results we have to assume a certain proportion as minimum in order to infer any kind of conclusions.

It is felt that at least 50% of the whole population must respond to the survey, and that to infer dissatisfaction or no-dissatisfaction at least 50% of those responding must agree or disagree to that particular issue of policy at hand, whatever the case may be.

The specific criteria of measurement to be used in the verification process will be explained later in Chapter VII, based on the above requirement.

F. Plan of Study

The plan of study in this research will include three distinct approaches as follows:

1. Survey of the literature. Under this approach the research will attempt to identify the main lines of the U.S. international policy

on air transport, the various aspects of the bilaterals, and the various categories of the airlines whose attitudes we would be assessing. Such areas will be covered in Chapters II through VI, inclusive, and will be based mainly on the available literature, as will be briefly explained below.

2. Survey of attitudes. Under this approach the research will attempt to survey the attitudes of the airlines through the use of survey questionnaire directed to airlines' executives who may be able to provide representative responses, as will be explained below under Methodology.

The survey of airlines' attitudes and their analyses will be dealt with in Chapter VII, as will be briefly explained below.

3. Personal reflections. Under this approach the research will attempt to provide brief reflections and draw certain implications based mainly on logic and personal conception of the problems involved.

The other area that will be covered under this approach is the attempt to propose some recommendations that will, of course, be based on the personal insight and experience of the researcher. This area of study will be dealt with in the last chapter of the research.

In brief, the research will take the following plan of study following this first chapter.

Chapter II: The Policy

The research in this chapter will revolve around the Bermuda I Agreement, recognizing it as basis for the previous era of U.S. bilateral arrangements, and from which a new era has evolved.

The study will first discuss how U.S. policy on international air transport was evolved, established, and developed in the period that preceded the Bermuda I Agreement.

The study then will center on U.S. policy during the era of the Bermuda I Agreement, using a logical approach relating to the various administrations beginning with the Truman Administration and ending with the Ford Administration.

Finally, the study will focus on the post-Bermuda I period, covering the Bermuda II Agreement and the governmental reactions to it by the executive and the legislative branches of the government in addition to the policy attitudes taken by the Civil Aeronautics Board.

Chapter III: The Bilaterals: The Bermuda Formula

This is one of three chapters on the bilaterals which will attempt to draw a good profile of the bilateral set-up that governs the U.S. international air transport system.

In this chapter is an assessment of the type of arrangements the U.S. had prior to the Bermuda I Agreement, which was characterized with a unique type of unilateral relations, and certain limited bilateral accords.

The study in this chapter will also attempt to assess the Bermuda I Agreement and the nature of the Bermuda formula or principle, which was mainly characterized by unrestricted capacity and multiple designation.

The study will also cover the various reactions to the Bermuda I Agreement, the problems and threats involved, and how the Bermuda I Agreement came to an end resulting in the Bermuda II Agreement and the

attempts made by the U.S. government at the wake of the Bermuda II Agreement to counteract its effects on U.S. air transport operations.

Chapter IV: The Bilaterals: Legal and Other Considerations

In this chapter four different considerations will be discussed, the first being international considerations.

Under this title the research will touch mainly upon the nature and character of the term "treaty," both in the international sense and in the U.S. national sense and how such a term is defined within the context of both the international law and the U.S. domestic law.

The second of such considerations is constitutional where the status of U.S. bilaterals as executive agreements is tested in the light of the U.S. Constitution.

Under regulatory considerations, the research will discuss the roles of the President and of the CAB in regulating U.S. air transport. In addition, the role of the International Air Transport Association (IATA) is also briefly related to the regulatory aspect of the bilaterals.

The last of the four types of considerations will deal with certain procedural aspects relating to the formation and negotiation of the bilaterals.

Chapter V: The Bilaterals: Significant Agreements

This is the last of three chapters on the bilaterals. The research will attempt in this chapter to discuss three distinct approaches to U.S. bilaterals.

The first of such approaches may be described as a control of the air approach covering the most restrictive type of bilateral agreements, namely, that with the U.S.S.R.

The study will attempt to discuss the tedious and most frustrating process characterizing the negotiation of such a bilateral with the U.S.S.R. and how it is unique among the rest of the bilaterals.

The second of such bilateral approaches is the one related to the Bermuda II Agreement and the denunciation of the Bermuda Formula.

An elaborate discussion of the Bermuda II Agreement will be provided, including the controversial aspects and the court litigations that were and still are in process.

The third and last of the approaches to the bilaterals with other countries is the current and most recent one centering on a liberal policy of exchanging liberal economic opportunities favoring competition.

Under this type of liberal approach to bilateralism, the research will mention several agreements that have been described as liberal.

Chapter VI: The Airlines

This chapter will attempt to draw a vivid profile for the airlines whose attitudes the research aims to assess. The airlines and their national associations will be discussed in brief, both as groups and as individual entities. Most important also, the study will attempt to direct attention to the value of the airline industry to the nation, and the airlines' case against the policy.

Chapter VII: The Attitudes

This is perhaps the most important chapter in the research, for it deals with the main issue, the survey of the attitudes.

In this chapter will be discussed the actual and individual hypotheses, the actual respondents to the survey, the responses themselves, and the analysis of such responses. More elaboration on the actual methodology used to collect data will also be given, and the process of codifying the responses with relation to the respondents.

In this chapter the verification of the various hypotheses will be carefully handled, and the final scores of dissatisfaction or no-dissatisfaction will be assessed according to a carefully designed criteria for the measurement of airlines' attitudes and for the verification of the hypotheses involved.

Chapter VIII: Epilogue

This final chapter of the research will deal first with developments and updates in the four major elements of the topic; the policy, the bilaterals, the airlines, and the attitudes which took place since the research was begun. It will also provide brief reactions to the new policy and some personal reflections followed by the possible implications of the findings of the survey and of the recent developments in policy directions.

This final chapter will also attempt to provide certain recommendations based on the findings of the survey, the implications arrived at, and the personal experience of the researcher.

G. Methodology

The collection of survey data will be accomplished in three distinct steps.

Initial Contact

An initial contact will first be made with the airlines and their two national associations, to attract attention and interest to the research and its objectives, and also to gather some preliminary data that may assist in the design of an appropriate instrumentation for gathering the survey data on the attitudes of the airlines.

An initial contact will also be made with U.S. government officials in an attempt to seek some insight on the policy that may further assist in the understanding of the problems involved.

Instrumentation Design

The gathering of data to assess airlines' attitudes will be accomplished through the use of a survey questionnaire.

This questionnaire will be designed on the basis of data gathered by virtue of the method used in the first step above, and on the basis of the extensive readings done in this connection.

The questionnaire will first be designed in an initial format, then subjected to a process of pre-testing for assessment of its quality, quantity, coverage, and relevancy.

The questionnaire will then be put into a final format upon approval by the research committee.

Data Collection

In this third and final step of collecting data to assess airlines' attitudes towards the policy, a lengthy process of contact and communication is anticipated.

Due to the fact that responses to the questionnaire must be representative of the attitudes of the airlines, a ranking officer in each airline must be willing to complete the questionnaire.

Another objective of the survey is to achieve a certain degree of standardization with relation to the rankings of airlines' executives who will complete the survey questionnaire in behalf of the company or entity they represent.

Because of the extreme difficulty, and most likely near impossibility, to direct the questionnaire to the highest level of management for obvious reasons, a range of rank within the airlines and their associations will be designated as an objective, as long as a certain degree of response representation and a uniformity and standardization of the ranking of respondents is maintained.

The objective is to survey the whole population of U.S. international airlines and the two national airlines' associations, the Air Transport Association of America, and the National Air Carrier Association.

The process of convincing the airlines and their two associations to complete the survey is anticipated to be difficult, lengthy, and tedious.

The actual process of data collection will be explained later in detail in Chapter VII.

To supplement the research effort in understanding the problems involved and to assist in arriving at the appropriate implications and recommendations in the final chapter of this research, an effort will be made to contact the actual respondents who have completed the survey, and certain government officials who may be willing to respond, in order to invite concluding comments. This particular augmentation to the research effort is subject to the availability of time and to the degree of difficulty that may arise.

More updating and elaboration on this area will be given in the final chapter of the dissertation.

CHAPTER II

THE POLICY

A. Introduction

The existing U.S. International Air Transport Policy, hereinafter called "the policy," is the product of many and various aviation-related events, both domestic and international, that have occurred since the early flight of the Wright brothers in 1903. It must also be looked upon as the product of various other considerations, such as those of foreign policy, national defense, national interests, and international accords, temporary or non-temporary, multilateral, bilateral or even unilateral, in addition to some economic considerations of both national and international nature.

The approach used here to review the Policy is chronological. The analysis will be divided into three distinct periods, utilizing Bermuda I as a dividing event. This analysis will be followed by a brief summary and some relevant conclusions.

B. The Pre-Bermuda I Period (1903-1946)

The review of the policy here will cover the background and the various considerations that led to the development of the Policy since the early days of heavier-than-air craft flight to the consummation of the Chicago Conference and the documents that resulted from that important convention, including that which led to the signing of the Bermuda I agreement. The review will also list what is believed

to be the most important factor which contributed to the feeling that a policy on international air transport is needed. This will include highlights of the development and growth of U.S. air transport, the significant international events, and the milestones and most important highlights of the air mail story which, no doubt, contains a long history of struggle that resulted in a powerful commercial fleet.

Technological Development and Growth

Langley's aviation attempts and failures between May 6, 1892, and December 8, 1902, to fly a heavier-than-air craft should not be ignored. Credit, however, is perhaps due, for the first sustained and control-powered, manned flight, to the Wright brothers, the two bicycle shop operators with only a high school education. Their bi-plane glider, named the Flyer, fitted with a specially designed 12-horsepower motor driving double screw propellers behind the plane, weighed only 605 pounds excluding the pilot. It is important to mention that not only the glider was designed by the two brothers, but also the motor and the propellers. This incident may be considered the initial step in the continuing development of aviation and the air transport industry, in all facets of usage, military, private, general, or commercial. It definitely led to the present highly developed international commercial air transport system in which the U.S. still maintains the lead.

The lead in the development of aviation industry, however, was not held by the United States early in this period. In 1909 it was indicated that although the first flight of a heavier-than-air craft was made in the United States, the bulk of aeroplanes that have actually

flown are of French design and that France has been the pioneer of heavier-than-air machines.[20]

In fact, between 1911 and 1914 the United States lagged badly in aeronautical development before World War I. J.C. Hunsaker[21] indicated that European progress was rapid, and at times spectacular.

By the time World War I erupted in 1914, it was reported that France had 1,400 planes; Germany, 1,000; Russia, 800; Great Britain, 400; and the United States only 23.[22]

However, in spite of the fact that the pace of development of the civil aviation industry in the United States was slow at the beginning due to lack of significant government support except through air mail subsidies, it continued to progress steadily, leading to the production of the first all-metal commercial plane in the United States by the Ford Motor Company on April 3, 1925, and by the introduction of the Boeing 247 in 1933, the Douglas DC-3 in 1936, and other aircraft types.[23]

U.S. Government Actions and International Events

The U.S., and perhaps the world, first legislation on aviation was a municipal ordinance regulating aircraft within the city limits

---

[20]Civil Aeronautics Board, Handbook of Airline Statistics, CAB, 1973 Edition, p. 474.

[21]Ibid. Hunsaker was a former chairman of the National Advisory Committee for Aeronautics. The Committee was created to supervise and direct the scientific study of the problems of flight, with a view to their potential solutions; to determine the problems that should be experimentally investigated; and to discuss the solutions and applications of those problems to practical questions.

[22]Ibid., pp. 473-499 for more elaboration.

[23]Ibid., pp. 546-554 for more elaboration.

of Kissimmee, Florida, enacted on July 17, 1908, which provided for aspects such as limits of flight, annual licensing, etc. However, the first state to pass legislation regulating civil aviation was Connecticut with "The Connecticut State Air Regulation" which involved the regulation of aircraft and pilots and which was dated June 8, 1911.[24] The establishment of the National Advisory Committee for Aeronautics in 1915 has also been a significant landmark in American aviation.[25]

Many laws relating to air mail were also enacted between 1916 and 1938, which had significant influence on civil and commercial aviation.

For a list of important U.S. actions, international events, and air mail milestones during this pre-Bermuda I period, see Appendix A.

The Policy

The policy evolved and was shaped through the influence of technological developments in the aviation industry, the air mail contribution, U.S. government actions, and the international environments and events that prevailed during this period. The Policy could be spotted from the actions of the Congress, the Board, and the Executive.

Also evident was the fact that there was no trace of any clear policy prior to World War I except perhaps concern for national defense and the desire to develop the aviation industry, a desire shared by the

---

[24] Ibid., pp. 473-499 for more elaboration.

[25] See footnote 21 supra for the purpose of creating the Committee.

rest of the industrialized countries. This can be inferred from the air mail major events at that time and the technological developments that took place before the war.

When the U.S. declared war on Germany on April 6, 1917 and entered World War I, which had been raging in Europe since August 1914, the need for aviation power was felt much more strongly. The National Defense Act had been passed during the war on June 3, 1916, placing extra emphasis on the need for aviation power, military rather than commercial. In fact, construction of commercial aircraft came to a virtual halt even before the entry of the United States into the war. Construction of military airplanes started as early as the end of 1914, when the Burges Company was already building military pusher sea planes for the Canadian government.

In the period after World War I and prior to World War II, the United States, along with the rest of the industrialized countries, showed interest in promoting the opportunity for a fair share of participation in world air transport service. The participation of the U.S. in the 1919 Paris Convention signified a policy decision in a sense, even though the Convention was not ratified. The air mail story still played an important role in the development of the aviation industry, even though air mail was mainly concerned with domestic needs.

Congress started to pass legislation aiming at fostering the development of commercial aviation in both the domestic and international scenes. Also, the participation of the U.S. in the various international conventions and conferences emphasized the determination of the U.S. to be an active member in the field of international air

commerce. Section 6(a) of the Air Commerce Act of 1926 proclaims the "complete and exclusive national sovereignty of the United States over its air space." It grants specific authority to the executive branch to permit foreign aircraft to navigate in the air space of the United States, if the foreign nation grants a similar privilege to the aircraft of the U.S.

At the beginning of 1930, it became clear that the U.S. had no comprehensive policy. It was also argued that the failure to ratify the 1919 Paris Convention demonstrated a negative decision of the United States, after World War I, to withdraw from European affairs and also from many phases of international cooperation.[26]

The single most important document prior to World War II that perhaps had a connection and a somewhat clear declaration of policy in international air transport was the Civil Aeronautics Act of 1938. Even though this act did not specifically spell out the Policy, it can be inferred that emphasis has been placed on some aspects having relative importance to the Policy. Such aspects include fulfilling the requirements of national defense, promoting, encouraging and developing civil aeronautics, development of navigation and traffic control facilities, and giving consideration to research and development in general.

Actually one may always say that an international air transport policy may be included within a national transportation policy. The

---

[26]For more details on this subject and on some proposals made as basis for a comprehensive foreign air policy in that period, see Kenneth Colegrove, "The International Policy of the United States," Journal of Air Law 2 (1931), pp. 447-473.

passage of the "Emergency Railroad Transportation Act of 1933" can be taken as a determination on the part of Congress to formulate a national transportation policy. One of the purposes of that act was to provide for the immediate study of means of improving conditions surrounding transportation in all its forms, and the preparations of plans thereof. An office of a Federal Coordinator of Transportation was created to safeguard and maintain an adequate national system of transportation.

By virtue of the Air Mail Act of 1934, a Federal Aviation Commission was appointed by the President to report on broad policy covering all phases of aviation and the relationship of the United States thereto. The 254-page Federal Aviation Commission's report was transmitted to Congress on January 31, 1935, bearing the Commissions's recommendations, which included under the first of its twelve headings (Air Transport) the following:

> It should be the Policy of the United States to maintain a position of world leadership in air transport, and to lend such aid as may be necessary to insure that the most modern and efficient equipment and methods shall be applied on American, domestic and foreign airlines.[27]

The Civil Aeronautics Act of 1938 provided that no foreign air carrier may engage in air transportation to or from the United States unless an appropriate permit is issued by the Board and approved by the President. Prior to the enactment of the Civil Aeronautics Act of 1938, it had been the policy of the U.S. that international aspects of civil aviation were to be under the control of the Interdepartmental

---

[27]For a detailed discussion on this subject and the relationship of national transportation policy to aviation, see Fred D. Fagg, Jr., "National Transportation Policy and Aviation," Journal of Air Law 7 (1936), pp. 155-201

Committee on Civil International Aviation, composed of assistant secretaries of certain executive departments. However, the 1938 Act endowed the Civil Aeronautics Authority with broad powers and charged it with full responsibility for the control of civil international aviation, except as limited by Section 801, 802, and 1102 of the Act. One of the activities of the Civil Aeronautics Authority in the foreign field was thus to define the policy of the United States.

The Interdepartmental Committee on Civil International Aviation would refer to the Civil Aeronautics Authority problems relating to international aviation and the Authority was empowered to formulate a policy in this respect. Of special importance, the Authority was required to look into problems relating to the extension and development of American international air transport service. Of prime importance in this area also was that the Authority was to formulate a policy concerning air transport service by U.S. flag and foreign carriers, especially across the North Atlantic.

In its efforts to do so, the Authority arranged a series of informal conferences with ranking officials of the State, War, Post Office, and Navy Departments, the Maritime Commission, and other interested departments and agencies of the government. Air carriers, also, were asked to express their views. The policy agreed upon by the Authority then was designed to

> . . . insure the sound economic development of air transportation between the U.S. and Europe to guarantee to [American enterprise] its fair share of transoceanic traffic, to permit such competition between American air carriers as

may be required in the public interest, and to carry out the objectives of the Act.[28]

Prior to World War II, the policy of the U.S. toward opening its skies to foreign air carriers was substantially negative. U.S. flag carriers desiring to fly overseas, especially to countries with air transport power, were left to their own initiative to secure flying permits or franchises from foreign governments by negotiating unilateral agreements. However, this was not the case in tapping European skies. In this respect, the U.S. stepped in to discuss agreements with European countries which would permit U.S. and foreign flag carriers equal opportunities to conduct commercial flights. But even in this case, such agreements were only in the form of exchange of notes until 1939.

It is thus evident that the United States' policy was still of a limited scope until the beginning of World War II on September 1, 1939. In fact the policy then was described as mostly negative. Until 1939, the United States upheld sovereignty of the air both by law and by deed, but not by word. Domestic routes were sealed off from foreign competition as were the airways of Japan and Russia. Until that date, national policy on flag-line operations was mainly that of the chosen instrument's Pan American Airways. The U.S. had no objection to Pan American's making its own agreement with foreign governments. This relieved the U.S. of any obligation to grant reciprocal privileges.[29]

---

[28]Civil Aeronautics Board, First Annual Report, covering the fiscal year ending June 30, 1939, pp. 26-27.

[29]Henry Ladd Smith, Airways Abroad (The University of Wisconsin Press, 1950), p. 128.

World War II might have been a turning point in bringing about some kind of a declared U.S. Policy on international air transport. During World War II, it was realized that the unsettled, belligerent, and chaotic conditions that were constantly increasing in intensity abroad placed a greater emphasis on the importance of aviation as a dependable and expeditious means of communication. Efficient and rapid coordination of all international aviation activities of the government was thus given prime importance by the Civil Aeronautics Authority, the Departments of State, War, and Navy, and other agencies of the government.

Defense activities, of course, occupied a greater aspect of the civil aviation operations through contracts. The international political situation had its effects on international civil aviation, U.S. international Policy, and, in general, national defense. The complex situation of the war accelerated the need to direct existing and prospective civil transport to military purposes. Plans and a policy were drawn by the government to accommodate the war situation, including calling upon the carriers to turn over a number of their aircraft to the Army.

The United States government, especially the CAB during World War II, realized that commercial air transport had become international in scope, and in mid-1943, attempted to devote some attention to U.S. future international policy in this field. A study was begun by the Board including the survey of views of aviation groups on international air problems. Included within the aviation groups were U.S. airlines which expressed their views, summarized below as follows:

1. The U.S. government must work out a reciprocal exchange with other countries of the general right of "innocent" flight and the right to land for refueling and other technical purposes, as distinguished from the right to engage in air commerce.

2. The U.S. should seek all operating and commercial rights necessary to trade on an equal basis with other countries. The U.S. also must conduct negotiations with foreign governments to secure international air transport operating rights.

3. Private companies should be permitted to operate in both the domestic and foreign field, and the conditions for operations must be decided in terms of individual air carriers according to the policies and standards already established by the Civil Aeronautics Act of 1938.

4. Uniform "Rules of the Road" for airways must be established from time to time through international agreements.

5. National interest, rather than airline self-interest, should be the deciding factor.[30]

In fact, it has been argued that the United States should not be guided in its air transport policy by commercial motives alone. It also has been argued that the frank admission of military and political motives in national air transport policies in the last few years will serve to clarify public thinking on the subject.[31]

---

[30]"18 Airlnes Give Views on International Policy," Civil Aeronautics Journal 6 (1943), p. 80.

[31]O. J. Lissitzyn, "International Air Transport and National Policy," Council on Foreign Relations (1942), pp. 94-97.

On November 11, 1943, President Roosevelt in a meeting at the White House indicated verbally his views on the Policy. Some of what the President said is briefly indicated below:

1. Germany, Italy, and Japan were not to be permitted to have any aviation industry, or any airlines, internal or external.

2. Each country should have ownership of its own internal aviation services; backward countries might be an exception.

3. American overseas aviation should not be handled by a single line. The scope of international aviation was too great to be trusted to any one company or pool.

4. As to air and landing rights, the President favored arrangements by which planes of one country could enter any other country, for the purpose of discharging traffic of foreign origin, and accepting foreign-bound traffic.[32]

It was argued that this presidential statement is what started the ball rolling. The International Conference of Chicago was called, and certain bilaterals were also negotiated.[33]

During World War II arguments were also proposed on national security and its relationship to the Policy. It was argued that military power is essential to national security in war, and that commercial air power is equally essential to national security in war as well as in peace.[34]

---

[32]Smith, Airways Abroad, op. cit., pp. 149-153.

[33]Ibid.

[34]Arthur E. Traxler, "International Air Transport Policy," International Conciliation, December 1943, pp. 617-627.

Another policy issue that also received consideration in 1943 was of an institutional character. Due to the fact that the development of international air transportation services must be based upon the consideration of both foreign relations as well as the provisions of the Civil Aeronautics Act, the CAB and the Department of State moved to clarify their respective roles. They issued a joint statement on October 15, 1943, which was aimed at eliminating any possible confusion in the minds of the aviation industry and the general public. The most significant points of that statement are briefly indicated below:

1. The Department of State has primary interest in the subject from the standpoint of foreign policy and international relations, including the broad economic effects of aviation in foreign countries.

2. The CAB is charged with the responsibility within the framework, and guided by the policies, of applicable legislation, of developing policy with respect to the organization and functioning of civil air transportation. The Board is required by law to study all of the economic and other factors which go into finding convenience and necessity for specific routes.

3. The policy of both the State and CAB is that of the closest collaboration in order that each may be fully appraised of the views of the other.[35]

The practice of U.S. air carriers to enter into unilateral agreements with foreign governments also continued during World War II.

---

[35]"CAB and State Department Clarify Interest in Foreign Air Transport," Civil Aeronautics Journal, Vol. 4, No. 11, November 15, 1943, p. 153. Also see CAB Report to Congress: FY 1943, pp. 8-9.

However, the CAB moved to require the filing of all such agreements in the latter part of 1943. The rejection of the "McCarren Bill" and the chosen instrument concept was a clear indication of the U.S. policy to avoid monopoly and to focus emphasis on competition. The concept of the chosen instrument was highly controversial and received the attention of many writers, including congressional hearings, of course.

The two major objections to the chosen instrument concept were emphasized by the CAB opinion accompanying its North Atlantic decision. They were:

1. The chosen instrument (the carrier) would be so powerful that it could interfere with public policies unacceptable to the management.

2. Several American flag carriers, at least in the North Atlantic operation, should provide a broader and more intensive development of equipment, facilities, and services than would be achieved by one company.[36]

Immediately after World War II, the United States' policy was aimed at maximum development of international air transportation and promised that no foreign flag airline seeking part of the industry would be excluded. This policy was described in the "International Air Transport Policy" of the 79th Congress (1945-1946) as follows:

1. U.S. aviation would continue to be progressive in the development of new equipment and operating procedures.

2. Adequate incentives would compel efficiency in operation.

---

[36]William L. Grossman, "An American White Paper on Air Transport," Air Transport 3 (November 1945), pp. 22-31.

3. Full economic potentialities of air transport would be realized by widening the market.

4. Healthy financial conditions would cause the inflow of adequate capital.

5. U.S. airlines would carry a volume of world traffic proportional with the importance of the United States as a market for air transport services.[37]

C. The Bermuda I Period (1946-1976)

During this period, the fruits of all historical events, in the previous period, both international and domestic, have contributed to the shaping of the Policy in its first clear and elaborate format. No effort will be paid in this section to trace historical technological development in aviation, such as the jet age and the introduction of the huge, fast, and long-range transport equipment, since the subject is so visible, and since the intention of this work is to move away from technical aspects. However, it will be taken for granted that during the previous period the basic blocks for the Policy had already been laid through the consequences of technological developments, air mail policies, the two major wars, and the early international efforts to define the rights and obligations of states in relation to sovereignty of the air and to pursue economic and possibly non-economic gains by utilizing this mode of transportation.

---

[37]Kane and Vose, op. cit., p. 147.

The analysis here will again be made chronologically, but in portions of periods covering the various administrations that followed World War II.

The Period Covering the Truman Administration

During the post-war years of World War I and World War II, the airlines of some nations had grown stronger and subsequently sought to induce other nations of the world to abandon the principle of sovereignty as codified in the Versailles Convention. In other words, they sought to internationalize their air space and airports.[38] The disputes between advocates of freedom of the air and those advocates of the principle of sovereignty continued to be hot all over the world, especially in the United States. The 1944 Chicago Convention set the final pace for a multilateral accord on "Freedoms of the Air" in a limited scope.

The focus in this section will be directed at the policies laid out in the Bermuda I agreement and the five freedoms of the air. The Bermuda Agreement (as it was called for a little more than thirty years before it came to be referred to as the Bermuda I Agreement) embodied the principle of the "five freedoms" and served, for the U.S., as a basic model for subsequent bilateral agreements calling for reciprocal air rights between nations. This agreement was signed on February 11, 1946, upon concessions which were made by the two-party states, the U.S. and the United Kingdom. This will be discussed in Chapter III.

---

[38] Traxler, op. cit., pp. 616-636.

During the Truman administration, the need for an aviation policy, both domestic and foreign, became pressing. On July 19, 1947, President Truman established a temporary Air Policy Commission composed of private citizens to assist him in formulating a national policy on aviation. The Commission was requested to submit its final recommendations by January 1, 1948.[39] Even though the concern did not specifically involve the international aspects of the policy, one must assume that such aspects should be within the framework of the national policy.[40] The Commission submitted its report, entitled "Survival in the Air Age," on the exact date as requested by the President.[41]

Even though most of the report was addressed to domestic aviation problems of the United States, military and civil, the Commission found it essential to consider fundamental questions of the national security. The report indicated that the United States must work to achieve world peace through support and development of the United Nations and the specialized agencies such as the International Civil Aviation Organization (ICAO). The report favored limited competition among American operators on international routes as indicated by the existing CAB policy. It also called for the removal and/or improvement of the restrictive conditions which exasperated the passenger.

---

[39]For details including the purpose of the Commission, see the "Official White House Press Release," dated July 8, 1947, Journal of Air Law and Commerce 14 (1947), p. 364.

[40]Department of State Bulletin (January 25, 1948), p. 116.

[41]For details on the international air transport aspects of the report submitted by the President's Air Policy Commission on January 1, 1948, see Journal of Air Law and Commerce 15 (1948), pp. 80-82.

The report also favored the position that air transport bilaterals remain executive agreements rather than take the form of treaties. It also supported the Bermuda-type provision and called the fifth freedom right essential not only for economic reasons, but also for the widest development of air transportation. The report also indicated that there is no valid reason why rate control is not as necessary in international operations as in domestic operations and called upon the executive to use its best efforts to obtain direct authority over all international rates. The executive was not, of course, the only policy-making body of the government that was concerned with aviation. On July 30, 1947, the Congress approved an act to provide for the establishment of a temporary Congressional Aviation Policy Board.[42]

Section 1 of the above act stipulated its purpose, which involved the international aspects of aviation as follows:

> To provide for the development of a national aviation policy adequate to meet the needs of the national defense, of the Commerce of the United States, both interstate and foreign, and to provide for the formulation and clarification of national policies relating to, or effecting aviation, including policies relating to the maintenance of an adequate aeronautical manufacturing industry.[43]

On signing the bill, President Truman indicated that such a Congressional Board would in no way conflict with the Presidential Air Policy Board mentioned above.

---

[42]Public Law 287, 80th Congress, 1st Session, July 30, 1947. For the development of the Bill and Conference of Congress, see House of Representative Report No. 1023, 80th Congress, 1st Session, dated July 21, 1947.

[43]Ibid.

On August 1, 1947, the Air Coordinating Committee, an inter-agency group created in September 1946 by executive order of the President, also prepared a statement of certain policies of the executive in the general field of aviation.[44] This statement reaffirmed the international obligation of the United States as specified by the 1944 Chicago Convention and by the individual bilaterals. It affirmed the doctrine that each nation absolutely controls the air space above its territory, and that over-flight or landing for any purpose is a privilege to be granted by the sovereign nations and that the exchange of such privileges has become a matter for inter-governmental negotiations. The statement upheld the Air Service Transit Agreement[45] privileges and urged nations which had not exchanged those privileges to do so within the framework of the Air Service Transit Agreement and the 1944 Chicago Convention.

Concerning international scheduled operations, the statement indicated that general principles of fair competitive practices, capacity, frequency, bases on which internal and traffic rights may be exchanged, and procedures for settling disputes should be embodied in a multilateral agreement. However, the right to fly specific routes should be negotiated bilaterally due to varying economic factors from one country to another. For international non-scheduled operations, the statement indicated that the United States believed in limiting it to the carriage of cargo only. The statement also indicated that the

---

[44] "White House Official Release," dated August 18, 1947, Journal of Air Law and Commerce 14 (1947), pp. 366-377.

[45] 59 Stat. 1693 (1945).

United States opposed arbitrary capacity quotas, rate quotas, rate differentials, and other practices which have the effect of eliminating competition, restructuring access to markets, or fostering monopolistic controls.

Three other important aspects of the statement should also be mentioned here. They are, briefly, as follows:

1. The U.S. reserves the right to refuse or revoke the operating permit of a foreign airline in the event that it is not satisfied that the substantial ownership and thus the effective control is in the hands of nationals whose flag the airline flies.

2. Disputes to be referred to the Council of ICAO, as the majority of U.S. bilaterals provide, may not be in the best interest of the United States, due to the fact that members of the Council are representatives of sovereign states and therefore subject to instructions, and consequently cannot appropriately perform this judicial function. When direct negotiations fail, special arbitration panels or other established, international procedures should be employed.

3. The United States reserves the right to designate the airports which may be used by any foreign scheduled air transport service.

In summary, this was President Truman's policy on international air transport: support for multilateral accords in almost all aspects of international air transport except specific routes is to be negotiated bilaterally; there is to be limited competition among American operators; strong support for fifth freedom rights; endorsement of the Bermuda Capacity principle with ex post facto review, but only passive support for IATA's rate-making mechanism.

The Period Covering the Eisenhower Administration

The second executive review of policy was conducted six years later. On September 3, 1953, President Eisenhower directed the Air Coordinating Committee to review the U.S. aviation policy and make recommendations for his consideration.

The Committee undertook the task, and with the help of appropriate representatives of the aviation industry, local governments, and other groups directly concerned with aviation matters, proposed and submitted its report on Civil Air Policy to the President, who approved it and said that it reflected his administration's central objective in this field to strengthen American aviation.[46]

Following are briefly what are believed to be the most important provisions of the Policy dealing with international air transport:

1. The ultimate objective of the U.S. continues to be the achievement of a multilateral air transport agreement, but in its absence the bilateral system will provide the basis for U.S. airline operations.

2. The exchange of all five freedoms of the air is essential to the economic operations of international routes, the fullest development of air transport services, and the interest of the traveling public.

3. Capacity issues will be based on the Bermuda principle.

4. The CAB needs added positive authority to disapprove or establish international rates between the U.S. and other countries.

---

[46] Statement by the President, May 20, 1954, which accompanied the Civil Air Policy, a report submitted by the Air Coordinating Committee (Washington, D.C.: U.S. Government Printing Office, May 1954), pp. 35-40.

Public support, consistent with the Civil Aeronautics Act, is given to IATA as the primary instrument for establishing and maintaining a sound fare and rate structure for international air services. The CAB should also have authority, by virtue of subsidy support, to exercise direct control over the rates of U.S. international air carriers.

5. The U.S. supports ICAO and urges other member nations to give support to its activities as per Article 28(a) of the Convention on International Civil Aviation.

6. The U.S. pledges continued support of the facilitation program, whose objectives include further simplifications of documentation and procedures affecting international air traffic and other actions aimed at speeding up clearance of international air traffic.

On May 20, 1955, the CAB adopted a liberalized transatlantic charter policy[48] which was designed to make possible at fair and reasonable rates and in accordance with the need of the public the movement by charters of legitimately derived groups of transatlantic passengers.[49]

The Smathers Report of 1956[50] concluded that no foreign carrier should profit at the expense of U.S. carriers, that the exchange of

---

[47] Ibid.

[48] The 1955 Transatlantic Charter Policy, 20 CAB, p. 782.

[49] CAB, Handbook of Airline Statistics, 1973 ed., pp. 487, 518; also see L. S. Keyes, "The Transatlantic Charter Policy of the United States," Journal of Air Law and Commerce 38 (1972), pp. 215-219.

[50] George A. Smathers, Report to Senate Interstate and Foreign Commerce Committee, S. 1875, 89th Congress, 2nd session, 1956.

air rights should provide an equitable exchange of benefits for the parties, and that U.S. flag carriers should be fully advised and consulted in the negotiations process. The chairmanship of U.S. delegations in the negotiation of bilaterals was moved from the CAB to the Department of State as one of the outcomes of that hearing.[51]

The Federal Aviation Act of 1958[52] was signed into law by President Eisenhower on August 23, 1958. This act is virtually the same old Civil Aeronautics Act of 1938 except perhaps in expanding power in the area of air safety. Provisions dealing with international operations are left almost unaffected.

The period covering the Eisenhower Administration was characterized by severe complaints by the airlines that the United States was giving benefits (beyond rights) to foreign carriers without adequate economic benefits for U.S. flag carriers.[53] This subject will be discussed further in Chapter III. This period was also characterized by concern on the part of Congress[54] for tougher economic regulations on the part of the CAB as well as a tougher negotiating stand by the U.S. team.[55] On October 10, 1960, the Air Coordinating Committee was

---

[51]Franklin J. McDermott, "U.S. International Air Transportation Policy: Yesterday, Today, and Tomorrow: An Overview," Bureau of International Aviation, CAB (July 14, 1978).

[52]Public Law 85-726, S.3880, 85th Congress, 1st session. For some details, see Kane and Vose, loc. cit., pp. 43-51.

[53]McDermott, loc. cit.

[54]Ibid. See also Hearing before the Committee on Interstate and Foreign Commerce, H.R. 4648 and H.R. 4677, 84th Congress, 1st session, March 18, 1955, in connection with IATA's practices.

[55]H. A. Wassenbergh, Post War International Civil Policy and the Law of the Air, 2nd revised edition (The Hague: Martinus, Nijhoff, 1962), pp. 171-174.

abolished as the government structure for obtaining coordinated views on certain international aviation matters.

On December 9, 1960, the Interagency Group on International Aviation (IGIA) was established pursuant to President Eisenhower's memorandum dated August 11, 1960.

The IGIA consisted of the Administrator of the Federal Aviation Agency (FAA), who acts as the Chairman, and the representatives from each of the following agencies: State, Defense, Commerce, and the CAB. The CAB was charged with accident investigations, statistics (generally labeled: Air Transport Policy including items on the economic work programs of ICAO), economic aspects of facility user charges, and activities of ICAO Legal Committee on relationships among carriers, shippers, and passengers.

On January 3, 1961, the Doyle Report entitled "National Transportation Policy" was made public as a preliminary draft by the Committee on Interstate and Foreign Commerce of the U.S. Senate. Two of the significant recommendations made by the report were as follows:

1. Establishing a Federal Department of Transportation that would be charged with the formulation of National Transportation Policy.

2. Placing the regulating activities of the CAB, ICC (Interstate Commerce Commission), and the FMB (Federal Maritime Board) in a single independent regulating body to be called the Federal Transport Commission.[56]

---

[56]CAB, Handbook of Airline Statistics, 1973 edition, op. cit., p. 490. This report was made by the "Special Study Group on Transportation Policies in the United States" headed by John P. Doyle.

The Period Covering the Kennedy and Johnson Administrations

Perhaps the first important event dealing with the policy which was in effect during this period was the submission of "Project Horizon."[57] This report sought to recommend Comprehensive National Aviation Goals which would also include the international aspects of Air Transport. Among the important factors that have been recognized by Project Horizon are the following:[58]

1. Continued U.S. prominence in international air transport is unquestionably in the national interest.

2. The U.S. must maintain aggressive and expanding international air transport systems for its present and prospective national security value in terms of auxiliary military airlift capability and political contact with foreign countries.

3. As a result, the decline of U.S. flag carrier participation in the world air travel market, particularly significant and worrisome across the North Atlantic, deserved the most concentrated attention of the government and the most affirmative effort of U.S. airlines.

4. The existing policies have evolved primarily since just before the end of World War II, mainly based on the 1944 Chicago Convention and the 1946 Bermuda Principles. Although the U.S. has adhered, pro forma, to those ideas and principles in practice, some

---

[57] On March 3, 1961, President Kennedy requested the FAA Administrator to develop a statement of national aviation goals for the period between then and 1970. For a complete text of "Project Horizon," see Federal Aviation Agency, Report of the Task Force on National Aviation Goals: Project Horizon (Washington, D.C.: Government Printing Office, 1961).

[58] Ibid., pp. 24-31.

of those principles have been broken by foreign carriers, and in recent years they have come under increasing pressure by foreign governments.

5. Criticism has been directed at the process of negotiating for routes, charging that foreign carriers have been secured more economic benefits than U.S. carriers.

6. Foreign carriers have grown stronger and are now more competitive, due to their purchases, often with U.S. aid, of long-range transports, and the development of greater skills in operational and marketing techniques.

Among the recommendations proposed by the report are the following:

1. U.S. aviation policies must be given greater recognition at the highest level of the government, as they affect U.S. flag carriers.

2. A comprehensive study of U.S. international aviation relations, commissioned by the President, is mandatory.

3. Considerations should be given to recreating the post of Assistant Secretary of State, with the holder of that office being in charge solely of transport and communications problems.

4. Immediate action in certain critical areas is necessary without awaiting the completion of the study, whenever such action can be taken within existing authority in the national interest, and in order to provide equitable treatment of U.S. flag operators.

On July 10, 1962, the CAB was authorized by legislation[59] to issue permanent certificates to qualified applicants to perform supplemental

---

[59]Public Law 87-528.

air transportation. This again was a determination on the part of Congress and the Executive to provide consumers with low-cost air transportation.

On April 24, 1963, President Kennedy approved an international air transport policy statement prepared by an Interagency Steering Committee. The statement mentioned, among other things, the following principles:

a. Basic framework: Maintaining the present framework of bilateral agreements.
b. Air routes and Services: The present network of international air routes is fully developed. An expansion must be approached with caution.
c. Capacity: The U.S. supports the Bermuda Capacity principles.
d. Air Carrier Pooling: Pooling arrangements impair the benefits competition can bring to the system. U.S. carriers will be permitted to participate in them only when the national interest requires.
e. The IATA mechanism is accepted: However, such acceptance is predicated upon strict adherence by carriers to their IATA agreements. If the agreements are violated, the United States will have to reconsider its relationship to IATA and its authority over violations. Congress must adopt legislation that would give the CAB authority to central rates in international air transport subject to approval by the President.
f. Competition among U.S. flag carriers: The U.S. favors competition by private enterprise, and the statutory mandate is found in the Federal Aviation Act of 1958.
g. Development of Air Cargo: The U.S. will press for lower cargo rates.[60]

On October 15, 1966, the 1966 Department of Transportation Act[61] was passed, establishing a Department of Transportation, and transferring the CAB's safety and accident investigation functions under Titles VI

---

[60]For the complete text of the statement, see "Statement on United States International Air Transport Policy," Journal of Air Law and Commerce 30 (1964), pp. 76-81.

[61]Public Law 89-670. For some details, see Kane and Vose, op. cit., pp. 52-62.

and VII of the Federal Aviation Act of 1958 to the National Transportation Safety Board within the Department.

There was no new policy statement on the period covering President Johnson's administration. The same policies of President Kennedy were adopted. However, a continuous review of established international aviation policies was undertaken during the Johnson administration to assure that those policies kept pace with the development in the air transport industry and with changing international economic and political situations.[62]

The Period Covering the Nixon and Ford Administrations

It is argued that the most significant events relating to the policy which took place during this period are as follows: the policy statements issued by both presidents, the passage and enforcement of the Fair Competitive Practices Act, the amended CAB Economic Regulation 213, additional legislative authority to the CAB to control foreign air transportation rates, and the denunciation of Bermuda I agreement by the United Kingdom. Each of these events shall be briefly discussed below in a chronological approach.

Executive policy. President Nixon's statement of the policy was released on June 22, 1970, from the White House.[63] In his statement, the President noticed that during the seven years that followed

---

[62] CAB Report to Congress, FY 1965, p. 7.

[63] White House Press Secretary release dated June 22, 1970. This statement was first issued in draft form on January 15, 1970. For the complete text of the statement, see "Statement of International Air Transportation Policy," Journal of Air Law and Commerce 36 (1970), pp. 651-660.

the 1963 statement, international aviation had grown drastically in traffic volume, improved equipment, and fuller schedules of services. Many problems had surfaced including congestion and delays at U.S. airport facilities, questions concerning U.S. bilateral arrangements with other countries, and lack of U.S. supervision over international rates and fares. The President also indicated in his statement that many of U.S. past guidelines were still useful and relevant. However, in some cases new approaches were proposed to meet current and foreseeable problems. The policy statement recognized that the aim should be the development and maintenance of a sound system of international air transportation that carries people and goods safely, efficiently, and economically.

The policy statement indicated that the system must: (a) provide passengers and shippers with the share in the benefits to be acquired through improved services and reduced fares, and (b) assure U.S. flag carriers a fair and equal opportunity to compete in world aviation markets.

The statement observed that there are other U.S. objectives or principles that must be recognized which may at times be served by the policy, and at other times by constraints upon the policy. Such objectives are as follows:

1. U.S. strategic and political interests.
2. U.S. international military air transportation interests.
3. Prospective efforts of policy on U.S. balance of payments.
4. Legitimate air transport interests of other countries.
5. U.S. historical belief in encouraging competition and reduced government controls.

6. U.S. concern for the quality of environments.

The policy statement concluded, among other things, that the bilateral agreements for passengers, mixed, and all cargo, in reaching accords, will be continued and the Bermuda capacity provision should be supported.

Both scheduled and supplemental carriers must be permitted a fair opportunity to compete, except where public interest requires protection of scheduled services. The IATA fares and rate-making mechanism seems to be acceptable, and the CAB must have added authority in this respect. The competition among and between U.S. flag and foreign carriers should be encouraged, resulting in significant benefits to the public.

Two other important conclusions of the policy statement refer to the need for:

1. U.S. vigorous opposition to the inequitable charging of U.S. carriers abroad;

2. Close attention and considerations to potential effects on the balance of payments.

On September 8, 1976, President Gerald Ford approved a policy statement on international air transportation, prepared by the Interagency Task Force on International Air Transportation Policy of the United States. On his letter of approval, the President indicated that reliance upon competitive market forces as the basic tenet of U.S. economic philosophy shall be sought to the greatest extent possible, and that the United States shall work through appropriate bilateral and multilateral forums to bring about constructive change for the benefit of air travelers, shippers, and carriers of all nations.

The policy statement listed five principal objectives:

1. Reliance on competitive market forces;

2. Provision of low-cost air transportation;

3. Support of a private U.S. international air transportation industry;

4. Consistency with, and contribution towards, U.S. national objectives in defense and security, foreign policy, and international commerce;

5. Encouragement of a safe and efficient system of airports and airways and protection of U.S. environments.

Supplementals and all cargo operations also had their share of support in the policy statement.

On fares and rates, the policy statement specified the policies concerning the roles of both the IATA and the CAB. Those are briefly as follows:

> The U.S. at present intends to continue to accept the IATA as the principal vehicle for intercarrier negotiations of scheduled tariffs. . . . However, IATA's tariff-setting structure should be . . . more responsive to market forces and innovative fare programs, including greater flexibility for rate setting by individual carriers. . . . In reviewing both agreements and individual tariffs, the Board should provide a meaningful opportunity for public hearings or other public review.[64]

Legislative policy. On March 22, 1972, the Federal Aviation Act of 1958 was amended[65] to provide the CAB with new authority to

---

[64]For the complete text of the policy statement and the Presidential approval, see White House Release dated September 8, 1976.

[65]Public Law 92-259.

investigate the reasonableness of rates and fares in foreign air transportation and to suspend, reject, or cancel such rates and fares.

The International Air Transportation Fair Competitive Practices Act of 1974[66] was passed on January 3, 1975. This act amended the Federal Aviation Act of 1958 to deal with discriminatory and unfair competitive practices in international air transportation, and for other purposes. This act directed the Departments of State, Treasury, and Transportation, the CAB, and other U.S. government agencies to keep under review, to the extent of their respective functions, all forms of discriminations or unfair competitive practices to which U.S. air carriers are subject in providing foreign air transportation services and to take appropriate actions.

The act also directed the Secretary of Transportation to survey the changes made to U.S. air carriers by foreign governments or other foreign entities, and should he determine that such changes were unreasonable, to coordinate with State and CAB to negotiate remedies and to take appropriate actions in collaboration with the Secretary of Treasury. The act had provisions about other aspects such as the transportation of government-financed passengers and property, promotion of travel on U.S. carriers in foreign air transportation, the observance of tariffs by ticket agents, and provisions about rebates. In the years that followed, enforcement of the act as prescribed was made, and at times the remedies taken were successful, but at other times they were not.[67]

---

[66] Public Law 93-623.

[67] CAB Report to Congress, FY 1975 and FY 1976.

CAB policy. Just prior to the start of fiscal year 1971, the CAB amended its economic regulation by adopting a new part 213, which authorized the Board, subject to approval by the President, to control the scheduled operations of foreign air carriers to the United States in situations where a foreign government restricts the scheduled operations of U.S. flag carriers.[68]

Foreign actions. The Bermuda Agreement was denounced by the United Kingdom in 1976, as explained in Chapter I. The agreement, however, remained in effect one year after denunciation date as per article (13) of the agreement. This subject shall be further discussed in Chapter III.

D. The Post-Bermuda I Period (1976-)

This period is perhaps the most important of all, due to the fact that the concern here is not merely with historical development of Policy aspects, but with current and future problems that the policy must deal with. These problems relate mainly to domestic and international events, multilateral and bilateral relations, energy shortages, new and forceful domestic mood of removing government controls, pressures of innovative fare discounts, and other areas of concern to the aviation industry.

Perhaps the most important events and actions pertaining to the Policy to be mentioned here should include the new policy statement, the Airline Deregulation Act, the Bermuda II event, and other events

---

[68] CAB Report to Congress, FY 1971, p. 47.

including various CAB actions. These and other policy-related issues shall be briefly discussed below.

Executive Policy

On August 21, 1978, President Jimmy Carter approved the policy statement prepared by the Interagency Committee on International Air Transport Policy chaired by the DOT (Department of Transportation). In his Presidential Statement accompanying the issuance of the policy statement, President Carter emphasized the administration's stress on a healthy competition, aiming at achieving the goals of lower fares, better service to more cities, and fewer governmental restrictions on charter travel. (See Appendix B: The 1978 Policy Statement.)

Unlike the previous policy statements, this one was titled "U.S. policy on the Conduct of International Air Transportation Negotiations," placing emphasis on the negotiation process. More elaboration on this statement will be provided in Chapter III.

Legislative Policy

Perhaps the most significant policy document that was passed by the legislative branch of the government in this period is the Airline Deregulation Act of 1978.[69] This act terminates the CAB's authority over domestic routes on December 31, 1981. It also provides for the expiration of authority over fare and charter regulations one year later. In addition, it provides for the phasing out of the CAB in five years.

---

[69]Public Law 95-504.

In spite of the fact that the act deals with domestic aviation, the spirit of the act was reflected in U.S. policy in the international arena which resulted in some dissatisfaction abroad, as will be discussed in later chapters.

At the time this chapter was being written, the Congress was moving to conduct hearings on a proposed congressional bill dealing with international air transport. This will be referred to in the final chapter.

CAB Policy

Five different aspects of the policy will be dealt with here. They relate to the concept of low fares, the linkage of domestic and international authority, the implementation of the Fair Competitive Practices Act, the IATA show-cause case, and the liberalized charter rules.

Low fares. Laker's low fares of $236 round trip on the North Atlantic[70] gave rise to competitive response by the transatlantic carriers who proposed standby and budget fares of $256 and lower APEX fares of $290. The charter responses were fares between $260 and $310. The CAB, however, raised the proposed levels of the budget and standby fares and disapproved the APEX fares.

---

[70]Elizabeth E. Bailey (member CAB), "Reform From Within: Civil Aeronautics Board Policy in 1977-1978," to appear in Problems in Public Utility Economics and Regulations, edited by Michael Crew (Lexington Books, 1979); see also Richard J. O'Melia (member CAB), "Major Development in United States Aviation Policy," remarks presented before the 1978 Air Transportation Conference, Miami, Florida, April 6, 1978, (released by CAB).

The Honorable Ms. Elizabeth Bailey[71] cites the main reason for the Board's decision as fear, fear that the Skytrain and the supplemental services needed protection, and fear that the CAB had no authority to prevent the scheduled carriers from rescinding their low rates. So actually the decision of the CAB, as Ms. Bailey indicates, was that of holding fares up (those of the scheduled) so that low fare options (those of the Skytrain and supplementals) for travel to Europe would continue. The President overturned the Board's decision and permitted the lowest possible fares for the consuming public, which was a win for competition. The President, however, was responsive to the Board's fears that Laker and/or the supplemental carriers might go out of business. He directed the State Department to negotiate ad hoc agreements with foreign governments to give the CAB permission to suspend the fares on six weeks' notice if they proved extremely destructive.

Linkage of domestic and international authority. Another policy issue that had both CAB and presidential involvement in this period was the linkage of domestic and international authority. This is seen in three different steps as follows:

1. New carriers were added to the transatlantic market: Delta, Braniff, and Northwest.

2. The exemption authority was granted to Pan American to put new interstate legs on some of its international flights.

---

[71]Bailey, loc. cit.

3. The CAB proposed to end distinction between domestic and international air freight forwarders.[72]

Implementation of the FCPA. Under the Fair Competitive Practices Act of 1974, the government took action during fiscal year 1977 to eliminate foreign restrictive practices affecting U.S. flag carriers in their operations abroad by virtue of Section 2(c) of the act.[73]

The IATA show-cause. The show-cause concept is back for the CAB and it is thought that it might produce more acceptable results. The show-cause is a method or an order issued by the CAB by which the Board expresses concern and proposes change. Show-cause procedure also permits a formal exchange of views, as indicated earlier, between the CAB and all interested parties. This does not involve foreign governments, of course, that are usually not willing to appear before an American regulatory body as a party and that usually make their views known through the Department of State.

At the time of writing this chapter there are cases pending that were initiated by show-cause orders, including one involving IATA agreements and, most importantly, the rate conference machinery.[74] The IATA show-cause will be referred to in other chapters.

---

[72] O'Melia, loc. cit.

[73] See CAB Report to Congress, FY 1977, pp. 105-116, for more details on the actions, the countries, and the discriminative and anti-competitive practices that were involved.

[74] U.S., Department of State, "International Aviation Symposium: Final Report," address by Marvin S. Cohen (chairman, CAB), p. 171.

Liberalized charter rules. In 1978 the CAB adopted three important changes relating to charters. The first is a dual certification granted to some charter carriers, permitting them to perform scheduled air services through temporary exemptions. The second of such changes is the deregulation of international cargo charter operations and the conclusion of some bilaterals involving acceptance of country-of-origin rule. The last of such changes is the adoption of the public charter concept, which eliminates the requirements concerning advance purchase, minimum stay, discount pricing, and the minimum group size. This issue will be referred to again in the final chapter.

Foreign Action

The denunciation of the Bermuda I Agreement and the ensuing negotiations resulted in the Bermuda II Agreement. Due to the fact that Bermuda II has put an end, at least between the two parties of the agreement, to the famous Bermuda Capacity Principle with an ex post facto review and placed other restrictions on U.S. flag carriers as has been indicated in Chapter I, it was faced with great opposition and concern by private entities including the airlines, by Congress, and lately by the executive branch as shall be discussed later. It is sufficient at this time to indicate that it did have undesirable restrictive provisions which the United States would not be willing to adopt as policy and basis for further bilateral or multilateral accords. More details on this agreement will be given in Chapter V.

The International Air Transport Association (IATA) also had to undergo a major change and overhaul of its conference machinery due to pressing dissatisfaction voiced by the governments of some of its

member carriers, including the United States, which initiated the show-cause order as explained earlier in this chapter.

More details on this subject will be provided in the final chapter as developments continue to take place at the time of writing this chapter.

E. Summary and Conclusions

Summary

The definition of the policy in this work has been broadened to include actions of the government as a whole that were not only thought at the time to be relevant to the policy, but also which significantly contributed in one way or another to the shaping of the Policy in this vital area of national concern.

The definition of the term policy also was not limited to the executive and legislative bodies of the government, but was also extended to the policies made and implemented by the CAB within the bounds of its legislative authority as specified by the 1938, 1958, and 1978 Acts. The definition also included the significant policies reflected by the actions of the government through the multilateral agreements, such as the 1944 Chicago Convention and through the landmark bilaterals such as the Bermuda I Agreement.

The review of policy was made in a chronological approach, and for easy reference and follow up, subperiods were used in the Bermuda I period which covers the various presidential administrations.[75]

---

[75] McDermott, loc. cit.

Air transport accords. Prior to 1939, U.S. air transport accords were in the form of unilateral agreements between the airlines and foreign governments. This policy, however, was not suitable for the North Atlantic Market where some of the European countries who have developed and acquired good air fleets, such as the United Kingdom and France, insisted on reciprocal rights. The year 1939 thus marked the beginning of bilateral agreements which were characterized with restrictions on frequencies and capacities.[76]

Before the end of World War II, the United States, motivated by vast air transport capabilities, moved to enter into a multilateral agreement for liberalized air transport service. Most of the other countries, however, were unwilling to grant fifth freedom rights. Bermuda I was the first landmark of air transport bilaterals granting fifth freedom rights, with non-restricted capacity formula and with only ex post facto review. This agreement also marked U.S. policy in bilateral arrangements.

The negotiation process. Only the 1978 Policy Statement recognized expressedly the importance of the process of negotiation. The statement indicated that agreements which do not accept trading opportunities for opportunities will not be given sanction without prior presidential approval.

Competition. It is the U.S. economic philosophy that air transport, even that at the international level, should be treated as a

---

[76]Smith, Airways Abroad, op. cit., p. 4.

business venture that will prosper only through providing competitive market environments, with little need for government controls. The 1970, 1976, and 1978 policy statements additionally recognized the importance of promoting competition and scheduled and chartered passenger services with the goals of achieving better service at the lowest economical prices possible.

Capacity. The Policy of the United States has always been and still is in favor of imposing no restrictions on capacities especially as reflected by the Bermuda I Agreement, and the many others that followed suit. The Bermuda II restrictions on capacity are not viewed as U.S. policy as stressed by the various government actions that followed the signing of the bilateral.[77]

Fares and rates. Emphasis and reliance by the United States on competition and the free enterprise system as an economic policy leads also to the issue of fares and rates (price) which, as the U.S. believes, should be left to market forces and which should be rid of governmental controls and especially of monopolistic manipulations.

The United States, however, had to accept IATA's fare-making mechanism, as was reflected by the Bermuda I Agreement and the Policy statements, except the 1978 statement. The support of IATA in all policy reviews was only passive and showed increased reservations.

---

[77]Andrea F. Lowenfield, "The Future Determines the Past: Bermuda I in the Light of Bermuda II," Air Law 3 (1978), pp. 2-10, for some details on U.S. government attitudes towards Bermuda II as not being the policy of the United States.

The 1978 policy statement and the action of the President to encourage the race for low cost air transport indicates that policy emphasis would be directed toward achieving the lowest fares possible for travelers and shippers in both scheduled and chartered traffic. The IATA show-cause case is still under review by the CAB.

Non-airline considerations. Almost all policy reviews, expressly or implicitly, have recognized the contributions of U.S. airlines to the prosperous development of the international air transport system that the United States currently has, and consequently, their rights and welfare must be considered in negotiating bilateral and multilateral accords. Even though the role the airlines have in the negotiating process has not been as effective as they would desire, they are thus far the only private entity to participate through representation, in the negotiating process, as observers and as advisors to the government. There are, however, other non-airline considerations that the U.S. policy repeatedly recognizes. Such considerations make it very difficult to analyze and measure the economic benefits accruing to the U.S. airlines vs. those accruing to foreign airlines in any reciprocal accord. The key non-airline consideration may be described as the national interest or foreign policy which justify the powers of the President in making the final decision.

Conclusions

It may be concluded that the U.S. policy on international air transport has been characterized by the desire to develop the system through the advantages it has, and hopes to have, advantages which

could be traced to many aspects of the system. Among them are the ability to generate traffic through its vast origination and destination points, and through its big and technologically developed air transport potentials, including equipment and facilities. In addition, another consideration is the influence the U.S. has in the international arena whenever, however, and wherever it has the clout or wishes to use its clout to get things done.

The Bermuda I, Bermuda II, negotiations with France, Italy, and Japan, relations with the Russians[78]--all had their unique characteristics, features, and influence on U.S. policy.

Many factors combine to work in favor of U.S. airlines and U.S. national interest, even though opposed by other countries: emphasis in promoting quality of service, low cost air transport, and the recognition of the benefits of competition between U.S. and foreign carriers on the one hand, and between scheduled and non-scheduled service on the other hand, in addition to the determination of the policy to trade opportunities for opportunities, to minimize government controls, restrictions and discriminatory and unfair competitive practices.

Even though all indications show that Bermuda II shall not be a precedent-setting bilateral nor a policy of the U.S., the President still reserves the power to approve bilaterals that do not meet the objectives of the United States as listed in the 1978 policy statement. This leaves open the probability of deviation from the Policy for non-airline considerations.

---

[78]The agreement with the U.S.S.R. will be discussed later in Chapter V.

Finally, only time will tell what the best policy is for the United States to adopt. Reflections and deductions in this respect will be reserved for the last chapter of this work.

CHAPTER III

THE BILATERALS: THE BERMUDA FORMULA

A. Introduction

Why do we have bilateral air transport agreements instead of one multilateral agreement that binds the whole world? Or better, why do we have to have any agreement at all? If bilaterals seem to be the prevalent type of accords in air transport, what do they have in common and what not? Does the system of bilateralism work well to achieve the goals and objectives of the contracting parties? Why do Bermuda I and Bermuda II agreements stand out so significantly among other bilaterals? What other bilaterals have a significance of their own? What is the Bermuda Formula or Principle and why has it existed for more than thirty years thus far? Will such a formula survive or will the problems and threats overcome the prospects for its survival? What actions are being taken by the U.S. to preserve the spirit of the Bermuda Formula? These and other questions shall be dealt with in this chapter.

According to a CAB report, the U.S. has more than seventy air transport bilaterals in force[79] which include the assumption of rights by fifteen countries that acquired independence from countries with which the United States has directly conducted an agreement.

Bilateral relations with countries where no agreements are in force are managed or regulated on the basis of unilateral grants of

---

[79] CAB Report to Congress, FY 1977, pp. 81-88.

operating authority by such countries, or on the basis of comity and reciprocity.

Air transport activities that require the use of the air space of another country or sovereign power need to be conducted with a permit or authority issued by that particular state. This is by virtue of the provisions of the outdated 1919 Paris Convention, the 1928 Havana Conference, and the current 1944 Chicago Convention which provides:

> No scheduled international air service may be operated over or into the territory of a contracting state, except with the special permission or other authorization of that state, and in accordance with the terms of such permission or authorization.[80]

This marks one of the basic thrusts of the 1944 Chicago Convention and the modern era of bilateral air transport agreements. It relates to the principle of sovereignty in air space and the failure of all endeavors to weaken its strong hold.[81] This briefly explains why some kind of an accord must be established between the various countries before any air transport operational rights may be acquired.[82]

Such accords may be either of a unilateral, bilateral or multilateral nature. Even though our concern here is with the bilaterals,

---

[80]Article 6 of the 1944 Chicago Convention.

[81]Barry R. Diamond, "The Bermuda Agreement Revisited: A Look at the Past, Present, and Future of Bilateral Air Transport Agreements," Journal of Air Law and Commerce 41 (1975), p. 422; Dr. Gerd Rinck, "The International Factors in German Air Transport," Journal of Air Law and Commerce 33 (1967), pp. 102, 108.

[82]O. J. Lissitzyn, "Bilateral Agreements on Air Tranport," Journal of Air Law and Commerce 30 (1964), p. 248.

a brief mention of unilateral and multilateral accords is unavoidable in order to link the subject of bilaterals to our topic.

The study in this chapter will deal with two important subjects, the pre-Bermuda I agreements and the Bermuda Formula or principles, followed by a brief summary.

B. The Pre-Bermuda I Agreements

American air transport accords before World War I and prior to the signing of the Bermuda I Agreement, as indicated earlier, were characterized by two features, either as unilateral or as limited bilateral accords. These will be briefly discussed below.

Unilateral Relations

In these types of accords, the United States government took the negative stand and limited its involvement to less than diplomatic contacts when necessary in assisting U.S. air carriers[83] to obtain operating rights through their own efforts with the governments concerned.[84]

In fact, the U.S. policy at that time was something of a closed system, especially before World War II. The U.S. was far behind Europe and had no desire to open its skies to world airlines. Landing rights were asked for from the United States as early as 1919 by Dr. Von Bauer who organized a small company with some of his old war

---

[83]Actually Pan American World Airways (then Pan American Airways) was the U.S.' chosen instrument at that time.

[84]Lissitzyn, "Bilateral Agreements on Air Transport," loc. cit.

buddies, but he was refused on the advice of military and naval authorities.[85]

Not only had the U.S. no desire to establish air transport reciprocal relations with other countries to which American carriers flew, but those countries had no national carriers of their own that were capable of conducting international operations. They were thus anxious to grant the American carriers the privilege to conduct service to their countries in return for the carriers' participation in establishing and developing the local airlines of that country.[86]

The approval of the Havana Convention on February 20, 1931, by the Senate made it easier to establish air transport relations with a number of countries ratifying that Convention such as Guatemala, Mexico, Nicaragua, and Panama.[87]

The U.S. still has some kind of bilateral air transport relations with countries where no bilateral agreements are in force, on the basis of unilateral grants of operating authority by each of those countries.[88] Such unilateral accords, however, were not satisfactory in the North Atlantic market, where most European countries were also looking for reciprocal rights before granting American carriers such

---

[85] Smith, Airways Abroad, op. cit., p. 10.

[86] A. W. Stoffel, "American Bilateral Air Transport Agreements on the Threshold of the Jet Age," Journal of Air Law and Commerce 26 (1959), p. 120.

[87] James L. Brown, "Pan American Cooperation in Aeronautics," Journal of Air Law and Commerce 9 (1938), p. 494. Refer to this article for detailed discussion on the Havana Convention.

[88] CAB Report to Congress, FY 1977, p. 81.

rights. This fact led to some limited bilateral accords, which will be treated below.

Limited Bilateral Accords

The bilateral accords which were entered into by the U.S. with some European countries in 1939 did not in fact represent the first time the United States entered into such air transport bilateral relations. It was argued that the United States concluded a civil air agreement with Columbia effective January 23, 1929.[89] This agreement, however, was in an era when the United States maintained a very restrictive attitude. Prior to and during World War II, the United States had already possessed a vast civil air fleet, and thus its politics and national policy had to change in order to accommodate American interests. The year 1939 was marked by some as the beginning of a new era in commercial aviation.[90] The U.S. government had to reverse itself on the matter of competition and regulation of U.S. international airlines.

Under the previous unilateral relations in Latin America and in the Pacific, U.S. carriers were operating without fear of competition from other carriers. Now in Europe, the U.S. airlines wish to penetrate an area and markets that are already well supplied by modern transportation systems, such as steamships, railroads, and buses, in addition to some strong national air transport systems.

Because of the fact that Great Britain had long had an active international air transport operation, the value of commercial rights in

---

[89]Stoffel, loc. cit.

[90]Smith, Airways Abroad, pp. 4-5.

other countries was not new to it. The United Kingdom was one of the first European countries to enter into a limited bilateral relationship with the United States. Reciprocal landing rights were obtained in England, Bermuda, Newfoundland, and the U.S. Other bilaterally reciprocal arrangements for landing rights were made with Canada, Eire, and France.[91]

Some of these agreements had a temporary duration and others had restrictions on capacity through limitations on frequency. The bilateral agreement entered into with Franch in 1939, for example, carried a period of six months during which American air carrier enterprises might engage in scheduled operations in a frequency not exceeding four times per week. A permanent agreement replaced that temporary one, assuring landing rights for the carriers of both countries.[92]

Such agreements also took the form of an exchange of notes rather than the now well established comprehensive form of the majority of U.S. bilaterals.[93] Bilateral agreements of the same types extended also to additional countries such as Spain, Portugal, Belgium, and New Zealand.

Rather than elaborate on the pre-Bermuda I type of air transport accords, it is sufficient to indicate that the type of agreements that existed at that period were not the type the U.S. would have favored. At that time the United States was all for a policy of freedom of the air while other European countries, with the U.K. at the lead, stood for

---

[91] Stoffel, loc. cit.

[92] CAB Report to Congress, FY 1939, pp. 27-28.

[93] CAB Report to Congress, FY 1940, p. 12.

a policy of Order of the Air.[94] It was thus not surprising for the United States to take long and strong strides in calling for a conference seeking to convince the world of its policy of open skies.

This naturally led to the events of the 1944 Chicago Convention and consequently to a new era of compromise between the two countries possessing commercial air power, the United States and the United Kingdom. The Bermuda I Agreement was signed and other followed thereafter.

C. The Formula

In this section we will look at a brief historical background leading to the development of the Bermuda Formula, major issues of the Bermuda I Agreement, the language and text of the Bermuda Formula, and some major problems and threats to the Formula, coupled also with some significant developments that may mark prospects of success to preserve the spirit of the thirty-year-old formula, in the implementation of U.S. policy on international transport.

Background

In order to understand what the Bermuda Formula is, it is believed that one must trace the historical positions of the contracting states to the 1944 Chicago Convention and the positions of the two parties to the Bermuda I Agreement.

---

[94] Diamond, op. cit., p. 420.

The 1944 Chicago Conference sought to achieve many tasks and objectives.[95] However, those objectives of all the major participants to that conference could be stated as follows:

> To insure, so far as possible, that they secured operating and traffic rights for their own international air services. Without exception, they believed that this could be achieved by an all embracing international agreement. The hidden obstacle was that some sought complete freedom of operations, others, control by an overriding international authority.[96]

Among those major participants to the 1944 Chicago Conference with those conflicting positions were the two parties to the Bermuda I Agreement, the United States on one side and the United Kingdom on the other. Both came to Chicago with their pre-war positions having been reversed.[97]

Those pre-war positions of the two countries were briefly explained as follows:

> Before the War, the U.K. had been better equipped than the U.S.A. in operating experience particularly in the pilots and aircraft available to operate international long haul services. At that time the U.S.A. preached predetermination, while the U.K. was all for freedom. It is a paradox of history that these roles were completely reversed as the War ended. The U.S.A. with its Transport Command and numerous transport aircraft available, was ready: the U.K. had little but experience to offer with resources plentifully reduced in a war effort which had been sustained so much longer.[98]

---

[95]For some details on the 1944 Chicago Convention, see the following references: Diamond, op cit., p. 439; H. A. Jones, "The Equation of Aviation Policy," Journal of Air Law and Commerce 27 (1960), p. 22.

[96]Diamond, op. cit., p. 439.

[97]Ibid.

[98]Ibid., with a reference to "Bilateral Agreements," Journal of the Royal Aeronautical Society 69 (1915), p. 473.

Each of the two countries had its own strategy which was dictated by the realities of its position. The strategy and position of the U.K. was described as follows:

> The official British Policy . . . was set out in a White Paper . . . . The White Paper . . . advocated that the first four freedoms of the air should be exchanged multilaterally among the contracting parties to a general agreement. The fifth freedom, as well as the right of cabotage in foreign countries, would not, however, be so exchanged, but . . . (would be a matter for negotiation).[99]

The United Kingdom, however, favored a plan that would assure order of the air in the "cartelest possibilities" of such a plan.[100]

Because of the strong position of the U.S. as described above, its strategy in the Conference aimed at securing unrestricted operating rights for all nations on international routes. The proposal of the U.S. thus presumed that frequencies and fares would be set up by market forces without international interference.[101] This U.S. position favoring open competition was criticized as follows:

> While freedom of competition has a ring of justice to it, there is some absurdity in its being espoused by a competitor who has a commanding lead in an industry characterized by strong economics of scale and considerable restriction of entry.[102]

---

[99] Ibid., p. 440, with reference to B. Cheng, The Law of International Air Transport, Vol. 17 (1962), pp. 18-19.

[100] Ibid.

[101] Ibid., pp. 339-340.

[102] Ibid. The position of the U.S. was cited by some as similar to that taken by the proverbial elephant who, while dancing through the chicken yard, cried "Everyone for himself." See: C. M. Sackrey, Jr., "Overcapacity in the U.S. International Air Transport Industry," Journal of Air Law and Commerce 32 (1966), p. 30.

It is thus evident that there was a head-on clash between the positions of the two countries; the U.K favoring order of the air and the U.S. favoring freedom of the air.

The plan offered by the United States at Chicago consisted of:

> A United Nations type of organization with considerable power in technical matters, . . . freedom of the air for peaceful civil aircraft, with as little regulation as possible, no delegation to any international authority to fix rates, routes, frequencies, or capacity . . . (emphasis added).[103]

Because of the conflicting positions of the two countries, two patterns of bilateral negotiations emerged after the Chicago Conference, one embodying the five freedoms without restrictions and the other characterized with predetermination of routes and frequencies.

The first of those patterns was adopted by the United States in its negotiation with a number of countries, and the second was adopted by the United Kingdom in its negotiation with some other European countries.[104]

Thus, it was this situation of unfinished business between the U.S. and the U.K. that led to the negotiation of the Bermuda I Agreement by the two countries.[105]

The Bermuda I Agreement

The meeting between the representatives of the U.S. and those of the U.K. in Bermuda was aimed at formulating a standard agreement which was later to serve as a model for all air transport agreements between the two countries and which in fact became a model for agreements between

---

[103] Jones, op. cit., p. 228.

[104] Diamond, op. cit., pp. 442-443.

[105] Ibid.

other countries as well. It was argued that although the objectives of the two countries were to negotiate a bilateral that would facilitate the exchange of commercial rights, the Bermuda I Agreement proved to be one of the most important events in international aviation history.

The judgment on the importance of Bermuda I was neither because it resolved the deadlock reached in Chicago between the two countries nor because it was an agreement reached between two major air transport nations at that time, but mainly because it brought about a general philosophy on the way in which the economic regulation of the industry should be achieved.[106]

At the beginning of the Bermuda meetings, the United States held the following positions in bargaining with the United Kingdom: (1) no limitation of frequencies vs. predetermination; (2) no division of capacity vs. fifty-fifty division of capacity; (3) no regulation of rates vs. regulation of rates; (4) complete grant of fifth freedom vs. no grant of fifth freedom; and (5) international body with advisory power only vs. international body with executive power over international air services.

The negotiations resulted in the Bermuda I Agreement which evidently was not a very painful task for either of the two countries. It was argued that both countries went to Bermuda ready to give concessions in return for the desired commercial rights.[107]

The key compromise was in the issues of fares and capacity. Both countries made concessions; the U.S. on the subject of fare regulations

---

[106]Ibid., p. 443.

[107]Smith, Airways Abroad, p. 257.

and the U.K. on the subject of capacity regulations.[108] These compromises from each of the two countries were described as follows:

> . . . Great Britain retreated from demands for restrictions on the number of flights each airline might fly (frequency controls), and on the number of seats each airline could offer to a particular destination (capacity limitations). [While] the United States, which had sought unregulated competition on the international routes, accepted direct control of rates . . . .[109]

It is thus argued that the somewhat unrestricted capacity formula of the Bermuda I Agreement is perhaps its dominant feature. It gave to the airlines the freedom to provide service at the frequency/capacity level they consider justified, subject to the general provisions and condition of the agreement.[110] In other words, the Bermuda I Agreement has introduced a regime of controlled competition, in contrast to predetermination and prior allocation of capacity.[111]

It was argued that the Bermuda Formula approached international air transport from a basically liberal point of view in contract to a protectionist approach.[112]

Assuming that the Bermuda I Agreement approached the capacity issue from a liberal viewpoint, it could also be argued that it provided for the exchange of all the five freedoms subject to certain broad principles which were designed as safeguards for the airlines of both

---

[108] Jones, op. cit., p. 231.

[109] J. McCarroll, "The Bermuda Capacity Clauses in the Jet Age," Journal of Air Law and Commerce 29 (1963), p. 115.

[110] Those conditions will be cited below.

[111] Diamond, op. cit., p. 447.

[112] Stoffel, op. cit., p. 122.

parties.[113] The Bermuda I Agreement, or the Bermuda Formula, however, did not specify the quantity of fifth freedoms allowed in relation to third and fourth freedoms, since:

> . . . the fixing of such a relationship would be contrary to the very spirit of the Bermuda Principles which allow a certain amount of latitude and flexibility, which is a "condition sine qua non" for the young and dynamic mode of transport civil aviation represents.[114]

One must not be misled, however, by the statement made earlier that the Bermuda I Agreement approached the capacity issue from a liberal point of view. The fact that it did approach the capacity issue from that point does not at all mean that all the countries that entered into bilaterals with the United States have a liberal policy. This is explained by the vagueness and flexibility of the Bermuda Formula to adopt itself to both policies, the liberal and the protectionist.

It was argued that the generality of the Bermuda clause terms merely provided some broad ideas which are therefore vague and flexible, a matter which made it possible to adapt them for protection as well as for a necessary amount of freedom.[115]

As was indicated above, a major goal of the 1944 Chicago Convention was to secure the five freedoms of international civil aviation through a multilateral agreement. (See Appendix C.) The most controversial of those is the fifth freedom, i.e., carriage of passengers and freight from one country to another. Because of the failure of the

---

[113] Ibid., p. 123.

[114] Adriani van der Tunk, "The Bermuda Capacity Clause," Journal of Air Law and Commerce 22 (1955), p. 406.

[115] Ibid.

Transport Agreement of the 1944 Chicago Conference[116] to secure a multilateral agreement on those rights, it was left to the bilateral approach to resolve those conflicts over the commercial rights.

The Bermuda I Agreement opened the door to such bilateral arrangements with considerations for the commercial freedoms. It also provided a general approach to the economic regulation of the industry. In 1961, one-third of all bilateral agreements followed the Bermuda model, and the rest had similar character, with provisions either less restrictive (Light Bermuda) or more restrictive (Heavy Bermuda). Most of this group, however, fell into the Heavy Bermuda type, strongly limiting each party's percentage of fifth freedom traffic and providing for the preliminary fixing of capacity. The predetermination of the capacity and frequency in these Heavy Bermudas differ from the provisions of the Bermuda Formula of an ex post facto review to such an extent that when applied to the number of seats offered, it is analogous to an import quota.[117]

The issue of capacity will be dealt with both later in this chapter and in other chapters, due to its economic impact on the performance of the airlines. Because of the impact that the Bermuda I Agreement still has on other bilateral agreements and on the attitude of the U.S. government towards the Bermuda Formula, the subject will continue to be discussed below in this chapter and in other chapters.

---

[116]For detail see Appendix 4 of the Conference.

[117]Diamond, op. cit., p. 428; also see John R. King and Susan C. Roosevelt, "Civil Aviation Agreement of the People's Republic of China," Harvard International Journal 2 (1973), p. 331.

The Bermuda I Agreement entailed significant qualifications of the commercial freedoms, e.g., government approval of rates and ex post facto governmental review of traffic capacity. It provided that both countries shall have fair and equal opportunities to operate designated air routes and that the carrier of each contracting party shall avoid undue interference with the services of the other party. The extent of the meaning of such provisions will be dealt with below.

The Formula

The Bermuda Formula (sometimes called the Bermuda Plan or the Bermuda Principles) dealt mainly with four major issues, entry or designation, routes, capacity, and tariffs. The spirit of the formula dealt with these four issues as follows.

1. Entry/designation: no rigid control on designation, but should be governed by market forces.

2. Routes: should be designated individually according to the particular circumstances.

3. Capacity: capacity and frequency levels to be judged by the operators themselves according to some capacity formula that will be discussed later.

4. Tariffs: are subject to the approval of the contracting parties, and the IATA Traffic Conference machinery is assumed to be the agent for setting such fares, subject to the approval of the parties. This machinery was provided for either explicitly or implicitly in the agreements.[118]

---

[118]U.S., Department of State, International Aviation Symposium, op. cit., paper presentation by Knut Hammarskjold, Director General, IATA, pp. 28-31.

The issue of charters was referred to neither in the original Bermuda Agreement nor in the Chicago Plan.[119]

Because of the controversial nature of the Bermuda Formula, it seems appropriate at this time to examine the exact and specific text and language of that formula as it was used in the various international documents. Following is the text and language of the formula:

> a. The air transport facilities available hereunder to the travelling public shall bear a close relationship to the requirements of the public for such transport.
>
> b. There shall be a fair and equal opportunity for the airlines of the contracting parties to operate on any route between their respective territories (as defined in the Agreement) covered by this Agreement and Annex.
>
> c. In the operation by the airlines of either contracting party of the trunk services described in the present Annex, the interest of the airlines of the other contracting party shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes.
>
> d. It is the understanding of both contracting parties that services provided by a designated airline under the present Agreement and Annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such airline is a national and the country of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in the present Annex shall be applied in accordance with the general principles of orderly development to which both contracting parties subscribe and shall be subject to the general principle that capacity should be related:
>
> 1. To traffic requirements between the country of origin and the countries of destination;
>
> 2. To the requirements of through airline operation; and
>
> 3. To the traffic requirements of the area through which the airline passes after taking account of local and regional services.[120]

---

[119] Ibid. The first major bilateral agreement covering both scheduled and charter services was the Bermuda II Agreement.

[120] Lissitzyn, "Bilateral Agreements on Air Transport," op. cit., pp. 250-251; also Lowenfield, op. cit., pp. 4-7.

This original text of the Formula appeared in paragraphs 3 through 6 of the Final Act of the Civil Aviation Conference held at Bermuda between January 15 and February 11, 1946, and was also incorporated into the Bermuda I Agreement.[121]

The same text also appeared in virtually identical form in the U.S.-France Agreement dated March 27, 1946, paragraphs b-d of Section IV of the Annex; the U.S.-Netherlands Agreement dated April 3, 1957, articles 8-10; both the 1953 and the 1960 versions of the Standard Form of Bilateral Air Transport Agreement issued by the U.S. to countries entering into aviation negotiation with the U.S.; and nearly all other transport agreements to which the U.S. became a party from 1946 through 1977.[122]

A brief analysis of the Formula should be helpful in the understanding of its nature and in the appreciation of the controversy that revolved around the interpretation of its terms. Lissitzyn[123] argued that this formula avoided the predetermination of capacity, favored by the British, but yet imposed restrictions, though in general terms. He further argued that the most significant element in this formula is perhaps the understanding that the primary objective of a service is to provide capacity adequate to the traffic demands of third and fourth freedoms traffic. This type of traffic was consequently called primary justification or primary entitlement traffic. Lissitzyn further indicates that this formula also provided for an ex post facto review or

---

[121] Lowenfield, op. cit., p. 4.

[122] Ibid.

[123] Lissitzyn, "Bilateral Agreements on Air Transport," op. cit., p. 251.

consultation if either government felt that an airline of the other party was not conforming to these restrictions. The administration of capacity standard was thus made flexible and evidently open to more than one interpretation in practice. The fifth freedom, secondary justification, however, was to be mutually accorded.

A recent analysis and critique of the language and workability of each of the individual items of the Bermuda Formula may be in place at this time. Each of the principles will be referred to exactly as indicated above (a, b, c, etc.):

Item a. The provision of this item neither represents a commitment to target load factors nor does it have anything to do with the relationship of aviation to other forms of transport. Furthermore, it neither entails a commitment to the typical demand curve nor seems to be the "motherhood clause" contained in all international agreements and would have been best left out.[124]

Item b. This clause is susceptible to misinterpretation in that it calls for equality of opportunity to compete, to start the race together, but not necessarily finish together.[125] It is not an affirmative action clause but is in essence a new discrimination clause.[126]

This clause was equated with Anatole France's famous and harsh statement, "The law in its majestic equality, forbids the rich as well

---

[124]Lowenfield, op. cit., p. 5.

[125]H. A. Wassenbergh, Public International Air Transportation Law in a New Era (Deventer, The Netherlands, Kluwer, 1976), pp. 41-42.

[126]Lowenfield, op. cit., p. 5.

as the poor to sleep under bridges, to beg in the streets, and steal bread."[127]

Item c. This item was described as another mystery clause, meaningless and best left out. It was argued that if it means that the carrier with jets shall wait until its competitors get them, it is contradictory to the preceding clause, and if it is intended as a subtle form of capacity control, it is so disguised as to be almost invisible.[128]

Item d. This is the clause that has raised the most controversy about the capacity formula, mainly because it deliberately left out any fixed ratio between the primary and secondary justifications. It was argued that the recognition that the requirement of through airline operations would vary from route to route, from plane to plane, and also over time as a function of aircraft size and range and of the growth of other airlines. It was further argued that this clause was carried over verbatim into the "Fair Competition" article of Bermuda II, and that its ambiguity may be subject to interpretation through the "consultative process" of Annex 2 of Bermuda II.[129]

The reasonableness of the Bermuda Formula was asserted as follows: ". . . everything taken together . . . the Bermuda Principle . . . has a sound conception of reasonableness at their basis,"

---

[127] Ibid.

[128] Ibid., p. 6.

[129] Ibid., p. 7. For a treatment of the working of the primary and secondary justifications traffic with some examples and suggestions, see Diamond, op. cit., p. 466.

and that "When copying the Bermuda clauses as has been done in so many cases this statement of policy should be assumed too."[130]

Problems and Threats

The Bermuda Formula worked reasonably well for the U.S. for almost a decade before its problems began to surface in the open, especially in connection with the interpretation of the capacity clause.

The attitude of the United States towards the Bermuda Principle in its liberal format when utilized in bilateral accords was extremely supportive. This is clearly indicated by the many bilaterals that have been entered into between the U.S. and other countries in the first decade of its life. This remained true for the U.S. until such time when U.S. interests, or carrier interests in particular, seemed to have been threatened either because of more capacity restrictions being imposed on U.S. carriers' operations, or because of more freedom being claimed and obtained by foreign carriers.

The heart of the problem lies in the difference of opinion between the United States believing that the Bermuda capacity clauses were indeed principles possessing some sort of moral or legal sanctions on one side and other countries, including the United Kingdom, on the other side that ". . . did not consider the capacity clauses as

---

[130]Adriani, op. cit., p. 413. The statement of policy referred to is the first item of the final act of the original Bermuda Agreement, which revealed the desire ". . . to foster and encourage the widest distribution of the benefits of air travel for the general good of mankind and to stimulate international travel as a means of promoting friendly understanding and good will among peoples and insuring the many indirect benefits of this new form of transportation to the common welfare of both countries."

principles," and ". . . continued to make agreements with European nations, limiting and allocating capacity and frequencies."[131]

To emphasize the diversity of the two beliefs, it was argued that the United States was not able to change the basic civil air transport concepts of most of the European nations and that it could safely be concluded that the Bermuda Formula had a meaning for the United States which was not shared by other countries.[132]

One of the earliest and most significant U.S. supports for the Bermuda Principle at the height of conflict surrounding the bilaterals was given in the Smathers Report, commenting on the capacity clause:

> While this provision (The Bermuda Principles) does not have the precision of a mathematical formula, it is generally recognized as a sound statement of principles to guide the day-to-day determination of capacity offered in international air transportation.[133]

The quality of the Bermuda Formula was recognized by both government spokesmen and airline witnesses.[134]

The German Agreement, which instigated the Congressional investigation reflected in the Smathers Report, was perhaps a clear beginning of a real threat to the Bermuda Principle as was indicated in the purpose of the Senate hearing.[135] The U.S. airlines that were affected by the provisions of the German Agreement complained that the U.S. paid

---

[131] Jones, op. cit., p. 323

[132] Ibid.

[133] "Federal Review: International Air Agreements," Journal of Air Law and Commerce 23 (1956), p. 356.

[134] Ibid.

[135] Ibid., p. 349.

too high a price for the traffic rights obtained in return from Germany and that the U.S. government had not properly valued U.S. market and rights Germany derived from serving that market.[136]

In stressing the need for a more effective control of capacity by the United States, the Smathers Report indicated that ". . . it is essential that the U.S. have a guiding principle to be followed" and that such a principle is to be found in the Bermuda I Agreement.[137]

This time it was U.S. entities (the Senate and the airline industry) that were asking for capacity controls. The reason for that, as indicated above, was sought in the inequitable exchange of economic rights, as it was conceived.

The Smathers Report further indicated that the U.S. had not controlled capacity effectively and that the Committee was unable to find a single case where the U.S. has asked a foreign government to alter the nature of its airlines' operations in order to put origin and destination traffic in the primary category.[138]

The Smathers Report also argued that the U.S. government never sought to accumulate the statistics necessary to support this contention in consultation with the other governments concerned.[139] The two important aspects cited by the Smathers Report in connection with the German Agreement were as follows:

---

[136]Ibid., pp. 350, 352.

[137]Ibid., p. 360.

[138]Ibid., p. 361.

[139]Ibid.

1. Failure by the U.S. government to measure the full value of the routes granted to Germany.
2. Refusal of the U.S. government to use this value to bargain in defense of U.S. interests.[140]

These two aspects remind us of what was indicated earlier--that the Bermuda Principle failed to establish an acceptable ratio between primary and secondary traffic. It is thus evident that this was the most difficult problem with the Bermuda Principle. The CAB contended that U.S. carriers would not be seriously affected by the grants to Germany due to the fact that the capacity provisions agreed upon in that bilateral, being the Bermuda Formula, would prevent the German airlines from operating enough capacity between the U.S. and points in South America to damage American carriers.[141]

The sharp criticism by U.S. carriers was directed at this very CAB interpretation and application of the Bermuda Formula, citing two important objections relating to its language and application.[142]

It is thus safe to say that, as far as the U.S. is concerned, the Bermuda Formula seems to have been acceptable and reasonable in the absence of a better alternative. However, the problem with the Formula seems to be built into its interpretation and application and in its failure to provide specific language. This very problem or disadvantage was also cited earlier as an advantage to make it acceptable to both the liberal and the protectionist.

---

[140]Ibid., p. 362.

[141]Ibid., p. 363.

[142]Ibid., p. 364.

In support of the Bermuda Formula by the U.S., a bill[143] was introduced proposing to write the gist of the Formula into the Civil Aeronautics Act, but it failed to pass for obvious reasons.[144]

The German Agreement was not the only bilateral that was characterized by "route give-aways" at that time, as contended by U.S. carriers and some elements of the legislative branch of the government. Two other agreements received similar criticism, one entered into with the Netherlands and the other with Australia. It was contended then that high policy, or non-airline factors, had been considered at that time in connection with those agreements.[145]

The acute criticism with respect to the routes exchanged and the capacity clauses was related to two distinct periods, one between 1955-1957, and the other between 1960-1962.[146] The first period embraces the dissatisfaction that arose because of the agreements entered into with Germany, the Netherlands, and Australia. The dissatisfaction during this period was related to the contention of route give-aways, the weakness of the Department of State to protect the interests of U.S. flag carriers, and the questioning of the adequacy of the Bermuda Formula.[147]

---

[143] S.2540, introduced on July 12, 1957.

[144] Lissitzyn, "Bilateral Agreements on Air Transport," op. cit., p. 253.

[145] Ibid., pp. 253-255.

[146] Ibid.

[147] Ibid.

The Europeans also argued that the United States was steadily turning towards an increasingly protectionist policy which led the French in 1958 to denounce their bilateral with the U.S.[148]

It was in the second period, however, that the peak of dissatisfaction with the operation of the existing system, in the airline industry and in government circles appeared to have been reached in 1961. This was evident in the following three distinct events:[149] (a) the hearing that produced the Project Horizon Report; (b) speeches made by high U.S. officials; and (c) the CAB proposal[150] that foreign air carriers' permits be amended to enable the Board to require their holders to furnish the Board with traffic data and to file their schedules with the Board for approval.

The last of these three events, the CAB proposal, was designed to "control the operation by foreign air carriers of capacity in excess of that regarded by the Board as permissible under the bilateral agreements," which "evoked strong protests by a number of foreign governments and air lines, who challenged the right of the United States under the agreements to take such measures."[151]

The specific causes of concern and dissatisfaction by the airline industry with the bilaterals and the Bermuda Formula at that time may be summed up in the following five items:

---

[148]Wassenbergh, Post War International Civil Policy and the Law of the Air, op. cit., p. 171.

[149]Lissitzyn, "Bilateral Agreements on Air Transport," op. cit., p. 255.

[150]CAB Order No. E-16288, dated January 18, 1961.

[151]Lissitzyn, "Bilateral Agreements on Air Transport," op. cit., p. 255.

1. Excessive and arbitrary restrictions imposed by foreign governments on the traffic carried by U.S. flag carriers. Some of these restrictions were based on the interpretations of the Bermuda Formula which are not accepted by the U.S.

2. U.S. carriers contend that some foreign carriers, mostly European, carry excessive volumes of fifth freedom traffic in violation of the American interpretation of the Bermuda capacity formula. Sixth freedom traffic also was carried by those foreign carriers, who regard it as merely a combination of third and fourth freedom traffic.

3. A number of foreign carriers operating to the U.S. and taking away traffic from U.S. flag carriers have continued to increase, due to the need to obtain reciprocal rights.

4. Many foreign carriers have shown a tendency to form pools and combinations to strengthen competition against U.S. flag carriers.

5. Some non-IATA member carriers, mostly Latin American, attempt to take away traffic from U.S. flag carriers by charging low fares.[152]

Perhaps the most significant problem and threat to the Bermuda Formula in recent years is the continued and vigorous dissatisfaction of other states, mostly European, with U.S. interpretation of the Bermuda Formula which led in essence to the Bermuda II Agreement.

The Bermuda II Agreement itself does not at this time seem to be as great a threat to the Bermuda Formula, but it is hoped that the effects of its restrictive provisions would neither influence other bilaterals which followed, in essense the Bermuda Formula, nor make it more difficult to conduct bilateral negotiations with other

---

[152]Ibid., pp. 255-259.

countries desiring similar treatment, as was the case with Japan and Italy.

Prospects

Perhaps one may distinguish and enumerate three types of events that characterized U.S. policy following the Bermuda II incident which may be considered as prospects to preserve the liberal spirit of desired bilateral relations with other countries. These are the general U.S. reactions to Bermuda II, the latest 1978 Policy Statement, and the negotiations of several liberal bilaterals.

Reactions to Bermuda II. The Bermuda II Agreement did contain some restrictive provisions that were of special significance. The significance of such restrictions does not arise mainly from their substance, for there exist other restrictive bilaterals, but from their historical nature which relates the Bermuda II Agreement to the Bermuda I Agreement in some sense. This significance arises from the fact that the restrictions (especially those relating to capacity) have been created by a change of heart from one of the two parties that established the roots of the Bermuda Formula in 1946, after which almost all other U.S. bilaterals were modeled.

The significance also arises from the fear of the impact that the agreement may have on other bilaterals.

Bermuda II resulted in a great deal of controversy in the U.S., revolving around its restrictive provisions, the role the airline industry and other U.S. entities had in the negotiating process, and a court litigation challenging its validity. Bermuda II also generated

congressional hearings in which a good deal of testimony unfavorable to it was given, not only by private entities, but also by government officials. Other pronouncements from government officials followed, indicating the intention of the government to liquidate the effects of Bermuda II. Such behavior by the government can also be seen in the hard stand the U.S. took in the negotiations with some countries that aimed at procuring similar restrictive provisions.

In March 1978, liberalization of the pricing practices of the U.S. and the U.K. was agreed upon, in addition to some amendments to the Bermuda II agreement, incorporating substantially more liberal provisions than had previously been available in the U.S.-U.K. market.[153]

The 1978 policy statement. The language and spirit of the recent policy statement approved by President Carter (see Appendix B) seems to have focused on the aftermath of the Bermuda II event.

In his presidential statement accompanying the issuance of the policy statement, President Carter stressed the policy of vigorous competition, with the goals of permitting lower fares, better service to more cities, and fewer government restrictions on charter travel.

As was indicated earlier, the policy statement links the achievement of such objectives to a negotiating process emphasizing various important aspects of air transport service.

Most important is the guiding principle for negotiating bilaterals as being the trading of competitive opportunities rather than

---

[153]Department of State, personal letter to the author in response to an enquiry, February 12, 1979.

restrictions. The significance of this policy statement is in its recognition of the vital role of the negotiating process in achieving the desired objectives. The significance of the Policy can also be seen in its firm stand and reliance on competition, giving an implication that more emphasis would be stressed on the spirit of the liberal Formula and furthermore hinting at freer fare setting and innovative and competitive pricing.

The significance of this policy statement can also be seen in the implementation of its provisions and spirit as reflected by the following type of behavior the United States adopted in the aftermath of the Bermuda II event.

The negotiation of liberal bilaterals. The pro-competitive policy was set out to achieve the liberal bilaterals it aimed at in an attempt to preserve the spirit of the Bermuda Formula and further minimize governmental controls. Four such agreements are listed here which have been signed with the governments of Belgium, the Netherlands, Israel, and Germany. The following official description of those agreements will shed some light on their liberal nature:

> With some minor exceptions, in the case of Germany, these agreements give the United States unlimited route rights and the right to designate an unlimited number of carriers on any route. Those agreements also contain either country of origin, or multilateral suspension rates articles, both of which are more liberal than the unilateral right of suspension rate articles that was standard in Bermuda I type agreements.[154] (Emphasis added.)

---

[154] Letter from Chairman Marvin S. Cohen, April 16, 1979, in response to an enquiry by the author.

This may be regarded as a successful venture by the U.S. to further preserve the liberal spirit of the Bermuda Formula. In contrasting these agreements with Bermuda I type agreements, one can argue that they also include other liberal provisions. For example, the Belgium agreement deregulates all cargo transportation. All four agreements, however, are important not only because they represent a turning point in the conduct of United States international aviation affairs, but also because of the extent to which they open these markets to competition. They are certainly the antithesis of the Bermuda II Agreement with the United Kingdom.[155]

More details on the liberal nature of such bilaterals and their impact will be provided later in Chapter IV.

D. Summary

In this chapter an attempt was made to provide the historical background of the Bermuda Formula. Before the Formula was established in 1946, the United States had maintained a policy of semi-closed skies until 1939. U.S. bilateral relations in air transport before that date were characterized by several unilateral arrangements and few bilateral accords with limited nature. In 1939, with U.S. airlines desiring to provide service across the North Atlantic and possessing a large scale capacity, the U.S. found itself obliged to enter into bilateral arrangements with some European countries, including the U.K. The limited nature of such bilateral arrangements did not meet with the desire of the U.S. to expand its air transport operations at the end of the war.

---

[155] Ibid.

The 1944 Chicago Conference was called by the U.S. in an attempt to sell the concept of freedom of the air to the rest of the world. Most of the nations convening in Chicago did not share this same idea with the United States. With the concept of sovereignty of the air well established and affirmed in Chicago, it was necessary to secure the permission of other states for acquiring operating rights within or across their territory. Both the United States and the United Kingdom came to this convention with their pre-war positions reversed. The United States favored freedom of the air while the United Kingdom favored order of the air. The 1944 Chicago Convention failed to secure a multilateral agreement granting all the five freedoms of the air to which both the U.S. and the U.K. were parties. The meeting of the representatives of both countries in Bermuda resulted in the Bermuda Formula and the Bermuda I Agreement, after which almost all other U.S. bilaterals were modeled.

The Bermuda I Agreement, or the Bermuda Formula, was a compromise between the two concepts, freedom of the air and order of the air. The U.K. agreed to unrestricted capacity formula, while the U.S. agreed to permit fares to be set by IATA.

The Bermuda Formula was described as being both flexible and ambiguous as it yielded to different interpretations. This nature of the Formula was considered to be both an advantage and a disadvantage.

The Formula, however, began to have its problems in the mid-50's with the signing of an agreement with Germany and two other nations. A congressional hearing was conducted in response to the dissatisfaction expressed by the airline industry, and a call for better

control of capacity by the U.S. was voiced. Several other problems and threats to the Bermuda Principle were also developing, in time resulting finally in the denunciation of the Bermuda I Agreement, which was replaced by the Bermuda II Agreement, containing significant restrictive provisions.

The U.S. government began to take action aiming at diluting the effects and impact of Bermuda II and at preserving the spirit of the Bermuda Formula. Some of those actions consisted of taking a hard stand in negotiating with other countries seeking provisions similar to those contained in Bermuda II; official pronouncement that the Bermuda II would not become a model in the same way that Bermuda I had; the passing of a new pro-competitive policy statement; and finally, the negotiation of several liberal bilaterals.

CHAPTER IV

THE BILATERALS: LEGAL AND OTHER CONSIDERATIONS

A. Introduction

Bilaterals are documents that include features which are both political and legal. The political features arise because at times there is a necessity for special political maneuvers and tactics between two sovereign states, each having its own political structure and economic institutions. Bilaterals are also legal documents in the sense that they are governed by both international and national laws, in their formation, implementation and/or terminations.

They have international legal features because they are considered treaties, regardless of whether they are approved by the parliamentary body in two thirds or simple majority, or whether they are reduced to mere executive agreements. Other reasons for their having national legal features are that they must conform to constitutional and statutory laws. Because bilaterals are considered treaties, they usually take precedence over national laws in cases of conflict.

In addition, bilaterals, being documents with such national and international magnitude, require a process of formation, negotiation, implementation, interpretation, litigation, modification, renewal, and termination that is normally more elaborate and sophisticated than the process utilized in ordinary contracts. In this sense, bilaterals are engulfed within the environments of foreign policy and are subject to

the international bargaining processes with their political and economical elements in addition to the leverage each state may have to influence the negotiating process to its favor. They are also subject to the moods of the international scene. Another feature of bilaterals is that they have some regulatory aspects in the sense that international and national bodies attend to the implementation of their terms and provisions.

The analysis in this chapter will comprise four types of considerations or factors: international, constitutional, regulatory, and procedural, followed by a brief summary.

B. International Factors

It is argued that most international factors relating to the behavior or conduct of nations arise because of some national policy and because of the position of a nation within the framework of the international environments. Bilateral agreements are no exception to this hypothesis.

International factors are thus influenced by, and conversely, themselves influence, certain national aspects that otherwise might not be affected. In this sense, international factors are at times extremely difficult and delicate to handle, for they require the convergence of both national and international facets through the foreign policy process and through the agreements arrived at by the governments concerned. The use of some kind of documentation is necessary to describe, usually in general terms, the intent of the parties. One example of such documents is the treaty form. The bilaterals fall into this kind of international agreement.

It is thus essential for us to describe some of the aspects of a treaty in international law. Among the international considerations considered in the making of a treaty are economic, political, and military considerations. Our analysis here will deal with the treaty form of international agreements, as well as some other international elements.

The Treaty

A treaty is considered to be one of the various forms of international agreements:

> International agreements assume various forms, and are given various descriptive designations such as treaties, conventions, acts, general acts, protocols, agreements, modi vivendi, etc. . . . The term "treaty" is usually employed in formal agreements of a political or quasi-political character . . . .[156]

International agreements, however, could be either formal, such as treaties, or informal, such as the exchange of diplomatic notes; and the general practice in international law is to differentiate between the two types of agreements.[157]

A treaty is defined as ". . . a formal instrument of agreement by which two or more states establish or seek to establish a relation under international law between themselves. . . . The international judicial effect of a treaty is not dependent upon the name given to the instrument."[158] In this international sense, an executive agreement

---

[156]William W. Bishop, Jr., International Law: Cases and Materials (Boston: Little, Brown and Company, 1971), 3rd ed., p. 92.

[157]Ibid.

[158]Ibid. This definition was provided by the Harvard Research in International Law.

is also considered a treaty. The U.S. Constitution, however, differentiates between treaties and executive agreements with relation to Senate or congressional involvement. (This will be discussed later.)

The fact that some of the air transport agreements involving the United States are in the form of multilateral, rather than bilateral, treaties (such as the 1944 Chicago Convention), perhaps warrants the need to discuss, in general terms, some aspects of treaty formation, implementation and interpretation, modification, and termination.

Formation. In the case of bilateral treaties, negotiations for their draft commence usually when one government notifies the other of its wish to conclude a particular agreement covering a certain matter. A prepared draft or text is customarily submitted; then negotiations and discussions take place, based on the proposed or counterproposed draft, usually in one of the capitals concerned. When the wording of a treaty is reached, it is prepared for signature, mainly in the language of both countries. If they differ, then two originals are usually prepared, one for each state.[159]

In the United States, with a bilateral or a multilateral agreement which should take the form of a treaty (as defined by the U.S. Constitution), the President submits it to the U.S. Senate to receive advice and consent to ratification, and upon receiving the same, the President ratifies the treaty if he sees fit. In the case of a bilateral treaty, after ratification by the foreign government in

---

[159]Ibid., p. 118. In the case of a multilateral agreement, only one copy is generally signed and sealed and retained in the archives of the government, or an organization such as the U.N., designated as the depository of the treaty.

accordance with its constitutional procedures, the two governments exchange instruments of ratification. The bilateral is then registered with the U.N. and published officially by the U.S.[160]

The rule of "pacta sunt servanda" is one of the most fundamental international law rules, meaning that treaties must be performed in good faith, a rule which seems to be well accepted by statesmen and tribunals. This of course is one essential aspect of agreements that is inherent in treaties to secure the obligations under the treaty in good faith with the understanding that such obligations have been agreed upon between the parties. Consequently, a state cannot relieve itself from the obligation of a treaty nor can it modify its stipulations without agreement by the other contracting parties.[161]

Implementation and interpretation. The implementation of a treaty includes, of course, the interpretation aspect. In fact, it is highly unlikely that treaties of an important character would be drawn so perfectly that no problem of interpretation would arise at all. To reach an agreement in a formally signed document is different from reaching an agreement on the same interpretation of the same provision, especially in the case of a difficult compromise. A dispute on interpretation usually comes after an agreement is signed and when the action of one of the parties is not in accord with the interpretation the other party attaches to that particular provision.

---

[160] Ibid., pp. 118-119.

[161] Ibid., p. 141.

In order to assist the states in the interpretation of treaty clauses of such nature, several guiding principles have been formulated, one of which is provided below.

The American Law Institute's Restatement of Foreign Relations Law of the United States (1965) provides in Article 147 the following criteria for interpretation:

> . . . the ordinary meaning of the words, the title and statements of purpose and scope, the circumstances attending the negotiation, drafts and other documents submitted for consideration, unilateral statements of understanding made by a signatory before the agreement came into effect, the subsequent practice of the parties in the performance of the agreement, change of circumstances, and the compatibility of alternative interpretations of the agreement.[162]

An example of the dispute that arises over the issue of interpretation is found in the case of the capacity clauses of the Bermuda Formula. The dispute relates to the interpretation the U.S. attached to the fifth freedom, which was not shared by the other parties to the Bermuda type agreements. However, because those agreements had an ex post facto provision of consultation, the dispute never found an acceptable remedy. This left the parties concerned unhappy at times and prompted actions by some that were considered by others as invalid, unilateral, and uncalled for by treaty provisions. It should be recalled that the CAB issued an order requiring foreign carriers to submit traffic data so that a basis for interpretation may be established. The reaction of foreign governments and carriers against such a Board action was prompt and vigorous.[163] It was argued that the Board should exercise

---

[162]Ibid., pp. 174-175.

[163]Wassenbergh, Post War International Civil Policy and the Law of the Air, op. cit., p. 172.

its judgment according to public interest stipulated in Section 402, subject to the limitation of compliance by the statutory provisions making the international obligations the overriding consideration, that such a regulation by the CAB would not be consistent with existing bilateral air agreements, that this regulation would not be uniformly applied to all foreign air carriers, because its application would be determined on a discretionary and discriminatory basis, and that the Board had no jurisdiction to amend the foreign air carriers' permits in the manner proposed.[164] It was also argued that the unilateral decision by the Board to impose a new condition requiring foreign carriers to submit traffic data, insofar as this would imply the disclosure of sixth freedom data traffic, has no basis in bilateral air agreements.[165]

Four countries, the U.K., the Netherlands, Scandanavia, and Italy, have rejected the U.S. interpretation of the Bermuda agreement.[166]

Modification and termination. There are several general methods by which the obligations in a treaty may terminate or be terminated such as notice given by a contracting party pursuant to the terms of the treaty; fulfillment of the provisions of the treaty; expiration of the period of time for which the treaty was concluded; extinguishment of one of the parties (in the case of bilateral treaties) or of the

---

[164]Ibid. The argument in this regard centered around the provisions of Section 402 (Permits to Foreign Carriers), Section 1102 (International Agreements), and Section 1108 (Foreign Aircraft) of the 1958 Federal Aviation Act.

[165]Ibid., pp. 173-179.

[166]Ibid., p. 179.

subject matter of the treaty, and agreement of the parties; implication, as for example, the conclusion of a subsequent agreement covering the same subject matter or one wholly inconsistent with the earlier treaty; or denouncement by one party and acquiesence by the other.[167]

The Bermuda I Agreement was terminated, as will be indicated later, in accordance with more than one of the above methods.

Other International Elements

One can enumerate various terms that are almost always considered when entering into a treaty with other countries. On top of the list is a term that can comprise all other descriptive terms. This is the phrase, "national interest." For example, the military aspects and considerations in a treaty, even though hidden, are based on national interests. Similarly, other aspects such as economical, political, national security, etc., can also be comprised within that one descriptive element, the national interest.

Let us see what the term "national interest" means. Three categories of basic national interest have been proposed as follows:

> a. Need to survive as a nation. This is considered an ultimate national interest that is sought by all nations.
> b. Need to better the life conditions of the nation's people. This is considered a penultimate national interest.
> c. Urge to expand territorially or commercially in order to provide for increasing or excessive popular growth. This, it is argued, is one national interest that paradoxically has been the heartland reason for the start of most wars.[167]

The national interest thus starts from a defensive stand, need to survive, and perhaps leads to an offensive stand, urge to expand, with

---

[167] Jones, op. cit., p. 223.

all its consequences. It is not surprising, thus, that some authors define interest in terms of power, as a political reality:

> The main signpost that helps political realism to find its way through the landscape of international politics is the concept of interest defined in terms of power. . . . The concept of interest defined as power imposes intellectual discipline upon the observor, infuses national order into the subject matter of politics, and thus makes the theoretical understanding of politics possible.[168]

It has been argued that statesmen think and act in terms of interest defined as power, and that the evidence of history bears that assumption out, and in addition, nations having the same interests find it easier to deal with each other because the identity of interests is the surest of bonds whether between states or between individuals.[169] This explains why the West is West and the East is East, and why no amicable accords have been reached, or might be reached, as long as the interests are in conflict.

Economy, defined in terms of interest, means "wealth,"[170] and it is the researcher's opinion that wealth is also a matter of interest, a matter of power, a matter of political realism, and its consideration in the making of a treaty cannot be avoided. Whenever a nation, in the process of concluding a treaty, concedes to the demands of another nation, it would not be for purely moral purposes.

There is always some kind of an interest that is being pursued, most likely political, military or economical, for it has been argued that:

---

[168]Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace, 5th ed., rev. (New York: Knopf, 1978), p. 5.

[169]Ibid., pp. 8-9.

[170]Ibid., p. 5.

> Nations, like individuals, do not divest themselves voluntarily of their accumulated wealth and of their resources of income merely in response to moral appeals . . . .[171]

In the making of an air transport bilateral, the government finds itself faced not only by interest demands of those national subjects that will be affected directly by its provisions such as the airlines, but also by those subjects that will be affected indirectly by its outcome. For example, the German and Dutch agreements of the mid-1950's, referred to in the previous chapter, have been attacked by the airlines and described as give-aways from the economic viewpoint of reciprocal exchange. However, it was argued that there were other military considerations involved and that there were other economic interests of the aircraft manufacturing industry that were at stake. This matter of foreign economic policy was described as a highly complex subject.

> Foreign policy has come to concern itself more and more with economics. Given the complexity of foreign economic policy, it is not surprising that occasionally some individual or industry may feel that it is being sacrificed in the overall national interest. . . . It is not that sound foreign relations and a prosperous domestic economy are in conflict with each other, for they are not really so, but rather that the subject is highly complex and paradoxical at the point of merging traffic.[172]

It was also argued that statistical figures portraying some economical advantages or disadvantages may not be the sole decisive factor in

---

[171]Guy J. Pauker, Military Implications of a Possible World Order Crisis in the 1980's (Rand: Santa Monica Report No. R-2003 AF, November 1977), p. viii. The researcher has some reservations to this statement.

[172]U.S., Department of State Bulletin, Paradox of Foreign Economic Policy, by Thorston V. Kalijarvi (June 1957), p. 1013.

the making process of a treaty. Other aspects of national interests may override those economical factors. Historical events indicated at times that the political process dominate the outcome, and the best example in this respect is the lengthy process that the agreement between the U.S. and the U.S.S.R. had to go through. (This will be discussed later.)

This brief essay on treaties and on the aspects of the concept of national interest should suffice to provide an idea of how international considerations are at times unavoidably mingled with national considerations and how the treaty-making process is influenced by such interaction.

C. Constitutional Considerations

While the term "treaty" in international law is very broad and is not dependent upon the name given to the instrument as indicated in the previous section, this does not hold true in the U.S. constitutional law. According to the U.S. Constitution, the term "treaty" is applied to any

> . . . international agreement, however denominated, which becomes binding upon the United States through ratification by the President with the advice and consent of the Senate, two-thirds of the Senators present concurring therein.[173]

Another term used in the U.S. to describe international agreements is referred to as "Executive Agreements." This term is used to describe all international agreements which become binding on the United States in two other ways:

---

[173]Bishop, op. cit., p. 93.

1. Executive agreements which become binding on the U.S. through the action of the President alone.

2. Congressional agreements which become binding on the U.S. through the action of the President together with Congress acting through a majority vote in each house.

Executive agreements may take the form of exchange of notes or of more formal signed documents.[174]

In this section will be discussed the status of the bilaterals as executive agreements as compared with treaties, within the framework of the U.S. Constitution. We will look into some historical background, trace some important decisions and some recent developments that are still shaping the basic elements and legal views surrounding this issue of constitutional nature.

Two relevant U.S. constitutional provisions describe the power of the President to make treaties and engage in other foreign relations: Article II, Section 2, provides that the President ". . . shall have power, by and with the advice and consent of the Senate, to make treaties . . . and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public ministers . . ."; Article II, Section 3, provides that the President ". . . shall receive Ambassadors and other public ministrers . . . ."

Even though these provisions do not mention the term "executive agreements," it has been argued that there are two grounds upon which a presidential power to make non-treaty agreements is based.

---

[174]Ibid.

The first of these is the practice of the United States conceding that it is too late for a purist insistence upon treaties as a mode of international agreements, even though not necessarily conforming to the Constitution,[175] and the second is based on foreign policy grounds with the argument that since the Constitution does not restrict agreement-making to the treaty process and does recognize an alternative to the treaty, the international agreement which is not a treaty is also available to the President as a foreign policy instrument.[176]

Others also argue that the making of executive agreements is a constitutional usage of long standing, resting upon the President's powers in the fields of foreign relations and national defense.[177]

It has also been the practice of Congress since 1792 to authorize by statute the making of executive agreements on a large variety of subjects.[178] This issue, however, is not yet settled in spite of how it appears to be from the above decisions, due to its complex and controversial nature, and due to the persistent evasion either by the

---

[175]Richard Cohen, "Self-Executing Executive Agreements: A Separation of Powers Problem," Buffalo Law Review 24 (1974), p. 139.

[176]Ibid., with reference to Article I, Section 10, of the U.S. Constitution.

[177]Oliver J. Lissitzyn, "The Legal Status of Executive Agreements on Air Transportation," Journal of Air Law and Commerce 17 (1950), p. 439. This argument was based on a decision by the Supreme Court, speaking of the ". . . very delicate, plenary and exclusive power of the President as the sole organ of the Federal Government in the field of international relations . . . ." The Court also indicated that it ". . . found the warrant for its conclusion not in the provisions of Constitution, but in the law of nations . . . ." See: U.S. v. Curtiss Wright Export Corp., 299 U.S. 304, 318 (1936).

[178]Ibid.

courts or by legislative statutes to decide on this important facet of separation of powers.

There are others, of course, who proposed arguments denouncing the constitutional validity of executive agreements and claiming that the term "agreements and compacts" was inserted into Article I, Section 10, of the Constitution so that interstate boundary settlements would be covered.[179] This argument was refuted with a counter argument claiming that it is equally clear that this was not the only meaning which the framers gave to these words for they referred to undertakings in which one party's obligation becomes entirely discharged through one act, and that the wording of most of the preliminary drafts of the Constitution, as well as the final version, refer to some variation of agreements with a foreign power.[180]

The pre-Bermuda II history indicates that this constituional issue dealing with the validity of executive agreements was raised mainly in a highly charged political atmosphere.[181]

For this reason, it was argued that the mounting tide of executive agreements, many of which are kept secret from the Senate, led the Senate in February 1972 to vote eighty-one to zero for the Case Bill.[182]

---

[179]Raoul Charles Warren Berger, "The Presidential Monopoly of Foreign Policy," Michigan Law Review 71 (1972), p. 1.

[180]Cohen, op. cit., pp. 139-140.

[181]Ibid., p. 137.

[182]Berger, op. cit., p. 3. The Case Bill requires that executive agreements must be sent to Congress after being signed for information;

It was further argued that the political atmosphere went further to put pressure on the executive branch by voting to cut all funds for recently concluded military base agreements unless such agreements are submitted to the Senate as treaties.[183]

Another argument on this constitutional issue by an opponent of the extensive use of executive agreements as a method of circumventing the rules of the Constitution distinguishes between discretionary and mandatory powers in the process of examining the texts of both Sections 2 and 3 of Article II of the Constitution.[184]

The description of mandatory power of the President made use of the term "shall": "shall have power to grant reprieves and pardons, shall be Commander in Chief, receive Ambassadors," and "take care that the Laws be faithfully executed."[185]

The description of discretionary power of the President, however, made use of the term "may": "may require the opinion, in writing of the principal officers in each of the executive departments," and "may, on extraordinary occasions, convene both Houses."[186]

The above argument further indicates that

> Nowhere do the proponents of an alternative method explain how the phrase "he shall have power" signifies a permissive grant to

---

see Harriet Oswalt Hill, "Bermuda II: The British Revolution of 1976," Journal of Air Law and Commerce 44 (1978/1979), p. 122.

[183]Berger, op. cit., p. 3.

[184]Lee B. Ackerman, "Executive Agreements, the Treaty Making Clauses, and Strict Constructionism," Loyola of Los Angeles Law Review 29 (1975), p. 587.

[185]Ibid., with reference to Article II, Sections 2 and 3 of the U.S. Constitution.

[186]Ibid.

> use other procedures for making international agreements. Rather, it seems apparent in the light of the wording of other clauses of the section that the President is to have discretion in determining when he would make use of the power, not that he had discretion in determining if another method was equally constitutionally permissible (emphasis added).[187]

Most of the arguments thus far seem to center around the issue of separation of powers, the proponents calling for extending the powers of the President to include executive agreements mainly on grounds of foreign affairs due to changing world situations, and the opponents calling for necessarily constitutional advice and consent by the Senate, in spite of changing world situations.

Since the President has authority to conclude certain types of agreements with other countries by use of executive agreements, the question becomes: what agreements should be concluded as treaties and what other agreements may be concluded as executive agreements? It is thus proper and safe to say that even those opponents that call for necessary constitutional advice and consent by the Senate indicate that the treaty-making process is to be invoked only when the agreement is of major or significant importance to the country.[188] In fact, even the Senator who sponsored the Case Bill recognizes this distinction.[189]

The U.S. Constitution does not provide guidelines on the distinction between cases requiring agreements to be concluded as treaties nor those that may be concluded as executive agreements. However, since court cases have provided a seemingly inexhaustible listing of subject

---

[187] Ibid., p. 590.

[188] Ibid., p. 592.

[189] Ibid., with reference to Hearings on S.R. 214 before the Senate Comm. on Foreign Relations, 92nd Congress, 2nd Session, 1972.

matters that may be covered by executive agreements, such as a protocol, a modus vivendi, and a postal convention.[190] In the pre-Bermuda II period there were six noteworthy cases regarding presidential authority to make executive agreements and the Case Bill, the only statute concerning this subject, all specifically sought to avoid this difficult constitutional issue.[191]

The courts thus have been reluctant to deal with the problem of presidential executive agreements and have avoided giving any ruling that may be considered explicit and decisive. U.S. government publications, however, list three cases under which an international agreement (other than treaties) may be concluded pursuant to one or more of such constitutional basis: agreements pursuant to treaties; agreements pursuant to legislation; agreements pursuant to the constitutional authority of the President which include his authority as chief executive to represent the nation in foreign affairs, his authority to receive ambassadors and other public ministers, his authority as commander in chief, and his authority to take care that the laws are faithfully executed.[192]

In addition to the unsettled question of this constitutional issue surrounding the executive agreements, the proponents of keeping air transport agreements as executive agreements provide a list of

---

[190] United States v. Belmont, 301, U.S. 324, 330-331 (1937), as quoted from Hill, op. cit., p. 126.

[191] Richard Cohen, Self Executing Executive Agreements, op. cit., p. 157.

[192] U.S., Department of State, Circular 175, Procedure of the Department of State Foreign Affairs Manual (FAM) II FAM 721, 26.

practical obstacles that are serious enough to be called "horrors" by some writers.[193] The most recent court litigation dealing with this issue is the case instituted by a group of U.S. entities under the guidance of representatives of the City of Tampa, Florida, which challenged the Bermuda II Agreement on constitutional as well as statutory grounds. (This will be dealt with in Chapter V.)

D. Regulatory Considerations

In the field of regulating the affairs of international air transport within the framework of U.S. bilaterals with other countries of the world, there are several national and international entities that play important roles. The analysis here will center around some important areas of regulation handled by two significant national entities, the Civil Aeronautics Board (CAB) and the President.

The CAB

The law provides that the Board:

> . . . shall consider the following, among other things, as being in the public interest, and in accordance with the public necessity and convenience:
> (a) The encouragement and development of an air transportation system properly adopted 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; . . . (emphasis added).[194]

---

[193] Hill, op. cit., p. 123.

[194] Section 102(a) of the Federal Aviation Act of 1958.

In contrast to the full authority of the Board over rates on domestic routes,[195] the Act authorized the Board only to eliminate discrimination or preference between persons or geographical areas in the case of regulating international rates. However, in spite of this limited authority, the Board felt that its general statutory responsibility for aviation affairs includes the duty to represent the interests of the United States in establishing a fair level of international fares.[196]

How does the CAB go about playing its regulatory role in international air transport? The Federal Aviation Act of 1958 provided the Board with two important avenues to perform its regulatory role in international air transport. These are the authority to disapprove carriers' agreements and the issuance of foreign carriers' permits.

Disapproval of carriers' agreements. The 1958 Act authorized the Board to disapprove by order any such contract or agreement that it finds to be adverse to the public interest, or in violation of this Act, and also to approve by order any such contract.[197] For example, the Board has the power to disapprove IATA's carriers' agreements (resolutions) establishing international fares. It also has the authority to approve such agreements if it finds them in the public interest as provided by the statute. Two courses of action are thus available to the Board in connection with such IATA or other carriers

---

[195] Section 1002(d) of the Federal Aviation Act of 1958.

[196] "CAB Regulation of International Aviation," Harvard Law Review 75 (1962), p. 579.

[197] Section 412(b) of the Federal Aviation Act of 1958.

agreements: either to approve or to disapprove. If the Board approves, such approval will render the fares effective and will result in an exemption from the anti-trust laws. Disapproval by the Board of IATA's resolutions for example, however, renders them ineffective and remits the carriers to independent actions.[198]

It has been argued on the one hand that in spite of the fact that the Board had no direct authority to regulate the independent conduct of carriers in international routes, the weapon of disapproval has proved effective enough to block affirmative IATA action disturbing a satisfactory status quo situation. On the other hand, it has also been argued that this power to disapprove IATA's agreements, for example, is largely ineffective to force IATA members to reduce their own rates.[199]

When the Board outrightly disapproves an IATA fare resolution, it means the end of any degree of uniform regulation, resulting in considerable economic chaos, where each government is left free to adopt its own desired rate or practice.[200]

An "open rate" situation takes place as a result of an outright disapproval by the Board of an IATA resolution. This "open rate" situation poses a threat to both U.S. and foreign carriers. For U.S. carriers, disapproval means mainly lack of immunity from the anti-trust laws, a lack which is regarded as very serious and undesirable to U.S.

---

[198]"CAB Regulation of International Aviation," op. cit., p. 580.

[199]Ibid., pp. 580-581.

[200]Leonard Bebchick, "The International Air Transport Association and the Civil Aeronautics Board," Journal of Air Law and Commerce 25 (1958), pp. 12-13.

carriers, for it increases the probability of, and decreases the freedom from, prosecution. For foreign carriers, especially European, the open rate situation is undesirable because they fear that U.S. carriers would take the initiative in undercutting the market.[201]

In disapproving an IATA agreement, the Board aims at minimizing monopolistic and anticompetitive actions which it feels will not assist in securing the lower international rates it favors. However, it has also been argued that despite the belief that open rates would result in rate reductions, the carriers have not reduced their rates in response to Board disapproval.[202] The Board, however, has some other informal tools in connection with this power to disapprove agreements.

One of such tools is the consultations it holds at times with U.S. flag carriers that are members of IATA before each IATA meeting. Those carriers are expected to make the Board's position clear to the Conference.[203] Although the influence of such discussion is questioned, it is unlikely that IATA members would totally ignore the CAB position on that particular issue due to the importance of the United States as a significant single market in international air transport, and due to the fact that disregard for the position of the CAB may lead the U.S. Congress to increase the CAB power.[204]

Another alternative method or tool the Board may use to pressure IATA to consider the Board's position is to threaten disapproval of a

---

[201] Ibid., pp. 13-14.

[202] "CAB Regulation of International Aviation," op. cit., p. 581.

[203] Ibid., p. 582.

[204] Ibid., p. 582.

resolution unless certain modifications are made. In this regard, it has been argued that a threat may provide results, even though actual disapproval might not, as long as the carriers are apprehensive of what might happen in an open rate situation.[205]

A third alternative method yet for the Board to use is to employ the device of conditioned approval. The Board in this way can approve for one year, threatening later disapproval if changes are not made.[206] It has been argued that this device of conditioned approval provides flexibility without sacrificing control. If IATA fails to meet a specified condition attached to the approval of a resolution, the Board can revoke its (412) approval.[207]

With the change in policy focusing more on consumers' interests following the Bermuda II event, the Board recently resorted to a new procedure in connection with its power to approve or disapprove carriers' or IATA agreements. On June 8, 1978, the Board issued an "Order to Show Cause."[208] This order questioned the concept of anti-trust exemption enjoyed by U.S. carriers and required IATA and other interested parties to submit their pleas prior to a decision relating to the future of U.S. participation in the Traffic Conference System of setting international tariffs. All CAB members concurred except member Richard O'Melia, who concurred in part and dissented in part.

---

[205] Ibid.

[206] Ibid.

[207] Bebchick, op. cit., p. 13.

[208] CAB Order 78-6-78.

Because of the importance and significance of the findings and conclusions set forth in this show-cause order, a brief look into those findings and conclusions is useful for their summary type of historical and developmental approach in world and U.S. affairs relating to this issue.

The show-cause order noted that when the Board approved the initial agreement in 1946, the majority took the position that the IATA proposal was the best available solution to a problem arising from a deficiency in the Board's statutory powers over fares and rates in foreign air transportation, which was limited to the removal of discrimination under Section 1002(f) and the approval or disapproval of agreements under Section 412. The Board also lacked power to suspend and investigate international fares and rates. the show-cause order also cited other factors that influenced the Board's decision to approve the IATA Traffic Conferences. Among such factors was the strong competitive position of U.S. flag carriers compared with the relatively weak or non-existent European carriers. The order also indicated that the Europeans feared that the U.S. government would not be able to control "economic rate cutting" by U.S. flag carriers, in addition to foreign policy considerations requiring cooperative stance with western Europe.

In justifying its show-cause order, the Board noted that the circumstances have changed since 1946, bringing about the following significant factors:

1. The enactment of Section 1002(j) of the 1958 Act in 1972 has caused a modification which by itself warrants reappraisal of CAB acquiesence in the Conference method of rate setting.

2. U.S. carriers have ceased to dominate international aviation and it is no longer reasonable to assume that they alone have the resources to engage in price competition.

3. The bargaining power of U.S. allies is now much more equal to that of the U.S.

4. Wishing to be cooperative with U.S. trading partners does not mean that the multilateral rate making through IATA is the sole mechanism through which friendly and mutually beneficial aviation relationships can be structured.

Other recent significant developments cited by the show-cause order include the relaxation of charter rules which led to lower fares and the current open rate situation in the North Atlantic which has encouraged the institution of deeply discounted promotional fares.

The Order indicated that the Board found that the above factors prompt reconsideration, that the recent developments reflect the breaking down of the IATA mechanism, at least temporarily, and that a thorough exploration of the merits of continuing the Board's approach of the Traffic Conferences machinery and related resolutions is warranted and necessary.

In affirming the Board's belief that modern air transportation has proved quite adaptable to regulation by the market place and that as a regulator it should rely increasingly on competition to promote public interest, the Order indicated that the Board increasingly allowed competitive forces to determine levels of price, market entry, and service. The Order also indicated the Board's opinion that wide departures from the principles of the anti-trust laws should be permitted, if at all, only to achieve important objectives that would

otherwise be foregone, and that the Local Cartage standard was now to be used to test anti-competitive proposals.[209]

In his concurring and dissenting statement, CAB member Richard O'Melia indicated that he fully supported conducting a review of IATA, to the extent that it is a review only (emphasis added), but that, in his opinion, the Board did not have the data or depth of analysis necessary to reach tentative conclusions on the dismantling of IATA, nor did it have a sufficiently clear picture of what would replace it.

At the time this chapter is written, the show-cause order was still under study. More on this subject will be provided in the final chapter. If an agreement or an IATA resolution meets with the Local Cartage standard, the Board will of course approve such an agreement or resolution leading to carriers' immunization from the operation of the anti-trust laws as stipulated in Section 414 of the 1958 Federal Aviation Act.

Issuance of foreign air carriers' permits. The issuance of foreign air carriers' permits is the second tool available to the Board to perform its statutory responsibility in international air transportation. The 1958 Act provides that foreign carriers may not fly into the U.S. without a permit issued by the Board.[210] In issuing such

---

[209] The Local Cartage Agreement Case, 15, CAB 850, 853 (1952). Under this standard, the Board will not approve anti-competitive arrangements unless it can be demonstrated that they are required by a serious transportation need or are necessary for the attainment of important public benefits.

[210] Section 402(a) 72 Stat. 757, 49 U.S.C. 1372(a), (1958).

permits, which is usually conducted as a matter of course upon the completion of the proper negotiating process between the two governments, the Board will consider the applicant's qualifications and the public interest. The 1958 Act also provides the Board with power to attach to such permits reasonable terms, conditions, or limitations as may be required by public interest. The Board has often utilized this power to promote policy objectives stipulated elsewhere in the Act.[211]

This power accorded to the Board by the 1958 Act is subject to two limitations as follows:

> 1. That the Board must exercise its power consistently with the obligations assumed by the U.S. in any treaty or agreement with a foreign government, and
> 2. That some conditions which extend its regulation to matters over which it has no substantive authority under the Act may be illegal.[212]

The President

The 1958 Act provides that:

> . . . any certificate authorizing an air carrier to engage in foreign air transport . . . or any permit issuable to any foreign air carrier . . . shall be subject to the approval of the President.[213]

This statutory power afforded to the President is absolute in nature. The President may use it for whatever reason he sees fit, be it economical, political, or military. The Supreme Court interpreted the Act as barring judicial review of any action by the Board that is subject to

---

[211] "CAB Regulation of International Aviation," op. cit., p. 583.

[212] Ibid., pp. 584-585.

[213] Section 801, 72 Stat. 782, 49 U.S.C. 1461 (1958).

the approval of the President.[214] The Court reasoned that it would be an interference with the executive prerogatives to require the President to state the grounds of his action or to review the order in the absence of such reasons. The Court regards the Board's function as advisory to the President, who was free to disregard its recommendation. Although the Court may have inferred in that case the likelihood that the President's exercise of discretion will involve foreign policy or national defense, the statute does not limit the President's consideration to such factors only.[215] It is thus argued that the role of the President in the regulatory process is very important and can influence the Board's regulatory decisions in international air transport.

E. Procedural Considerations

Two important procedural aspects of U.S. air transport bilaterals will be dealt with here--the formation and the negotiation aspects.

Formation of the Bilaterals

The formation, implementation, interpretation, modification, and termination of treaties have received some general treatment in the beginning of this chapter. Here, however, we shall deal specifically with certain procedural aspects that take place prior to the signing of air transport bilaterals.

---

[214] "CAB Regulation of International Aviation," op. cit., p. 586; with reference to Chicago and Southern Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948).

[215] Ibid.

Two processes of the formation aspect of bilaterals, not necessarily different from each other, will be mentioned here. The first comprise five basic steps as follows:

1. The CAB designates (certificates) a U.S. carrier or carriers to serve a particular international route.

2. The state and the CAB negotiate a bilateral with the other government concerned. (Steps 1 and 2 may be interchanged in sequence.)

3. In the case of a bilateral with a Communist country, such as the U.S.S.R., the designated U.S. carrier negotiates a separate inter-carrier commercial technical agreement with the foreign airline involved.

4. The FAA is charged with ascertaining that the foreign carrier meets safety and navigational requirements as established by ICAO and FAA regulations.

5. The CAB processes and, after approval by the President, issues a foreign air carrier permit. (See supra under CAB.)[216]

It has been indicated that even though this basic process as stated in these rudimentary terms, seems relatively straightforward, it is quite complex in practice, for it involves elaborate interactions among a number of governmental agencies and between those agencies and the commercial carriers.

The second process of formation comprises the following elaborate steps:[217]

---

[216]Hans Heymann, Jr., The U.S.-Soviet Civil Air Agreement from Inception to Inaguguration: A Case Study (Santa Monica, California: Rand, 1972), p. 6.

[217]Stoffel, op. cit., pp. 124-125.

1. A. U.S. carrier may apply to the Board for a certificate of public convenience and necessity to provide service to a given foreign country.

2. The Board may then request the state to undertake negotiations with that foreign country to permit such services.

3. Close informal coordination may then take place between the state and the CAB to establish what rights are desirable and what rights may be offered in exchange.

4. The CAB may then consult not only with the carrier certificated to service that route but also with other carriers that may have interest in the matter.[218]

5. Preliminary contacts may then take place between the two governments through diplomatic channels.

6. The standard form of air transport agreement based on the Bermuda Principle may be proposed for the conclusion of a bilateral.[219]

7. When the other government agrees in principle, formal delegations from both countries are designated to conduct negotiations for the conclusion of a bilateral.

8. A. U.S. delegation is normally made up of one or more members of the CAB, members of the Board staff, officials from the State,

---

[218]Recent developments indicate that the government may also consult with interested U.S. entities other than the airline industry.

[219]This may not hold true as a result of recent developments in the Policy and in bilateral negotiations following the Bermuda II event.

and observers representing the Air Transport Association of America (ATA).[220]

9. If the agreement can be reached on the basis of the Bermuda Principle (now disputed) with some modifications to suit local conditions, and if a schedule of routes is appended to that agreement, approval for the conclusion of that agreement is then obtained from the Secretary of State or an official designated by him.[221]

10. Close coordination with the Board and with the industry continues at every step of the process.[222]

11. When the agreement is concluded and signed, it is published as part of the Treaties and other International Acts Series (T.I.A.S.).

Without considering special cases of bilateralism in air transport and recognizing that no two agreements will involve the same circumstances due to the involvement of many variables of national and international nature, economical or political, the process listed above is perhaps still the one followed in reaching most bilaterals, with some minor changes here and there.

Negotiation of Bilaterals

Somewhere during the process of formation, the real negotiating phase takes place, determining the final outcome. The closer the

---

[220]It should be noted that officials from the Department of Transportation will necessarily participate in the delegation. Stoffel's article was written in 1959. Also, observers from U.S. entities other than the airline industry may be permitted to participate.

[221]Of course, if the Bermuda Principle is not accepted as basis for the agreement, difficulties arise as was indicated earlier and as was the case in the Bermuda II Agreement, which will be treated later. The Bermuda Principle may not be the desired goal of U.S. negotiations, according to recent developments.

[222]This has been disputed in the formation of Bermuda II.

philosophies and policies of the two countries are, and the more equal the exchange of economic benefits as perceived by the two parties, the easier the negotiation becomes and the less time is consumed.

The scope of the standard form developed at Chicago was relatively narrow and dealt basically with the following six spheres:

> a. Designation of the airlines for the operation of agreed services and their qualifications;
> b. Procedure for granting the operating authorization;
> c. Applicability of national law and regulations relating to the operation of aircraft and to the admission to or departure from national territory of passengers and other traffic;
> d. Recognition of aeronautical certificates and licenses;
> e. Nondiscrimination in the imposition of airport and other charges;
> f. Customs exemptions for fuel, oils, spare parts, etc., destined for use by aircraft operated on agreed services.[223]

The topics and elements of negotiations are various but the most important of those are routes, privileges for the use of airspace, rates, frequencies, capacities, and degree of economic control.[224]

Other specific elements and topics that are also significant and usually considered in bilateral negotiations are beyond rights,[225] multiple designations,[226] change of aircraft or gauge,[227] the charter

---

[223]Z. Joseph Gertler, "Bilateral Air Transport Agreements: Non-Bermuda Reflections," Journal of Air Law and Commerce 42 (1976), p. 789; with reference to ICAO Doc. 2187 (1960), pp. 20-21.

[224]Diamond, op. cit., pp. 426-427.

[225]Stoffel, op. cit., pp. 128-129.

[226]Ibid., pp. 132-133. This issue received some significance in the negotiation of Bermuda II.

[227]Ibid., pp. 133-134.

issue, and other anticompetitive and discriminatory practices when possible. Technical provisions are less frequent.[228]

The negotiation phase of the process as well as the final outcome may be influenced, at times, by political and military factors, such as in the case of the U.S.S.R. agreement, or by hard-line stands from either of the parties or hard concessions from both parties, such as in the case of the Bermuda II Agreement. Both cases will be discussed later in Chapter V.

F. Summary

Four different types of considerations relating to the bilaterals have been discussed thus far. The first of such considerations deals with the treaty form of international agreements as viewed in international and national law. We discussed how treaties are formulated and implemented and looked at some problems connected with the interpretation of certain treaty provisions, especially those that come as a result of compromise and are usually drawn in a language to suit both parties. We also looked at some factors that govern the modification and termination of treaties in general terms. Finally, we looked at how the term "national interest" comprises almost all other international elements considered in the conclusion of any bilateral, whether they are economical, political, or military.

Under the second type of consideration, we dealt mainly with the issue of air transport bilaterals being conducted as executive agreements rather than treaties. We looked into this controversy

---

[228]Gertler, op. cit., p. 787.

with highly political connotation and discussed the various theories advanced by both opponents and proponents of executive agreements, based on two basic grounds--the long-standing practice of the U.S. and the foreign policy issue.

Under the third type of consideration we discussed the regulatory roles of the CAB and the President, especially with relation to carrier agreements, and mostly those dealing with the IATA rate-making mechanism. We saw how the CAB arrived at its conclusions, which resulted in the issuance of its order to show cause. We discussed the various tools available to the CAB in performing its statutory responsibilities and how the anti-trust laws fit into this regulatory process.

Under the fourth and last type of considerations discussed in this chapter, we looked into some procedural aspects relating specifically to the formation and negotiation of air transport bilaterals.

Under the formation of bilaterals, we looked at the process that the bilaterals go through before they are signed. Within the process of formation, we discussed the negotiation phase and the major elements that usually lend themselves to the negotiations.

CHAPTER V

THE BILATERALS: SIGNIFICANT AGREEMENTS

A. Introduction

The study here will comprise three kinds of significant agreements, the first of which leans heavily toward control of the air and has proven to be a most unique agreement for several reasons of political, military, and national security nature.

The second of this type of agreements is one that ended more than thirty years of air transport relations which had been based on the Bermuda Formula between the two parties that established that formula. We will discuss the reasons for denouncing the Bermuda Formula and elaborate on the various aspects which surrounded the denouncement of the formula, the agony that evolved in the formation and negotiation process, the legal controversy that arose and is still pending, and the impact and reaction to the agreement.

In the last type of such agreements, we will discuss a group of agreements that followed the renouncement of the Bermuda Formula and that were concluded in an attempt by the U.S. government to pursue a vigorous liberal approach. This discussion will be followed by a brief summary on the contents of this chapter and some relevant conclusions on all three chapters on the bilaterals.

B. Control of the Air: The U.S.-U.S.S.R. Agreement

The U.S.-U.S.S.R. bilateral[229] is perhaps the most unique bilateral on air transport that the United States had entered into in spite of its insignificant economic impact on the industry as a whole. The uniqueness of this agreement comes partly from the lengthy process of its formation--lengthy for obvious international reasons, or specifically, for reasons that were highly related to national interest and weighted by both political and military issues. The process of formulating this agreement took almost eleven years and two additional years elapsed before it was first implemented. Our analysis of this bilateral will attempt to cover material relating to the departure from the Bermuda Formula and some international regulatory and procedural aspects.

Departure from the Bermuda Formula

The Soviet Union did not attend the 1944 Chicago Conference and had no desire to share in the international air transport markets, especially in the North Atlantic where the United States sought to enter, giving up its concept of open skies by conceding to fare and rate regulation by IATA traffic conferences as was explained earlier. The Soviet Union, however, remained outside this international market in an isolation which was quite tight.[230]

---

[229] U.S., Department of State, Treaties and International Agreements Series (T.I.A.S.) 6135 (1966).

[230] Hans Heymann, Jr., "The Soviet Role in International Civil Aviation," Journal of Air Law and Commerce 25 (1958), pp. 256-280.

It was only in 1955 that the United States considered the subject of a U.S.-Soviet agreement on air transport. The event was the Geneva Conference of Foreign Ministers, where the United States, the United Kingdom, and France proposed to the U.S.S.R. a tripartite approach for exchange of air services. The U.S.S.R., however, declined that proposal and expressed a desire to deal bilaterally with each country.[231]

Naturally, it was not the United States nor either of the two other countries (U.K. and France) that obtained rights to fly into the U.S.S.R. The first Soviet civil air agreement was entered into with Finland, permitting reciprocal air services between the capitals of the two states.[232] The U.S.S.R. also eventually concluded bilaterals with other countries before it entered into agreement with the United States.[233]

Later, when an official discussion between the delegations of the U.S. and the U.S.S.R. took place, the latter proposed an agreement, in principle, on the establishment of reciprocal direct air transportation service between the two countries, a proposal which was accepted by the U.S. delegation and which indicated that such a service must be conducted in accordance with the Chicago Convention and the standard provisions in more than fifty U.S. bilaterals, meaning the Bermuda Formula.

---

[231]Heymann, The U.S.-Soviet Civil Air Agreement, op. cit., p. 36.

[232]Ibid. The Finland-Soviet Agreement was dated October 19, 1955.

[233]Ibid., pp. 36, 39. Those other countries include the Scandinavian countries and the United Kingdom; see also Heymann, The Soviet Role in International Aviation, op. cit., p. 276.

This U.S. position was affirmed by President Eisenhower on December 9, 1957, on his policy guidance on "U.S.-Civil Aviation Policy Towards Sino-Soviet Bloc," which emphasized the need to base U.S.-Soviet civil air relations on the principle of equal benefit and acceptance of established international conventions and standards.[234] However, it took some three years of interrupted negotiations due to political and military reasons which will be discussed later for the United States to agree to depart from the U.S. standard Bermuda Formula in this case of bilateralism with the Soviets.[235]

The CAB in its briefing to U.S. carriers pointed out that the restrictive characteristics of the proposed agreement would be as follows:

1. Service will be provided only to terminals in each country, with no "beyond rights."

2. Only one carrier is to be designated by each country.

3. Capacity is to be predetermined.

4. Capacity and rates are to be fixed by agreement between the carriers subject to approval by both governments.

5. Both airlines must begin services concurrently.

6. Services of both carriers can be suspended by either government.

---

[234] Ibid., p. 37.

[235] Ibid., p. 40. The U.S. agreed to depart from the Bermuda Formula for various reasons, including the fact that the U.S.S.R. was not a member of ICAO and that Aeroflot was not a member of IATA at that time. The U.S.S.R., however, adhered to the 1944 Chicago Convention in 15/10/1970, but stayed out of the IATA.

7. Agreement can be terminated on six months' notice.[236]

Each of those restrictive provisions will be briefly discussed in the light of the agreement that was signed five years later.

Terminal to terminal routes. The design of routes from terminal to terminal, with no beyond rights, was obviously for security reasons. The fact that the bilateral had a detailed description, in the Supplementary Agreement, of such a route supports this assumption. The annex of the original agreement described the direct route for each of the two carriers as follows: ". . . for the Union of Soviet Socialist Republic Moscow-New York and return, nonstop in both directions, except for agreed technical stops" and ". . . for the United States of America New York-Moscow and return, nonstop in both directions, except for agreed technical stops."[237]

This route, however, was later amended to include intermediate points with stopover rights for the carriers of both countries.[238] This in turn removed the restriction of terminal to terminal destinations but retained the restriction of no beyond rights, even though each of the two countries have beyond rights in other bilaterals. Naturally, these restrictions are not in accord with the Bermuda Formula, which permitted all the five freedoms for necessary and purely economic reasons. The provision of no beyond rights, however,

---

[236]Ibid., pp. 42-43. This briefing was given by the CAB on March 29, 1960.

[237]Tables I and II consecutively in the Appendix of the U.S.-U.S.S.R. bilateral.

[238]Heymann, The U.S.-Soviet Civil Air Agreement, op. cit., p. 54.

was not left absolute, for the Annex expressly stipulates the possibility of allowing such rights, provided they are stipulated in the Tables of Agreed Services.

Designated carriers. In accordance with the agreement of having only one designated carrier, the U.S.S.R. designated Aeroflot, and the U.S. designated Pan American World Airlines. The United States government can, of course, designate any other airline, provided the administrative and procedural considerations are taken care of and provided that the designated carrier enters into an agreement with Aeroflot for resolving technical and commercial questions not covered by the agreement, as stipulated in Article 2 of the bilateral.

Recent talks with responsible Pan Am officials indicate reluctance of other airlines, in response to U.S. policy change, to conduct service to the U.S.S.R. mainly because of the unattractive economics involved. The Bermuda Formula, of course, provided no restriction on multiple designation, as was explained earlier.

Capacity predetermination. Articles 3 and 2 of the Bilateral determine the general conditions relating to the capacity issue. Article 3 provides, in part, the following:

> 1. The capacity to be provided . . . shall be related primarily to the requirement of the traffic having its initial origin or ultimate destination in the territory of the Contracting Party whose nationality the airline possesses. . . .
> 2. The designated airline . . . shall submit periodically . . . traffic statistics. . . .
> 3. There shall be fair and equal opportunity . . . .

Article 2 provides, in part, the following:

> 2.2 . . . All technical and commercial questions not covered by this agreement . . . in particular, the establishment

> of schedules, frequency of flights, capacity, fares and rates . . . shall be solved by agreement between the designated airlines.
>
> 2.3 Those agreements are to be approved by the governments.

Another provision that could affect the capacity issue is that concerning consultation, as specified in Article 16 of the Bilateral. The Bermuda Formula avoided predetermination of capacity and provided an ex post facto provision, as opposed to the consultation process, for resolving disputes thereof.

Fares and rates. Article 4 of the agreement dealt with fares and rates, stipulating that all fares and rates shall be established at reasonable levels and that such fares and rates shall be filed with the appropriate authorities. (See above under capacity predetermination.) Capacity fares and rates are to be fixed by carrier agreement, subject to government approval.

As to be expected, the Bilateral did not provide answers for what would happen if the carriers did not agree, or if any one of the governments did not approve such carrier agreements. Such a dispute might be resolved either through the consultation provisions in Article 16, or through either of the extreme provisions of suspension and/or denunciation stipulated in Articles 5 and/or 17, respectively. These resolutions, of course, are not in accord with the standards set forth in the Bermuda Formula, as was discussed earlier.

Concurrent airlines service. Security reasons may have had more weight than economic reasons for the provision for airlines to begin service concurrently, as set forth in Article 2.3. The inagural service by both carriers was conducted on the same date (July 15,

1968), with Aeroflot using IL-62 and Pan Am using Boeing 707, on a frequency of once a week between the two cities.[239] The Bermuda Formula did not, of course, provide for such restrictive conditions.

Suspension of service. Article 5 of the Bilateral reserved the right of each of the two parties to withhold, suspend, or revoke the agreement under the following circumstances:

1. Dissatisfaction by one party resulting from the belief that substantial ownership and effective control of such airline are vested in nationals or agencies of the other contracting party.

2. Failure of an airline of one contracting party to comply with the laws and regulations of the other contracting party as stipulated in Article 9 of the agreement.

3. Failure of an airline to perform its obligations as set forth in the Supplementary Agreement.[240]

4. Failure to fulfill the conditions under which the rights are granted in accordance with the agreement on the basis of reciprocity.

This withholding, suspending, or revoking was to take place only after prompt consultation between the two governments, except in the case of failure to comply with the laws and regulations referred to in Article 9.

Although not as restrictive, a similar provision was provided for in Article 6 of the original Bermuda I Agreement, and those

---

[239] Ibid.

[240] The Supplementary Agreement is very detailed, dealing mainly with safety and security measures.

that followed its standards. In the Bermuda type agreements, however, such a provision was deemed essential for reasons of sovereignty and to compensate for the feeling of dissatisfaction from one party in cases of economic abuse by the other party. In the case of the Soviet Agreement a political reason is added regarding security or generally national interest. Unlike the Bermuda type agreements, this power to suspend in the Soviet Agreement is tied to other highly detailed provisions.

Termination on six months notice. A provision for termination on six months notice perhaps signifies a higher level of distrust between the parties, since the Bermuda type agreements provide for a twelve, rather than six, months notice.

Upon analysis of the above provisions, one can argue that the Soviet Agreement departs a good deal from the Bermuda Formula and remains perhaps the most restrictive of all U.S. air transport bilaterals with other countries, especially in this new era of liberal U.S. policy.

The International Aspect

Two important aspects of the Bilateral will be discussed here--the uniqueness of the Bilateral as an executive agreement, and some other international aspects.

Unique executive agreement. In spite of the fact that the Soviet Agreement is not a treaty within the meaning of the U.S. Constitution in that it cannot be subjected to advice and consent by the U.S. Senate, it has received a great deal of congressional

attention from its inception in 1955 to its inauguration in 1968. It has also received the attention of three presidents, and unlike any other executive agreement, a good deal of coordination with the Congress until the congressional opposition completely faded away before the agreement was actually signed in 1965.

Congressional participation in the formation of this important (international treaty) executive agreement is discussed here only to illustrate the significance and uniqueness of this particular bilateral. Due to the unique political environments that exist between the U.S. and the U.S.S.R., it is not unsafe to say that coordination by the President with the Congress, or more exactly, congressional leaders would be highly likely. However, it has been argued that prior to 1963, both documentary files and personal recollections of government officials were uninformative on this matter.[241] This informational gap, it was argued, may be explained by the fact that the art of formal congressional relations was not highly developed at the Department of State during this early period, and that on major foreign policy issues the dialogue between the two branches of the government tends to be conducted mostly in the form of off-the-record conversation between the individual White House aides and congressional leaders.[242]

However, during 1963, 1964, and later years, the State Department took a "formal sounding" of congressional views due to the fact

---

[241] Heymann, The U.S.-Soviet Civil Air Agreement, op. cit., p. 21.

[242] Ibid.

that there was considerable congressional opposition to entering into an agreement with the Soviets.[243]

Open congressional hostility began in 1963 when the partial nuclear test ban treaty came before the Senate for ratification. That, coupled with the earlier wounds of the Berlin Confrontation and the Cuban missile crisis, added to the vigor of the opposition, and the attempt of President Kennedy to use the treaty and the agreement as vehicles for reducing U.S.-Soviet tension was described as imprudent. The efforts of the Department of State to explain the agreement to the opposing congressional leaders in order to elicit their support was quite ineffectual.

Opposition to the agreement mounted perceptibly in early 1964 after Soviet fighters shot down two U.S. military aircraft that had strayed into East Germany within a brief interval. Such opposition to the agreement, however, reached its climax on March 20, 1964, when the joint Senate-House Republican leadership issued a formal statement opposing the signing of the agreement. Concern by the executive branch about this congressional opposition continued, however, to dominate the discussion of the agreement for the rest of the year.

By September 1966, when President Johnson decided to proceed with signing the agreement, congressional opposition had completely evaporated. One may safely conclude, then, that this cooling off of congressional opposition and the general atmosphere of acceptance of the agreement by the Congress and the industry put such executive

---

[243]Ibid., pp. 21-22.

agreement further away concerning the possibility of its being challenged on legal or constitutional grounds.

Other international aspects. As argued earlier, every matter that any state or country may take into consideration in dealing with other countries relates directly in some way to national interest. Within this framework of thinking, we will look into some international considerations that influenced the formation and implementation of the Soviet Agreement, directing our attention mainly to the political and national security issues. Economic aspects are not as significant, since only one carrier is thus far involved and no other carrier showed interest to get involved with conducting operations within the bounds of the agreement and within environments so characterized with highly international political tension.

It took eleven years to conclude an agreement and two additional years to commence implementing it for less than two months when services had to be postponed for political reasons. This fact merely indicates how international events that bear no relationship to air transport could affect commercial air transport service. We will take a brief look into such aspects and events which have been arranged chronologically and see how they influenced the formation and implementation of the Bilateral.

Some of those significant events were as follows:

> Nov. 4, 1956: Soviet military suppression of Hungarian uprising results in one-year hiatus after reasonable progress of talks.
>
> Feb.-July 1958: Increased apprehension over Soviet policies in the Middle East . . . causes controversy and second thoughts on desirability of agreement.
>
> Nov. 1958: The Berlin Confrontation results in putting off all thoughts of bilateral.

May 1, 1960: U-2 shot down over Soviet territory casts pall over U.S.-Soviet relations.

1965-1966: Deepening U.S. combat involvement in Vietnam freezes bilateral thoughts.

July 1, 1968: Nuclear Nonproliferation Treaty signed, and agreement reached to begin SALT talks, which lead perhaps to beginning of inaugural flights.

Aug. 21, 1968: Soviet Army occupies Czechoslovakia.

Sept. 5, 1968: Department of State informs Soviet Ambassador that second Aeroflot inaugural flight should be postponed "because of the current international situation."[244]

Those various events clearly indicate how worldwide international events can significantly influence the formation and implementation of a bilateral on air transport, even though they were not related to air transport. They are, however, as seen by the government, closely related to national interest, and thus it becomes unavoidable that they should affect the outcome of the negotiation of an insignificant bilateral from the economic viewpoint.

The Regulatory Aspect

The role of the president (or presidents) in the formation and subsequent implementation of the Bilateral has been most dominant due to the unique and significant political situation. The role of the CAB, however, was reduced to a minimum for the same reason. This role also is expected to remain unchanged.

In spite of the detailed provisions and clauses of the Bilateral, there are still terms in the agreement that lend themselves to more than one interpretation, such as those terms relating what should be considered reasonable, fair, or equal. Such terms may lead to disputes either in connection with the regulatory process or in relation to suspension or termination.

---

[244]Ibid., pp. 35-54.

The Procedural Aspect

Only one important procedural aspect, the format of the Bilateral, will be briefly discussed here. The format of this Bilateral is somewhat unique. The agreement was executed in several parts, each made as an integral part of the Bilateral expressly or consequentially. Those parts are as follows:

1. The major text of the agreement consisting of seventeen articles and incorporating the other parts into it.

2. The Annex, made up of four articles and the description of the routes agreed upon. The Annex also designates the carriers and the agreed freedoms of the air.

3. The Supplementary Agreement. This part of the agreement is one that is usually not incorporated in U.S. air transport bilaterals. It sets, in detail, technical procedures of routes and operations for safety and national security reasons.

4. Carrier's Agreement. This part is also unique to such an agreement, since it leaves much detail to be determined by the carriers, Pan Am, a privately-owned, and Aeroflot, an official government-owned, controlled and supported enterprise.

Other U.S. bilaterals following the Bermuda Formula leave much of such detail (mainly air fares and rates and other trade aspects but not including capacity or frequency) to IATA. In both cases, however, such agreements are subject to government approval.

C. Denouncing the Bermuda Formula: The Bermuda II Agreement

Formal ending to the Bermuda I Agreement came in the diplomatic note dated June 22, 1976, with this introduction:

> . . . Her Majesty's Government believes that the time has come to renegotiate the Bermuda Agreement as a whole. Accordingly, they . . . serve notice of termination of the Bermuda Agreement, as amended . . . .[245]

As was indicated in Chapter I, the U.K. provided five reasons for the denunciation of the Bermuda II Agreement. It proposed that some changes and improvements should be considered to assure better balance of benefits and more profitable operations for its airlines, as follows:

> Routes were to be realigned to give greater benefits for U.K. carriers.
>
> Capacity was to be more tightly regulated to provide greater efficiency of operations and greater opportunity for U. K. carriers, and
>
> The tariff mechanism was to be improved, so that the CAB could no longer issue eleventh hour vetoes of rate increases.[246]

The problems that existed years before the note of termination was served were numerous, and they have given the United Kingdom inclination to make unilateral interpretation of the provisions of the Bermuda I Agreement, in addition to taking unilateral actions to enforce the U.K.'s interpretations of those provisions.[247] In fact,

---

[245] U.S., Congress, House, Hearings before the Subcommittee on Aviation of the Committee on Public Works and Transportation, 95th Congress, 1st session, Sept. 29 and Dec. 2, 1977. (Washington, D.C.: U.S. Government Printing Office, 1978), Ser. No. 95-31 (hereinafter cited as House Hearings on the Bermuda II Agreement), p. 6.

[246] Ibid., p. 8.

[247] Ibid.

at the time of the denunciation of the Bermuda I Agreement, there were still several problems pending and pressing for immediate attention, making it more difficult to negotiate a new agreement suitable to the U.S. Such problems include disputes about the capacity offered by the U.S. carriers in the North Atlantic, U.S. operations at Hong Kong, CAB action on excess baggage, and the opposing interpretation on the legality of a normal economy fare filed by the British.[248]

The whole issue, of course, centered around economic factors and the dissatisfaction of the British with the existing situation then, blamed mainly on the provisions and interpretation thereof of the Bermuda I Agreement, and with the hope of improving the U.K.'s position by reaching a better agreement. An economic analysis for a five-year projected period (1975-1981)[249] presented to the U.K. team during the negotiation, to refute their interpretation of the economic situation of the carriers of the two countries, indicates the importance of U.S.-U.K. Atlantic markets in terms of both tourism spending and air transport revenues for scheduled U.S. and U.K. carrier services. The analysis also illustrates the importance, to the U.K., of both air transport revenues and tourism receipts in terms of G.N.P. As was indicated above, the share of the market was the center of the British concern, whose estimates indicate a 69:31 ratio in favor of the U.S.

With such projections and analysis presented in the early rounds of negotiations, the U.S. delegation contended that if the Bermuda system was to continue, the U.K.'s share of the market would

---

[248] Ibid., pp. 8-10.

[249] Ibid., pp. 65-66.

increase as the years progressed and the U.S.'s share would decrease, bringing the ratio to 45:39 in favor of the U.S. in 1978, with the rest of the share going to other countries. Rejecting this argument, the U.K. also rejected further U.S. arguments that airline revenues would approximate an even division beginning in 1979.

The U.K. contended that the U.S. projections presumed that airlines would act rationally and would reduce the amount of service (capacity) when unprofitable, and insisted on a share of the market by means other than the forces of the market--namely government intervention.

Negotiations about the issues of capacity, tariffs, and multiple designations were also difficult and produced a great deal of tension. However, after many rounds of hard negotiations, the Bermuda II Agreement was, of course, signed at the last minute. Our analysis of the Bermuda II Agreement will show how the Bermuda Formula was denounced, discuss some important legal, regulatory, and procedural aspects of the Bilateral, and will review some of the reactions to that Bilateral.

Denouncing the Formula

As may be expected and as was explained earlier, the denouncement of the Bermuda I Agreement came as a result of continued U.K. dissatisfaction with the Bermuda Formula and the disputes relating to the capacity issue. The denouncement of Bermuda I does not necessarily mean a total denouncement of the Bermuda Formula. However, the choice of descriptive behavior is due to the fact that denouncing the Bermuda

I Agreement, which had laid the basis for the Bermuda Formula, by one of the two parties that established the Formula is not just an insignificant denouncement or renouncement of a Bermuda-type agreement, but a serious act that could produce an undesirable impact on the bilateral relations with other countries.

The Bermuda Formula as a whole came to being because the two concepts of freedom of the air, supported by the U.S., and control of the air, supported by the U.K., could not meet. The compromise was necessary for both countries to depart from their initial stands. Now, the Bermuda II Agreement, it was argued, meant that the British had gone back to their original 1946 position.[250]

By denouncing the Bermuda I Agreement, the U.K. proved that one more amendment to it would not achieve the revolutionary change they had sought for a long time. They sought to establish a completely new look and approach to the 1946 formula. Their goals were to gain equal shares of the routes, predetermination of capacity and schedules, and abolition or contraction of fifth freedom rights.[251] Their main objective was to achieve an economical advantage, namely an increase in the earnings of British carriers through a reduction in the earnings of U.S. carriers.[252]

After the Bermuda II Agreement was concluded, it was feared that it might in turn establish a new model for future U.S. bilateral

---

[250]Robert R. Gray, "The Impact of Bermuda II on Further Bilateral Agreements," Air Law 3 (1978), p. 17.

[251]Ibid.

[252]Hill, op. cit., p. 114.

agreements, especially after the Bilateral was praised by ranking U.S. officials, including the President.[253] This may or may not imply that the U.S. intended for the Bermuda II Agreement to become a new model for U.S. agreements, just as the Bermuda I Agreement was. Subsequent events, however, proved that the Bermuda II Agreement would not make it as a new model for future U.S. bilateral relations.

Will Bermuda II become a model for U.K. agreements? It has been argued that the U.K. will not follow Bermuda II any more than it followed Bermuda I, for the U.K. still has far more restrictive agreements with other countries. If Bermuda II will not establish a new model for either of the two countries, why is it so significant and much talked about? This question will be clearly addressed as we continue with our analysis in this chapter, which will focus on some important issues where the Bermuda II Agreement sought to depart from the Bermuda Formula.

The fifth freedom. The five freedoms of the air are considered critical because of their great economic necessity and impact in conducting air transport operations, especially the fifth of those freedoms. The fifth freedom, as is recalled, allows the carrier or carriers of one state to carry passengers from one foreign country to another (see Appendix C). The U.S. has consistently maintained support for both the Bermuda Formula and the five freedoms, especially the fifth freedom.[254]

---

[253] Gray, loc. cit.

[254] Hill, op. cit., p. 114.

In the Bermuda I Agreement this fifth freedom allowed U.S. flag carriers to pick up British passengers in Britain and its territories and fly them to other points, resulting of course, in a deprivation of revenues from those passengers for the British airlines. The U.K. believed that under the Bermuda Formula, it was losing passengers and thus profits, to U.S. carriers, and that the benefits to the U.S. were far greater than the benefits to the U.K.[255] The U.K. demanded an end to the fifth freedom rights which U.S. carriers enjoyed by stopping much of their fifth freedom rights east of London and west of Hong Kong.

The fact that U.S. carriers made three times the revenue of British carriers on international flights originating on British territory led the U.K. to demand limitation on U.S. carriers' fifth freedom rights through an initial stand of a fifty-fifty share of revenue. The British, of course, did not achieve that goal but did achieve a position more favorable to them than total fifth freedom rights for U.S. carriers.[256]

Specifically, the Bermuda II agreement required the U.S. to surrender fifth freedom rights to twenty-two cities immediately upon signing the agreement, and to give up fifth freedom rights from the U.K. to Belgium and Austria in three years, and to Holland, Sweden, and Norway in five years.[257]

---

[255] Ibid.

[256] Ibid., p. 115.

[257] Ibid., p. 117.

The Bermuda II Agreement, however, did not totally eliminate fifth freedom rights for U.S. carriers. In those particular markets where fifth freedom rights were eliminated immediately or after the lapse of some years, the U.S. retained permanent fifth freedom rights to Frankfurt for two U.S. carriers, and to Hamburg, Berlin, and Munich, plus eleven more cities around the world, for one U.S. flag carrier.[258]

When comparing these routes, however, with the twenty-nine fifth freedom points granted the U.S. in the Bermuda I Agreement,[259] one can see the disappointment and disenchantment with the Bermuda II Agreement.

Another major advantage obtained by U.S. flag carriers in this connection is the unlimited blind sector rights beyond London into Europe.[260] These significant blind sector rights, gained by the U.S., however, were not considered a sufficient economic offset to the reduction of fifth freedom rights explained above.[261]

The capacity clause. The Bermuda I Agreement and the Bermuda Formula in general stipulated that capacity should be adequate to the traffic demands, as indicated earlier. This clause in recent years

---

[258]Ibid.

[259]The Bermuda I Agreement Annex III(b)(1) and (2).

[260]These blind sector rights permit U.S. carriers to carry passengers originating in the U.S. through London and beyond to any point in Europe. Fifth freedom rights, on the other hand, allow passengers originating in London to travel beyond London on U.S. carriers. See Hill, op. cit., p. 117; also Aviation Week and Space Technology (July 27, 1977), p. 27.

[261]Hill, op. cit., p. 116.

and before the renunciation of Bermuda I, was the subject of much controversy, and was one of the major factors that led to the renouncement of Bermuda I by the U.K. Because of this dissatisfaction with the provisions of the capacity clause in the Bermuda Formula, which did not provide for government control, the British sought in the new agreement to include provisions for government control to regulate the capacity offered by the airlines and to intervene in a carrier's decision to offer capacity levels in any market.[262] This, of course, is in conflict with the U.S. policy, which favors minimum government intervention in carriers' decisions. The position of the U.K. was that the capacity provisions of the Bermuda Formula were outdated and had been responsible for creating an over-capacity problem in the North Atlantic and in other markets. This over-capacity, or excess capacity, problem was recognized by the U.S. as well.[263]

The U.K. argued that the ex post facto review method of capacity levels and problems stipulated by the Bermuda I Agreement was, in practice, ineffective and seldom resorted to in any event and that such method should be replaced. In its negotiations with the U.S. on capacity controls, the U.K. called for the establishment of a minimum

---

[262] Ibid., p. 114; see also Aviation Week and Space Technology, (July 26, 1977), p. 29. Capacity levels refer to the numbers of flights per week between two cities or along a particular route. Capacity in general, however, refers to the number of passengers carried within a particular span of time, which could be influenced through frequency and/or type of equipment.

[263] Ibid., p. 115. Over-capacity exists at continuous low load factors that do not economically justify those particular scheduled flights, resulting in loss of revenues to carriers, and higher costs to consumers.

capacity base and for allowing the airlines to agree among themselves on additional capacity increases. In the absence of such an agreement, the allowable capacity would fall to the minimum set by the government.[264] The U.S., however, did not agree to such a plan and insisted on maintenance of the Bermuda Formula.[265]

These two conflicting positions on the capacity issue, the U.S. calling for a status quo and maintenance of the Bermuda Formula and the U.K. calling for positive controls, made the compromise very difficult and threatened interruption of traffic flows in case an agreement was not reached. As indicated earlier, representation of the two countries in the negotiation process was stepped up and hard bargaining took place which finally led to an agreement, the Bermuda II, with its special capacity formula as a compromise between the two positions.

Under the Bermuda II Agreement, the plans for capacity offerings of each carrier would be subject to approval by the other side, and in the case of disagreement an elaborate administrative process would take place by which governments of the two sides could control capacity levels.[266] This capacity formula of Bermuda II is found mainly in Article 11 (Fair Competition) and Annex 2 (Capacity on the North Atlantic). The Bermuda II capacity formula, like the old formula does not seem to be immune from the evils of unilateral interpretation,

---

[264] Ibid., pp. 115-116. The concept of minimum capacity base basically calls for the establishment of carrier capacity allowances at a minimum to avoid overservicing a certain air market.

[265] Ibid.

[266] House Hearings on Bermuda II, op. cit., p. 265.

or at least dispute, in spite of the checks and balances established. It is evident that this new formula was aimed mainly at the North Atlantic markets for which Annex 2 was agreed upon.

Consultation vs. ex post facto. The U.K. had never liked the ex post facto review provided by the Bermuda Formula. The British objection to that type of review probably stemmed from their opinion that review of problems after the fact amounted to too little, too late.[267] It is for this reason that this kind of review was totally eliminated in Bermuda II and was replaced by the concept of consultation, especially in connection with the concern over excess capacity, mainly over the North Atlantic as provided in Article 12 and Annex 2 of the Agreement.

In a joint statement issued by the representatives of the two governments to the negotiation, the following was announced in connection with consultation:

> On the North Atlantic . . . the Agreement provides a consultative process to deal with cases of excess provision of capacity, while ensuring that the designated airlines retain adequate scope for managerial initiative in establishling schedules. . . . It is also the objective of the two nations to avoid unduly frequent invocation of this consultative mechanism.[268]

Multiple designations. While the Bermuda II Agreement never anticipated, nor stipulated for, restrictions on multiple designation, it specifically provided for such limitation. It was aimed, no doubt, at

---

[267]Hill, op. cit., p. 115.

[268]Joint statement accompanying the signature of the original agreement by the Rt. Hon. Edmond Dell, MP, and the Hon. Alan S. Boyd, Special Ambassador.

avoiding the over-capacity issue in addition to providing an opportunity for the U.K. to achieve a better balance of profits. Article 3 of the agreement deals with this subject and stipulates that each country designate only two carriers in the New York-London and Los Angeles-London routes, while all other city pairs which include London may be served by only one carrier from each country. It also provides that each nation may designate an additional carrier, should the traffic on that segment increase or should one previously designated carrier cease to compete sufficiently.

On routes other than New York-London and Los Angeles-London, each country may designate a second carrier in three different situations as follows:

1. If total traffic exceeds 600,000 passengers per year, or

2. If one carrier takes on more than 450,000 passengers per year regardless of the total traffic carried by both carriers, or

3. When one carrier decides not to compete on that route or offers only token service.[269]

Other provisions of Article 3 permit a maximum of three designated carriers for all-cargo air services on certain routes with some restrictions.

These restrictions on the number of carriers that may provide service on a certain market sought to avoid over-capacity, provided mainly by U.S. carriers as the British contended and consequently to

---

[269]Hill, op. cit., p. 118. Token service results when a carrier makes a basic decision to no longer fly a route and offers only one or two flights along the route per week, in essence allowing any other carrier on that route to serve it with no resulting overcapacity.

improve the situation of the carriers of both nations, especially those of the U.K., in its attempt to balance its economic returns.

Tariffs. Bermuda II stipulated that new agreements proposed by air carriers and reached through IATA activities should be filed with the aeronautical authorities of both countries at least thirty days before the proposed date of introduction. In case one of the countries was not satisfied with the new proposed rate, it must notify the other within 15 days. In that event the countries should endeavor to reach an agreement and if they did not do so within the original 30 days, the proposed rate would go into effect unless one or the other of the aeronautical authorities saw fit to suspend its operations.[270]

As was provided earlier, one of the areas of Britain's concern and dissatisfaction with the Bermuda I Agreement related to this tariff and pricing scheme. The British were most disturbed about the attitude of the CAB in connection with its approval and disapproval of IATA rate agreement, contending that the Board increasingly tended to intervene in matters relating to internatinal tariffs at a very late stage in the proceedings to heighten the practical difficulties presented by the time scale set by the agreement.[271] This attitude was plainly indicated in the Diplomatic Note of Renunciation, which argued that the Board disapproved the Summer North Atlantic Tariffs filed with the Board only one day before the date on which they were to take effect.[272]

---

[270]Bernard Wood, "Bilateral Agreements: A Current View," Air Law 3 (1978), p. 24.

[271]Ibid., p. 25.

[272]House Hearings on Bermuda II, op. cit., p. 7.

Article 12 of Bermuda II attempted to correct the situation in a manner acceptable to both countries. The British wanted to distinguish between the tariff agreements themselves and the process of filing those agreements by the individual carriers.

Article 12 did deal separately with tariff agreements, IATA or others, and with tariff filings by the individual carriers by extending time periods for the various actions in order to reduce the chance of last minute disapproval.

Another innovation of Article 12 was the creation of the Tariff Working Group to advise carriers of the views of governments and to facilitate intergovernmental discussions of fare standards. This Group was to make recommendations in accordance with Annex 3 on tariffs including load factor standards within one year of the date of the agreement, and whenever called for, to consider specific issues. The consultation process was also to be utilized when the proposed tariffs were not satisfactory to either of the two governments. The tariff article also provided that, in the event either side would not approve a proposed new tariff, it could require that the former tariff remain in effect and the other country would be obliged to keep their tariffs as well. It has been argued that this kind of provision may have the most serious ill effect from the viewpoint of the traveling public, for it will act as a significant constraint on price competition and the introduction of lower fares.[273]

The charter issue. Charter air transportation of both persons and cargo was not dealt with in the 1944 Chicago Convention. In fact,

---

[273]Ibid., p. 276, with reference to Straszheim, op. cit.

even in 1947 when the CAB adopted some kind of comprehensive regulations covering irregular air carriers (as they were called then), such carriers were generally excluded from foreign air transportation of persons.[274] The Board believed then that because demand for international travel was sufficiently satisfied by U.S. and foreign carriers, any further acitivity in this field by irregulars was unjustified.[275] Not even the Bermuda I Agreement dealt with this issue. As the demand for charter service increased through the years and as the Board tended to promote such activity in order to provide low-cost service for consumers, the issue of air charters, especially in the North Atlantic markets, came to be significant. Competition for chartered traffic and with scheduled traffic also increased between U.S. carriers themselves and between U.S. and foreign carriers. The Bermuda II Agreement as originally signed failed to clarify the charter aspect and provided for dealing with the issue of liberalizing passenger charter service at a later date and to use the consultative process if needed.

Article 14 and Annex 4 were amended later to describe the agreement reached on this issue. It was argued by an official of the Department of State that this charter amendment to Bermuda II incorporated substantially more liberal charter provisions than had previously been available in the U.S.-U.K. market.[276]

---

[274]Lucile Sheppard Keyes, "The Transatlantic Charter Policy of the United States," Journal of Air Law and Commerce 39 (1973), p. 216.

[275]Jack M. Goldklang, "Transatlantic Charter Policy: A Study in Airline Regulations," Journal of Air Law and Commerce 28 (1961/62), p. 100.

[276]U.S. Department of State, personal letter to researcher, op. cit. (see footnote 153 supra).

The Legal Aspect

Bermuda II has again raised the issue of the constitutional or general legal validity of bilaterals, not only in the writings of those who have been touched by the circumstances that surrounded it, or in the hearings conducted by both the House and the Senate on the Agreements, but also in the courts by those who believe that it has violated certain constitutional and statutory provisions. Following is a brief discussion of this controversial issue in two arenas, out-of-court and in-court.

Out-of-court sound-off. One of the strong and elaborate challenges to the validity of Bermuda II raised statutory and constitutional grounds.[277]

This challenge attempted to show that Bermuda II violates the Federal Aviation Act on grounds of being anticompetitive and the Constitution on grounds of being an executive agreement rather than a treaty, as well as violating some other procedural grounds. The same line of argument and challenge was also used in court as will be discussed below in more detail.

It has also been argued that the Constitution requires that U.S. international aviation policies must be developed by Congress and the CAB in the context of the public interest and that Bermuda II should be declared null and void.[278]

---

[277] House Hearings on Bermuda II, op. cit., p. 342. Testimony of Reuben B. Robertson, Director, Aviation Consumer Action Project.

[278] Ibid., p. 373. Testimony of George J. Bean, Director of Aviation, Hillsborough County Aviation Authority, Tampa, Florida.

Most of the above challenges to the legal validity of Bermuda II, as can be seen, came from non-airline entities. Not all airlines, however, have shied from giving an opinion on this issue, for at least one U.S. international airline has asked that Bermuda II be overturned for its restrictive nature.[279]

In-court litigation. It was indicated earlier that Bermuda II was also challenged in court as being invalid for constitutional and statutory grounds. The case was brought to court by the Greater Tampa Chamber of Commerce and others. The case was dismissed by the District Court, then appealed to the U.S. Court of Appeals for the D.C. Circuit.

In their appeal, the plaintiff-appellants advanced three lines of argument in their challenge to the legal validity of the agreement.[280] The first line of argument was based on separation of powers, in that the President had usurped his powers without advice and consent from Congress in concluding that agreement and that Bermuda II should have been a treaty. No further treatment of this line of argument is needed.

The second line of argument was also based on separation of powers, but on procedural grounds, with relation to the appointment of the special ambassador, in addition to other statutory procedural grounds.

---

[279] Ibid., p. 389. Testimony on behalf of Capitol International.

[280] Brief of Plaintiff-Appellants, Greater Tampa Chamber of Commerce, et al. v. Brock Adams, et al., 79-1123, U.S. Court of Appeals, D.C.C., Mar. 26, 1979. (Hereinafter cited as Brief of Plaintiff-Appellants.)

The third and last line of argument was based on statutory grounds, violation of the Federal Aviation Act. Plaintiffs argued that Bermuda II should be set aside because it conflicts with the Act in three areas: elimination of existing competition, capacity limitations, and rate control.

The last two lines of argument will be treated here in some detail.

Appointment of the special ambassador. Besides addressing the issue of ratification of treaties, Article II, Section 2 of the U.S. Constitution provides that ambassadors may be nominated as officers of the U.S. by and with the advice and consent of the Senate. Plaintiffs argued that the President had, without seeking or receiving the advice and consent of the Senate, appointed Mr. Alan S. Boyd as his special representative, with the rank of ambassador, to head the U.S. delegation negotiating Bermuda II.[281] The District Court held that Mr. Boyd was properly installed as the chief U.S. negotiator in accordance with a statutory provision that the personal rank of ambassador or minister may be conferred by the President in connection with special missions for the President of an essentially limited and temporary nature, not exceeding six months.[282] Those two important conditions formulate the basis for such appointment.

As for the second condition (six months), the lower court found that the appointment of Mr. Boyd was proper under the statute and noted

---

[281] Ibid., p. 47.

[282] Ibid., pp. 47-48, with reference to 22 U.S.C., Section 901(C).

that it was contemplated that the negotiating mission would be completed within six months. The appeal argued, however, that this issue was never raised by plaintiffs and thus had no bearing on their challenge to the appointment of Mr. Alan S. Boyd. Plaintiffs, however, raised the first condition (whether the mission was of an essentially limited and temporary nature) on their challenge to the appointment of Mr. Boyd.

The appeal noted that the statements advanced by defendants that Mr. Boyd had only the personal rank of ambassador in no way undercut the applicability of section 901(C) of the statute. It also noted that when the Senate Committee on Foreign Relations reported the bill which contained section 901(C), it propsed total abolition of the use of that title, absent Senate confirmation, except for recess appointment:

> . . . This section requires that persons given the title of "ambassador" or "minister" must first be nominated by the President and confirmed by the Senate in accordance with the requirements of the Constitution. . . . It would thus abolish the present practice of conferring the personal rank of "ambassador" or "minister" on individuals for protocol purposes.[283]

It was also noted that although the House version of the legislation contained no similar provision, the House agreed to the Senate proposal with an amendment that permits the President to confer the personal rank, provided that the above two conditions are observed.[284] The appeal also noted that there is undisputed evidence that, far from being sent on a limited mission, Mr. Boyd was allowed to negotiate a

---

[283]Ibid., pp. 48-49, with reference to S. Report No. 92-754, 92nd Cong., 2nd session, 50 (1972).

[284]Ibid., with reference to H. Report No. 92-1145, 92nd Cong., 2nd session, 166 (1972).

comprehensive and unprecedented agreement with the United States' most important bilateral partner in the field of civil aviation.[285]

The appeal further noted that the defendants' contention that the appointment of Mr. Boyd was no different from the appointment of Linowitz as co-negotiator in the Panama Canal Treaty should be refuted due to the differences relating to the process of negotiation, the role of the appointee, the duration of the appointment, and the fact that the Panama Canal agreement was concluded as a treaty rather than as an executive agreement.[286] The appeal noted that this mistake, which was made by defendants and the District Court, is to simply read the phrase essentially limited out of Section 901(C), thus recognizing as valid any appointment for no more than six months, whatever its importance.[287]

Delegation of authority. The plaintiff-appellants also questioned the validity of the authorization of Mr. Boyd and Secretary Adams to sign Bermuda II on behalf of the United States. The argument noted that the defendants conceded that there was no published delegation of power such as would have been adequate under 3 U.S.C. section 301, and that there was no proof that the President, either specifically or through a standing delegation to the Department of

---

[285] Ibid., p. 49.

[286] Ibid., pp. 50-51.

[287] Ibid.

State, could authorize such a signature, concluding that this was another issue which needed further investigation.[288]

Lack of consultation with the CAB. The argument presented here is that Section 802 of the Federal Aviation Act required advising and consulting with the Board on the establishment or development of air navigation, including air routes and services.[289]

The appeal noted that it was absolutely clear that the CAB was not adequately advised of the progress of the negotiations leading to Bermuda I, nor was it effectively consulted. It concluded that the mere fact that the subject matter involved foreign affairs cannot justify classifying as non-justiciable a challenge to a statutory violation which would be recognized and corrected if presented in another context.[290]

Elimination and prohibition of competition. The Federal Aviation Act has mandated competition in air transportation to the extent necessary to assure the sound development of air transportation to meet the needs of the United States.[291]

The plaintiff-appellants argued that, unlike Bermuda I which permitted unlimited multiple designation on all routes, Bermuda II eliminated competition among U.S. airlines on all routes except New York and Los Angeles and caused a U.S. carrier, Pan Am, to lose its

---

[288] Ibid., p. 52.

[289] Ibid., pp. 4, 52-57.

[290] Ibid.

[291] Section 102(d), 49 U.S.C., 1302(d).

Boston-London route, which was originally determined by public need. They concluded that the effect of Bermuda II was to override both the mandate of the Federal Aviation Act requiring competition and the CAB's formal determination of the public need for competitive service by U.S. airlines on numerous historic routes.[292]

Another argument raised by the plaintiff-appellants in this respect was that Bermuda II severely limits new competitive offerings by air carriers. They argued that of eleven points from which non-stop service by U.S. carriers is to take place by virtue of the Transatlantic Route Proceedings,[293] only two were provided for in Bermuda II--Atlanta and Dallas/Ft. Worth, with Houston giving a three-year lead time to British carriers before any U.S. carrier may offer non-stop service from it and another city to be named later. It was further argued that Baltimore, under Bermuda II, would lose its independent air service to the U.K., since it <u>became a single point with Washington, D.C.</u>[294]

<u>Capacity limitations</u>. The plaintiffs argued that while Bermuda I is consistent with the Federal Aviation Act provision that a carrier may not be restricted from increasing service as the development of the business and the demands of the public shall require,[295] Bermuda II

---

[292]Brief of Plaintiff-Appellants, op. cit., pp. 23-24.

[293]CAB Docket 35908. Tampa was one of the points named in this proceeding but was omitted from Bermuda II.

[294]Brief of Plaintiff-Appellants, op. cit., pp. 26-27.

[295]Section 401(e)(4), 49 U.S.C., 1371(e)(4).

requires U.S. carriers to refrain from increasing service if it will affect unduly British airlines.[296]

The Plaintiff-Appellants argued that in proclaiming Article 11 of Bermuda II legal, the Defendant-Appealees apparently rely on the notion that the President may unilaterally authorize the British government to regulate U.S. airlines in a manner that the statute forbids the CAB to undertake. This, it was noted, reflects a clear attempt to evade Section 401 (e)(4).

The Plaintiff-Appellants also refuted the defendants-appealees' further argument that even without Bermuda II the British could unilaterally limit the number of U.S. flights across the North Atlantic to London. They pointed out that there is a vast difference between a unilateral exercise of sovereign power by the U.K. limiting U.S. carrier frequencies on one hand and a formal agreement by the U.S. accepting such a regime on the other. The Plaintiff-Appellants further argued that under the Constitution, the President cannot unilaterally determine that a statutory policy such as that reflected in Section 401 (e)(4) must be sacrificed in order to achieve some other end which he regards as desirable. If prior statutes are to be abandoned due to the exigencies of negotiation, the Senate must join the President in that decision, or the law must be repealed or amended by Congress and the President.[297]

---

[296] Brief of Plaintiff-Appellants, op. cit., p. 28, with reference to Article 11(2) of the Bermuda II Agreement.

[297] Ibid., pp. 29-30.

Rate Control

The Plaintiff-Appellants argued that Bermuda II provides a set of standards for tariffs in U.S.-U.K. routes and gives the U.K. a veto power over U.S. carriers' rates which are not in accord with the standards established by the Federal Aviation Act.[298]

They argued that Bermuda II required the CAB to take into account the views of the U.K. in reaching decisions on rates and to give due consideration to the recommendation of the Tariff Working Group in reviewing IATA tariffs and agreements. These requirements, they argued, are at odds with the CAB responsibility and authority for rate making in accordance with the statutory standards.[299] The latest developments in this court litigation, if any, will be provided in the final chapter.

The Regulatory Aspect

In this section of the study we wish to re-emphasize and clarify the regulatory roles of both the CAB and the President in the wake of the recent developments, including the Bermuda II event.

The Transatlantic Route Proceeding is one which is related to many markets, including those provided for in Bermuda II. The decision of the Board on that proceeding was submitted to the President for approval in accordance with Section 801 of the Federal Aviation Act. The President returned the decision, approving all aspects except for the award of certain routes to certain air carriers.

---

[298]Section 1002(j)(5), 49 U.S.C., 1482(j)(5).

[299]Brief of Plaintiffs-Appellants, op. cit., pp. 31-32.

In response to petitions of some U.S. airlines affected by the President's decision and to clarify its role in relation to that of the President in international air transport, the Board indicated that:

> . . . While it is true that we generally accept petitions for consideration in international route cases, we do so to enable the parties to address Board findings upon which the President may have relied; not to challenge determinations that he has made independently and against the Board's advice.[300]

The Board, then, wishing to review and clarify the relationship in that respect between the President and itself, indicated that the U.S. Supreme Court observed that Congress had completely inverted the usual administrative process in such matters, and that:

> Presidential control is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies.[301]

This reaffirms the nature of the regulatory roles of both the President and the CAB and shows that Bermuda II had no effect on such statutory and constitutional setting within the meaning of court rulings cited in the above proceeding.

The Procedural Aspect

The analysis here will be limited to the formation of Bermuda II and mainly to the negotiation aspect. The initial positions of the two countries were that the starting position of the U.S. was simply to maintain the Bermuda Formula but the U.K. position was a clear return to its historic position after World War II--control of the air.

---

[300] Civil Aeronautics Board, Docket 25908: The Transatlantic Route Proceeding: Supplementary Opinion and Order, CAB Order 78-1-118, Jan. 11, 1978.

[301] Ibid.

With such disparity in positions and with the solid stand of the U.K., the U.S. felt that the U.K. showed no interest in serious negotiation and that such negotiations would be difficult as long as the U.K. intransigence persisted. Representation of the two countries had to be stepped up to heads of state and after five rounds of talks between February 28 and July 23, 1977, the agreement was finally concluded in its original text.

The negotiating process utilized in Bermuda II was criticized for several reasons, including the extensive use of the small working group in the last phases of the negotiation to the exclusion of the advice of U.S. airlines and other U.S. private entities concerned, the incomplete and ineffective participation of the CAB and finally, the general lack of guidelines and effective strategy to begin with.[302]

D. Quid Pro Quo vs. Liberal

The term liberal gives the impression of the free skies concept and the term quid pro quo gives the impression that there is no such thing as a free lunch. The analysis here will attempt to see how the two concepts differ from each other and will provide a brief discussion on a sample of the recent liberal agreements concluded between the U.S. and other countries.

---

[302]For an elaborate discussion on the negotiating process of the Bermuda II Agreement, see House Hearings on Bermuda II, op. cit.; see also U.S. Senate Hearings on International Aviation before the Subcommittee on Aviation of the Committee on Commerce, Science, and Transportation, 95th Cong., 1st session, Nov. 29 and Dec. 1, 1977. U.S. Government Printing Office, Serial No. 95-50, hereinafter cited as Senate Hearings on Bermuda II.

Quid Pro Quo

The term quid pro quo simply means something for something. In the law of contracts it refers to the legal consideration necessary to formulate a binding contract. Students of contract law, however, recognize the many and various cases surrounding the doctrine of consideration. Quid pro quo was defined as the antithesis of something for nothing, or the expression of the idea of a bargain, an exchange of this for that.[303]

This concept comes to mind whenever an agreement just concluded is branded as a give-away where the airlines of the other side are presumed to have achieved more economic benefits from its implementation than would U.S. airlines. One may recall the controversy that arose in the mid-1950's relating to the German, Australian, and Dutch agreements and the resultant Smathers Report.

Bermuda II has also been branded by some as a give-away agreement that will result in more economic benefits accruing to the U.K.

Even though some liberal agreements were also described by some as give-aways that should not have taken place, relating to certain aspects of the Belgian Agreement, for example, the recent liberal policy approach did not give too much emphasis to this quid pro quo concept.

It has been argued that in concluding the recent liberal agreements, the U.S. employed rough calculations of exchanged economic benefits to insure equivalent quid pro quo in terms of commercial

---

[303]Arthur L. Corbin, Corbin on Contracts (St. Paul: West Publishing Company, 1975), p. 179.

benefits. It was further agrued, however, that making the calculation in this manner tends to obscure the primary interest of the traveling public, the raison d'etre of an air transportation system, and that the concept and such calculation did not go far enough to promote efficient low cost service through competition.[304] The airline industry, however, seems to believe in equal exchange of benefits, whenever an agreement seems to be unfair. It is thus evident that the quid pro quo concept is not the ultimate criteria in concluding a bilateral agreement by the U.S., whose policy it is to place emphasis on consumers' welfare.

Liberal

The Bermuda II event had prompted the U.S. government to re-evaluate its policy and to pursue an approach that would restore balance to the system which had been upset by that agreement. This is not a change of policy on the part of the United States, however, but merely an attempt to return to the original policy of open skies as compared to the conservative Bermuda I system that was characterized by an acceptance of fare regulations by IATA. The U.S. policy zeroed in on concluding new agreements that are described as liberal. The analysis here will not treat any one particular agreement, but will look into those liberal aspects of such agreements in an attempt to illustrate the point.

The open skies concept is the very basic concept which the U.S. wished to pursue in the post-war period but had to abandon for lack of

---

[304] U.S. Department of State, personal letter, op. cit.

acceptance by the rest of the world. It has been argued that there are seven key points that should characterize an open skies agreement:

1. Multiple designation.

2. Liberal route grant for services from/to the homeland of the carrier.

3. No distinction between freedom categories.

4. No capacity (frequency), aircraft type or traffic restrictions.

5. Tariff competition in a fair market place and the promotion of low cost transportation options.

6. Charter freedom.

7. Freedom to do business in each other's territory by diminishing discrimination and unfair competitive practices.[305]

The term open skies seems to be more appropriate when associated with a multilateral agreement than with a bilateral agreement. Or better, the term is best related to a policy rather than an agreement. The fact that open skies between two countries are almost useless without fifth and six freedom rights which require operating rights in other countries makes the use of the description somewhat inappropriate. The term liberal is perhaps more appropriate to use. A liberal bilateral thus is perhaps one that avoids restrictions on those various aspects of operation.

---

[305]H. A. Wassenbergh, "Towards a New Model Air Transport Services Agreement," Air Law 3 (1978), pp. 198-200.

In a broad sense, the term liberal is given to an agreement that enhances competition and substitutes airlines' initiative for government regulations.[306]

We shall look into some aspects of the various agreements that were given the description liberal and that were concluded after the Bermuda II event. Agreements of this liberal kind were concluded between the U.S. and the following countries: Australia, Belgium, Israel, Jamaica, The Netherlands, Peru, Poland, South Korea and West Germany. Generally speaking, these agreements vary in their liberal spirits, from those that are less liberal, such as the Peru and the Australian agreements, to those that are more liberal such as the Belgian, Israeli, Dutch, and the German Agreements.

Most of those agreements seem to have similar provisions that coincide with the new and current model air transport agreement, which is usually issued by the Department of State whenever negotiation of a new agreement arises. This model agreement follows, of course, the new liberal approach the U.S. government is attempting to sell to its air transport partners.

With some minor changes from one agreement to another to suit each situation, those liberal agreements give the United States unlimited route rights and the right to designate an unlimited number of carriers on any route. They also contain either country-of-origin or multilateral suspension rate articles. Both of those articles are

---

[306]U.S. Department of State, personal letter, op. cit.

more liberal than the unilateral right-of-suspension rate articles that were standard in the Bermuda I type agreements.[307]

When the agreement with West Germany was concluded, it was described as the most liberal bilateral pact and was also described as a breakthrough for promotion of open competition and low fares in the international market.

The terms of this German Agreement include the following:

1. The carriers of both countries are granted unrestricted fifth and sixth freedom rights. It was argued that this is the first time that any foreign flag carrier has been given total traffic rights beyond U.S. points.

2. U.S. airlines may fly to any city in West Germany. German airlines are granted authority to serve eleven U.S. cities.

3. There are to be no restrictions on multiple designations.

4. Liberal U.S. charter rules will apply from any point in the U.S. to any point in West Germany.

5. Low innovative and promotional fares can be introduced by all airlines serving the routes.

6. There is to be limited government intervention in airline issues concerning competition and fare structures.

The agreement thus includes the country of origin concept, which will permit the carriers of each nation to establish their own fare structures.

As for capacity, frequency, or change of gauge, the agreement provides that:

---

[307]Civil Aeronautics Board, personal letter, op. cit.

> Neither contracting party shall limit the volume, frequency, or aircraft type . . . except as may be required for technical, operational or environmental reasons under uniform conditions.[308]

U.S. airlines' reactions indicate that the provisions of the German Agreement summarize the new deregulation law and the Carter policy on international aviation.[309]

Only one week after concluding the German Agreement, the U.S. government concluded another agreement with Belgium, an agreement which was described as the most liberal to date and the ultimate in liberalization.[310]

The Belgian Agreement has a rate clause which provides that neither government can disapprove a price either between the two countries or involving a third country unless the other government agrees to the disapproval. The agreement also contains one unexpected provision--deregulation of scheduled and charter cargo operations.

Some of the provisions of the Belgian agreement are as follows:

1. Charter operations are either under country-of-origin rules or the rules of the nationality of the airline.

2. Complete operating flexibility shall include change-of-gauge, multiple designations and elimination of the possibility of capacity restrictions. U.S. carriers can serve any Belgian city via any intermediate points and continue to any beyond points.

---

[308] Aviation Week and Space Technology (Nov. 6, 1978), p. 33. This agreement was concluded on Nov. 1, 1978.

[309] Ibid.

[310] Aviation Week and Space Technology (Nov. 20, 1978), p. 35.

3. Sabena, which operates now to New York and Atlanta, may select two new U.S. points immediately upon signature, with another to be selected in six months.

4. Sabena also will have beyond rights to Mexico and Canada and may pick up U.S. passengers at one point of its choosing for flights to Mexico City.

From the viewpoint of the U.S. government, those liberal agreements should be described as a victory, for they were intended to achieve the goals set out in the new policy statement and they contribute to providing consumers with a variety of services and lower fares.

E. Summary and Conclusions

Our summary will only touch upon the highlights of this chapter while the conclusions will attempt to arrive at some relevant insight relating to all three chapters on the Bilaterals.

Summary

In this chapter we have discussed three types of approaches the U.S. has followed in concluding aviation relations with other countries. In the first of these approaches, we saw the most restrictive of all agreements, the U.S.-U.S.S.R., one that leaned mostly towards control of the air due to political and international considerations. This is true in spite of the presence of a supplementary agreement between the airlines of the two countries to agree on certain aspects of air transport. We saw how these political and international considerations, or in other words, the national interest, played a

most visible role, prolonging the period for formulating that agreement to eleven years, and an additional two-year period before implementation of the agreement took place. We also saw how that agreement departed so very clearly from the Bermuda Formula in many respects.

In the second of those approaches we saw how Bermuda II denounced the Bermuda Formula at least from the standpoint of one of the two parties that established it in 1946. We saw how Bermuda II differed from Bermuda I with respect to fifth freedom rights, capacity, multiple designation, tariffs, etc. We saw also a return to the challenge of the status of Bilaterals as executive agreements instead of treaties out of court and in court litigation and how the negotiating process played an important role.

The last of the three approaches was vigorously pursued by the U.S. government after the Bermuda II event. This approach was implemented in many agreements such as those with West Germany and the Belgians, and it is claimed by the U.S. government to be the ultimate in achieving a procompetitive, consumer-oriented approach. This concept of bilateralism promoted liberal pricing policies and removed most of the restrictions relating to capacity, frequency, type of equipment, charter and cargo, etc.

Conclusions

Our overall conclusions from those chapters on the bilaterals will be listed briefly as follows:

1. As far as the U.S. government is concerned, the concept of the Bermuda Formula may not survive for long as a title, but this

may not be true, however, with the spirit of the concept itself, so long as it can rid itself of the IATA rating machinery.

2. The IATA may be in trouble if its pending reform does not prove workable.

3. The open skies concept might be the talk of the 80's in air transport relationship, if the U.S. succeeds in concluding more liberal bilateral agreements with its most important European competitors, provided excess capacity is avoided, and provided the American market continues to be the most lucrative and attractive.

4. The pending court challenge to the status and validity of Bermuda II provided perhaps the strongest case ever. However, regardless of what ruling may result, the challenge to the status of the bilaterals as executive agreements rather than treaties will continue to take place as long as politics exist, and as long as some U.S. entities anticipate a glimpse of success in such court litigation.

5. The spirit of the quid pro quo concept will still maintain its importance to U.S. airlines, regardless of the difficulty involved in the computational process.

CHAPTER VI

THE AIRLINES

A. Introduction

Two important aspects of the research have been discussed thus far: the U.S. policy on international air transport and the U.S. bilateral system. Since the design of the research is to analyze the attitudes of the U.S. international airlines towards the policy as reflected by the bilaterals, we need to examine those airlines whose attitudes we are attempting to analyze. This chapter will be devoted to drawing a vivid profile of such airlines in order to help understand the issues involved. The term airlines will at times be used to mean U.S. international airlines for pruposes of brevity.

The analysis will approach the problem by looking into three major areas: the system and its statistics, the value of the airlines and the airlines' case against the policy. This will be followed by a brief summary and some relevant conclusions.

B. The Airlines' Profile

This section will attempt to analyze the structure of the U.S. airlines that are conducting international operations, both individually and as groups, to describe why their services are so important to the nation, and finally to attempt to define the airlines' case against the policy as interpreted from printed literature.

The System and Its Statistics

There are mainly three categories of U.S. airlines that conduct international operations. Those three categories represent, in fact, only a few of several categories that make up the entire U.S. air transport industry (air carriers) which include locals, commuters, intra-Hawaiians, intra-Alaskan, etc.[311] U.S. air carriers that conduct international operations fall mainly into the following three categories: international and territorial, all-cargo, and supplemental. All of those carriers, of course, carry on domestic operations as their major activities with the exception, at this time, of Pan American World Airways.

Before discussing these categories, it is appropriate to note that few commuters conduct operations across U.S. borders in the north with Canada and in the south with Mexico, or in other areas such as the Bahamas, Bermuda, the Caribbean, Puerto Rico and the Virgin Islands. However, because of characteristics pertinent only to commuter service, such as free and most frequent exit and entry, size of operations, lack of CAB regulations, etc., this category of air carriers is not included.[312]

The airlines. This analysis will consist of a brief background on each of the three categories of U.S. international airlines and list some of the important and relevant statistics. First, however, one

---

[311] Kane and Vose, op. cit., p. 11.

[312] For more details, see references on commuters such as the official airline guides and the publications of the Commuter Airline Association of America. Also see CAB Report to Congress, FY 1977, p. 88.

must draw attention to some factors that must be borne in mind when international aspects of U.S. air transport relating to the individual airlines are considered. Some of those factors are listed below:

1. It is virtually impossible to totally separate the international profile of the airlines from the whole system it belongs to.

2. The international operations of the airlines constitute a lesser proportion of the total operations than the domestic operations, except for Pan Am, as will be shown.

3. No one indicator is sufficient to project a good image of a business entity such as air carriers, and the use of a multitude of indicators is best, if convenient and practical. In our case, however, only a select few of these indicators will be given in order to draw the vivid profile we intend to create here.

The purpose of the research is to analyze attitudes of the airlines rather than their performance.

International and territorial: The terms "international" and "territorial" were both established in 1938. The first term, international, was originally established to include U.S. flag airlines operating between the United States and foreign countries. This term was later changed to international and overseas to embrace additional routes connecting the continental United States and its territories or possessions. The second term, territorial, was originally established to include carriers conducting certified flight operations within a territory of the United States. Currently, however, the two terms, international and territorial, have been combined to include those U.S. carriers operating between the United States and foreign countries, as

well as those operating over international waters to territories and possessions of the United States.[313] Currently, airlines in this category conduct both scheduled and nonscheduled operations with scheduled operations constituting the major type of activities, as will be seen below.

Statistics indicate that total revenue passenger miles (RPM) for this category of airlines, which rose continually between 1968 and 1973, declined between 1973 and 1975 then started picking up substantially in 1977, rising to $36,609,570,000, representing an increase of $10 billion more RPM than the 1968 figure. The statistics for 1978 indicate that the total RPM jumped even further, up to $44,104,146,000.[314] These statistics are quite impressive, especially since they comprise more than 25% of total RPM flown by the same airlines in their domestic operations.

Making the same comparison for another indicator, one finds that the proportion of cargo traffic carried by international and territorial airlines exceeds by 50% that of the cargo traffic carried by the same airlines in their domestic operations.[315] Other statistics indicate that total operating revenues for this category of airlines continued to rise during all ten years between 1968 and 1977. Net operating income also kept rising with the exception of 1974, which

---

[313] Kane and Vose, op. cit., pp. 124-125.

[314] Air Transport Association of America (ATA), Air Transport 1978, p. 16; also see Civil Aeronautics Board, Traffic Statistics (December 1978), for 12 months ending December 1978, p. 15.

[315] Ibid.

showed a negative figure.[316] One can also find an acceptable profit margin for this category of airlines in 1977 when compared to domestic trunks--4.5:3.4, and a good rate of return compared to domestic trunks for the same year--13.7:9.6.[317]

During the month of March 1979, this category of airlines operated ninety-seven aircraft, with a total of 26,265 aircraft hours, as compared to 1,660 aircraft and 424,458 aircraft hours for domestic trunk airlines.[318]

The average cost of fuel in March 1979 for this category of airlines, at 26.338 cents per gallon, was higher than that for domestic trunks, at 41.855 cents per gallon, a difference due, perhaps, to higher fuel costs abroad.[319]

Looking at the airlines in this category, one finds that Pan Am had the highest RPM while Continental had the lowest. While we will not attempt to critically analyze such statistics, it is appropriate to mention that total RPM for the international and territorial airlines climbed steadily between 1976 and 1978. Later statistics computed for the year 1979, as shown in Table VI-1, indicate that the increase in total RPM was again on the rise. Table VI-1 also indicates that the overall nonscheduled traffic for this category of airlines is generally insignificant and accounts for less than 8% of the total RPM.

---

[316] ATA, Air Transport 1978, op. cit., p. 21.

[317] Ibid., pp. 22-23.

[318] Aviation Daily, July 14, 1979, back of p. 263.

[319] Aviation Daily, June 19, 1979, back of p. 283.

TABLE VI-1

INTERNATIONAL AND TERRITORIAL REVENUE PASSENGER MILES (000)
(FOR 12 MONTHS ENDING FEBRUARY 28, 1979)

Carrier	Total (A)	Scheduled (B)	Non-Scheduled (C)	C/A%
American	4,062,589	3,955,889	106,700	2.6
Braniff	2,807,999	2,565,347	242,652	8.6
Continental	257,708	257,708	--*	0
Delta	1,102,413	1,025,310	77,103	7.0
Eastern	4,511,499	4,488,921	22,578	0.5
National	1,221,059	1,221,059	--*	0
Northwest	2,241,167	2,173,501	67,666	3.0
Pan Am	21,794,844	19,401,975	2,392,869	11.0
TWA	10,328,782	9,476,445	852,337	8.3
Western	804,223	794,680	9,543	1.2
Total:	49,132,283	45,360,835	3,771,448	7.7

*Not available.

Source: Compiled from CAB, Air Carrier Traffic Statistics, February 1979.

Another good indicator is the revenue ton mile (RTM) transported by this category of airlines. Table VI-2 shows a similar trend as that for RPM shown by Table VI-1, with Pan Am in the lead and Continental trailing.

Since the international and territorial statistics are part of the overall statistics of the system trunks, it is perhaps desirable to see at least one indicator showing the proportions of international to total traffic transported by this important category of the airlines. Table VI-3 illustrates these statistics and clearly indicates that more than 90% of Pan Am operations are international, while Continental, Delta and Western carried the least proportions of international traffic, compared to their domestic operations.

The rankings of the ten airlines, as they appeared among 1,006 public companies surveyed by Forbes in three important areas of management performance, are shown in Table VI-4, with Braniff ranking best in profitability, Western ranking best in growth, and National ranking best in stock market ratings.

All-cargo: All-cargo air carriers went through a long process of development before they were finally certified in 1949 as all-cargo air carriers on a temporary basis. Their certificates provided limitations on the transport of air mail and passengers. Those limitations were finally removed and the carriers were permitted to enter into contracts for the carriage of mail and for the transportation of passengers on a charter-only basis. Those temporary certificates of convenience and necessity were renewed at each expiration date, but

TABLE VI-2

INTERNATIONAL AND TERRITORIAL REVENUE TON MILES (000)
(FOR 12 MONTHS ENDING FEBRUARY 28, 1979)

Carrier	Total (A)	Scheduled (B)	Non-Scheduled (C)	C/A%
American	509,615	498,470	11,144	2.2
Braniff	328,897	304,632	24,265	7.4
Continental	31,549	31,549	--*	0
Delta	120,280	112,570	7,710	6.4
Eastern	549,251	546,994	2,258	0.4
National	140,911	140,911	--*	0
Northwest	404,091	397,022	7,069	1.7
Pan Am	3,260,343	3,016,152	244,191	7.5
TWA	1,304,836	1,182,361	122,474	9.4
Western	88,538	87,583	954	1.0
Total:	4,913,258	6,318,244	420,065	8.5

*Not available.

Source: Compiled from CAB, Air Carrier Traffic Statistics, February 1979.

TABLE VI-3

INTERNATIONAL, TERRITORIAL AND DOMESTIC REVENUE PASSENGER MILES (000)
(FOR 12 MONTHS ENDING FEBRUARY 28, 1979)

Carrier	Total (A)	Domestic (B)	International (C)	B/A%	C/A%
American	30,013,947	25,951,358	4,062,589	86	14
Braniff	10,433,518	7,625,519	2,807,999	73	27
Continental	8,940,416	8,682,708	257,708	97	3
Delta	24,463,894	23,361,481	1,102,413	95	5
Eastern	25,789,432	21,277,933	4,511,499	83	17
National	8,024,548	6,803,489	1,221,059	85	15
Northwest	7,179,838	4,956,671	2,241,167	69	31
Pan Am	23,881,914	2,087,073	21,794,844	9	91
TWA	28,713,740	18,384,958	10,328,782	64	36
Western	10,782,212	9,977,989	804,223	93	7
Total:	220,898,556	171,766,273	49,132,283	78	22

Source: Compiled from CAB, Air Carrier Traffic Statistics, February 1979.

TABLE VI-4

THE FORBES YARDSTICKS, 1978 OF INTERNATIONAL AND TERRITORIAL AIRLINES (RANKINGS AMONG 1006 COMPANIES)

Carrier	Profitability	Growth	Stock Market
American	872	--*	371
Braniff	247	145	486
Continental	779	110	228
Delta	254	384	644
Eastern	904	--*	292
National	873	783	220
Northwest	770	496	457
Pan Am	961	--*	314
TWA	941	305	599
Western	342	60	584

*Not ranked.

Source: Compiled from Forbes, January 8, 1979, pp. 41-50.

now, however, they are permanent.[320] Currently, these carriers engage in scheduled and nonscheduled traffic of mainly cargo and mail but will also provide service to passengers on a limited and charter-only basis.

The situation of this group of airlines seems to be better than that of the international and territorial airlines. Total cargo traffic for this category kept rising steadily during the whole ten year period from 229,021,000 ton miles in 1968 to almost fourfold that figure in 1977.[321] Making a similar comparison, as in the case of international and territorial airlines, one finds that the international operation of this group dominates those of the domestic operations.

Statistics also indicate that in the final three years of a ten year period (1968-1977), both total operating revenues and net operating income increased steadily.[322] As in the case with the international and territorial airlines, statistics also show an acceptable profit margin for all-cargo/international in 1977, when compared to all-cargo/domestic--10.0:4.1; and a good rate of return compared to all-cargo/domestic for the same year--16.7:9.3.[323] And again, the average cost of fuel in March 1979 for all-cargo/international at 47.046 cents per gallon was higher than that for all-cargo/domestic at 41.674 cents per gallon.[324]

---

[320]Kane and Vose, op. cit., pp. 130-132.

[321]ATA, Air Transport 1978, p. 16.

[322]Ibid., p. 21.

[323]Ibid., pp. 15, 23.

[324]Aviation Daily, June 19, 1979, back of p. 285.

As in the case of the international and territorial airlines, it is appropriate to mention some statistics showing the proportions of international traffic as opposed to the total services of the system's all-cargo airlines.

Table VI-5 indicates that while Airlift and Flying Tiger Airlines have more and less RTM than 50%, respectively, in international traffic, Seaboard conducted only international traffic.

Table VI-6 shows that the overall RTM nonscheduled traffic accounts for 30% of the overall RTM transported by this category of airlines in their international activities. The table also shows that the bulk of Airlift's RTM was carried on a nonscheduled basis, while the opposite was true for both Flying Tiger and Seaboard.

Table VI-7 shows that this category of airlines had no RPM at all in their domestic operations. Table VI-8 shows that almost all RPM for this category of airlines were transported on a nonscheduled basis.

Supplementals: The Federal Aviation Act defined the term supplemental air carrier and the term supplemental air transportation in order to contrast such carriers with those certified to conduct scheduled transportation and to provide for statutory limitations, such as the transport of mail and the sale or offer for sale of inclusive tours through selling or offering for sale individual tickets directly to members of the general public.[325] Recently, however, and pursuant to the new deregulation approach and CAB policy and attitude, some supplemental airlines have been authorized to conduct certain scheduled

---

[325]Federal Aviation Act, sec. 101 (33 and 34), as amended, 49 U.S.C., 1301.

TABLE VI-5

ALL-CARGO, ALL SERVICES REVENUE TON MILES (000)
(FOR 12 MONTHS ENDING FEBRUARY 28, 1979)

Carrier	Total (A)	Domestic (B)	International (C)	C/A%
Airlift	294,944	119,803	175,141	59.4
Flying Tiger	1,479,578	779,287	700,291	47.3
Seaboard	474,965	--*	474,965	100.0
Total:	2,249,487	899,090	1,350,397	60.0

*Not available.

Source: Compiled from CAB, Air Carrier Traffic Statistics, February 1979.

TABLE VI-6

ALL-CARGO, INTERNATIONAL REVENUE TON MILES (000)
(FOR 12 MONTHS ENDING FEBRUARY 28, 1979)

Carrier	Total (A)	Scheduled (B)	Non-Scheduled (C)	C/A%
Airlift	175,141	41,841	133,301	76.1
Flying Tiger	700,291	494,672	205,619	29.4
Seaboard	474,965	406,413	68,552	14.4
Total:	1,350,397	942,926	407,472	30.2

Source: Compiled from CAB, Air Carrier Traffic Statistics, February 1979.

TABLE VI-7

ALL-CARGO, ALL SERVICES REVENUE PASSENGER MILES (000)
(FOR 12 MONTHS ENDING FEBRUARY 28, 1979)

Carrier	Total (A)	Domestic (B)	International (C)	C/A%
Airlift	150,701	--*	150,701	100.0
Flying Tiger	716,528	--*	716,528	100.0
Seaboard	225,682	--*	225,682	100.0
Total:	1,092,911	--*	1,092,911	100.0

*Not available.

Source: Compiled from CAB, Air Carrier Traffic Statistics, February 1979.

TABLE VI-8

ALL-CARGO, INTERNATIONAL REVENUE PASSENGER MILES (000)
(FOR 12 MONTHS ENDING FEBRUARY 28, 1979)

Carrier	Total (A)	Scheduled (B)	Non-Scheduled (C)
Airlift	170,701	--*	170,701†
Flying Tiger	716,528	--*	716,528†
Seaboard	225,682	11,501	214,181†

*Not available.

†All-military.

Source: Compiled from CAB, Air Carrier Traffic Statistics, February 1979.

flights through sales of individual tickets, while others have been issued exemptions to conduct scheduled traffic between the U.S. and certain foreign countries, as indicated in earlier chapters.[326]

The supplementals have also passed through a process of development from their initial creation as irregulars to this current role within the system of U.S. international air transport. They were first established to relieve pressure on high density domestic trunk routes as they occur seasonally. They also usually have contracts with the military to transport both troops and supplies. These contracts proved to be more profitable and dependable sources of income that the original seasonal demand indicated above. In addition, the supplementals conducted charter services to foreign countries.[327]

The present U.S. policy of promoting service and price competition could make the role of the supplementals more important in the international market, provided U.S. bilaterals would give them that chance, such as those liberal bilaterals discussed earlier in the previous chapter. Unfortunately, the number of airlines in this category is not always stable or certain, as in the case of the previous two categories. Unlike the case with all-cargo airlines, the situation of the supplementals seemed to be declining in the ten year period (1968-1977).[328]

---

[326]See, for example, CAB Orders 78-9-2 and 78-11-156 dealing with such exemptions issued to scheduled and supplemental carriers pursuant to Section 416(b) of the Federal Aviation Act of 1958, as amended.

[327]Kane and Vose, op. cit., pp. 131-132.

[328]National Air Carrier Association (NACA), Annual Report: 1978 (Washington, D.C., July 1978), pp. 4-6, 8-9, and 20-25.

Statistics also indicate that the average cost of fuel in March 1979 for the supplementals, international at 48.386 cents per gallon was higher than that for the supplementals, domestic, being 43.300 cents per gallon;[329] and it was also higher than the average cost of fuel for the previous two categories of airlines.

The case with the international supplementals is different from that of the previous two categories, due to various reasons which include the unstable number of U.S. supplementals conducting international operations; restrictions on charter operations, at times either by the bilaterals or by the conduct of foreign countries; and U.S. government restrictions, although recently relaxed[330] due to the new reregulation policy and mode. This instability, in turn, leads to lack of statistical data on the operations of the supplementals. The analysis, however, will present whatever uniform data are available on the individual supplementals with the hope that the information will assist in formulating satisfactory profiles for each of the supplementals concerned.

It is unfortunate that sufficient updated data on the international operations of this category of airlines and whatever other data are available are not so uniform as that of the previous two categories.[331]

---

[329] Aviation Daily, June 19, 1979, back of p. 286.

[330] See, for example, CAB Release 79-197, dated Aug. 29, 1979, which reported that the CAB allows the airlines to sell charters directly to the public instead of having to go through independent tour wholesalers.

[331] For more details, see NACA, Annual Report 1978, op. cit., p. 19.

The airline's associations. There are two U.S. associations to which most U.S. international airlines belong--one for scheduled airlines and the other for supplementals. These are the Air Transport Association of America (ATA) and the National Air Carrier Association (NACA).

The Air Transport Association of America (ATA): This association acts as a service group to the airline industry with a three-fold purpose:

1. To advance the common interests of the certified airlines industry.
2. To develop better services for the public.
3. To share in national defense.[332]

The ATA pools the talents of the air industry to deal with a variety of common interests, ranging from design standards for new aircraft to the cutting of red tape of international travel. Members of the association hve a common motive--to maintain the best system of air transport possible. Supported financially by its member airlines, whose proportionate shares are based upon their gross income, the ATA accomplishes its tasks through a system of conferences and committees.

The conferences, composed of representatives from the airlines, are divided into two main categories: operations and traffic. Decisions by either of those conferences must be unanimous, with all member airlines having an equal voice in major decisions affecting the entire industry. To pursue specific tasks, the conferences appoint committees which are made up of specialists in their given fields.[333] All U.S.

---

[332]Kane and Vose, op. cit., pp. 137-138.

[333]Ibid.

international airlines listed in Chapter I as trunks and all-cargo are member airlines of ATA.[334]

The National Air Carrier Association (NACA): As with ATA, the NACA is an association to which supplemental airlines belong. However, not all U.S. international supplemental airlines listed in Chapter I are members of NACA, according to its latest annual report. NACA is a trade association representing the supplementals, which provide charter air transport for passengers and cargo in both domestic and international markets. The association acts as the voice of its member airlines in their relationships with the U.S. government, state regulatory agencies, the governments of other nations, with the multifaceted tourism community, and with all private and public organizations interested in their low cost chartered air transportation activities.[335]

According to NACA's annual report of 1978, only the following three supplementals are members of NACA: Evergreen International (recently dropped out), Trans International (currently Transamerica), and World Airways.

In contrast to scheduled flights, the supplementals offer charter flights of different types, each having their own features with relation to length of stay, stopovers, pricing, advance purchase, availability of one-way transportation, minimum group contract size, and eligibility.[336]

---

[334]For more details, see the whole report, ATA, Air Transport 1978, op. cit.

[335]NACA, Annual Report 1978, op. cit., inside cover.

[336]Ibid., p. 17, for details.

The Value of the Airlines

It is not difficult to sit and think of how valuable the airlines are to the nation, with their salable product of commercial air transportation. It is important to realize such value both for civil and military purposes, domestically or in the international arena. ATA developed and published a matrix which provides a detailed listing of the various benefits of the airlines, to individuals and to society, in both the national and international arenas in civil and military situations, and in terms of the various commercial aviation outputs, such as speed, capacity, technology, efficiency, safety, economy, etc., which is a valuable and important reference.[337]

The value of air transportation for civil purposes is more touched upon in the matrix, while little was indicated about the value of air transportation for military purposes. Because of the special significance of its value with relation to the interests of the researcher, some details will be given here concerning the Civil Reserve Air Fleet (CRAF) and the involvement of the airlines in it. The discussion in this respect will be kept to a minimum. One must always keep in mind, however, that the value to the military of an airline's service such as an airlift, does not stop at the limits of CRAF or similar concepts, but extends to the ability of the nation to utilize the airline's service in case of national or international military airlift needs in times of war or peace, a value that is impossible to measure.

---

[337]ATA, The Value of Commercial Air Transportation to the U.S., to Its People, to Its Economy (Washington, D.C.: Air Transportation Association, 1973), pp. 6-7.

The discussion here will deal with some background and statistics without touching upon the problems of the airlines with CRAF at this time, a subject which will be discussed later in this chapter.

The CRAF was originally established by President Truman in 1951, and its use was expanded by President Eisenhower in 1954 by a policy which provided that the use of the fleet would be extended to routine traffic in peace time. The current CRAF program resulted from a 1960 Department of Defense (DOD) report on the "Role of the Military Air Transport Service in Peace and War."[338] The revenues from Cargo Airlift procured by DOD through CRAF between 1960 and 1977 are depicted in Table VI-9, which shows a significant decline in the last few years.

The CRAF is composed of U.S. civil air carriers which provide, under contracts, operating and support personnel and facilities and aircraft to the Military Airlift Command (MAC) under stated conditions.[339] Some of the policies under which CRAF operates are listed below:

1. The CRAF may be activated in increments of three stages at the discretion and option of the government. The three stages of the CRAF are:

   a. Stage I--Committed Expansion: It can be used to perform airlift services when the MAC airlift force cannot meet both deployment and other traffic requirements simultaneously. MAC Commander has the authority to activate this stage.

---

[338] ATA, The U.S. Airline Industry from 1977 to 2000, a statement given by Dr. George W. James, Senior Vice President, Economics and Finance (ATA), to the National Transportation Policy Study Commission in Washington, D.C., June 22, 1977, p. 17.

[339] Military Airlift Command Regulation (MACR) 55-8, 1 (October 8, 1976), under Foreword.

TABLE VI-9

INTERNATIONAL CIVIL CARGO AIRLIFT PROCUREMENT
BY DOD REVENUES, FY 1960-FY 1978

FY	Cargo ($ millions)	FY	Cargo ($ millions)
1960	41.9	1969	190.0
1961	55.6	1970	120.5
1962	104.8	1971	45.1
1963	103.6	1972	146.3
1964	88.1	1973	77.4
1965	122.6	1974	28.9
1966	166.2	1975	31.0
1967	325.7	1976	16.4*
1968	244.9	1977	11.7

*Includes $1.6 million in transition period to new fiscal year beginning October 1.

Source: ATA, The U.S. Airline Industry from 1977-2000, June 22, 1977.

b. Stage II--Airlift Emergency: It is an additional airlift expansion identified for an airlift emergency not warranting national mobilization. The Secretary of Defense has the authority to activate this stage.

c. Stage III--National Emergency: This is the total CRAF airlift capability made available when required for DOD operations during major military emergencies involving U.S. forces. The Secretary of Defense will activate this stage only after a national emergency has been declared by the President or the U.S. Congress or under specified conditions.

2. All carriers must be participants in the CRAF as a prerequisite for award of MAC peacetime annual airlift business.

3. Equipment mobilized under CRAF will cater to the transport of passengers and cargo and will also include wide-body aircraft to accommodate cargo/baggage containers.[340]

The aircraft will also have to meet certain criteria for long- and short-range international, domestic, and Alaskan flights.

By explaining the value of the airlines' services to the nation, we intend to show the importance of keeping this sector of the nation's capability healthy and in top shape and, consequently, recognizing that the attitudes of these airlines cannot be totally ignored, in the formulation of bilaterals with other countries, and it is hoped that this objective has been achieved.

---

[340]Ibid., pp. 2-1 through 2-5.

The Airlines' Case

We do not intend to elaborate here on the individual problems of the airlines as stated in Chapter I. However, we wish to approach this section by presenting an introductory picture of how the airlines feel about the policy as it affects their interests, mainly through bilateral arrangements with other countries. The main concern is the concept of the airlines' interests. Those interests revolve, of course, mainly around the airlines' shares of the air transport markets, both internationally and domestically.

Our analysis here is intended both to clarify the profile we wish to present and to introduce the analysis of the survey data in the following chapter, which will present the actual attitudes of the airlines as surveyed. In spite of the fact that the airlines do not agree all the time on government policy matters, due to the circumstance of each airline, one can say that, in general, they would have similar attitudes about certain major issues of the U.S. international air transport policy. Those issues will be briefly discussed below.

The major argument of the airlines' case is that their share of the market is either declining or is below its justified proportions, mainly because of the bilateral arrangements with other countries that give away greater opportunities for economic gains to foreign airlines than justified. This situation may arise because of the lack of U.S. government protection against the uncompetitive and discriminative practices faced by the airlines abroad as well as the process of negotiating the bilateral agreements--a process which lacks organization

and does not sufficiently consider the airlines' opinions and problems. The airlines' case against the policy is not limited to commercial air transport only, but extends also to military airlift which, because of DOD policies, is declining, as indicated earlier.

The airlines argue that U.S. policy developed in 1960 called for the curtailment of Air Force airlift operations for other than hardcore military traffic and the expanded utilization of commercial carriers for civil-eligible cargo.[341] The airlines further argue that recent Senate hearings disclosed that the Air Foce has arbitrarily reversed without either Congressional or Presidential approval the government's long-standing policy on the use of the commercial aircraft of the Civil Reserve Air Fleet.

The argument further indicates that MAC is operating a world-wide scheduled airline to carry the routine cargo normally transported by commercial airlines at greater expense to taxpayers. This practice in turn would jeopardize the cargo capability of the CRAF.[342] More on CRAF will be provided in the final chapter including DOD counter-argument on this issue if possible.

C. Summary and Conclusions

Summary

Our design in this chapter is to attempt to draw a vivid profile for the airlines while keeping in mind the real purpose of

---

[341] ATA, The U.S. Airline Industry from 1977 to 2000, op. cit., pp. 17-19.

[342] Ibid.

the research--to analyze the attitudes of the airlines rather than their image or performance.

In our analysis of the airlines' profile, we saw that there are three major categories of U.S. airlines conducting international operations: the international and territorial, the all-cargo, and the supplementals. We also discussed the fact that there is another category of airlines that were certified to engage in international service, but not on a scheduled basis. This is the commuter or air taxi category of airlines, which were not included in the analysis or survey because of the insignificant size of their operations as compared to the three major categories mentioned above. We examined some background on how each of the three major categories of airlines came to be established and took a brief look at the two major airline associations to which they belong. We also recognized the fact that the operations of the supplementals were irregular, and the number of such supplementals engaged in international traffic were, in fact, not always fixed.

In our study of the airlines' profile, we also analyzed the value of their services to the nation in time of peace and in time of war and discussed the reason why such an industry should survive and maintain a healthy existence, being afforded the opportunity to be heard and have their opinions considered. Finally, we touched briefly upon the case of the airlines' opposition to the policy which they claim contributes to decreasing their share of the market and affords foreign airlines greater economic opportunities.

Conclusions

Here are some of the relevant conclusions that are worthy of consideration:

1. While the management or title of U.S. international airlines is separate from the management or title of the same airlines in their domestic capacity, they are both one and the same at the highest level of management and at the level of ownership. It is thus safe to conclude that the success or failure of one will influence the success or failure of the other.

2. Within the same U.S. international airlines, especially the international and territorials, scheduled traffic may be managed separately from nonscheduled traffic. This, in turn, will produce different attitudes towards policies that may tend to promote either of the two types of traffic where their interests may conflict.

3. The relaxation of some of the classical restrictions on charter operations may not please the airlines whose main efforts are directed toward the scheduled type of traffic. This, in turn, escalates the fight for better shares of the market and thus causes the opinionated attitudes and the struggle for shaping policies that will serve the ultimate interests of each.

4. The importance of the airlines to the nation, as reflected by the value of their services, makes it imperative that their case be heard.

CHAPTER VII

THE ATTITUDES

A. Introduction

The topic of this section of the research is (in brief) the attitudes of the airlines towards the international air transport policy as reflected by the bilaterals. The topic deals with four major headings: the attitudes, the airlines, the policy, and the bilaterals.

Chapter II provided us with a brief account of the major lines of the policy. Chapters III, IV and V presented a detailed analysis of the bilateral set-up and gave examples of some significant agreements. Chapter VI drew a profile of the airlines and the national airline associations, and indicated the value of the airlines to the nation. This chapter will touch upon the central issue in the research--the attitudes as surveyed. In this chapter we will look into the actual methodology used for the collection of data and the difficulties involved in gathering that data. A tally of the actual responses to the survey questionnaires will also be given, using a coding process to maintain the confidentiality of this survey, which aims for the anonymity of the individual respondents. Although the respondents to the survey will be identified, their individual responses will not be linked to their actual identity. The validity of the representation of the sample will also be discussed.

Our attempt in this chapter will, of course, center around the verification of the general theme of dissatisfaction of the airline

industry towards the policy. The individual hypotheses involved will be provided, as will the specific criteria which define the weight of evidence available.

The success of the survey will be judged in the light of its ability to verify the general theme of dissatisfaction by obtaining at least sufficient evidence showing dissatisfaction relating to the issues or areas covered by the survey, with at least a 50% count. That is, if 50% or more of the responses indicate an air of dissatisfaction or, conversely, if more than 50% of the hypotheses were verified to indicate a general air of dissatisfaction, it would be safe to conclude that the survey did accomplish the task with a certain degree of success, depending on the crude ratio of dissatisfaction to no-dissatisfaction.

The analysis will cover topics on the survey, the hypotheses, the respondents, the sample, the responses, the analysis, and the findings, all followed by a brief summary and relevant conclusions.

B. The Survey

The idea of this research came as a result of our assumption of the seriousness of the airlines' problems and their dissatisfaction with the policy, as briefly described in Chapter I and the subsequent chapters. It was also concluded that if the hypothesis of dissatisfaction is verified by the proposed survey, it should serve to direct attention, in an academic sense, to policy issues that perhaps could accept reconsiderations by policy makers and all those concerned.

The difficulty of conducting such a survey was not underestimated. The difficulty arises from various reasons, such as the

seriousness of the subject, which has political connotations; and the difficulty in directing the survey questionnaires to the highest level of airlines administration in order to achieve the best and most representative responses.

It is also difficult to determine, for ranking purposes, equal and similar ranks in the various airlines responding to the survey questionnaire, for obvious reasons, relating to willingness, organizational structure differences, company policy, etc. Such difficulties also relate to the coverage of the survey and the size of the instrumentation that should be used to gather survey data.

It is thus necessary, in order for the survey to be meaningful and workable, to adopt an appropriate methodology to overcome the difficulties explained above in one way or another. The researcher initially made an appeal to the airlines to participate in this academic research in the beginning of 1979 with the help of the Department of Transportation at The University of Tennessee, Knoxville. The appeal was well received by all of the airlines that chose to respond. The survey questionnaire was devised, pre-tested for coverage, relevancy and size, and was finally designed in its present format as shown in Appendix D.

In contacts with the executives of the airline industry, the confidentiality of individual responses was promised, for guarding against whatever ill feelings or misunderstanding might arise. To maintain uniformity and representation of responses and to ascertain positive participation, the survey questionnaire was directed to airline industry executives occupying the ranks of president or vice-president or equivalent (leaving the decision to be adjudged according to company

circumstances) and willingness to complete the survey in recognition of the reality of the situation.

Appendix D divides the survey questionnaire into four major areas: the policy, the airlines' role in the negotiation process, Bermuda II and other general issues of concern.

The measurement of respondents' opinions was assigned three major key reflexes: agreement, disagreement, and the lack of both in order to provide respondents with a wide range of options in their opinions. It was deemed essential to afford respondents this wide but controlled choice of responses because of the controversial nature of the issues involved and the difficulty of designing the questions in such a way that suited the circumstances of each individual respondent. For each of the two major reflexes, agreement and disagreement, three different gradations were assigned to describe the nature of agreement or disagreement: total, strong, and mild, to cater for individual feelings and differences.

Between the two ranges, agreement and disagreement, the respondent was given a choice to check a response that would indicate uncertainty or inability to decide (due to the vagueness of the question, for example) or to indicate simply inapplicability or unwillingness to respond for any reason, such as the sensitive nature of the issue involved.

Contact with the airline industry was made by correspondence and telephone, and in certain cases personal contact was made. Such contact continued from the beginning of 1979 to late September of 1979 in an attempt to have the survey completed by all the airlines involved.

In late September 1979 it was decided that the remaining airlines (whose executives showed great reluctance to respond for various reasons) would probably fail to respond ultimately, and further contacts would yield no results. Since more than 50% of those polled had completed the survey, the analysis should yield valid results. In addition to the airlines, the two national airline associations (ATA and NACA) which were also asked to participate in the survey kindly consented.

An attempt will be made later to bring the survey results to officers of the airlines for their comments in order to augment the value of this research.

C. The Hypotheses

As was indicated in Chapter I and elsewhere, the central focus of the research relates to the dissatisfaction of the airline industry with the policy. In Chapter I, it was indicated that this general theme of dissatisfaction would be approached through the verification of several hypotheses, each dealing with a certain issue of concern to the airlines. Those issues will center mainly around the bilateral set-up, including the Bermuda II event, in addition to some other general issues of importance. Following are sixteen individual hypotheses treating selected major policy issues in addition to the last main hypothesis:

Hypothesis 1: Establishing an office in the DOS at the Assistant Secretary level is favored by the airline industry.

Hypothesis 2: The airline industry supports the proposition that a congressional team should participate in the pre-negotiation meetings held at the DOS.

Hypothesis 3: It is preferable to the airline industry that the bilaterals remain as executive agreements rather than take the form of treaties.

Hypothesis 4: The airline industry is unhappy with the role it plays in the negotiating process. This role has not improved over the years and remains unsatisfactory.

Hypothesis 5: There is a consensus among the airlines that a change in the policy is overdue and that such change should:

a. Center around a national economic policy;

b. Center around the negotiating process;

c. Come from the legislative branch;

d. Come from the executive branch;

e. Include a more constructive role for the airline industry in the negotiation of bilaterals.

Hypothesis 6: The airline industry does not oppose the participation of experts from other U.S. concerns in the negotiation of bilaterals, provided the interests of the industry are not jeopardized.

Hypothesis 7: There is an agreement within the airline industry on the following issues regarding Bermuda II:

a. Bermuda II is, in general, unsatisfactory to U.S. interests;

b. The restrictive provisions of Bermuda II have had a negative impact on the airlines;

c. Bermuda II has not been the best possible agreement under the circumstances;

d. The restrictive provisions of Bermuda II might formulate a precedent for future restrictive agreements;

e. The new liberal bilaterals may have a diluting effect on the restrictive nature and provisions of Bermuda II;

f. The U.S. will not denounce Bermuda II in the 1980's.

Hypothesis 8: The airline industry does not favor the appointment of a special negotiator from outside the ordinary negotiating team.

Hypothesis 9: Recent emphasis on consumers' interests would not be opposed by the airline industry, provided airlines' interests are accorded equal consideration.

Hypothesis 10: The airline industry feels that the 1974 Fair Competitive Practices Act has not been a success thus far.

Hypothesis 11: The airline industry feels that exchanging cabotage rights with European countries is not economically attractive.

Hypothesis 12: The airline industry feels that high policy considerations unrelated to air transport will continue to play a significant role in important bilaterals.

Hypothesis 13: The airline industry feels that its situation may decline if restrictive agreements crowd liberal or Bermuda-type agreements.

Hypothesis 14: The airline industry feels that the chosen instrument concept would not become an issue even if restrictions become the mode in future bilaterals.

Hypothesis 15: If restriction becomes the mode in future bilaterals, the airline industry may find it more economically attractive

to shift its efforts to domestic markets because of the recent deregulation in this sector.

Hypothesis 16: Due to the increasing opposition to the Bermuda Formula abroad, the airline industry feels that the U.S. must find a suitably acceptable alternative to accommodate U.S. air transport interests.

And finally, the main hypothesis as indicated in Chapter I:

Hypothesis 17: The airline industry feels that the U.S. policy on international air transport is generally unsatisfactory.

D. The Respondents

One of the ultimate goals of this research was to survey the whole population of the airline industry, associations and carriers having international operations. Unfortunately, however, although 100% did not respond, a sufficient number of the whole population did respond and the results should prove valid.

The Airlines

The airlines that responded to the survey include seven international and territorial (trunks), two all-cargo, and three supplementals as follows:

International and territorial. The airlines in this category that responded to the survey, arranged alphabetically, are American, Delta, Eastern, Pan American, Trans World, United, and Western. As was indicated in Chapter I, United may not be listed under the category "international and territorial" for technical reasons; but it does

conduct operations beyond the continental U.S. and it is anticipated that it will conduct operations in certain international markets in the Far East soon.

In addition, United is considered one of the most important system trunks and one should not attempt to survey the attitudes of the airline industry without including it. The other four international and territorial (trunks) airlines that did not respond to the survey are Braniff, Continental, National and Northwest.

National provided a reason for not responding, being involved in a merger case and indicating that its legal department had advised against completing the survey. The other three airlines proved to be unreachable despite repeated correspondence and telephone contacts, as the records indicate.

All-cargo. Two all-cargo airlines completed the survey, Airlift and Seaboard. The third all-cargo, Flying Tiger, did not choose to complete the survey, indicating through its legal department that responding to the questionnaire was not in the interest of the carrier.

Supplementals. The three carriers in this category that completed the survey are Capitol, Evergreen, and Trans-International, or Transamerica, as it is currently called. Those supplementals that did not choose to complete the survey are Rich, World and Zantop, in spite of repeated correspondence and telephone contacts, as the records show. Recent statistics,[343] however, indicate that Rich has engaged only in the transportation of international cargo, both military and civilian,

---

[343] Aviation Daily (October 5, 1979), p. 192.

with minimal revenues, compared to the rest of the airlines in this group. Statistics also indicate that Zantop has no international operations.

Another supplemental that emerged after the survey was launched is Aeroamerica. Consequently, an attempt was made through telephone contact to reach its executives and to inquire whether the airline would be willing to complete the survey. It was eventually decided to call the attempt off due to time constraints. As in the case of Rich and Zantop, the evidence indicates that Aeroamerica was not in the list at all.

The Associations

Executives from both ATA and NACA also kindly responded to the survey. Just as in the case of the airlines, the identity of those executives shall be kept confidential and their individual responses will not be separately analyzed. Rather, they will be included in the group of airlines which they represent--Group A, B and C, as will be explained below.

One must bear in mind, however, that executives from these associations sometimes tend to project personal opinions rather than the opinions of their member airlines.

Because such executives have to represent the ideas of a number of airline members at the same time, one must assume that their responses project a complex composite of attitudes that may or may not coincide with the attitudes of all the airlines that are members in that particular association.

In all cases, however, one must assume that all the responses are genuine, sincere, and representative and should portray a general image of the composite attitudes of the airlines both in general and as an industry.

The respondents, airlines and associations will be categorized into three groups for analysis and confidentiality purposes as follows:

Group A: This group will include all respondents from the international and territorial (trunks) airline (7), all cargo airlines (2), and the Air Transport Association of America (ATA) (1), ten in all.

Group B: This group will include all respondents from the supplementals (3), and the National Air Carriers Association (NACA) (1), four in all.

Group C: This grouping will combine groups A and B into one category formulating the airline industry, fourteen (14) in all.

For maintaining the confidentiality of the survey as promised to the respondents, the groupings of the respondents will be coded, and each respondent will be assigned a code number to make certain that the identity of each individual respondent, airline or association cannot be linked to any particular individual response. The key to the codes will be possessed by the researcher only.

E. The Sample

Before we proceed to the responses and their analysis, it is essential to comment on the validity and representation of the sample of respondents as related to the whole population. One can see from

the previous section on the respondents that it is easy to have a count of the actual respondents but it is not as easy to determine what the actual population count is, due to the situation of some of the supplementals, which renders it difficult to characterize them among the population. This difficulty results in uncertainty to determine the real proportion of the actual number of respondents to the population of the U.S. airline industry in the international markets.

As was stated in Chapter I, however, we must have a minimum of 50% of actual respondents in order to validate the representation of the responses as reflecting the attitudes of the industry. The represenation of responses may also go beyond having a valid sample. A process of weighting the responses of some airlines versus those of others might also be considered. These considerations are what we hope to examine in this section.

If one does not consider Aeroamerica and Zantop within the whole population of the airline industry, we will have a sample of fourteen out of twenty-one airlines, constituting almost 67%. If one, however, does consider those two supplementals within the whole population of the airline industry, we will have a sample of fourteen out of twenty-three, constituting 61%. In both cases we have a sample exceeding 50% of the whole population, a proportion which should provide us with valid results.

One may also wish to consider giving weights to the responses or attitudes of one group of respondents versus the other group of respondents with respect to any criteria such as size of the group, taxable income, passengers carried, value to the nation, etc. If such

weighting is adopted, Group A will naturally be given priority over Group B, and in this case one will consider that the sample from Group A constitutes ten out of fifteen respondents, or two-thirds, versus four out of eight from Group B, or four out of six, if Aeroamerica and Zantop are not considered in the whole population. Also, the number of respondents in Group A is equivalent to two and one-half times that of Group B.

The point here is to emphasize that the number of respondents is sufficient to guarantee valid and representative results.

F. The Responses

The reader should familiarize himself with the method used by the respondents to measure their reflexes to the survey questionnaire. These methods are provided in the first page of Appendix D. The actual responses will also be exhibited in the same manner.

It seems necessary to indicate here that the response of lack of agreement or disagreement as designated by the number 3 or the letter U reflects the fact that the respondent could not check any of the other six responses. It is also essential to state the fact that very few respondents chose to leave very few questions unanswered for one reason or another. In such cases, and to avoid the possibility of decoding the identity of a respondent, the researcher has checked 3 as a response to assist in perfecting the proportions without influencing the results, since only very few of such non-response cases were recorded.

Tallies of responses are provided in Appendixes E-1 and E-2 for groups A and B, respectively.

G. The Analysis

Now that we have determined that the sample is valid and that the responses are representative, we will proceed with the analysis of those responses in our attempt to verify each individual hypothesis and to conclude whether the central hypothesis of dissatisfaction could or could not be verified.

Appendix F shows a tabulation of the responses in each of the three key categories, agreement, disagreement and the lack thereof, for each of the three groups of respondents, A. B. and C. The appendix is arranged with reference to the hypotheses 1 through 17. Each of the hypotheses was to be verified by responses to one or more of the questions as shown. Appendix F also provides easier cross references of hypotheses to questions and of questions to hypotheses.

The proportions used in the analysis as shown represent the exact proportions of the total responses received and not of the whole population of the airline industry engaged in international air transport.

The Criteria

The criteria to be used in the analysis and verification of the hypotheses is as follows.

Conclusive evidence. Conclusive evidence of agreement or disagreement is to be concluded if the proportion of any of those two categories of responses exceeds 50%.

Sufficient evidence. Sufficient evidence of agreement or disagreement is to be concluded if the proportion of any of those two

categories is exactly 50% and the proportion for the other and for the lack of agreement or disagreement is less than 50% but greater than zero.

Weak evidence. Weak evidence of agreement or disagreement is to be concluded if the proportions for both categories of responses are less than 50%, provided the difference between the two proportions is greater than 25% and the proportion for the lack of agreement or disagreement is less than 50%.

No evidence. No evidence of agreement or disagreement is to be concluded if:

1. The proportion for the lack of agreement or disagreement is 50% or greater.
2. The proportion for either agreement or disagreement is less than 50% provided the difference between the two proportions is 25% or less.
3. The proportions for both agreement and disagreement are exactly alike.

In all of the above cases the assumption and the conclusion should be to disregard the question and the response.

Possible A-B conflict. Possible A-B conflict of interest is to be concluded if:

1. There is conclusive evidence of agreement by one of the two groups of respondents A and B and a conclusive evidence of disagreement by the other group.

2. There is conclusive evidence of agreement or disagreement by one of the two groups of respondents with a proportion of 75% or greater and a sufficient evidence of disagreement or agreement (opposite to the first evidence) so that a difference of 25% or greater exists between the two proportions.

Complete evidence. Complete evidence of agreement is concluded when there is conclusive evidence of agreement by all groups of respondents (A, B, and C) and evidence showing total lack of disagreement by all groups of respondents. The opposite will be used to conclude a complete evidence of disagreement.

The Verification

The verification of hypothese will be undertaken in three distinct steps, titled Conclusions, Verification, and End-Result. These will be briefly discussed below as follows:

Conclusions. Conclusions will be made from the responses to each of the questions for each of the two groups of respondents A and B according to the above criteria. Each question will have its individual conclusion to the type of evidence found, as was explained above under Criteria, the kind of response (agreement or disagreement) and the mode of such response (total, strong, or mild). A conclusion will be drawn for each of the two main groups of respondents, A and B, in the same manner.

Verification. The verification of each of the hypotheses will be done by considering the outcome of responses to the question or

questions related to the particular hypotheses and will be based on an average of the responses of Group C respondents. This average will be measured against the same criteria used in the conclusions above and in the same manner.

End results. Two brief terminologies for concluding end results will be used in conjunction with each of the hypotheses involved as follows:

1. Dissatisfaction: this description of airlines' attitudes will be concluded if the average results of Group C responses indicate conclusive or sufficient evidence of a situation deemed by the airline industry to be not in their interests. The same criteria used in the conclusions for each of the individual questions will also be used to arrive at this end result.

2. No dissatisfaction: this description of airline attitudes will be concluded if there is only weak evidence or if there is no evidence of an existing situation deemed by the airline industry to be in their interests, using the same criteria explained above.

The application of this process of verification and utilization of the above criteria produced the results shown in Appendix G which clearly indicates a dominant tendency of dissatisfaction towards the policy. Further analytical comments are provided below.

Comments

There are three areas which warrant some comments--the possible A-B conflict of interest, the complete evidence of agreement or disagreement, and the hypotheses that did not yield themselves to the

verification of dissatisfaction towards the policy. Those will be briefly discussed below.

Possible A-B conflict of interest. There are three areas where possible conflict of interest was detected according to the set of criteria used above. Those areas were associated with questions B-3b, A-1c, and D-6 as follows:

Question B-3b. The issue here relates to the contention that other areas or concerns (labor, airport management, consumers, etc.) have an equally important vested interest in the outcome of the negotiations as that of the airline industry. While Group A disagrees with this contention, Group B agrees with it.

One of the explanations that can be offered here is in the difference between the basic mission of each group as it has traditionally functioned. It boils down to the difference between the ultimate task of scheduled air carriers (which applies mainly to Group A) and the ultimate task of non-scheduled air carriers (which applied mainly to Group B). The services of each group appeal to different kinds of consumers, passengers or shippers. The services of Group B, however, the chartered traffic, appeal mainly to the price-conscious consumer. These services are offered as alternatives to the oridinarily high-priced scheduled traffic, which suffers from low load factors in off-season periods. This places Group B in a position of competition with Group A. For example, Group B usurps a significant portion of the traffic that otherwise would have been Group A's.

Because these other areas would include consumers and because Group B identifies itself mainly with low cost, it is to be expected

that Group B would support the above contention, while Group A would not.

The conclusion that one may draw from this result is that while Group A may hold its support for the participation of those concerns in the negotiating process, Group B would render its support to that effect.

Question A-1c. The issue here is the contention that an agreement on charters should be a pre-condition to an agreement on scheduled operations. While Group A disagrees totally with this contention, it is expected that Group B agrees with it totally, as is evident from the survey responses. Because of the obvious and anticipated conflict in the attitudes of the two groups, no further comment is necessary here.

Question D-6. The issue here relates to the contention that an alternative to the Bermuda Formula may have to be found to accommodate U.S. air transport interests. Because the combined effect of a possible A-B conflict resulted in no evidence of agreement or disagreement by Group C respondents, the conclusion is to discard the question because of possible misinterpretation by the respondents. As a consequence, no further comment is necessary here.

Complete evidence of agreement. By reference to the evidence as provided above and by reference to Appendix F, one can see that the evidence is associated with responses to questions D-3, B-1c, B-2b, A-8e, A-1a, A-1b, A-1c, and A-3 (arranged according to the numbering of the hypotheses) as follows:

Question D-3: There is evidence of complete agreement by the airline industry that air transport bilaterals should remain as executive agreements rather than take the form of treaties. This, as was explained above, is due perhaps to the feeling that the disadvantages associated with the treaty process and the advantages associated with the executive agreement process are greater and more advantageous to the industry.

This is an important conclusion because it not only gives an indication of the attitudes of the airline industry in this respect but may also point to less support for legal litigations or political controversy revolving around the legal status of the bilaterals as executive agreements rather than treaties.

Question B-1c: There is evidence of complete agreement by the airline industry that the small working group concept is unfavorable to the airlines because it tends to exclude them from effective participation in the negotiating process.

The importance of this conclusion relates to the nature of the concept of negotiation and the dissatisfaction associated with it by the airline industry in their capacity as observers. This dissatisfaction with the concept is also expected to characterize the attitudes of prospective participants in other areas of concern such as labor, airport management and consumers, if and when the government affords them the opportunity to participate in future negotiations.

Question B-2b: There is evidence of complete agreement by the airline industry that the qualification when desirable or necessary as used in the testimony of a DOS official does not guarantee sufficient participation by the industry in the negotiating process. The significance

of this conclusion is that there was agreement mainly strong and with a total 100% count on the issue.

This is another strong point in the compounded end results which shows complete dissatisfaction by the airlines with regard to their role in the negotiating process. A similar dissatisfaction may also be evident toward other U.S. concerns that may be permitted by the government to participate in the negotiating process.

The concern with this qualification relates not to the condition itself, but rather to the fact that the government decides when and what is considered desirable or necessary. This is a decision left to the discretion of those who, although they may be authorized to make the decisions, often make them without clear guidelines.

Question A-8e. There is evidence of complete agreement by the airline industry that a change in the U.S. air transport policy must include a more constructive role for the industry in the negotiating process, if the situation of the airlines is to improve. Again, the significance of this conclusion adds to and supports the evidence of dissatisfaction by the industry regarding the role it plays in the negotiating process.

Questions A-1a, A-1b and A-1c: There is evidence of complete agreement by the airline industry that the U.S. negotiating team must be instructed to emphasize the interest of both consumers and carriers. However, this evidence indicates that emphasis on those interests should not be to the benefit of either party and that it should be equally distributed. The overwhelming total and complete agreement on this issue points to the concern of the airlines that recent policy

trends tend to jeopardize their interests in favor of non-airline considerations, evidence of which will also be shown in the next two examples of complete agreement. This is supportive evidence of the dissatisfaction towards the policy.

Question A-3: There is evidence of complete agreement by the airline industry that the government, in its attempt to focus on consumers' interests, may lose track of and may endanger carriers' chances for better deals in future bilaterals.

This complete agreement is supportive of the notion that the industry has concerns for the future regarding the direction of U.S. policy and the possible consequences that may influence the industry's interests.

Question A-6: There is evidence of complete agreement by the airline industry that high policy and other non-airline considerations will continue to be involved in important bilaterals. This is further supportive evidence of the notion that the industry is concerned about future bilateral arrangements.

All of the above evidence of complete agreement is supportive of the conclusion to and verification of the main hypothesized theme of this research work: that the airlines are dissatisfied with the policy.

Hypotheses showing no dissatisfaction. Appendix G lists five hypotheses that did not yield themselves to the verification of dissatisfaction. Some comments on these hypotheses and the responses associated with them are provided below.

Hypotheses 2 and 3: These deal with status quo situations that have remained thus by choice. Consequently, one can say that there are no existing situations which may be considered as sources of dissatisfaction to the airline industry. It seems to me that dissatisfaction with an existing situation contributes to dissatisfaction more than an existing situation contributes to no-dissatisfaction.

It is thus possible to say that the acceptance of the status quo as covered by those two hypotheses could not influence the total attitude of dissatisfaction as verified by the other hypotheses.

Hypotheses 14, 15 and 16: These deal with predictions of possible future events that could or could not result in dissatisfaction. Each of the no-dissatisfaction end results associated with each hypothesis needs a little comment to show how much influence they may have on the general attitudes of dissatisfaction by the airline industry as hypothesized.

Hypothesis 14: This hypothesis was not actually meant to detect an air of dissatisfaction but to detect a possible outcome which may or may not lead to dissatisfaction. The fact that a chosen instrument or chosen instruments could please those who would be chosen and displease those who would not, unless a different composite instrument is formulated in one way or another, and the fact that the concept does not exist now renders the conclusive end result of no-dissatisfaction given for this hypothesis less significant. Consequently, one could conclude that the no-dissatisfaction end result will have no significant influence on the total attitude of dissatisfaction as verifed by the other hypotheses.

Hypothesis 15: This hypothesis was also meant to detect a possible event rather than the specific attitude of dissatisfaction. If that event (more restrictions leading to less attractive international markets and more efforts being directed towards domestic markets) should take place, it would not be because of U.S. policy alone but because of the compounded effects of other foreign policies. Consequently, the dissatisfaction would not be aimed mainly at U.S. policy but at the situation as a whole. In any event, since business efforts could be directed to more prosperous markets (domestic), one could assume that the possible dissatisfaction associated with this issue would be less significant and would have less influence on the total attitude of dissatisfaction as verified by the other hypotheses.

Hypothesis 16: Because there was no evidence of agreement or disagreement to verify this hypothesis and because our conclusions were to discard the question and the responses for lack of sufficient evidence to verify the hypothesis one way or another, we must conclude that the no-dissatisfaction element attached to this hypothesis should have no influence whatsoever on the total attitude of dissatisfaction as verified by the other hypotheses.

In sum, we must conclude that the five hypotheses that did not contribute by their end results to the verification of the general theme of dissatisfaction could have no or very little influence on the end results of dissatisfaction verified and found by the other twelve hypotheses.

The end result thus is that the research did successfully verify the hypothesis of dissatisfaction.

H. Summary of the Findings

Following is an account of the results of the survey, whose results lead to the contention that the survey was successful and verifying the main theme of the hypothesis of dissatisfaction of the airline industry with the policy on international air transport. A summary of the findings of the survey will be provided here, centering around the two categories of end result descriptions used previously in the final analysis of each individual hypothesis, dissatisfaction and no-dissatisfaction.

Areas Showing No-Dissatisfaction

A. The airline industry did not feel that the Congress should be involved in the pre-negotiation phase of the bilaterals. Their feeling stemmed perhaps from the combined realities of the constitutional and political situation or from the fear that such action might result in unnecessary delays which in turn might lead to business losses.

B. The airline industry also resisted the idea that the legal status of the bilaterals should take the form of treaties rather than executive agreements, most likely for the same reasons given above.

C. Keeping in mind that the greatest bulk of the criticism was aimed at Bermuda II negotiations process, the airline industry felt that, disregarding the Bermuda II event, the principles recommended by the 1956 report are usually and reasonably considered by the government and that the technical advice of the airline industry is also given reasonable consideration by the government. It must be

mentioned, however, that this is the combined result of the opinions of Group C, with evidence that is neither very strong nor conclusive. (See responses to questions B-1d and B-2a.) This becomes clearer when one looks at the responses given by Group A to both issues, which showed no evidence of being weak or inconclusive, and the fact that responses to other questions of similar nature show dissatisfaction.

D. The airline industry felt that a change in the existing policy would improve the situation of the airlines but that such a change should not necessarily come from the legislative branch of the government. This is due perhaps to the fact that other areas of dissatisfaction were mentioned in this connection. It may also be true because of their low expectations that a change coming from the legislative branch of the government would be very helpful or would have immediate results.

One recalls that in the wake of the Bermuda II event, efforts in Congress were launched to pass certain bills dealing with international air transport, as was indicated in Chapter II. This area will be dealt with later and again in the final chapter.

E. The airline industry did not feel strongly that the restrictive provisions of Bermuda II resulted in a financial loss. (Neither did they feel that the agreement would become a model for other restrictive agreements.) However, this does not negate the fact that many aspects of the Bermuda II event did create a great deal of dissatisfaction.

F. The airline industry did not think that U.S. airlines would desert the international markets to the domestic markets if restrictions

in bilaterals becomes the mode. They will, evidently, continue to fight for their fair shares of the market

G. Responses to question D-6 (hypothesis 16) indicate that the question was most likely unclear or did not mean the same thing to all respondents. The question was designed to forecast the new direction of U.S. policy in the wake of Bermuda II as viewed by the airline industry. However, developments in this area evolved so quickly that the U.S. adopted the liberal approach when the Bermuda Formula was denounced by the U.K., which perhaps makes the question look out of place to the respondents.

This new liberal stand taken by the U.S. government in its current bilateral relation is what was in the mind of the researcher as an alternative to the Bermuda Formula, not exactly the liberal stand itself, but the change of policy as a consequence to Bermuda II and its possible effect on U.S. bilateral arrangements.

These are the areas covered by the research survey. It is thus not contended by the researcher that these are the only areas of the policy that are to be found satisfactory to the airline industry.

Areas Showing Dissatisfaction

Again the researcher wishes to make it clearly understood that the following areas are not the only areas of the policy that are unsatisfactory as viewed by the airline industry and as implied by the survey analysis. They are merely areas covered by the research within the bounds of its limited academic scope.

A. The airline industry feels dissatisfied with the fact that the U.S. government has not yet established an office in the DOS at the under-secretary level to coordinate aviation matters, to devote more time and attention to the problems of aviation matters, and to develop more skill in handling the bilateral relations.

B. The airline industry feels that the principles listed in the 1956 Senate report are still appropriate today with regard to the extent of their role in the negotiation process. (See question B-1.) The industry feels also that those principles have not been adhered to in the negotiation of Bermuda II.

C. The airline industry is dissatisfied with the use of the small working groups concept in the Bermuda II negotiation and feels that the use of such a concept is detrimental to its effective participation in the negotiation process.

D. The airline industry is dissatisfied with the qualification when desirable or necessary as was used in the testimony by a DOS official. The industry feels that such a qualification is also detrimental to its effective participation in the negotiating process.

E. While there is sufficient evidence that the airline industry feels that the full implementation of the principles listed in the 1956 report may imply a clear intrusion by the private sector in the decision-making process by the government, it also feels, through conclusive evidence, that the DOS testimony clearly indicates the unwillingness of the government to accept that intrusion. The dissatisfaction here probably does not come from the recognition that the government has the final say, but from the fact that these should

not be the criteria to administer national affairs, and that consideration for the welfare of the parties affected by government decisions should be recognized.

This feeling of dissatisfaction is also emphasized by the conclusive evidence obtained by the survey that the role of the airline industry in the negotiating process had not improved since the release of the 1956 report. The conclusive evidence also indicates that such role in the 80's would remain farther from the total involvement recommended by the 1956 report and closer to the when desirable or necessary stated by the DOS testimony.

This feeling of dissatisfaction is summarized by the conclusive evidence found that the airline industry finds its role in the negotiating process to be generally unsatisfactory.

F. Another area of dissatisfaction felt by the airline industry as surveyed relates to the need to introduce certain changes into the Policy in order to improve the situation of the airlines.

The feeling is that such changes should center around a national economic policy (perhaps as the policy of deregulation) and competition as implemented in the domestic market, although the evidence was merely sufficient.

Sufficient also was the evidence that such a change should center around the negotiating process, and that it should come from the executive branch.

The evidence, however, was conclusive that the airline industry felt that such a change should include a more constructive role for the airlines in the negotiating process. This evidence, of course,

supports the previous evidence of dissatisfaction about the role of the airline industry in the negotiating process.

G. The Bermuda II event brought into focus the need for the technical advice of experts from fields other than the airline industry such as labor, airport management, and consumers. Experts from such areas have not traditionally been represented in the negotiation process of the bilaterals. The airline industry, having access to such representation, however ineffective it may have been as explained above, did not object to the participation of such experts, believing that it might lead to a better understanding of the problems that concern them. However, the industry feels that those concerns do not have an interest in the negotiation process that is as equally important and vested as theirs.

The dissatisfaction here, if any, comes perhaps from the fear that the interest of the airline industry may be jeopardized either because of possible conflict of interests or because of the possible consequences of having representations from many U.S. private concerns and the unavoidable impact of the concept or qualification of when desirable or necessary.

H. An important area of dissatisfaction by the airline industry is the Bermuda II event. This feeling of dissatisfaction revolved around the finding that the agreement was not the best one possible, and that the agreement is unsatisfactory to U.S. interests, in spite of the fact that the industry felt it would not be denounced in the 1980's by the U.S. and that the new liberal agreements would have a diluting effect on the restrictive provisions and nature of Bermuda II.

I. Another area of dissatisfaction relates to the negative feelings of the airline industry about the appointment of a special negotiator from outside the ordinary negotiating team.

J. The negotiating process as a whole was received with general dissatisfaction by the airline industry. While the industry felt that emphasis might be placed on the interests of consumers in the negotiating process, it thought that such emphasis should also be equally placed on the interests of the airlines. The industry also believed that in focusing on consumers' interests, the government might lose track of airlines' interests, and that such an approach might endanger the airlines' chances for better deals in future bilaterals. The evidence also indicates that the feelings of the industry are that consumers' interests would be emphasized on future bilaterals.

K. The industry also expressed dissatisfaction with the inability of the Fair Competitive Practices Act of 1974 to remedy the ills it was designed for. They felt it was not a success.

L. The industry felt that exchanging cabotage was not economically favorable.

M. The use of high policy and non-airline consideration in future bilaterals is also a source of dissatisfaction in the airline industry.

N. Another area of concern to the industry is the feeling that the situation of the airlines may decline if restriction becomes the mode in future bilaterals.

O. Finally, the general feeling of the airline industry is that the policy is unsatisfactory. This was conclusively evident with the tendency of the agreement by the respondents being strong.

In sum, the survey, in its attempt to verify the central theme of dissatisfaction toward the policy, was able to verify such hypotheses by evidence of dissatisfaction towards many more areas than those showing no dissatisfaction. Most of the areas, of course, related to the bilateral set-up, including, but not limited to, the role of the industry in the negotiating process, the process itself, discrimination abroad, and some concerns for the future.

Appendix H provides a summary of the various hypotheses and the results of the survey. The Appendix indicates that five of the hypotheses (2, 3, 14, 15, and 16) could not be used to assist in the verification of the general hypothesis of dissatisfaction of the airline industry towards the policy. Four of those five could not even be verified. Eleven of the hypotheses, however, were verifiable almost entirely conclusively and could be used to assist in the verification and support of the main hypothesis.

It is thus possible to conclude that there is a definite air of dissatisfaction towards the international air transport policy as it stands now, which characterizes the general feelings of the airlines within those areas surveyed and verified to that effect.

I. Summary and Conclusions

Summary

In this chapter we have reviewed the actual methodology used to gather the survey data, and indicated the failure to achieve one

of the goals of the survey in terms of methodology, that is, we were unable to solicit responses from all the airlines. However, we did receive responses from more than 60% of the whole population, depending on how such proportion is calculated. Our conclusion was that this proportion was sufficient to provide us with a reliable set of data for the purpose of verifying both the individual hypotheses and, finally, the main hypothesis.

Sixteen individual hypotheses were given to be verified by responses to forty-two questions. The main hypothesis (17) was to be verified by responses to one question and by the combined results of the first sixteen hypotheses.

Due to the difficulties associated with gathering data and soliciting responses from key post officers in the industry, a process of selection had to be employed in order to choose what areas should be covered for the maintenance of the quality of the research while regarding the limited scope within which the research must be conducted.

The collection of data (responses to the survey questionnaire) lasted for a period of almost nine months, after which it was decided that additional efforts to obtain more responses would be unfruitful. This chapter has also provided an account (tally) of the responses received from the respondents, with some worthwhile remarks and an explanation of the coding process used for maintaining an objective of confidentiality.

Naturally, the analysis has dominated the greatest portion of the chapter. A criteria for the analysis and conclusions was used

to provide for a certain degree of objectivity and for a systematic and numerical process of arriving at logical conclusions.

The approach used to analyze the survey data was made in three steps:

Step 1: Analyzing responses to each individual question and drawing conclusions of evidence (conclusive, sufficient, weak or no evidence) for the attitudes of each of the two groups of respondents, A and B.

Step 2: Verifying each individual hypothesis through the combined results and making conclusions drawn from the responses to the question or questions pertaining to that particular hypothesis. The conclusions for the verification of each hypothesis were based on evidence for the attitudes of Group C respondents.

Step 3: Drawing a conclusion as an end result (dissatisfaction or no dissatisfaction) for each of the hypotheses based on the combined results of the conclusions drawn in Step 2 above.

Five appendices were also provided to exhibit survey results and findings.

Conclusions

Only one conclusion in connection with this chapter will be provided here. Because it was possible to verify the existence of an air of dissatisfaction in twelve of the hypotheses from a total of seventeen, which is greater than 50%, it should be concluded that the survey did achieve its objective in verifying that there is an air of dissatisfaction by the airline industry towards the international

air transport policy within the limited scope of this research and within the bounds of the areas covered by it.

CHAPTER VIII

EPILOGUE

A. Introduction

This final chapter will provide five major sections, the first of which will deal with the major developments that have been taking place as this research was being conducted. As will be seen, such developments have been updated as the writing of the chapter goes on in order to keep the reader informed and to shed light on the broad scope and dynamic nature of the topic. Updating will involve areas of the Policy, the bilaterals, the airlines, and the attitudes. New information has been added to the manuscript up to the date of delivering it for submission to the dissertation committee about mid-April of 1980. The reader's attention is directed to the release of the IATA show-cause order final decision by the Board which may have an unexpected outcome and which will either confirm the current attitude of the CAB or introduce a change of attitude in light of recent developments in the international arena.

The second of the five major sections of this chapter will review samples of reactions to the U.S. Policy, both the domestic deregulation and the drive for an open skies regime.

The third section will review the newly enacted International Air Transportation Competition Act of 1979 (IATCA) as compared to the key elements of an open skies regime. In addition, certain sensitive policy issues will be discussed in the light of recent industry reactions and attitudes towards them. This third section will also

provide a special essay on the attitude of the CAB and review a sample of the criticism directed at the Board.

The fourth of the five sections to be treated in this final chapter will present the personal views of the researcher on the two major drives of the U.S. government, domestic deregulation and the open skies policy, in addition to a discussion on the new IATCA and the CAB. This fourth section attempts as well to look at the implications of the verified dissatisfaction of the airlines towards the Policy and the reasons why it is important to afford the industry's attitudes the proper considerations.

The final section will provide some brief and general recommendations made on the basis of the research results as possible solutions to some of the problems discussed.

B. Developments and Update

It should be recalled that the topic of this research deals with four major headings--the policy, the bilaterals, the airlines, and their attitudes. It should also be mentioned that the research effort was launched early in 1979 and has continued as new events in the airline industry have developed. Therefore, an entire section in this final chapter will be devoted to updating current developments in the field, especially those that had to be left unresolved in earlier chapters.

Developments concerning the policy should include the newly proposed international bill and the IATA show-cause case. Developments in the area of the bilaterals must touch upon both the progress of

the government in its drive to negotiate more liberal bilaterals and upon recent events concerning the Bermuda II Agreement. Developments concerning the airlines should include the new events that have taken place as a result of deregulation, including merger cases, the changing role of the original irregulars and supplementals, and the emergence of a newly created group of supplementals. Developments concerning the attitudes will review the somewhat successful effort launched to obtain some reflections from executives of the airlines, with the hope that they may assist in the final analysis and recommendations.

The Policy

In this section we will update some of the policy issues that were previously discussed and will also review additional developments relating to the policy which are thought to be of some importance. The discussion will include issues relating to the three major government policy body makers--the Congress, the administration, and the CAB.

Legislative policy. Following the congressional hearings on the Bermuda II Agreement and the passage of the 1978 Deregulation Act, Congress was all set to define its own policy on international air transport by producing some kind of legislation. Hearings were conducted by both the Senate and the House on the progress and outcome of the Deregulation Act and on separate proposed bills by both elements of the Congress. A congressional bill requires passage by both the Senate and the House of Representatives. The usual process for the development of such a bill is for each body of the Congress to develop

its own bill through appropriate committees and subsequently a conference takes place for the purpose of agreeing on a congressional bill.[344]

On November 27, 1979, the Senate-House conferees met for the first time to resolve differences between the two bills on international air transport. They were faced with five issues that were still in disagreement: the authority of the CAB to set a zone of reasonableness for fare levels; emergency cabotage; the prohibition against interstate service at Love Field in Dallas, Texas; the question of whether hearings should be held by the CAB before altering a carrier certificate regarding international routes; and the issue of whether the President would be given authority to review international agreements having foreign policy implications.[345]

Senate-House differences were finally resolved and the bill was sent to the President for signature. If signed by the President, this legislation will become law as the U.S. International Air Transportation Competition Act of 1979. Thus far the bill as submitted to the President provides for the following:

1. Carriers would be permitted to immediately lower fares by 50% and to raise fares by 5% in six months without CAB intervention.

---

[344]For development of the Senate bill, see Traffic World, Aug. 22, 1979, pp. 31, 100. Also see the following issues of Aviation Daily: June 8, 1979, p. 225; Sept. 24, 1979, p. 114; Sept. 25, 1979, p. 121; Oct. 2, 1979, p. 161; and Nov. 14, 1979, p. 65. For development of the House bill, see the following issues of Aviation Daily: Oct. 26, 1979, p. 300; Nov. 14, 1979, p. 65.

[345]Aviation Daily, Nov. 28, 1979, p. 130.

2. Within six months after enactment, the CAB would have to establish the standard foreign fare level (SFFL) to be used as a benchmark for the international zone of reasonableness, with some discretion by the Board in certain cases.

3. Subject to presidential review, the CAB could suspend or revoke the permits and fares of foreign flag carriers whose governments unreasonably restrict U.S. airlines.

4. The CAB could suspend or revoke a carrier's gateway rights if unserved for 90 days.

5. The CAB would have to consider U.S. airlines' competitive position when approving a carrier's request to serve a foreign city and must assure that the U.S. airline has equal opportunity for profitability as foreign air carriers.

6. Anti-competitive international air agreements might not be approved unless necessary for improved public benefit, international relations, or U.S. foreign policy considerations.

7. Foreign-registered aircraft might be used under lease on domestic U.S. routes under special FAA regulations.

8. Interstate service to Love Airport would be resolved by a restriction to flights to the four contiguous states, with some other restrictions placed on Love service.

9. The CAB would be prohibited from approving part charters by U.S. carriers until after December 21, 1981.[346]

---

[346] Aviation Daily, Feb. 12, 1980, p. 237. See also U.S., House of Representatives, Conference Report, No. 96-76, S. 1300, 96th Congress, 1st session, Dec. 19, 1979, for details including goals for International Aviation Policy.

The President had until February 16, 1980 to sign this international aviation bill. (See Executive Policy section.)

Another legislative policy that is being developed deals with international cargo rate flexibility, a concern about which the Congress is moving to develop a bill. The bill introduced by the House is intended to give international cargo carriers flexibility to charge their rates within a specified zone.[347] A CAB member expressed concern over the difficulty of applying the formula proposed by the bill due to the fact that, unlike passenger fares, cargo rates have no well-defined base price upon which a zone or zones or reasonableness can be established. The idea of the bill has been praised by one airline executive as an enhancement to reliance on market forces in international air cargo transportation.[348]

CAB policy. Three issues in this connection deserve attention: a new international fares policy, charter liberalization rules, and the IATA show-cause order. All of these three policy issues or directions which the CAB has accepted or is now considering are attempts to hasten the achievement of the new U.S. policy objectives, with emphasis on introducing the spirit of the new domestic deregulation experiment into the international arena. A brief discussion of such policy directions and an update of the developments thereof are provided below for the purposes of putting things into perspective.

New international fares policy: CAB staff are currently in the process of developing a new policy for assessing its fare filings,

---

[347] Aviation Daily, Nov. 28, 1979, p. 131.

[348] Aviation Daily, Dec. 5, 1979, p. 173.

a policy that is designed to provide a surrogate for competition in markets where the CAB must still regulate.[349] Disenchanted with the IATA rate conference machinery and convinced that fares in restricted international markets are still too high, the CAB is still sensitive to criticism for lack of objective standards that would assist in the decision-making process. Faced with the frequent responsibility to make decisions relating to fare changes and proposals made either by individual U.S. carriers or by collective agreements such as IATA resolutions, the CAB finds itself compelled to develop a systematic fare setup to be used as a basis for its decisions. In doing so, a CAB staff working group on this subject indicates that three factors are always recognized and kept in mind: (1) U.S. aviation policy says that competition, not regulation, is the best price governor; (2) most foreign markets remain non-competitive; and (3) under competition, prices and costs tend to equivalence.[350] Of the methods of evaluation that are being considered, the following three are mentioned:

1. Competitive markets: This method is based on the supposition that a relatively "competitive" per-mile fare can be picked out from carrier pricing decisions in a bilaterally liberal market.

2. Rates of return: This method was viewed by the staff as a kind of check on the first method--a way of testing whether the fare level produced by the first method would be reasonable.

---

[349] Aviation Daily, Sept. 27, 1979, p. 142.

[350] Aviation Daily, Sept. 13, 1979, p. 58.

3. Application of cost difference between "normal economy fares" and "discount services" to "competitive fares": This method is based on a "fairly consistent pattern" discerned in the relationship between normal fares and deep discount fares.[351]

Finally the CAB reached a decision to institute a new methodology for analyzing the reasonableness of international fare increase proposals. This new system will use a Standard Foreign Fare Level (SFFL) which establishes a ceiling fare level in every major international geographic region. It also allows a 5% upward fare flexibility in the U.S.-Europe region. The SFFL is similar to the Standard Industry Fare Level (SIFL) used in domestic markets. In using the SFFL system, individual airline fare increase requests will be analyzed on the basis of the cost of all airlines in the region. The use of this SFFL system is presumed to be a first step in implementing the provision of the newly enacted International Air Transportation Competitive Act.[352] (See below under Executive Policy.)

Liberalized charter rules: In August 1978 the CAB adopted new liberalized charter regulations which were described by ICAO as the most important policy change in non-scheduled traffic and of far-reaching importance.[353] Those regulations were designed to eliminate most current charter forms by the end of 1978 and to replace them with

---

[351]For more details on these three methods, see Aviation Daily, Sept. 27, 1979, p. 142.

[352]For the implementation of this new method to some fare increase proposals, see CAB Release 80-20, dated Jan. 29, 1980.

[353]International Civil Aviation Organization (ICAO), Annual Report of the Council, 1978, Doc. 9266, p. 16.

a new charter category called public charters. This concept of public charters eliminates the requirements of advance purchase, minimum stay, discount pricing (non-discriminatory structure is essential), and minimum group size, while retaining the minimum charter contract size of at least twenty seats.

The liberalized rules also permit one-way charters but prohibit open-ended round trip charters. The 1978 ICAO Report indicates that in the beginning of 1979 only Affinity Group, Single Entity, and Overseas Military Personnel charters would continue to be in effect, together with public charters.[354] Public charters have been denounced by some foreign governments such as the United Kingdom, which voiced its opposition to this concept often and kept public charters out of Britain.[355]

The IATA show-cause order: As cited earlier, the opposition to the IATA show-cause order began with a dissent by one of the Board members. This speech was followed by strong opposition from foreign governments and airlines in addition to disagreement from some U.S. government agencies. From the time the order was issued to the time action was taken by the Board to terminate the proceeding, many events haven taken place, including hearings and intergovernmental coordination. Because of the important nature and implications of this IATA show-cause order, this paper provides a brief account of the major events

---

[354] Ibid. For a description of the types of charter flights see NACA, 1978 Annual Report, op. cit., p. 17.

[355] U.S., Department of State, International Aviation Symposium, op. cit., presentation by Adam Thompson, chairman, BCAL, p. 104.

that took place from the inception of the order to the decision to terminate the proceeding.[356] The show-cause concept relies on the philosophy that the burden of proof is placed on other parties, rather than on the claimant. Black's Law Dictionary defines such an order as "against a rule." It is thus expected that much opposition was likely to develop against such a CAB approach, especially in handling international aviation matters. It was argued that the show-cause order came after the appointment of new CAB members and staff and after a closed meeting during which a decision was made to initiate an investigation questioning the validity of continuing anti-trust immunity to those carriers participating in IATA traffic conferences and the show-cause order (78-6-78) was subsequently issued.

Because the case of the CAB was sufficiently explained in Chapter IV, it will not be elaborated upon here. Rather, we will look into reactions to the order. Following the issuance of and in response to the show-cause order, the IATA revised its traffic conference provisions and filed its revisions with the CAB, requesting that the IATA be granted interim approval by the Board and be considered in the show-cause order proceedings. Later in 1978 the IATA filed its initial show-cause order testimony, stressing the following three points: that "no alternative regime can duplicate IATA's contributions," "confirmation of the Board's tentative findings would be detrimental to the performance of the international air transport system," and

---

[356]For a general look at the progress of the show-cause order, see issues of Aviation Daily, June 1979 through December 1979. See also IATA, 1979 Annual Report: The State of the Air Transport Industry, pp. 25-28.

"it was difficult to detect any public interest which would be served by finalizing the Board's tentative findings."[357]

During the eight months that followed issuance of the show-cause order, the following events took place:

> 1. 48 governments make direct representation to the U.S. Department of State or the CAB.
> 2. 71 governments indirectly express their concern through the representation made by the Arab Civil Aviation Council (ACAC), the African Civil Aviation Commission (AFCAC), and the European Civil Aviation Conference (ECAC).
> 3. 45 airlines file direct testimony with the CAB and the member carriers of the Arab Air Carrier Organization (AACO), the Association of European Airlines (AEA), the African Airlines Association (AFRAA), the Air transport Association of America (ATA), and the Orient Airlines Association (OAA) express their concern through joint submissions by those regional airline associations.[358]

Of the three executive departments having the greatest influence on international aviation policy, the Department of State and the Department of Transportation called for moderation on the part of the CAB, while the Department of Justice supported the tentative decision of the CAB. Faced with this vast opposition and protest, the CAB on May 14, 1979 issued an order granting the IATA's revised traffic conference provisions interim approval, which removed from the show-cause order proceeding the majority of IATA resolutions not related to fares and rates and which established the legislative hearings procedure to examine those resolutions directly concerned with the IATA's tariff coordination activities.[359] The IATA immediately filed

---

[357] IATA, 1979 Annual Report, op. cit.

[358] Ibid.

[359] Ibid. The order involved is CAB Order 79-5-113.

a petition with the CAB asking for partial consideration of the above order and requesting that ". . . the proceeding be stayed pending appropriate diplomatic exchanges, . . . the revised IATA traffic conferences provisions be given a fair working test" and that ". . . the environmental consequence of the CAB tentative findings be evaluated."[360] Both DOT and DOS supported the IATA's requests for a fair working test of the new provisions as well as time for meaningful inter-governmental discussions.

The Board, however, issued another order on June 13, 1979 which rejected the request for a twelve-month test period for the revised traffic conference provisions; revised the timetable of the legislative hearing procedure; and agreed to meet with the DOS to discuss arrangements for multilateral consultations with foreign governments.[361] Subsequently, the Board decided to schedule some regional multilateral consultations between U.S. officials and interested governments. Three such consultations were held in July 1979 when the positions of the participants were expressed, leaning mainly towards "strong opposition to the unilateral nature of the show-cause order procedure, support for the new IATA structure and revised traffic conference provisions, and support for an adequate period of time to test these new provisions."[362] Unhindered by all the protest and

---

[360] Ibid.

[361] Ibid., CAB Order 79-6-65.

[362] Ibid. The meetings were convened in Bogota (July 23-24, 1979), Brussels (July 26-27, 1979) and Nairobi (July 30-31, 1979). A fourth meeting was planned to take place in Manila but was called off due to lack of interest to participate by some Far Eastern governments. See Aviation Daily, July 30, 1979, p. 155, and July 31, 1979, p. 162.

opposition showing concern over the whole matter of the show-cause order and the legislative hearing procedure, the CAB went on with the hearing where testimonies were given by representatives from the IATA, the DOS, and the DOT, experts from the CAB and other various interested parties. Both the DOS and the DOT asked that further proceedings be suspended pending multilateral discussions on the results, following a one-year test period of the revised IATA provisions.

On August 30, 1979, the Board issued another order withdrawing its tentative show-cause findings concerning IATA rates and rate-related resolutions covering the provisions of air transport services between non-U.S. points.[363] The legislative hearing, however, continued in October 1979. While the DOS decided not to appear at the legislative hearing,[364] it continued to ask that the hearings be terminated and CAB member Richard O'Melia intended to press for that specific end.[365] It was argued that the CAB could have terminated the hearing at that time pursuant to the DOT motion. Instead, it deferred action and kept alive rumors that it was looking for a way out of the proceedings without losing face.[366] During these final hearings, testimonies were heard calling the Board's action an outrage and it must have been obvious that forty-seven foreign governments had formally protested to the DOS, and forty-three others, acting through regional organizations,

---

[363] Ibid., CAB Order 79-8-194.

[364] Aviation Daily, Oct. 19, 1979, p. 258. The DOS and the CAB decided to have a confidential meeting on Nov. 14, 1979 on the subject matter. See Aviation Daily, Nov. 5, 1979, p. 19.

[365] Aviation Daily, Oct. 17, 1979, p. 241.

[366] Aviation Daily, Oct. 22, 1979, p. 265.

had rejoined this chorus of outrage.[367] In fact, some witnesses expressed their desire for string-free anti-trust immunity.[368] The only U.S. government agency in agreement with the Board's action was the Department of Justice calling tentatively for disapproval of at least part of IATA rate-making machinery.

On December 5, 1979, the Board, in a 3-1 vote, decided to drop its IATA show-cause order but disallowed U.S. carriers to participate in any traffic conferences over the North Atlantic for the next two years. CAB member Richard O'Melia agreed with abandoning the show-cause order but opposed the majority's plan to ban U.S. carriers from North Atlantic rate making.[369]

A CAB release declaring termination of the show-cause proceeding indicated that continued approval of the balance of IATA resolutions not affecting the North Atlantic traffic would depend on two conditions: first, the IATA must confirm its expressed willingness to grant Board observors the right to attend all sessions of traffic conferences affecting the U.S.; and second, the IATA would be asked to make explicit in its rules that for all routes touching the U.S., the so-called innovative fare proposals by one carrier need not be approved by any other member of the conference. The CAB release also indicated that the Board intended to review the situation in the North

---

[367] Aviation Daily, Oct. 23, 1979, p. 273.

[368] Aviation Daily, Oct. 24, 1979, p. 285.

[369] Aviation Daily, Dec. 5,, 1979, p. 169. One must remember that at this time this was merely a vote and a stand not yet formalized by a decision.

Atlantic and elsewhere in two years.[370] The IATA called this CAB release a "trial balloon" to see if foreign governments would object to the Board's narrowing of its originally proposed lifting of anti-trust immunity from all IATA fares negotiations to include only those of U.S. carriers on North Atlantic routes. The IATA also indicated that it would have to exercise appropriate procedural and legal steps to retain anti-trust immunity for tariff coordination pending intergovernmental discussions of the matter in some appropriate forum if the CAB issued a formal order in accordance with the above release announcement. IATA's Director General also criticized the Board for attempting to force other changes upon foreign carriers and their governments, citing the idea of auctioning or settling by lottery airport landing slots and the dismantling of the IATA travel agency program, adding that the Board seemed to forget that at the end of every air route to and from the U.S., there is another country whose commerce is equally at stake. The IATA Director General also indicated, with reference to the other condition mentioned in the above CAB release (which requires a CAB representative to attend IATA fare negotiation sessions), that there would be obvious practical difficulties if about one hundred other governments were to follow suit and ask for the same right. He added that such a provision existed in the structure of the ICAO fares and rates panel, but the U.S. had not availed itself of such an open invitation for the previous two years.[371]

---

[370] CAB Release 79-257, dated Dec. 5, 1979. This second condition is implicitly included in IATA's new rules, as indicated by IATA during the proceedings.

[371] Aviation Daily, Dec. 24, 1979, p. 278.

The Council of ICAO on December 15, 1978 adopted a resolution which called upon the contracting states "to refrain from any unilateral action which would endanger multilateral fares and rate-setting systems . . . ." This resolution obviously referred to the show-cause order.[372] The CAB finally issued its decision after a long wait, and called it a tentative decision so that parties may comment on the decision. It was argued that this was done to avoid suspected legal challenges. The dissent of resigning CAB member Richard O'Melia was attached, warning of another show-cause order in two more years as the Board gathers more data to support an immediate termination of IATA.[373]

Executive policy. The administration continued its drive for the policy of trading opportunities as can be interpreted from the few other liberal agreements recently signed with other countries, such as the agreement with the Netherlands-Antilles. (See the Bilaterals section.) Such efforts, however, were not successful in reaching liberal agreements with hard-line countries such as Japan and Italy, or with extremely restrictive governments such as the Peoples' Republic of China. This fact and the widespread concern and dissatisfaction of the international aviation communities with U.S. policy are bound to have made it more difficult for the government to achieve its final objectives. (See below under Reactions to the New Policy.) In furthering his 1978 policy statement and in his drive to secure a free market environment for U.S. airlines, President Carter signed

---

[372] ICAO, 1978 Annual Report, op. cit., p. 20.

[373] Aviation Daily, April 17, 1980, p. 266; April 18, 1980, p. 275.

into law the international aviation bill, thus creating the new International Air Transportation Competition Act of 1979, which would ease individual carrier entry into new international markets and allow rate changes within a zone of reasonableness free of CAB influence (more about this act will be provided later in this chapter). In his statement accompanying this new law, President Carter praised it and indicated that it would strengthen his hand to ensure American consumers and carriers the benefits of more international flights from more American cities and regions with greater flexibility to set fares as low as "efficient management and open competition will allow."[374]

The Bilaterals

The drive of the United States to sell its open skies, low fares, pro-competitive policy to the rest of the world and the inability to achieve a multilateral accord on this matter has led the U.S. to push hard for more liberal bilaterals with any country desiring to exchange such economic opportunities with the United States. The liberal approach and the behavior of the CAB towards the IATA's fare agreements and the open fare system existing over the North Atlantic led to a great deal of criticism from countries and airlines opposed to this U.S. policy (see Reactions to the New Policy below). It was claimed recently that even some of those countries that had entered into the so-called liberal agreements have shown an inclination to resist the implementation of certain

---

[374] Aviation Daily, Feb. 20, 1980, p. 274. For the text of the President's statement accompanying the new law, see Aviation Daily, Feb. 20, 1980, back of p. 274. The bill was signed into law on Feb. 15, 1980.

provisions agreed upon with the United States. (See below under Reactions to the New Policy.) In fact, there are times when a disagreement between two countries having liberal bilaterals with the U.S. may result in some confusion or delay over bilateral arrangements of one or both of those countries with the U.S.[375]

In its zeal to make its liberal policy conducive for other countries to agree to the new liberal policy, the United States has recently conducted talks with the Netherlands-Antilles to enter into what is called a "close to a model" agreement, which would include a new pricing provision calling for a dual or mutual disapproval. In addition to the mutual disapproval pricing article, the agreement will also permit charter operations under rules of either country at the choice of the carrier. The ALM Antillean airlines will have rights to seven points in the United States and beyond rights to Canada. The "very generous" landing provisions give the Netherlands-Antilles rights to Puerto Rico and the Virgin Islands. ALM will also retain current rights to New York and Miami and will be able to select two additional cities. ALM will be given a special three-year protection (from U.S. carriers competition) in the Miami-Netherlands-Antilles market, after which ALM would be allowed to fly beyond Puerto Rico to some point in Europe and to select three additional cities in the continental U.S. The U.S. did not seek any new landing rights through this agreement. Aviation Daily contends that some U.S. airlines may challenge this agreement as just another give-away.[376]

---

[375] Aviation Daily, Nov. 20, 1979, p. 102.

[376] Aviation Daily, Jan. 23, 1980, p. 122.

When the "country-of-origin" concept was used in some of the liberal bilaterals, as was explained in earlier chapters, it was described as revolutionary and supportive of the liberal concept of bilateralism. This concept, however, does not seem to be the most favored to the United States, for it is being replaced in the new liberal bilaterals with the dual disapproval pricing concept mentioned above which calls for mutual disapproval of fares by both governments before it can be discarded.

As for the controversial and partially restrictive Bermuda II Agreement, the U.S. was eager to soften these restrictions and kept negotiating with the United Kingdom somewhat unsuccessfully for a long time, until recently an accord was finally reached. Under this agreement, sixteen additional U.S.-London services were agreed upon to be authorized by 1984, eight to be named by each country. The accord was reached in the form of a memorandum of consultation initialed on March 5, 1980 which called for the following new operating rights:

1. Beginning in late spring of 1980, U.S. airlines will be able to offer Denver-London service for the first time, with additional service from Boston which is served currently only by TWA.

2. In January of 1980, an additional U.S. airline will be added to the Miami-London route which is served currently by Pan Am under a temporary exemption.

3. In April 1980, British Caledonian will be permitted to begin St. Louis-London service

4. In April 1981, British Airways will begin a New Orleans-London service.

5. By the end of 1981 the United Kingdom will be able to add a new airline to the Miami-London route which is expected to be served by Laker Airways.

6. Each of the two countries will be able to select two additional U.S. cities for new London service in 1981 and an additional three cities, one each per side in 1982, 1983, and 1984.

The heads of the two delegations indicated that all U.S. cities not currently receiving nonstop service will be eligible for selection during the five-year period of the new accord. These will include Baltimore and Newark, cities that receive service through the Washington and New York gateways.

The new accord will also permit a phased liberalization of North Atlantic cargo pricing although rather than establishing new passenger charter rules, it will permit each country to govern charter flights separately on the basis of reciprocity.

Reactions to this accord from both sides were conservative and cautious. U.K. reactions included a praise for the pact but described it as a "toughly negotiated package deal" which should be satisfactory to both sides in terms of their "particular interests, which inevitably differ to some extent." Cautious U.K. reactions pointed to the current economic conditions which may not be "conducive to expanded operations." U.S. reaction also was mixed. The resulting significant expansion of transatlantic air service between the two countries was described as satisfactory. However, the lack of changes in pricing, fifth freedom rights, and charter operations were described as unsatisfactory.

All reactions, of course, depend on who is expressing those opinions.[377]

As for the court litigation on the Bermuda II Agreement, the Defendants-Appellees brief filed on June 26, 1979, seems to have been most successful, despite the elaborate reply filed by the Plaintiffs-Appellants on July 17, 1979. In remanding for dismissal by the lower court, the U.S. Court of Appeals, D.C. circuit, found that the claimants (Plaintiffs-Appellants) "lack standing" to invoke the court's powers. (The lower court, U.S. District Court, previously ruled that the Plaintiffs-Appellants had standing because they were injured by a diminution in air services caused by the Bermuda II Agreement.)

The Appeals Court indicated that while the lower court may have been correct in its claim that less adequate service resulted, it could not agree that such a conclusion resolves the issue of standing to bring this suit. The Appeals Court added that the lower court:

> . . . did not evaluate appellant's standing in terms of that aspect of current Supreme Court standing doctrine which holds that, absent a substantial liklihood that a federal court can redress the injury a plaintiff claims to have suffered, the plaintiff has no standing to invoke the court's power. . . . The complaint proffers no evidence that, were the agreement re-negotiated, the United Kingdom would be amenable to terms other than those of Bermuda II. . . . Appellants have failed to show that this court can redress the injury appellants aver they have suffered. . . . Absent such a showing, excercise of its power by a federal court would be gratuitous . . ."

and thus inconsistent with prevailing law.[378]

---

[377] For details on the conditions of the new accord, see Aviation Daily, Mar. 6, 1980, p. 26; for U.K. reactions, see Aviation Daily, Mar. 10, 1980, p. 43; and for U.S. reactions, see Aviation Daily, Mar. 12, 1980, p. 58.

[378] Bill Henzey, Airline Reports, Feb. 14, 1980, p. 5.

The Airlines

Ever since the Bermuda II event, domestic deregulation, and the beginning of the U.S. drive for open skies, the airlines have seen a revolution in progress: nearly free entry and exit, resulting in concentration in previously monopolistic markets, supposedly more profitable; loss of service to many small and medium-sized communities; airport problems relating to congestion; difficulties by some airlines in securing slots; increasing noise levels; traffic growth unmatched by corresponding rates of returns; low yields caused by continually increasing cost elements and low fares; shrinkage of some air carrier use, while some grow either from within or through combination and still others are newly born; hidden safety problems requiring more attention; supplementals departing from their traditionally known roles in air transport; and increasing competition between U.S. airlines themselves and between U.S. airlines and foreign carriers as well as numerous other problems.

The airlines' case was aggravated by drastic increases in cost elements, especially fuel costs, with no relief from the CAB to grant them corresponding fare increases. These escalating costs resulted in drastically low returns on their investments, further complicating the airlines' ability to secure the ever-increasing capital requirements.

In addition to discussing two important and general subjects relating to the fuel crisis and the further research made on the Civil Reserve Air Fleet (CRAF), we will update some relevant and important developments relating to each category of U.S. international airlines which we have dealt with so far.

International and territorial. Two important issues are worthy of mention here--the cases of mergers within this category of airlines and the invasion of their scheduled and nonscheduled operations by U.S. supplementals and other U.S. carriers as well as the issue of foreign carriers being injected into the various markets.

We will discuss briefly two cases of mergers, one of which has already taken place at the writing of this section, the other still pending. The Pan Am-National merger was the first to be finally approved after a fierce fight by both Eastern and Texas International. After much study, investigation and deliberation, the CAB approved the National merger with Pan Am, while disapproving it with either Eastern or Texas International, because Pan Am met the standard test used in such cases--namely that the merger would not substantially lessen competition in an area of the country. The test was not met in the case of either Eastern or Texas International. The Pan Am merger, which took effect on January 7, 1980,[379] was an end-to-end merger in which Pan Am was primarily an international air carrier (as was indicated in Chapter VI), National being the smallest of the trunks having its principal routes from the Northwest to Florida and across the Sunbelt.[380]

---

[379] Aviation Daily, Jan. 7, 1980, p. 26.

[380] Aviation Week & Space Technology, International Air Transportation Conference, "Deregulation: Fact vs. Fancy," Washington, D.C., Feb. 11-12, 1980. Address by Thomas G. Cody, Vice President-Legal and Governmental Affairs, Pan Am, "Mergers: Does Deregulation Foster Concentration?" The researcher attended this conference and obtained preliminary copies of speeches made. The official report of the whole conference should soon be published. (Hereinafter cited as AW & ST, International Air Transportation Conference.)

The second case to be discussed briefly here is the proposed merger between Continental and Western. This merger was not approved by the Board for not meeting the aforementioned standard and, generally speaking, was not consistent with the Federal anti-trust laws.[381] This disapproval by the CAB was met with sharp criticism. (See Reactions to the New Policy below.)

Another case of combining airline efforts which falls short of a proposed merger to the Board at this time is the attempt by Texas International to gain control over Trans World Corporation, which owns TWA. The attempt seems to be in progress but its fate is not yet clear, even though it has been rumored that Texas International executives are determined to gain control of TWA.[382]

All of the above examples indicate that the new era of deregulation, both domestically and potentially in the international arena, will call upon the airlines, especially the trunks, to combine in their struggle to retain their status and survive within the trunk system category.

Invasion of the markets that used to be primarily served by the trunks has also been a major development that has developed with the new policy of deregultion or, specifically, the policy of multiple permissive entry and awards. These markets have been invaded not only by the supplementals whose traffic was primarily chartered, but also by other carriers that have been newly combined (such as U.S. Air)

---

[381] For some reflections on the Board's opinion, see Bill Henzey, Airline Reports, Sept. 27, 1979, pp. 1-2.

[382] Airline Executive, Nov. 1979, p. 8.

or newly created and fast-growing (such as Air Florida). In fact, the North Atlantic is not the only area where fierce competition takes place between U.S. and foreign carriers. The Caribbean market, for example, is an area where U.S. trunks will find themselves facing new competition from U.S. carriers, both supplemental and other carriers, and also from foreign carriers.[383] This policy of multiple designation has been denounced by some carriers as being both a waste and a disservice to both U.S. carriers and consumers.[384]

All-cargo. The most significant development to be mentioned here is the proposed merger between Flying Tiger and Seaboard. When Seaboard agreed to sell its remaining shares to Tiger International, the parent company of Flying Tiger, it was argued that such a deal would create the world's largest cargo airline--even bigger than Aeroflot by about 2.7% by 1978 traffic standards.[385] On January 15, 1980, initial approval of this merger was ruled by a CAB law judge who indicated that while such a merger would create a strong all-cargo carrier to meet the fierce competition of foreign flag carriers across both oceans, it would not be creating a competitive monster for U.S. carriers.[386] The Department of Justice (DOJ), however, has asked the Board to reverse this recommended decision, arguing that an alleged need to meet strong competition is not a valid justification for an

---

[383] Aviation Daily, Feb. 7, 1980, p. 210; Feb. 15, 1980, p. 257.

[384] AW & ST, International Air Transportation Conference, op. cit., address by C. E. Meyer, Jr., President, TWA, "Expanding Horizons."

[385] Airline Executive, Aug. 1979, p. 7.

[386] Aviation Daily, Jan. 16, 1980, p. 83.

anti-competitive merger and calling for preserving the independence and spirited competitive growth of the two carriers.[387] The CAB's Bureau of Consumer Protection has also joined the DOJ in asking for a CAB review of this merger decision. Tiger International and Seaboard have indicated, however, that they "strenuously oppose" such a CAB review, arguing that the proceeding on this merger application has entered its third calendar year and noting that had the filing been made a few months later, the Deregulation Act would have applied, requiring a decision by the Board within six months. They have also argued that opponents of the merger have sought to block the acquisition both before the Board and in several federal courts and failed, adding that such efforts have caused considerable delay and imposed substantial added costs on all concerned. In addition, they claim that the CAB judge reached his decision after careful consideration of over 20,000 pages of discovery documents, exhibits, and transcripts.[388] The finalization of this proposed merger case remains to be seen.

Another relevant aspect worhty of mentioning here is the intention of the Board to certificate other all-cargo applicants into the international markets that were primarily served by the three all-cargo carriers for both charters and scheduled service.[389] Such an action would be bound to introduce more competition into those markets, which may require changes of strategies on the part of the original three all-cargo carriers.

---

[387] Aviation Daily, Feb. 5, 1980, p. 196.

[388] Bill Henzey, Airline Reports, Feb. 14, 1980, pp. 3-4.

[389] For some details on this subject, see Aviation Daily: Feb. 11, 1980, p. 226; Feb. 20, 1980, p. 276.

The supplementals. As was indicated earlier, the term "supplementals" is now being replaced by the term "charter air carriers." In its decision to revoke the requirement that U.S. supplemental airlines state in their advertising that they are "supplemental air carriers," the Board indicated that it remains to be persuaded as to why the public needs special notice that it is dealing with a supplemental or charter airline. The Board also indicated that the former line between scheduled and supplemental airlines is no longer clear, since scheduled authority is being granted on a wider variety of airlines.[390] The term "supplemental," however, will be used in this research to preserve the distinction and to portray the significance of such developments which took place between the assumption and completion of this research work, in addition to the facilitation of the academic analysis.

The procompetitive policy of the CAB permitted the supplementals in the first place to conduct scheduled service in order to meet the competition faced by the cheap discounted fares offered by the scheduled airlines, both U.S. and foreign flag. This was after the discounted fares attracted passengers that originally were presumed to have taken chartered traffic. The status of the supplementals, however, was not left unattended by the CAB, which promotes the multiple entry concept and which is currently working to create a large number of new supplemental carriers with authority to operate both domestic and international charters. The CAB indicated that anyone able to pass fitness standards and having a service plan and an attorney to

---

[390] Airline Executive, March 1979, p. 11.

push it will get a certificate. Of about sixty applicants in 1979, it was reported that five may probably be approved by the CAB in the coming months. This will have the potential of creating a batch of new carriers that may eventually acquire big airplanes and be granted authority to conduct scheduled service.[391]

Fuel costs. The airlines' fuel costs, which were quoted in Chapter VI, do not reflect the true current picture of fuel costs at the time this final chapter of the research is being written. The average cost of a gallon of fuel for the airlines has almost doubled since then. In the first quarter of 1979 it was argued that an addition of 1 cent per gallon adds $20 million annually to the fuel costs of United. Since United represents 17.1% of all U.S. trunk airlines flying hours, this 1 cent increase in the price of a gallon of fuel means additional costs of $117 million to all U.S. scheduled airlines and an estimated $267 million to free world scheduled airline services.[392]

The continuous drastic increase in fuel costs has resulted in the need to increase fares, but the CAB was not prepared to listen to airlines' appeals. From an average of 40 cents per gallon in the beginning of 1979, the price of fuel climbed to an average of 69 cents by the end of October 1979, adding almost $2 billion in airline expenses for 1979.[393] Of the $450 million reduction in the third quarter revenues of 1979 suffered by U.S. international carriers,

---

[391] Airline Executive, Nov. 1979, p. 16.

[392] Ibid., p. 8.

[393] Aviation Daily, Oct. 30, 1979, p. 313.

$160 million was attributed to fuel cost increases. This prompted the airlines to urge the Board by telegram to establish immediately a short-notice fuel surcharge mechanism for international fares.[394] Still later, by year end in 1979, the ATA appealed to the Board for immediate implementation of a fuel cost pass-through allowance for international carriers as recommended them by the International Bill (S. 1300) being considered by Congress. The House-Senate Conference Report provided for 5% upward and 50% downward flexibility zones the first 180 days after enactment, together with a mandated fuel-cost adjustment every sixty days.[395] The Board, however, did not show any inclination then that the appeal might be granted.[396] A recent survey on fuel costs caused the ATA again to reiterate the "urgent need" for a fuel cost pass-through mechanism for international services. The survey showed that carriers will pay 6 cents more per gallon for fuel in the month of January 1980 alone than in December of 1979. In its telegram to the CAB, the ATA indicated that, due to the new oil price increase announced by OPEC, this drastic increase in fuel cost required a fare increase relief and asked the Board to add immediately 3 cents per gallon to the projected fuel cost for the January 1, 1980, Standard Industry Fare Level (SIFL) to recover a shortfall created in the third quarter of 1979. The Board, however, did not agree, despite requests made by both Senator Howard W. Cannon (D-Nev.), Chairman of the Sub-committee on Aviation of the Committee on Commerce, Science and

---

[394] Aviation Daily, Nov. 20, 1979, p. 98.

[395] This was later signed into law.

[396] Aviation Daily, Dec. 28, 1979, p. 290.

and Transportation, and Rep. Harold T. Johnson (D-Calif.), Chairman of the Committee of Public Works and Transportation.[397] The CAB recently decided to set a June 26, 1980, target date to act on the ATA petition, which was initially filed in August 1979 and amended in October 1979 as was indicated above. The ATA petition, as should be recalled, asked for international standard fare levels, zones of flexibility and a method for adjusting the fare level and, finally, when amended in October 1979, asked for a fuel surcharge. The Board indicated that this ATA petition raised issues that are part of the just enacted International Air Transportation Competition Act of 1979 and of an ongoing Board analysis on international fare methodologies.[398] The ATA, being eager to recover expenses caused by the drastic increase in fuel costs, asked the CAB to allow the "broadest possible" zones of reasonableness for both domestic and international fares. The ATA indicated that neither the current domestic reasonableness zones--up to 10% upward and 7% downward, nor liberalization proposed by the Board was sufficient to permit rapid recovery of both fuel and non-fuel cost increases.[399] The ATA also indicated that the 5% upward pricing zone afforded carriers in most markets was being used for recovery of staggering fuel cost increases and not for the implementation of peak

---

[397] Aviation Daily, Jan. 4, 1980, p. 19.

[398] Aviation Daily, Feb. 20, 1980, p. 274.

[399] Aviation Daily, Feb. 19, 1980, p. 266. The CAB proposed fare liberalization policy mentioned was made in January 1980 to include possible elimination of a fare ceiling in short-haul markets.

and off-peak pricing schemes as was originally intended by the new law.[400]

The ATA predicts that airlines' fuel bills could exceed their labor costs in 1980. It was indicated that total fuel costs for ATA member airlines would exceed $10 billion in 1980 alone, more than their total operating costs in 1970, and, accordingly, international carriers should be given an opportunity to pass on fuel costs in increased fares similar to what took place for domestic carriers in 1979.[401]

In order to demonstrate the drastic effect of fuel cost increases on fares, one may look at a comparison to price hikes in other products or services that are not fuel-intensive. For example, recent CAB studies showed that air farea would hardly have increased at all in 1979 had it not been for the drastic explosive increases in fuel prices. It was implied, accordingly, that fares would have increased only 0.5% between January and November of 1979 if fuel prices had increased at the same rate as other commodities, excluding food.[402]

The bulk of such increases in fuel costs goes to the oil companies, of course, in the form of profits. Exxon alone reported $4.3 billion profits for the year 1979, a sum which represents more than the profits accumulated for the airline industry in all of its history.[403]

---

[400] Aviation Daily, Feb. 20, 1980, p. 274.

[401] Aviation Daily, Jan. 14, 1980, p. 67. See also Aviation Daily, Feb. 7, 1980, p. 209 for elaboration.

[402] Aviation Daily, Jan. 25, 1980, p. 137.

[403] Aviation Daily, Feb. 4. 1980, p. 185.

In December of 1979 the average cost of fuel internationally was 82 cents per gallon, with TWA paying the highest--85.56 cents per gallon and Western paying the lowest--63.86 cents per gallon.[404] The ATA reported that fuel costs climbed from 20% of airline industry operating expenses in 1978 to almost 27% in 1979.[405] ATA also predicts that in 1980 airlines will be paying $1.10 per gallon for jet fuel by the end of December 1980, thus paying $10.6 billion for the estimated 11.2 billion gallons of fuel they will use, compared to the 1979 estimated fuel bill of $6.5 billion for almost the same amount of fuel.[406]

The ATA also indicated that fuel costs increased from a negligible portion of airlines' operating expenses only a few years ago to nearly 30% in February 1980 and on certain routes fuel costs represent 50%.[407] Naturally, even the majority of IATA-member airlines are eager to pass such fuel cost increases to consumers through higher fares and will be seeking relief. British Airways, for example, has recently filed with the CAB for a 13% across-the-board fare increase in U.S.-U.K. markets to take effect April 8, 1980, from which 8% goes for increased fuel costs and 5% for increases in non-fuel costs.[408] Whether the Board will grant such a request or not is a different issue, especially at this time when the Board is engaged in the probe

---

[404] Aviation Daily, Feb. 8, 1980, p. 221.

[405] Aviation Daily, Oct. 30, 1979, p. 313.

[406] Aviation Daily, Feb. 7, 1980, p. 209

[407] Aviation Daily, Feb. 5, 1980, p. 197.

[408] Aviation Daily, Feb. 14, 1980, p. 254.

and study of the Standard Foreign Fare Level (SFFL) and the determination of the markets to be investigated.[409]

Of the foreign carriers that are critical of CAB policy and have suffered losses in 1979 mainly because of fuel cost increases is Alitalia. Even though no figure on the size of the loss has been provided, Alitalia describes the loss as drastic but bearable.[410] This illustrates that even foreign carriers will be pressing for relief from both the CAB and the IATA in the form of fare increases. Even though no agreement on a pass-through mechanism was reached, IATA carrier representatives agreed recently on a 5% to 10% passenger fare increase effective April 1, 1980, and 6% to 13% for cargo, effective March 1, 1980. Flying Tiger was the only U.S. carrier present at that conference[411] and in general is the only U.S. carrier that still participates in both IATA traffic conferences and trade associations activities.[412] It was reported recently, however, that final carrier approval has been obtained for an IATA system to pass fuel cost increases to passengers and the request was submitted to governments for their approval.[413] This perhaps was in response to the IATA's expectation that worldwide 1980 third quarter per gallon fuel costs

---

[409]For elaboration on the CAB probe on the SFFL, see Aviation Daily, Feb. 21, 1980, p. 281.

[410]Aviation Daily, Feb. 20, 1980, p. 278.

[411]Aviation Daily, Jan. 25, 1980, p. 138.

[412]Aviation Daily, Feb. 13, 1980, p. 241.

[413]For details on this fuel cost pass-through approved recently by IATA carriers, see Aviation Daily, Feb. 19, 1980, p. 269.

would reach $1.24 compared to 81.9 cents in the third quarter of 1979 and 51.3 cents in the first quarter of 1979.[414]

Whether the government will approve this pass-through mechanism and whether the CAB probe of the SFFL will help provide some of the relief sought remains to be seen.

The course of action U.S. airlines may pursue to find relief from the effect of such fuel cost hikes may include, among other things, the pooling of efforts as proposed by the Airline Fuel Corporation (AFCo) which includes thus far thirty-four carriers wishing to participate; six U.S. certificated carriers, four cargo operators, ten foreign air carriers and fourteen commuters.[415]

CRAF. It was indicated in Chapter VI that the airline industry provides the Department of Defense (DOD) with its services to meet the requirements of the military airlift. It was also indicated that the industry argued for its need for more DOD business, a business which has been declining recently to the disadvantage of the industry, which relies on it for healthy growth and sometimes even for its survival. It was also indicated that DOD counter argument will be sought on this issue if possible.

The researcher has been fortunate to learn many enlightening facts about CRAF through visits to Scott Air Force Base, MAC Headquarters, and the Pentagon where additional light was shed on the value of the airline industry to the nation, partly by its participation in such a program. Some of those pertinent facts and highlights

---

[414] Aviation Daily, Feb. 19, 1980, p. 265.

[415] Aviation Daily, March 25, 1980, p. 131.

learned through contact with DOD officials (see Acknowledgment) are as follows:

1. DOD procurement of airlines' services can be achieved either through volunteered peacetime, fixed and/or additional engagements, or through activation of the CRAF program in cases of various kinds of emergencies. According to the uniform format, contractual obligations provide for procurement of quaranteed airlift services determined by expressly fixed contracts and of some additional expansions which takes place either through peacetime operations encompassing varying categories of services or through incremental activation and utilization of the CRAF program, depending on the type of emergencies involved as was explained earlier in Chapter VI.

2. According to DOD officials, the air carriers involved in CRAF have been very cooperative and responsive to military airlift needs which were fulfilled through guaranteed and additional peacetime expansion arrangements without having to activate the CRAF program. The cooperative and responsive attitudes of the carriers involved were described as pleasant and understanding.

A recent investigation of the responsiveness of the CRAF program to provide for airlift emergencies yielded satisfactory results and showed willingness of the carriers to get more involved and to become more familiar with the program and more proficient in the required task. Despite the communications problems discovered in one of the important exercises but later remedied by corrective actions, the carriers felt that test exercises are important for measuring their responsiveness to military airlift emergencies and needs. This

they believe should keep the CRAF program alive short of activating its fleet, which will definitely disrupt civilian air traffic. The carriers believed that they can meet military missions and that wide-body aircraft can be supported with ground and material handling equipment at military bases. They also believed that their airlift resources can be provided within forty-eight hours as required for CRAF, stage III.[416]

3. In response to the industry's argument as stated in Chapter VI concerning the declining use of the industry's services and the operation of a worldwide scheduled airline to carry routine cargo normally transported by commercial airlines, DOD officials voiced the following counter arguments:

a. While DOD officials admit that their use of the participating airlines' services has declined, they argue that such action was not an orchestrated or planned effort to deny business to the carriers, but merely a result of decreasing demand and of the necessity to keep their organic fleet in commission for training purposes, and as a consequece, utilizing such available facilities prevents waste and unnecessary expenses.

b. DOD officials deny the allegation that the DOD conducts a worldwide scheduled airline for cargo or passenger airlift in the sense made by the airlines' argument. They

---

[416]U.S., General Accounting Office (GAO), report by the Comptroller General of the U.S.: The Civil Reserve Air Fleet--An Effective Program to Meet Defense Emergency Airlift Requirements, Dec. 7, 1978, pp. 6-12.

indicate that such flights were conducted until the mid-50's and that their existing scheduled operations to certain parts of the world can hardly be described as a worldwide scheduled airline. They indicate that such operations are limited in scope and are intended to provide certain essential logistical support.

c. Statistics obtained from the DOD on the procurement of commercial airlift in the fiscal years 1977 through 1979 indicate that the shares of the international and territorial airlines have declined steadily, but not sharply, while the shares of all-cargo carriers increased from a total of approximately $61 million in 1977 to more than $75 million in 1978, but declined to a little more than $68 million in 1979. The shares of the supplementals, however, increased steadily and sharply to almost double between 1977 and 1979. Total expenditures, however, for all three categories of carriers increased slowly--only slightly more than $35 million between 1977 and 1979. A summary of such statistics is provided below in Table VIII-1.

4. Experience with the program has resulted in a boiler plate[417] encompassing almost all provisions that have become

---

[417]This term is used to describe the standard clauses and similar contract language inserted as a matter of course, or by compulsion of statute or regulation in government contracts. Another similar term that is sometimes used to indicate the same thing is "clauseology." For elaboration see John W. Wheelan and Robert S. Pasley, Federal Government Contracts: Cases and Materials (Mineola, N.Y.: University Casebook Series Foundation Press, 1975), p. 4.

TABLE VIII-1

DOD COMMERCIAL PEACETIME AIRLIFT PROCUREMENT--YEARS ENDING SEPTEMBER 30, 1977, 1978, AND 1979
OVERSEAS AIRLIFT (MAC)
(LONG AND SHORT RANGE)

Fiscal Year	International and Territorial[a]	All-Cargo	Supplemental	Total Obligations[b]
1977	103,162,000.92	60,834,371.19	42,476,746.95	205,822,565.94
1978	95,298,540.50	75,692,272.13	65,416,036.27	236,377,889.50
1979	89,066,206.80	68,374,023.75	83,724,673.91	241,163,204.50

[a]Figures include $650,383.43, $28,309.40, and $1,520.00 for short range international airlift provided by Eastern Airlines in the fiscal years 1977, 1978, and 1979, respectively.

[b]Figures do not include $169.00, $650.00, and $180.00 for short range airlift provided by Alaska Airlines in the fiscal years 1977, 1978, and 1979, respectively.

Source: Compiled from DOD (MAC) RCS:SAF-ALG(M) 7301 Form for the fiscal years 1977, 1978, 1979.

well known to both parties, the DOD and the concerned carriers, resulting in minimal negotiation whenver a contract comes up for signature. Time consuming pre-contractual activities have thus been substantially curtailed or eliminated. DOD officials also indicate that the government has never been involved in any court litigation involving the contractual performances of the carriers. In only one case judicial opinion was sought in connection with the power of the CAB to reset fares.

5. Fares, of course, are essential ingredients of airlines' compensation. DOD officials indicate that the kinds of fares involved in military procurement of airlift services from the airlines are usually established by the CAB and that DOD pays the minimum of such established fare levels. This criteria for compensating the airlines is accepted by both DOD and the carriers. A stumbling block in airlines' compensation is, of course, the significant increase in fuel prices which has already been elaborated upon. This results in an element of uncertainty, making it difficult to predict what fares should be contractually used. Because of budgetary reasons and other governmental policies, the fixed price contract is more preferable to the U.S. government. However, if the lowest levels set by the Board are to be used, the carriers find themselves at a disadvantage due to lack of adjustment clauses for sharp and unpredictable fuel cost increases. This situation has prompted DOD officials and the carriers to push for contractual provisions permitting compensation adjustments for fuel cost increases.

6. Another area where unpredictably increasing fuel costs will have a bearing is the newly proposed CRAF enhancement program

which calls for incorporating the convertibility feature in wide-body aircraft that are on order by the participating carriers. In addition to the cost involved which will be distributed over the sixteen years (the usable life span of the aircraft or contract), this concept will also require additional expenditure for fuel consumption which comes as a result of the permanent excess weight added to the aircraft. This requires more appropriations and future budgeting. This program involves a total of sixty-five aircraft to be delivered in specified numbers for each of the next eight years, between 1981 and 1987. Several options dealing with this newly proposed concept have been advanced to the Congress by the DOD--options which involve an estimated adjustment cost of $124.5 million between 1986 and 2002, and the matter is still pending.[418] Whatever the anticipated or actual costs would come to be, it is certain that the value of this added airlift capability should be more than reasonable justification for the program. In any case, the value of the airline services to the nation in this respect should always be kept in mind.

7. DOD officials indicate that of their airlift needs, currently 50% is procured from the airlines; the other 50% is transported by the MAC organic fleet.

---

[418]For more details on this enhancement program and the contracting options for fuel compensation, see U.S., Senate, Hearings before the Subcommittee on Procurement Policy and Reprogramming of the Committee on Armed Services, Civil Reserve Air Fleet, Nov. 30, 1979. The researcher has been able to obtain only a stenographic transcript of the hearing through DOD officials.

8. A summary of the scope and capabilities of the CRAF program in terms of segments, aircraft numbers and types is provided in Tables VIII-2 and VIII-3.

9. Carriers involved in the CRAF program as of January 1, 1980, are as follows: Domestic Segment--Hawaiian, Evergreen, Transamerica, and Zantop; Alaskan Segment--Reeve Aleutian and Wein Air Alaska; Short-Range International--Alaska, Braniff, Continental, Eastern, Pan Am, and World; Long Range International--Airlift, American, Braniff, Capitol, Continental, Evergreen, Flying Tiger, National, Northwest, Pan Am, Seaboard, Transamerica, TWA, United, Western, and World.[419]

The Attitudes

As was indicated in Chapter I, the researcher has launched a post-survey effort to obtain opinions from airline executives relating to a current policy issue which they consider as most dissatisfactory to the industry. In January 1980 the researcher wrote each of the executives who participated in the survey, including ATA and NACA, sent a copy of the summary of the survey findings, and asked that each respond to these three questions:

1. What is one important policy issue that is considered most dissatisfying to the industry?

2. What should the government do about it?

3. What could the industry do about it?

This effort, as can be seen, was directed at identifying the current policy issues causing the biggest problems to the airlines in the changing environment of the late 70's and the early 80's, as viewed

---

[419]Military Airlift Command (MAC) HQ Form 0-312, as of Jan. 1, 1980.

TABLE VIII-2

CRAF: SUMMARY OF SEGMENTS

Segments	Stages I	II	III
Domestic	-	36	39
Alaskan	-	-	8
Short-Range International	-	-	41
Long-Range International (PAX)	8	18	250
Long-Range International (Cargo)	49	68	124
Total CRAF	57	122	462

Source: MAC HQ Form 0-312, as of January 1, 1980

TABLE VIII-3

CRAF CAPABILITIES

	Stages		
	I	II	III
Domestic Cargo Capability (MTM)[a]	-	1.634	1.804
Alaskan Cargo Capability (MTM)	-	-	.297
Short-Range Cargo Capability (MTM)	-	-	1.489
Long-Range Capability			
Total Passenger Aircraft Capability (MPM)[b]	5.999	13.156	144.259
Wide-Body Lower Lobe Bulk Cargo Capability (MTM)	.182	.401	2.096
Narrow-Body Cargo Capability (MTM)	2.363	3.476	5.736
Wide-Body Cargo Capability (MPM)	3.678	4.502	8.208
Total Long-Range Cargo Capability (MPM)[c]	6.223	8.379	16.040
Grand Total Passenger Capability (MPM)	5.999	13.156	144.259
Grand Total Cargo Capability (MTM)	6.723	10.013	19.630

Source: Compiled from MAC HQ Form 0-312, as of January 1, 1980.

[a]Million ton miles.

[b]Million passenger miles.

[c]Potential emergency bulk cargo capability--3.668 (MTM) (plywood floor kits) not included.

by those executives. It was also directed at identifying some of the alternatives available to the U.S. government as well as to the airlines in solving such problems. Only nine out of fourteen executives reached responded to this effort. Briefly, the responses received indicate the following areas as being most dissatisfying to the industry:

1. The emphasis placed on political, rather than commercial, issues by U.S. negotiators;

2. The give-away of valuable market areas by the U.S. government without receiving in return sufficient considerations for U.S. carriers;

3. Failure of the current deregulation experiment to go far enough, and the failure to afford airline management enough flexibility;

4. Proliferation of airlines with the possible consequence of over-capacity and huge losses;

5. Imposing U.S. policy, domestic deregulation, and open skies on foreign governments;

6. Failure to approve fuel cost pass-through.

All of the actual responses received are shown in Appendix I.

C. Reactions to the New Policy

This section is intended to present a sample of reactions to the new U.S. policy in both the domestic and international arenas. The reason for delaying the presentation of the reactions to the final chapter relates to the dynamic nature of the topic of the research, the need for including the major developments and recent events that are shaping the industry and influencing, as well as being influenced by,

the attitudes of other nations within the international aviation community; the impact and consequences of reregulation; the liberal bilaterals; and, in general, the open skies policy being strongly advanced by the U.S. government. This discussion will treat the pros and cons of deregulation and then review some of the reactions to the open skies policy from both sides, within the U.S. and abroad. The reactions presented here will include some quotations which are believed to have been picked judiciously and without subjectivity. The sophisticated reader, however, may wish to refer more often to the sources, which have been fully documented for easy reference.

Domestic Deregulation

No attempt will be made here to discuss the pros and cons of the 1978 Deregulation Act before its development or during congressional hearings.[420] Instead, our discussion will focus briefly on the impact of the deregulation experiment and the prospects for its success, in order to establish some grounds for the future outlook of the U.S. drive for an open skies regime.

The pros. According to the CAB, the first year of deregulation was marked by an increase in operating efficiency, more service and

---

[420]For a brief look on the pros and cons of deregulation before enactment of the law, see Jaeques Lauriac, "Air Transport Policies Regarding Public and Private Airlines," Institut Du Transport Aerien (ITA), April 1979, pp. 101-107; see U.S., Senate Hearing Before the Subcommittee on Commerce, Science, and Transportation, 95th Congress, 2nd session, on S. 3363, Aug. 22, 23, and 24, 1978 (Washington, D.C.: U.S. Government Printing Office) Serial No. 95-131 (1978). For some general analyses on deregulation, see Nawal K. Taneja, U.S. International Aviation Policy (Lexington, Mass.: D. C. Heath and Company, 1980), pp. 29-54.

lower fares. Following are brief summaries of several general resulting changes:

1. Productivity: Operating costs for the trunks, after adjusting for inflation, dropped approximately 50 cents per revenue ton mile (RTM) for the year ending March 1979.

2. Fares: Despite rising fuel prices, the average fare actually paid in August 1979 was lower even in current dollars than it was in 1977. It is estimated that consumers saved approximately $1.5 billion (in current dollars) over what they would have paid for air travel under regulated pricing policies.

3. Traffic: Airline traffic was up more than 16% in 1978 and rose another 14% through the first month of 1979. In June of 1979 over 2 million more people were carried by domestic airlines than in June of 1978, despite the grounding of the DC-10's.

4. Profits: Industry earnings soared to a record $1.4 billion in operating profits in 1978. For the year ending July 1979, operating profits were $904 million, despite the disruption caused by the United strike, the grounding of the DC-10's, escalating fuel prices, and some spot fuel shortages.

5. Expansion of small airlines: Former regional carriers such as U.S. Air, Texas International, and Republic experienced almost a 32% increase in revenue passenger miles (RPM) over 1978. All of the former charter carriers now provide scheduled service in some markets and all the large intrastate carriers such as PSA and Air Florida have entered into interstate operations.

6. Employment: As of July 1979, employment went up 10% over July 1978 to 334,000 full-time employees.

7. Management: Airlines' management now have more flexibility to cope with rising costs and the recession.[421]

The CAB, however, admits that some transitional difficulties have resulted from the deregulation experiment, namely increased ground congestion at many larger airports and the unavailability of 15- to 50-seat aircraft for commuters to provide the level of services they would like in many small communities. The Board, however, indicates that the aviation industry, airport operators, and the federal government are all working to solve such problems as quickly as possible and that most of such difficulties should be resolved by the time the Board is scheduled to go out of business on December 31, 1984. The Board finally concludes that deregulation is working.[422]

Another favorable attitude towards deregulation came from Senator Howard Cannon when he took issue with deregulation critics. Senator Cannon indicated that the empirical evidence proves that the benefits of deregulation far outweigh the disadvantages. He also indicated that one must consider the 50% to 70% increase in fuel, the double-digit inflation, and the recession before blaming increased fares on deregulation, adding that despite all, fares have declined in constant dollars from fares of June 1979. Cannon also added that not one

---

[421]CAB release, Update: Airline Deregulation, the First Year, Oct. 19, 1979.

[422]Ibid.

airline executive has come to him asking for reregulation of the industry.[423]

Other pros for the deregulation experiment came from U.S. government and industry officials, some of whom were clearly cautious and conservative.[424]

The Air Operators Council International (AOCI) was also pleased with results achieved thus far by the deregulation experiment, citing traffic increases which have resulted in more revenues. The AOCI, however, indicates that final judgment should be withheld until after a full economic cycle is completed.[425]

The Air Transport Association of America (ATA) also reported an increase in November traffic in both RPM and load factors, domestically and internationally.[426]

Alfred Kahn praised the deregulation experiment and disagreed with critics' contentions that the recent sharp increases in air fares and the decline in industry profits are proofs that the deregulation experiment has failed. He provides four arguments to such critics' contentions:

1. Air fares should go up as fuel costs soar.

2. Fares are not expected to be lower today than they would be if we had retained full regulation.

---

[423] Aviation Daily, Oct. 23, 1979, p. 276. Senator Cannon was addressing the Air Traffic Control Association in Atlantic City, N.J.

[424] Aviation Daily, Oct. 25, 1979, pp. 294-296.

[425] Aviation Daily, Dec. 3, 1979, p. 157.

[426] Aviation Daily, Dec. 21, 1979, p. 267.

3. One can still get super-saver fares between all major cities in the country. Travellers saved $2 billion in fares last year because of price competition.

4. No one ever promised the industry that its profits would be protected against either recession or an energy emergency.[427]

Frank Borman, Eastern chairman, also indicated that while deregulation was initially opposed by Eastern, he believed that its effect has been a positive one. He noted, among other things, that Eastern has entered ten new cities in response to the opportunity the deregulation experiment allowed, but added that it is still premature to estimate what effects the experiment will produce on the airline industry's financial performance.[428]

Statistics also indicate that trunk traffic increased 12.1% in 1979 and capacity for the year was held up to a 9.3% increase, giving the industry a 1979 load factor of 63.4%, compared to 61.8% for 1978.[429]

President Carter also praised the deregulation experiment in his State of the Union message, indicating that:

> The Airline Deregulation Act of 1978 is working well, with reduced passenger fares per mile, and with the airlines better able to withstand the effects of recession and fuel price increases than would have otherwise been possible.[430]

An additional praise for deregulation came from the Council of Economic Advisors (CEA) in its annual report to Congress. The CEA indicated that as of the end of September 1979, average fares for

---

[427] Aviation Daily, Jan. 15, 1980, p. 78.

[428] Ibid.

[429] Aviation Daily, Jan. 18, 1980, p. 97.

[430] Aviation Daily, Jan. 25, 1980, p. 138.

domestic trunks were 78% above their mid-1977 levels, but added that average weighted input prices were largely offset by improved productivity, and that the airlines have used their fleets more intensively, with airborne hours per aircraft rising 12% between the third quarter of 1977 and the same 1979 period. In taking a strong stand against claims that such air fare increases indicate that deregulation will be a failure in the long run, the CEA said:

> Nothing could be further from the truth. Deregulation of an industry does not render it immune to increases in prices of factors of production. It does affect the degree to which such increases are translated into higher unit costs and prices. The airline industry has recently provided graphic proof of how reduced regulation can improve productivity and hence price performance.[431]

Another plus for the domestic deregulation experiment of the United States is the impact it produced abroad, especially with relation to competition and discount fares. It attracted attention to the high fares on the European continent and the existing capacity restrictions which were blamed for holding back the development of the air transport system in Europe.[432] It also raised the question of whether Europe as a whole can also deregulate its air transport system.[433]

Airline domestic deregulation may also claim credit for the proposed deregulation of the trucking industry if and when such a law comes into existence.

---

[431] Aviation Daily, Feb. 4, 1980, p. 189.

[432] Bron Rek, "Europe at the Crossroads," Flight International May 26, 1979, p. 1739.

[433] Bron Rek, "Can Europe Deregulate?" Flight International, May 26, 1979, pp. 1755-1756.

The concept of deregulation has also been praised very recently by the airline industry. Such praise, however, has been qualified by the call for total deregulation and an earlier CAB sunset by the end of 1980 instead of 1984.[434] Consumers are, of course, reaping the profits of deregulation in many of the prosperous markets. The trans-continental market is perhaps the one market where travellers can find more competition and varieties of services at varying rates and discounts.[435] The battle in this market includes additional promotions such as guaranteed fares, coupons, and tempting sales commissions.[436]

The cons. A recent analysis of U.S. aviation policy shows that the policy has swung back and forth like a see-saw with airlines' financial problems on one hand and traffic boom on the other. A brief profile of the see-saw of government aviation policy is portrayed by the analysis as follows:

1. 1946: Following World War II, the first round of competitive route awards began.

2. 1947/1948: With weakening industry finances, the CAB started investigations "to lessen excessive competition . . . and contract the air route pattern . . . ."

3. Early 1950's: A traffic boom again was seen following the Korean War, airlines' finances improved, and the CAB became route expansionist again.

---

[434] AW & ST, International Air Transportation Conference, op. cit., address by C. E. Meyer, Jr.(President, TWA), "Expanding Horizons."

[435] Aviation Daily, March 6, 1980, p. 28.

[436] Aviation Daily, March 7, 1980, p. 34.

4. Early 1960's: Financial problems again plagued the airlines and the Board started investigations to look into the elimination of uneconomical competition.

5. Mid-1960's: Jet improvements produced another traffic boom and the CAB stated that its route activity was centered "on cases involving expanded competition, including route swaps, capacity agreements and other measures."

6. Late 1970's: Traffic was growing fast, outpacing capacity expansions and the CAB this time had "literally knocked the door off its hinges. . . ."

The analysis further predicts that the pendulum of government policy is likely to swing back again in a few years, for there will be too much competition which would have to be reduced. It concludes that a lesson should be learned from this experiment to achieve a reasonable balance between regulation and competition.[437]

Robert Oppenlander, Senior Vice President, Finance, at Delta expects that a number of airlines will go out of business during the next downward movement in the cycle. He draws a similarity between the airlines' situation in the late 70's to that of the mid-60's, which was characterized by rapid traffic growth outstripping the expansion of capacity with a proliferation of discount fares. The trunks did will then, he indicated, earning about 10% in 1966, but later high-load factors gave way to overcapacity, ROI fell to 2% and discount fares shrank drastically. Oppenlander observed, however, that the airlines

---

[437]Melvin A. Brenner, "U.S. Airlines Ride See-Saw Aviation Policy," Airline Executive, March 1979, pp. 41-42.

at that time were not under the present pressures and that most of them came through the rough period of the mid-1960's as well as that of 1973-74. He concluded that the next time around, a number of companies may not have the resilience that they had then.[438]

Another recent analysis points to a continually declining gap between unit revenues and unit expenses and predicts that the crucial years of U.S. trunk profits are just ahead.[439]

Among the factors making up airline costs, which are also soaring as a result of the deregulation impact, are the payments of sales commissions by the airlines that found themselves having to seek more business through agents. In a study including twenty-three U.S. scheduled airlines, it was found that such payments soared 22.3% from $245.9 million to $300.7 million in the period April-June of 1979. This amounts to an estimated expediture of $1.2 billion for the whole year.[440]

Continually rising fuel costs, of course, contribute more to the increase in unit costs of airlines' services, as explained earlier in this chapter. This drastic increase in unit cost for the airlines which is not met by a similar increase in unit revenue resulted in declining profits, as should be expected.

---

[438]John F. Brindley, "Deregulation of the Air Transport Industry: Cheered by Some, Condemned by Others," Interavia, April 1979, English Edition, p. 306.

[439]Colin Hugh McIntosh, "U.S. Trunk Profits Reach the Crucial Years," Airline Executive, June 1979, pp. 78-81.

[440]Airline Executive, October 1979, p. 7.

Dr. George James, Senior Vice President, Economics and Finance (ATA), indicated that the airlines will see more than a half-billion dollar drop in profits in 1979 against 1978, adding that a great deal of that is due to rapidly rising fuel costs and the lag that took place in recovering those costs.[441] Dr. James later indicated that earnings for the first nine months of 1979 were down $580 million from that of the same period in 1978. Despite a 13.5% gain in traffic, of such decline in earnings, about $60 million was for the first quarter, $70 million for the second quarter, and an estimated $450 million for the third quarter--the industry's worst financial quarter since the 1975 recession.[442]

While revenues for the trunks, excluding Continental, were up 17.6% for the third quarter of 1979, they were not up nearly enough to stem the growth in expenses, which shot up 30.9% for the third quarter of 1979. The major reasons cited by the trunks for this sharp decline in earnings were the constantly rising prices of jet fuel, United's lengthy second quarter strike, half-fare coupons used by United to recover from the strike and by American to compete, and the DC-10 grounding.[443]

---

[441] Aviation Daily, Oct. 24, 1979, p. 284.

[442] Aviation Daily, Oct. 30, 1979, p. 313.

[443] Aviation Daily, Oct. 31, 1979, p. 321. Continental was excluded because it had not yet released its quarterly statement. For comment of the executives of the trunk carriers on the results of the third quarter, see Aviation Daily, Nov. 6, 1979, p. 25.

Deregulation, not fuel, has been cited by one analyst as the primary cause for the airlines' poorer profit performance. David Campbell, Senior Vice President, Institutional Sales, of Wheat, First Securities, Inc., indicated that deregulation has brought about "an almost indiscriminate expansion of routes . . . which has cost the carriers plenty in terms of additional personnel, terminals and low load factors. Ultimately this will be corrected when carriers begin to drop routes. In the meantime the consumer must pay the price."[444]

A recent ATA report indicated the sharpest one-year earnings drop in the airlines' history. The report estimated that industry earnings in 1979 will be down $800 million from 1978, when the airlines had a profit margin of 5 cents on each dollar of revenue and earned $1.2 billion. The estimated $400 million industry profit figures for 1979 on about $26 billion in revenue is one-third of 1978 profits and will yield a profit margin of less than 2%.[445]

One analyst predicted early this year that an industry slowdown may have begun. The Aviation Daily market analyst is pessimistic about the 1980's and forecasts negative traffic growth through the first two quarters, continued ballooning of fuel costs at the same pace as 1979, and even a significant erosion of business travel, the backbone of airline traffic.[446]

The drastic situation of airline earnings is bound to result in other financial problems and difficulties for the industry such as

---

[444] Aviation Daily, Jan. 16, 1980, p. 86.

[445] Aviation Daily, Jan. 25, 1980, p. 141.

[446] Aviation Daily, Jan. 9, 1980, p. 41.

capital requirements needed to finance new equipment, for example, and the prospects for airline stocks.

A recent modified ATA report indicates that the industry will be needing $90 billion capital requirements for equipment needed between 1979 and 1989 and that the 1979 performance of the airlines is well below the levels necessary to position the industry in an able situation. This $90 billion breakdown is $80 billion for passenger aircraft to be delivered in the 80's, $7 billion for freighter aircraft, and $3 billion for passenger aircraft to be delivered in 1979. The assumptions that underlie this $90 billion estimate are as follows:

> A 7% annual passenger traffic growth, a 63% load factor, 9.5 hours per day utilization rate, a 7% annual aircraft cost inflation rate, a 9% annual cargo traffic growth rate, a 65% cargo load factor for freighter aircraft, and a 2% increase in the average seating density.[447]

Fredrick Bradley, Jr., Vice President, Citibank of North America, indicates that deregulation contributes to airlines' financial problems. He points out that the inability of the airlines to institute fare increases sufficiently high to counter soaring fuel costs and reduced traffic is a direct problem of deregulation and CAB's current philosophy. Bradley further indicates that:

> Prospects of uneconomic competition that tends to pull down yields and profits for all is worrisome to a lender. . . . It is disturbing to lenders to note that the regulators, apart from the current fuel cost-driven increases, still assume in setting their policies that the basic fares are too high . . . .[448]

---

[447] Aviation Daily, Oct. 24, 1979, p. 284.

[448] Aviation Daily, Jan. 18, 1980, p. 97.

Bradley later indicated that the airline industry must maintain "a sufficiently high level of earnings to guarantee an unimpeded flow of funds from institutions and lenders who will be financing the industry's massive new equipment demands."[449]

Realizing this financial bind of the airline industry, CAB chairman Marvis S. Cohen, in a speech before the New York Society of Security Analysts, urged the advisors to support the industry in obtaining needed capital and expressed concern that gloomy speculations about the industry's soundness "can easily lead to a self-fulfilling prophecy."[450]

Delta chairman W. T. Beebe expects that some carriers will be facing financial problems. He argues that "those airlines that are having trouble now will have additional trouble as deregulation gathers momentum so they will have to look for strengthening probably through merger . . . ." He explained that the only reason for carriers to seek a merger would be to obtain equipment because "you can fly into any city you want, so why merge . . . ?"[451]

As for airline stocks, statistics indicate that air carriers' stocks were generally down in November 1979 following results of the 1979 third quarter.[452] Some analysts recommended in 1978 that airline stocks should be sold. It was felt at that time that the profits would peak and that the industry's problems were just beginning to surface.

---

[449] Aviation Daily, Jan. 29, 1980, p. 158.

[450] Ibid., p. 157.

[451] Aviation Daily, Jan. 2, 1980, p. 2.

[452] Aviation Daily, Nov. 2, 1979, p. 12.

This year, 1980, it is predicted that the airlines are heading for an operating loss of about $500 million, that the industry has not yet experienced the brunt of the recession, and that the consumer will be a reluctant purchaser of airline tickets. The prediction goes further, to indicate that some airline stocks might decline as much as 30% over the first few months of 1980, that only two or three airlines would make money, and that some carrier as well might be forced to merge in 1980.[453]

Concerning mergers, it should be recalled that one of the three cases of mergers mentioned earlier in this chapter, the proposed Continental-Western, was disapproved by the Board. We will examine some reactions to that merger disapproval in an era of deregulation and competition between bigness and smallness. Joseph S. Murphy, editor and publisher of Airline Executive, indicated that deregulation is not what it seems and that the airline industry is not deregulated but only partly free of its regulatory chains. In linking this argument to the proposed but disapproved merger of Continental and Western, Mr. Murphy argues that the disapproval of the merger between two small trunks was exercised for reasons that are just not supposed to exist under deregulation. Only CAB member Richard O'Melia voted in favor of the merger, recognizing that deregulation is supposed to mean just that--not an on-again off-again rule made to suit the fancy of a highly politically-oriented CAB. Mr. Murphy observed that Continental and Western are strong competitors with the big four airlines, but mostly with American, United, and TWA. He observed that under the regulatory

---

[453] Aviation Daily, Jan. 16, 1980, p. 86.

atmosphere, they not only competed with those big airlines, but outperformed them profit-wise. Now, under deregulation, an airline needs a broad base in order to compete with such giants as American, United, and TWA. Even after the proposed merger takes place, Mr. Murphy argues, the two companies, Continental and Western, would only approach the $2 billion level in revenues which is 35% to 50% below the size of any of the big three. He argues that the free market system suggests survival of the fittest but does not mean that the CAB would step in to keep some of the contenders from remaining fit. He concludes that the disapproval of the merger is a worse form of regulation than that which existed before passage of the Act.[454]

One of the criticisms directed at deregulation concerns the number of points being served and the fact that they actually have declined rather than increased, as claimed by the CAB, and that few big cities have suffered. This argument is based on the fact that CAB statistics did not draw a distinction between certificated and non-certificated points. The argument also indicates that airlines, including commuters, dropped services entirely to forty-three communities in the twelve months ending May 1, 1979, even though launching services to thirty-three other points for the first time, which leaves a deficit of ten points.[455]

---

[454]Joseph S. Murphy, "The Hypocrisy of U.S. De-Regulation," Airline Executive, September 1979, p. 4.

[455]"De-Regulation Fall-Outs: Fewer Points Served, Big Cities Suffer Too," Airline Executive, September 1979, p. 25.

Other related criticism and resultant effects of deregulation include the crowding of airports,[456] struggles of the airlines for space to handle expanded traffic,[457] the requirements for improved safety measures in aircraft designs,[458] and operation.[459]

Additional effects of deregulation include the crowding of more seats into the aircraft to increase their capacity at the expense of travellers' comfort[460] and the aggressive marketing attitudes of some airlines for attracting more traffic[461] with the consequence, for instance, of an airlines' ad bill costing more than $700 million.[462] Also included among the effects of deregulation is the practice of overbooking and the consequent increase in bumping passengers,[463] which seems to be more fixed into the system as it becomes increasingly unavoidable.

---

[456]Melvin A. Brenner, "De-Regulation Creates Airport Crunch," Airline Executive, June 1979, pp. 22-23.

[457]Adele C. Schwartz, "Airports, Airlines Scramble for Space to Handle De-Regulation Traffic Spurt," Airline Executive, July 1979, pp. 44-46.

[458]Airline Executive, July 1979, p. 4.

[459]Aviation Daily, Oct. 25, 1979, p. 294; also Airline Executive, October 1979, p. 6.

[460]"Airlines Jam More Seats on Planes," The Knoxville News-Sentinel, Dec. 2, 1979, p. B-2.

[461]Joseph S. Murphy, "De-Regulation Means Get Aggressive at Braniff International Airways," Airline Executive, March 1979, pp. 12-16.

[462]Joseph S. Murphy, "Airline Ad Bill Tops $700 Million," Airline Executive, July 1979, pp. 31-33.

[463]CAB Release 79-259 dated Dec. 6, 1979; CAB Release 80-13, dated Jan. 16, 1980.

Retired TWA Chairman Charles Tillinghast and former CAB Chairman Secor Browne, two well-known aviation spokesmen, have also expressed similar concerns over the current status of deregulation, indicating that re-regulation is around the corner and that it may come sooner than expected, mainly because of the mounting subsidies required and because of the loss of service to small communities.[464] This loss of service which includes the state of West Virginia has caused Senate Majority Leader Robert Byrd (D-W. Va.) to put a hold on the renomination of CAB Chairman M. S. Cohen.[465] This may result in a change of attitude on the part of the government in dealing with deregulation for it reflects dissatisfaction of some important policy makers, either over the deregulation itself or over the management of it.

Open Skies

Reactions to the open skies policy, mostly unfavorable, has been building up both within the U.S. and abroad ever since the U.S. began to pursue the policy with its liberal bilaterals approach and its attitude towards IATA's activities, as was explained earlier. In this section the discussion will assume that the U.S. government in general looks favorably at the policy unless otherwise indicated in certain cases and by some U.S. officials. Reactions to the policy of open skies will be treated here in both scenes, within the U.S. and abroad.

---

[464] Airline Executive, February 1980, p. 6.

[465] Aviation Daily, March 25, 1980, p. 130; April 7, 1980, p. 203.

The scene within the U.S. Beginning with the position of the CAB towards the policy will provide a better picture of the controversy over the policy. In June 1979 the CAB chairman presented his views on six assumed objections to the U.S. International Air Transport Policy which he called myths and which he attempted (somewhat successfully) to discredit. Following is an analysis of each of his individual arguments.[466]

> First Myth: The United States is attempting to foist its approach on other nations which may have different national goals and is ignoring basic principles of sovereignty and comity.

Chairman Cohen argued that the 1944 Chicago Convention left one area where no multilateral agreement could be reached, i.e., an explanation of how commercial airlines would be permitted to compete, a decision which was left to bilateral negotiations between the sovereign governments. It is not wrong for the U.S. to negotiate liberal bilaterals with other countries who have freely entered into such agreements which are in accord with the U.S. system of free entry and price flexibility. The U.S. has never denounced an agreement and has always honored its end of the bargain. He also argued that a number of countries have already accepted deregulation to varying degrees and that he expected others to do so. He recognized that much of the criticism over "unilateralism" comes from the IATA show-cause order

---

[466] Marvin S. Cohen, Chairman, CAB, "Six Myths About U.S. International Air Transport Policy," an address before ITA Think Tank on International Air Transportation held in Paris, France, June 8, 1979. For some counter arguments see Melvin A. Brenner, "An Open Letter to Chairman Cohen Refuting De-Regulation's Myths," Airline Executive, October 1979, pp. 22-23.

which, he argued, is attributed to lack of familiarity with U.S. procedures.

> Second Myth: De-regulation quickly will lead to the loss of the regular high frequency service that is required by the world business community.

Chairman Cohen argued that there is no evidence to support such an allegation. He also argued that air travel should not be the prerogative of only business travellers and the very rich; that a greater range of services can be made available to other kinds of travellers with the help of today's aviation technology; and that competition is the most efficient way to insure the proper mix of services.

> Third Myth: Open competition is inconsistent with sound energy policy which may require severe restrictions on leisure travel to assure maintaining service of business travellers.

Among his arguments on this subject, Chairman Cohen contended that there is evidence indicating that the industry can adjust to rising fuel costs by becoming more efficient through traffic increases and by shifting to newer technology aircraft which are 20% to 35% more energy-efficient than many of the aircraft now in use.

> Fourth Myth: Competition may look good during the boom in the business cycle but history has shown that excessive discount pricing during growth periods has led to over capacity and financial disaster during the downturns.

Chairman Cohen's argument here included the conention that in a competitive environment each airline will have maximum flexibility to develop a pricing and service scheme to best see it through a recession and that airline management can do just as well, if not better, over the business cycle without regulation as it can with it which would be reason enough not to intervene.

Fifth Myth: Careful regulation and capacity control can achieve lower fares than can open entry and competition.

Cohen argued that while low fares are not a specific goal of U.S. policy, they are one of the inherent byproducts of competition. He argued that low fares can also be had through regulation. He cited as an example the Super Apex flight between Sydney and London, which comes upon determination by the governments that such fare can be offered only by Quantas or British Airways to the exclusion of other efficient operators from such market, an act which may invite retaliation and protectionism.

Sixth Myth: It is foolish to talk about open skies when the industry is so dependent on external constraints such as limited airport capacity, air traffic control, tourist organizations, etc.

The argument here included the contention that most of the potential competitors are already flying to those airports only under various handicaps imposed by restrictive bilaterals and that most airport operators welcome new business. As for congestion, he argued that it is not a new problem and that solutions must be found, regardless of whether there is greater competition.

Earlier in 1979, Chairman Cohen in explaining that liberal bilaterals have been signed with other countries at their own free will and without coercion from the U.S., indicated that each of those bilateral agreements represents a step towards a more competitive system and added that ". . . when increased access to U.S. markets is desired, the practice of exchanging liberalization makes it extremely

difficult for a conscientious negotiator to say no to substantial new opportunities being offered to the foreign carrier . . . ."[467]

The above discussion will serve not only to provide the U.S. position but also to explain some of the important criticism aimed at the new U.S. policy.

Other individual important policy issues that should be considered in our analysis here include cabotage and the Fly America Act. Both issues have been the subject of some controversy within the U.S. and abroad. Cabotage was one of the most sensitive and emotional issues discussed during the hearings on the International Bill (the new International Air Transportation Competition Act of 1979). It came right after the grounding of the DC-10's and the resultant stranding of passengers. In his testimony on cabotage, CAB Chairman Marvin Cohen indicated among other things that it would be very helpful to the U.S. government, U.S. carriers, and also to the public if the U.S. were able to negotiate cabotage rights but that it should be used sparingly and only when the U.S. receives commensurate rights. In his prepared text for the hearing, however, Cohen indicated that cabotage should be authorized only in emergency situations.[468] Richard Cooper, Under-Secretary for Economic Affairs, DOS, dismissed the argument that cabotage would lead to the destruction of the U.S. aviation industry but did not endorse unlimited grants of authority to foreign carriers, adding that cabotage should be limited to emergency

---

[467]Marvin S. Cohen, "Competition in International Air Transportation: A Look at the Home Front," speech before the International Aviation Club, Washington, D.C., Jan. 23, 1979.

[468]Aviation Daily, Aug. 22, 1979, p. 289. Cabotage involves permitting foreign carriers to carry local and domestic traffic.

periods when no other U.S. carrier capacity is available.[469] Senator Howard W. Cannon (D-Nev.) also favors cabotage in emergency situations only.[470] However, the U.S. airlines and unions alike have adamantly opposed cabotage.[471]

One must also recall that this survey has provided conclusive and complete evidence on the attitudes of the airlines towards cabotage.

The airlines and unions were not alone in their vigorous opposition to allowing cabotage rights to foreign carriers. The American Bar Association (ABA) transmitted a resolution to the Senate Aviation Subcommittee, also opposing the consideration of cabotage rights in the proposed international aviation act (S. 1300) or any similar legislation. In expressing its concern over the subject of cabotage to foreign carriers, the ABA report indicated that it would affect more than just aviation, with possible ramifications that should be given additional and closer study before any change is made. ABA's concerns included the possible domination of domestic U.S. transportation by foreign carriers and the possible weakening of U.S. carriers, or the exclusion of some of them from domestic routes. Defending its stand, the ABA indicated that:

> . . . It is not being protectionist to suggest that the nation's domestic transportation system should be in the hands of

---

[469] Ibid.

[470] Aviation Daily, Aug. 28, 1979, p. 321. See also Howard S. Cannon, "International Aviation," an address before the International Club, Sept. 18, 1979.

[471] Aviation Daily, Aug. 22, 1979, p. 289. See also "Legislative News," Traffic World, Aug. 27, 1979, pp. 31, 100; Aviation Daily, Aug. 23, 1979, pp. 297-298.

> nationals. That is just plain good economic sense and good national defense sense. . . . Reliance on foreign air carriers for domestic transportation makes no sense in time of peace and even less sense in time of national emergency. No other nation relies on foreign transportation for domestic service and no arguments have been put forth that we know of as to why the U.S. ought to do so. . . .[472]

The ABA, however, indicated that the appropriate answer is that which was proposed by Senator Cannon's bill providing for U.S. carriers to wet lease foreign registered aircraft. The Senate-House Conference on the international aviation bill (S. 1300), however, agreed to adopt emergency cabotage but provided safeguards to insure that cabotage will not be used as a strike-breaking device.[473]

From the economic viewpoint, exchanging cabotage rights is not profitable to U.S. air carriers. The U.S. airlines felt that extensive traffic rights in the U.S. offered to foreign carriers as a quid pro quo may have opened the national market too widely to foreign operators without establishing tangible benefits in return.[474]

The use of the Fly America Act[475] as a tool for negotiating liberal bilateral agreements has also been a controversial issue both in the U.S. and abroad. Some foreign governments argue that the Fly America Act is inconsistent with a liberal policy. The State Department

---

[472]Bill Henzey, Airline Reports, Sept. 17, 1979, pp. 3-4.

[473]Aviation Daily, Dec. 13, 1979, p. 218.

[474]John F. Brindley, "U.S. Air Transport Policy: International Reactions to Deregulation," Interavia, May 1979, p. 429.

[475]Public Law 93-623 dated Jan. 3, 1975. This act, in general, provides that when government transportation is not utilized and travel is authorized by commercial airlines, U.S. certificated air carriers will be used for all commercial air transportation of persons or property if service provided by these carriers is "available."

wanted repeal of the Act, claiming it was extremely drastic. DOS has the impression that most foreign governments have provisions encouraging the use of national airlines but not drastic sanctions.[476]

During a hearing on S. 1300 (recently signed into law as the International Air Transportation Competition Act of 1979), U.S. government witnesses made a strong case that the Fly America Act is counter to government policy in reducing government regulation and promoting competition in international aviation. Foreign governments also argue that while the U.S. enthusiastically preaches open skies, it continues restrictions where it best suits its interests. The State Department also argues that the Act has become a symbolic problem for foreign governments, pointing to inconsistent U.S. adherence to a free market.[477] The U.S. airlines, of course, oppose the idea of negotiating the Fly America Act in bilateral agreements.[478]

The international bill S. 1300, however, gave U.S. negotiators the flexibility they needed to use the Fly America Act when negotiating with foreign governments if they would agree to liberal competition bilaterals which meet with U.S. international aviation goals.[479] (More about the Fly America Act will be provided later under Reflections.)

---

[476] DOS outgoing telegram No. 7491, dated June 16, 1979.

[477] Howard W. Cannon, U.S. Senator (D-Nev.), "International Aviation," op. cit.

[478] "Legislative News," Traffic World, Aug. 27, 1979, pp. 31, 100.

[479] Howard W. Cannon, U.S. Senator (D-Nev.), "International Aviation," op. cit.

Additional criticism of the U.S. policy from a U.S. entity was voiced recently in a Washington, D.C. conference by C. E. Meyer, Jr., President, TWA, when he denounced two major means used by the U.S. in its attempt to increase competition and consumer benefits--multiple entry and commitment to lower transatlantic fares. As for the first of these two policy means, multiple entry, Mr. Meyer indicated that the introduction of more U.S. carriers makes some economic sense in some international markets resulting in benefits to both the public and the participating carriers alike. In many other markets where the traffic is too thin to be profitably divided among U.S. carriers competing against each other and also against foreign carriers as well, Mr. Meyer indicated that it is the foreign carriers that are likely to be the principal beneficiearies.

Concerning lower transatlantic air fares, where IATA's rate conference machinery also does not apply, Mr. Meyer indicated that the U.S., in its attempt to secure such fares in bilateral agreements, barter for those lower fares valuable competitive advantages such as increased access to U.S. markets without corresponding benefits abroad for U.S. carriers. This, he indicated, should lead to weakening the position of U.S. carriers in international aviation and would ultimately be a desservice to the consumer as well. In directing attention to what U.S. policy should be, Mr. Meyer indicated that the policy must recognize the philosophical and economical differences between the U.S. on one side and other aviation countries on the other side. The policy, he indicated, must not export the domestic economic philosophy of this nation, as the mounting evidence shows, to environments with social, economic, and political realities based

on sets of assumptions different from those of the U.S. Mr. Meyer stressed the importance of cooperation with aviation partners of the U.S., especially in this present atmosphere of unrest and uncertainty, even though at times it goes beyond "basic common sense economics" and that the U.S. must have at its disposal a ". . . substantial, economically viable international route system and a large fleet of modern aircraft capable of supporting our strategic and foreign policy objectives on a worldwide scale . . . ."[480]

The scene abroad. The U.S. International Air Transport Policy has also come under attack during several of the international aviation-related conferences held both in the U.S. and abroad. In this section we will address the criticism directed at the policy by non-U.S. entities in speeches made at those meetings. The discussion will relate to five important meetings, three of which were held in 1979. The other two were held in 1980 while this section was being written.[481]

The first of the conferences convened in 1979 was held in Kingston, Jamaica, between January 30 and February 2, 1979. According to some, this symposium was a complete failure. The U.S. open

---

[480] AW & ST, International Air Transportation Conference, op. cit., address by C. E. Meyer, Jr., President, TWA, "Expanding Horizons."

[481] Two other conferences will be held this year after submission of this research. These are: (1) Lloyds' of London Press: International Civil Aviation Conference No. 2 ("The Economic Challenge of the 1980's"), New York, Statler Hotel, New York City, April 29-30, 1980; (2) Institut Du Transport Aerien, The Eighth International Symposium of the ITA: "The Economic Future of Air Transport, Strategies for the 1980's," Hotel Meridien, Paris, France, May 20, 21, 22, 1980.

skies policy was displayed for all to see, but what they saw was a disaster. The great benefits of low fares claimed were proved illusory. World airlines' leaders emphasized cooperation and expressed their suspicion about the underlying intent of the U.S. selective free trade policy. They could not understand why the U.S. would rule out Australian beef and Japanese steel but insist on open skies for airline service.[482]

The U.S. open skies policy was criticized and smeared by many of the participants representing world airlines from countries such as France, the United Kingdom, Kenya, and Zambia, in addition to the IATA. Such criticism claimed unilateralism, protectionism, contradiction, and bigness vs. smallness and placed emphasis on multilateral cooperation.[483]

The second of the 1979 conferences at which the U.S. policy came under attack was the Lloyds of London seminar held in New York, during which leading airline executives expressed their opposing views to CAB policy.[484] Ross Stainton, Deputy Chairman and chief executive of British Airways, indicated that the U.S. open skies policy was a sham and attributed that to the following factors:

---

[482]Joseph S. Murphy, "A U.S. Debacle in Kingston," Airline Executive, March 1979, p. 8.

[483]CAB, "Congress Split over U.S. Air Policy Approach," Airline Executive, March 1979, pp. 24-26; see also Wayne W. Parrish, "How Not to Sell a World Aviation Policy," Airline Executive, March 1979, pp. 27-30.

[484]For some reflections on this conference, see Joseph S. Murphy, "International Air Policy Battle--U.S. Loses Round Two," Airline Executive, July 1979, pp. 21-23; and "U.S.--IATA Air Differences at New York Conference," Air Transport World, July 1979, pp. 54-59.

1. Overcrowded airports and the practice of airlines to control secure slots for their flights.

2. The wasting of tons of fuel when aircraft are queuing for the take-off runways.

3. Crowded expressways resulting in seats left empty by passengers who were late for flights.

4. Delay and discomfort caused to tens of thousands of passengers stranded due to lack of regulation.

5. More and more airports coming to resemble Los Angeles, Chicago, or Heathrow which are known for their terrible congestion problems.

6. Cancellation of flights due to fuel shortages.

Stainton pointed out that emphasis of the 1944 Chicago Convention was on agreement, cooperation, and equity and that no state can expect to impose its own dogma upon the international air transport or expect to preempt a market without either compromise or retaliation. One point of interest raised by Stainton regarding the attitude of the U.S. was that the rest of the world escaped the problems the U.S. experienced by means of monopolies and trusts, and hence the rest of the world does not view airlines' responsible cooperation such as that in IATA traffic conferences as dangerous in itself, nor is it harmful or undesirable.[485]

Knut Hammerskjold, IATA's director general, indicated that the overwhelming reaction and criticism was not being directed

---

[485]Joseph S. Murphy, "International Air Policy Battle," op. cit.

against low-fare consumer-oriented attitudes or the reduction of government interference but rather at the pace and methods being used and the unilateral approach to multilateral inter-nation issues. He indicated that he is convinced that the time has come to bring together leading economists of the world in a neutral inter-forum to provide policymakers with a common economic basis by which they may make their decisions.[486]

Air France's Pierre Giraudet also took a strong stand against the U.S. policy, asserting that "applying the law of the jungle" to international aviation fails to recognize flag carriers as "essential props" to foreign relations, development of tourism, job generation, national aircraft production, national prestige, and sovereignty.[487]

Alitalia's Umberto Nordio also attacked the open skies policy and questioned the importance and priority the U.S. attaches to such a policy, questioning whether its benefits warrant the considerable friction it causes with its allies abroad.[488]

Sir Lenox Hewitt of Quantas sees this international air deregulation movement as a "passing fancy" and offers four major reasons for its ultimate abandonment:

1. Free trade in airline seats will not become universally accepted any more than the world will become a big happy free trade zone.

---

[486] Ibid.

[487] Ibid.

[488] Ibid. For additional reflections on Mr. Nordio's speech, see Umberto Nordio, "Midway Reflection on Open Skies," Air Transport World, July 1979, pp. 86-88.

2. High break-even load factors, which have been pushed even higher by increasing fuel and other costs, will be less and less attainable in an environment of unregulated capacity.

3. There is a real danger of lowered safety standards as carriers are pressured into chronically unprofitable situations.

4. U.S. motorists will not tolerate rationed gasoline at the time airlines are flying internationally with 40% of their seats empty.[489]

James Atwood, then Deputy Assistant Secretary of State, countered that the U.S. is not ". . . acting as something of an international bully in aviation, imposing its policies on a helpless, unwilling world. . . ." He cited four points for his contention: the U.S. has not terminated existing agreements, it has abided by existing agreements; avoided use of existing bilateral rights to create confrontation; and has kept strictly to aviation issues in negotiations.[490]

The third and last of the 1979 conferences at which the U.S. policy came under attack was the Think Tank debate staged by ITA in Paris on June 8, 1979. Generally speaking, executives of world airlines who spoke in the New York seminar mentioned above voiced again their vigorous oppositions to the U.S. policy and questioned its validity and goals. Roman A. Cruz, President of IATA and Philippine Airlines, questioned whether the U.S. free skies doctrine is merely a ploy to rewrite the rules and end up with dominance of world air routes by powerful U.S. airlines. Almost all the speakers

---

[489] Ibid.

[490] Ibid.

in that conference mentioned that the U.S. had constructed barriers to textiles, shipping, shoes, and other items while simultaneously attempting to remove all restrictions on airline routes. It was argued that the lineup by the major sovereign countries was almost solid against the U.S., despite the defense offered by CAB Chairman Marvis S. Cohen, CAB member Elizabeth Bailey, and Michael Levine, then director of both Domestic and International Affairs at CAB.[491]

Before a discussion of the two conferences held in 1980, it is not out of place to mention here the consultations made in three foreign cities, Bogota, Brussels, and Nairobi between representatives of the U.S. government and representatives of foreign governments. The evidence showed that all of some thirty-seven governments attending those consultations took a strong stand against the U.S. policy and especially against the IATA show-cause order.[492]

Two important conferences held in 1980 have also witnessed some strong criticism directed at the U.S. policy. The first of these two conferences, attended by the researcher, was sponsored by Aviation Week and Space Technology in Washington, D.C., February 11 and 12, 1980.

Of those non-U.S. speakers praising the U.S. policy on international air transport, one should mention J.Y.M. Pillay of Singapore Airlines, who praised U.S. liberal policy and asked for cabotage

---

[491]Wayne W. Parrish, "U.S. Amateurs Lose 'Think Tank' Debate to International Pros," Airline Executive, July 1979, p. 47.

[492]Airline Executive, November 1979, p. 16.

rights[493] and Hans Roben of the Netherlands Civil Aviation Authority, who contended that liberal bilaterals do work.[494] Mainly, however, non-U.S. speakers were critical of U.S. policy. Three speakers should be considered in this connection. The first, Alitalia's Umberto Nordio, renewed his attack on the policy and the means the U.S. employs to impose it on other countries, stressing the importance of "multilateral, patient, and dedicated" international cooperation rather than confrontation.[495] Herbert Culmann of Lufthansa was also very critical of the CAB which, as he indicated, seems to be on one side while the rest of the world is on the other side. In criticizing the new U.S. bilaterals, he distinguished between three types of bilaterals as follows:

1. Those bilaterals that were used to coerce other countries to accept U.S. aviation policy such as the Dutch and the Belgian agreements.

2. Those bilaterals that reflect more equal bargaining leverages, such as the Bermuda II Agreement, with which the U.S. is not happy.

3. Those bilaterals that may be regarded as good examples of a moderate and rational agreement, the German Agreement, although meant to serve a specific purpose in the "domino game of the CAB."

---

[493] AW & ST, International Air Transportation Conference, J.Y.M. Pillay, Chairman, Director General, Netherlands Civil Aviation Authority, Singapore Airlines Ltd, "Meeting the Challenge."

[494] Ibid., address by Hans Raben, "The Real Test: Does a Liberal Bilateral Work?"

[495] Ibid., address by Umberto Nordio, Chairman, Alitalia, "The Politics of Confrontation Diplomacy."

Culmann indicated that despite the fact that Germany is not unhappy with the agreement, the U.S. never seriously intended to trade "open skies against open skies," because the skies of Germany have been open since the war and thus Germany's bargaining power is quite limited.[496]

Speaking in behalf of IATA, C. I. Taylor stressed the necessity for multilateral coordination and cooperation through IATA, which, he argued, will still be there as long as international airlines must cooperate with one another. He called upon resigned members to rejoin the structured IATA and pay their shares if they want the benefits, for ". . . there is no such thing as a free lunch."[497]

The second of the aforementioned conferences held was the ICAO second air traffic conference held in Montreal, Canada, February 12 through February 28, 1980. During this meeting opposition to U.S. policy was again voiced by many of the participants. Delegates from both Germany and Japan, for example, commented on the importance of continued fares coordination by IATA. In addition, both the Peoples' Republic of China (PRC) and Italy spoke of the importance of predetermination of capacity.[498] The PRC representative described his country's policy as follows:

1. Traffic should be established through bilateral or multilateral consultation between the carriers subject to the approval of

---

[496]Ibid., address by Dr. Herbert Culmann, Chairman, Lufthansa German Airlines, "A View from Europe."

[497]Ibid., address by Claude Taylor, President, Air Canada and IATA, "Results of a Structured IATA."

[498]Aviation Daily, Feb. 13, 1980, p. 241.

the governments concerned. He opposed unilateral action in this respect.

2. Capacity should relate closely to demand and should be reasonably predetermined and regulated and as such should be adjusted thereafter through consultation according to traffic requirements.

3. Both scheduled and non-scheduled traffic are integral parts of the same market and their regulation should be harmonized.[499]

While Belgium and the Netherlands, two countries having liberal bilaterals with the U.S., appear to have been among the few supporters of the U.S. dual disapproval of fares philosophy at the conference, many other countries were firmly opposed to this U.S. position (proposal) including China (PRC), the Philippines, Austria, Cuba, and Brazil, in addition to the African countries such as Mali, Senegal, Togo, and the Ivory Coast.[500] In response to the vigorous opposition to the U.S. proposal that point-of-origin and the mutual or dual disapproval concept of bilateral accords be considered as standard along with current bilateral agreements sanctioned by ICAO, the U.S. delegation at the conference found itself forced to withdraw that proposal. Contributing to this decision also were resolutions passed by an overwhelming majority of the countries represented in one of the two working panels, resolutions decrying unilateral government actions and encouraging the IATA traffic conference system. While some countries such as Chile and Jamaica supported the U.S. and called on ICAO members to recognize that the world was changing, many other countries

---

[499] Aviation Daily, Feb. 15, 1980, pp. 257-258.

[500] Aviation Daily, Feb. 19, 1980, p. 268.

took the position that it was too soon to measure the benefits of the U.S. policy, indicating that two or three liberal bilaterals should not set the standards for all subsequent agreements. Countries voicing their support and approval for multilateral rather than unilateral fares negotiations included Austria, Australia, Argentina, Algeria, Brazil, Belgium, China, Cuba, Canada, Chad, Egypt, France, West Germany, Guinea, Ivory Coast, Italy, Israel, Ireland, Japan, Morocco, Mexico, Mali, Norway, Nigeria, New Zealand, Philippines, Poland, Senegal, Saudi Arabia, Togo, and Yugoslavia.[501] In its closing sessions the ICAO conference, with delegates from more than 100 countries, firmly expressed continued support of a multilateral fares negotiations system and urged that governments avoid unilateral actions which might have a negative effect on carrier efforts toward reaching agreements. In fact, the conference specifically recommended that the worldwide multilateral machinery of the IATA traffic conferences should be adopted as a first choice when establishing international fares and rates and that carriers should not be discouraged from participating in IATA machinery. It was reported that this was a setback to U.S. efforts both to remove the IATA's negotiated fares resolutions from anti-trust immunity and to sign liberal bilaterals with individual countries implementing a point-of-origin or dual disapproval of fares system.[502]

---

[501] Aviation Daily, Feb. 21, 1980, p. 286.

[502] Aviation Daily, Feb. 29, 1980, p. 332.

At the heart of the open skies regime lies the issue of rates, which relates very closely, of course, to the IATA role in coordinating the multilateral efforts. IATA has been called a cartel by some U.S. government officials and thus has, as a result, been questioned about its rate coordination activities. Sir Lenox Hewitt, Quantas chairman, indicates that charging that the IATA is a cartel which sets and determines rates is "an absolute and intellectual outrage and obscenity."[503] J. Ross Stainton, chairman of British Airways, called for a return to common sense in airline operations, including a more logical pricing structure. The present structure, he claims, is still based on DC-4 days. He described deregulation and open skies as a "perishable policy in today's complexities . . . ."[504]

D. Reflections

The purpose of this section is to offer some brief reflections on certain issues of the new policy as set forth by the new International Air Transportation Competition Act of 1979 (IATCA) and to relate the airlines' attitudes toward such issues in addition to some relevant foreign reactions in certain instances. A copy of the new law is reproduced in Appendix J and will be referred to as the IATCA henceforth. Our discussion will first cover the key points of the open skies regime in addition to some other policy issues relevant to the topic and will finally look into certain attitudes towards the CAB and the

---

[503] Airline Executive, December/January 1980, p. 8.

[504] Aviation Daily, Feb. 23, 1980, p. 301.

implementations of its tasks to see why the CAB is the recipient of so much criticism.

Open Skies

The discussion in this section will revolve around the key points of an open skies regime listed earlier in Chapter V. We will look into each of those seven points, relate them to U.S. policy, the attitude of U.S. airlines, and the reactions of foreign concerns where applicable. The objective of the discussion is to evaluate whether the U.S. is really launching a policy to achieve goals that are closely associated with an open skies regime--the regime that the U.S. in 1944 attempted to sell to the world, but failed to secure a multilateral accord and sympathy. The seven key points to be used here as an approach to the analysis are multiple designation; liberal route grants; removal of distinction between freedom categories; removal of restrictions on capacity (frequency), aircraft type, or traffic in general; tariff competition; charter freedom; and finally the removal of discrimination and unfair competitive practices. Each of those categories will be discussed briefly and separately. Brief reflections will also be provided but the general concluding comments will be dealt with later under Implications.

Multiple designations. Without taking into consideration the various restrictive bilaterals that existed before the Bermuda II

---

[505]For details on the nature and relative importance of multiple designation, see address by Milford L. Coor, Senior Attorney, TWA, "The Relative Effects of Multiple Designation," International Aviation Symposium, op. cit., pp. 121-126.

event, it may be argued that it was Bermuda II which imposed new and uncalled for restrictive measures on multiple designation, a concept which was handled neither by the 1944 Chicago Convention nor by the Bermuda I Agreement. It should be recalled that this specific restriction resulted in dissatisfaction to U.S. airlines, especially those that had to cease service in certain markets. Following the Bermuda II event, the 1978 policy statement (see Chapter II) specifically indicated that "flexibility to designate multiple U.S. airlines in international air markets" is one of the negotiating objectives of the statement. The new bilaterals also continued to press for multiple designations and recently the IATCA also provided for multiple designations as among the goals for international aviation policy. (See Appendix J, section 17.)

One must also expect that most other countries would not be enthusiastic or sympathetic with the multiple designation concept, mainly because the greatest majority of the international air transport community operate only one major airline and, thus, it would not be in their interest to permit more than one U.S. airline into their market, especially those that are economically attractive. It must also be noted that multiple designation is an objective of U.S. policy to be achieved through negotiation rather than a rigid policy that may not be deviated from if necessary. Due to the fact that designation is an element of traffic operations that is very much interrelated with the freedoms of the air, the capacity, the markets served, etc., the attitudes of the airlines towards some restrictions on this concept of operations must not be regarded as always dissatisfactory. In fact, some U.S. airlines recognize the necessity

to deviate from this concept in markets that are described as thin where multiple designation could result ultimately in disservice to consumers and to U.S. airlines, a factor which would lead to higher fares rather than achieve the desired objective of low fares through increased competition.[506] It is thus safe to say that multiple designation is a concept that is provided for by legislative law, pursued through negotiations, and is supported by the airline industry if used wisely where existing foreign competition justifies it. The ultimate objective should be foreign policy considerations, the net competitive position of the U.S. airline industry, and the long-range effects on the nature and cost of the service to the public.

Liberal route grants. It is common knowledge, of course, that the new U.S. policy has indulged in granting route rights to foreign carriers in return for equal opportunities to compete. The new IATCA states that one of the goals of international aviation policy is to provide opportunities for foreign carriers "to increase their access to U.S. points if exchanged for benefits of similar magnitude for U.S. carriers or the travelling public with permanent linkage between rights granted and rights given away" (Appendix J, section 17). This policy, however, has been the subject of dissatisfaction for the airline industry. The industry does not object to the exchange of routes but believes that such exchanges have been to the disadvantage of U.S. carriers because the system does not in fact provide U.S. carriers with similar or comparable economic advantages to those

---

[506] AW & ST, International Air Transportation Conference, address by C. E. Meyer, Jr., President, TWA, "Expanding Horizons."

traded for a liberal agreement and the adoption or acceptance of U.S. philosophy. The industry also feels that the U.S. government is not aware of the value of such extensive route grants to foreign carriers. The objective of the policy, however, is to place emphasis on consumers' interests more than those of the carriers, to trade opportunities for opportunities, and to sell the U.S. philosophy of increased competition and its benefits. It should be recalled from Chapter VII that the survey showed the concern and dissatisfaction of the industry, which feels that the U.S. government may lose track of its objectives by pursuing such a policy and may also endanger U.S. carriers' interests resulting in disservice to consumers in general and consequently weakening the healthy growth of the industry. This would lead to the unavoidable end result of harming the airlift capabilities of U.S. needs, which should be maintained at all times as an essence of national defense, security, and interests in general.

Removal of distinction between freedom categories. The removal of the distinction between the categories of the freedoms of the air is still far from being achieved or implemented by the United States, even though it is embarking on the process and will ultimately require such action. This policy, however, calls for multilateral sanction if it is to be effective, due to the nature of the fifth and so-called sixth freedoms. The efforts of the U.S., however, can claim credit for achieving some progress in this respect through the various liberal bilaterals that have been signed thus far. Again, the objection of the airline industry relates to the excessive economic benefits surrendered to foreign carriers without comparable economic

benefits for U.S. carriers. It is also argued that the U.S., in its attempt to sell its policy to the rest of the world, may have extended its arm too far.

No capacity (frequency) aircraft type or traffic restriction. This key element of an open skies regime relates to multiple designation or vice versa. The newly enacted U.S. policy is totally committed to the removal of such restrictions. (Appendix J, sections 2 and 17.) The attitudes of the U.S. airlines towards this key element is similar to that mentioned in connection with multiple designations. The majority of foreign governments, including some of those with whom liberal agreements have been signed, do not favor such policy, mainly because of the strong competitive position of U.S. carriers and their desire to share, almost equally, in the benefits of the traffic governed by the particular bilateral.

Tariff competition in a fair market place and the promotion of low-cost options. Tariffs and fares are perhaps the most problematic and important key elements of an open skies regime, or any regime, because they have a direct impact on revenues and profits. This key element of an open skies regime combines three important factors: tariff competition, the assumption and requirement of a fair market place, and the consequent promotion of low-cost traffic options.

Tariff competition: One must not assume at all, of course, that this means total lack of regulation, for the simple reason of reality and necessity. The U.S. policy is naturally very much in favor of tariff competition as was explained earlier and as stipulated

in the new IATCA (Appendix J, section 17). The act, however, stipulates several provisions aimed at regulating fares. The role of the Board in regulating fares has been made elaborate and comprehensive (for example, see Appendix J, sections 2, 14, 15 and 24). It is important to be aware of the complications involved with such regulated tariff competition as might occur with the newly enacted regulation.

Some of the newly enacted provisions or amendments that are believed to be of significant interest and relevance to our topic are as follows: the new IATCA regulations preclude the Board from finding a fare unreasonable or suspending or cancelling such fares if the fare is within a specified zone of reasonableness--5% above to 50% below the standard foreign fare level (SFFL). The Board, however, may suspend or cancel a fare even within such a zone of reasonableness if it finds the fare unduly "preferential, or prejudicial, or unjustly discriminatory" (with respect to increases) or "predatory or discriminatory" (with respect to decreases). The Board may also suspend or cancel any fare within the zone if it finds such action in the public interest because of unreasonable regulatory actions of a foreign government with respect to a U.S. carrier fare proposal. It is interesting to point out also that the Act provides that the non-suspendable increases mentioned above do not become effective for a period of 180 days after enactment of the law. This, of course, retains the regulatory umbrella of the Board during this period following February 15, 1980, in this respect. After expiration of the 180 day period, the carriers would acquire, for the first time, the right (free of the Board's suspension power) to increase their fares

5% above the SFFL as adjusted during the 180-day period. (More about the establishment of the SFFL will be discussed below, given its controversial nature.)

The IATCA also authorizes the Board to suspend a foreign carrier proposed or even existing tariff on "public interest" grounds, rather than being confined to the traditional criteria for rate suspensions (i.e., unjust or unreasonable, discriminatroy, preferential, or prejudicial). The Board is also authorized to suspend a proposed "initial tariff" (previously precluded) with a provision permitting the foreign carrier to charge any fare (not suspended) of a U.S. air carrier in the market, during the period of such suspension.[507]

The SFFL, mentioned earlier in this chapter, is based on fares filed for and permitted by the Board to go into effect on or about October 1, 1979, and before the 180-day deadline after enactment of the IATCA. The Board can determine, in an oral evidentiary hearing before an administrative law judge, within this period that a fare in effect on October 1, 1979, is unjust or unreasonable and may establish a different SFFL for any such market. Moreover, the Board may make such a determination only for markets which in the aggregate do not exceed 25% of the total passengers carried in foreign air transportation during the most recent twelve month period for which data are available. It is interesting to note that any SFFL established by the Board (which would be below the adjusted October 1, 1979, fares) would not take

---

[507]For detailed reference, see Appendix J, sections 14, 15, 16, and 24; see also Summary of the International Air Transportation Competition Act of 1979, February 1980, a CAB internal memorandum circulated by the Assistant General Counsel, International Affairs and Special Projects.

effect until the expiration of the 180 days following February 15, 1980, the date of the enactment of the IATCA, and would not reduce outstanding fares but would simply lower the base upon which the 5% increase and cost increases would be calculated. Although the idea of using the October 1, 1979, fares as basis for establishing the SFFL is quite satisfactory to the airlines, this provision should be a relief to the airlines and should reduce chaos and confusion in the regulation of fares by the Board.

Once an SFFL is established by the Board, it is not left alone due to the dynamic nature of cost elements. The IATCA for this reason required the Board to make periodic adjustments to the SFFL, including that in effect in the initial 180-day period following enactment, equivalent to the percentage change from the last previous period of the actual costs per available seat mile. It must be noted, however, that no adjustments may be made to costs actually incurred. This is not very helpful to the airlines' efforts to pass increases in fuel costs, as was indicated earlier. The Board may utilize all relevant and appropriate information "reasonably available." Adjustments are to be made within thirty days after enactment and not less often than every sixty days thereafter, solely for fuel costs, but not less often than 180 days with respect to all other costs. This again reflects that the legislators have felt that the unpredictable situation of fuel cost necessitates more urgent review and adjustment. The Board, however, is permitted by rule to increase the 50% downward flexibility of fares.[508]

---

[508] Ibid.

Of course, the Board, after long preparations and selection of certain markets, has formally (February 27, 1980) launched its investigation of foreign fares and the possible establishment and adjustment of the SFFL as provided for by the new IATCA. Unofficial opinions within the Board hint that the upward flexibility (5%) will probably be allowed in most, if not all, of the twelve foreign city pairs designated for the investigation. Such opinions also hint that the inflation impact, coupled with the Board's suspension of many pre-October 1, 1979, fare increase proposals, kept the lid on carriers' profits.[509] This unofficial CAB attitude, in fact, may have been the reason for recent authorized increases in the SFFL of 6.1% in Latin American, 8% in North Atlantic, and 9% in Pacific markets, effective April 1, 1980. In addition, the Board expressed willingness to consider requests by carriers that wish to submit single-fare proposals for the entire peak season, initially pegged at higher-than-SFFL guidelines which would be maintained throughout the summer. These new increases in the SFFL were in response to a "significant" increase in the rate of fuel cost escalation within the last several weeks. The Board in this instance used the most recent available weekly data, which was a departure from its usual practice of calculating the domestic fare level wherein the Board uses data averaged from the most recent four months. The Board also indicated that North Atlantic carriers may avail themselves of the legislative 5% upward flexibility.[510]

---

[509] Aviation Daily, Feb. 28, 1980, p. 321.

[510] Aviation Daily, Mar. 13, 1980, pp. 65-66.

This is another step by the Board in recognizing the critical situation of the airlines caused by the fuel crises and is expected to minimize the criticism of the investigation, its approach, and its outcome. Such criticism, however, is not totally absent, as was indicated earlier. Airline criticism of the SFFL investigation is not limited to the markets chosen, but is also extended to the selection of October 1, 1980, for fare flexibility, as well as to selection of that date, asking for a substitute date in order to produce economically fair results.[511] Foreign reactions to the introduction of the SFFL were very conservative and described it as a "very logical" step by the U.S. government but did not rule out the necessity for tariff coordination by IATA traffic conferences.[512]

The task of the Board in its investigation of foreign fares will not be an easy one, especially because of the deadline attached to its conclusion by law--namely August 13, 1980, the expiration date of 180 days after enactment of the IATCA. This seems to be of great concern to CAB officials and judges.[513] It has also been argued that the problems of such an investigation will relate to the elements of its structure, such as the critical issue of the rate of return, a problem which was confronted in the Domestic Passenger Fare Investigation (DPFI) launched a decade ago.[514] It may be concluded that tariff

---

[511] Aviation Daily, Feb. 25, 1980, p. 299.

[512] Aviation Daily, March 10, 1980, p. 44.

[513] Bill Henzey, Airline Reports, Feb. 28, 1980, pp. 1-3.

[514] Bill Henzey, Airline Reports, March 3, 1980, pp. 3-4. It is interesting to note that the Board uses a form of Rate of Return

competition is not nearly perfect and that regulation will continue to persist.

Fair market place: This assumption and requirement of a fair market place for tariff competition and low-cost traffic is very troublesome for obvious reasons, relating in part to the competitors themselves, the nature of the market place, the bilateral and multilateral arrangements involved, and other restrictive and anticompetitive practices. However, because of the fact that pure tariff competition was not existent, it becomes irrelevant whether the market place was fair or not to satisfy the key points of the open skies regime. It might as well be more practical to just assume that the market place is fair enough.

Although the new IATCA did not mention the fair market place in those exact words, the intention could be inferred from the various provisions in sections 2 and 17 (Appendix J). Again, a fair market place is a concept that is totally supported by the industry if and when it can ever be achieved.

Promotion of low-cost transportation options: The IATCA specifically provides that the Board considers the availability of "low-price service" as in "the public interest and in accordance with

---

(ROI) which is not very satisfactory to the airline industry due to the Board's interpretation and computation of net income. In its recent study of capital requirements for the 80's, the ATA used a corporate ROI instead of CAB ratemaking ROI. This corporate ROI is defined as

$$\frac{\text{Net income + interest on long-term debt}}{\text{Long-term debt + stockholders' equity}}$$

See: ATA, Airline Capital Requirements in the 1980's, September 1979.

the public convenience and necessity" (see Appendix J, section 2). Low fares, of course, could not be a favorite objective of the airlines, but they usually come as a by-product of competition and the need for higher load factors and more revenues. Low cost options, symbolized by innovative and keep discount fares, have been crowding themselves, and perhaps resulting in uncalled for escalation of first class and coach fares instead of having the opposite effect. The U.S. policy of promoting low fares is opposed by foreign governments and carriers for reasons described earlier, mainly those relating to the threat aimed at business travel, the backbone of scheduled traffic.

Charter freedom. The U.S. policy toward charter freedom has moved recently to the removal of the distinction between scheduled and charter carriers, as evidenced by the changing role of the supplementals. This policy, however, is not viewed with great enthusiasm by other countries that wish to make that distinction as clearly defined as possible. At the same time these countries wish to regulate the operations of both categories of carriers separately while each remains an integral part of the same system, bilaterally. The new IATCA provides that one of the goals of the policy is to have the "fewest possible restrictions" on charter operations (see Appendix J, section 17).

It is interesting also to note that the IATCA precludes U.S. carriers from operating Part Charters in foreign air transportation until December 31, 1981. However, in light of NACA's submission of a staff proposal to exempt carriers from domestic Part Charters prohibition, the IATCA specifically precludes authorization of such domestic Part Charters by exemption. This prohibition against Part

Charters is made even more restrictive by the Explanatory Statement contained in the Conference Report, which states the intent that foreign carriers should not be authorized to perform Part Charters during the two-year prohibition period (which applies only to U.S. air carriers) "unless such authorizations are required to meet the obligations of the United States under existing agreements with foreign countries." The Explanatory Statement also adds " . . . Nor should the U.S. government enter into new agreements which permit part charters by foreign air carriers during the pendency of the prohibition against such charters by U.S. carriers." The Explanatory Statement also cautions the Board against permitting part charters under the guise of scheduled service group fares.[515] (See Appendix J, section 26.)

Eliminating discrimination and unfair competitive practies. The new IATCA has stressed the importance of this key point of freedom to do business in each other's territory by eliminating discrimination and unfair competitive practices and has given the Board authority to act in retaliation to foreign discrimination and anticompetitive practices.[516]

The IATCA authorizes the Board, subject to presidential approval, to summarily suspend, modify, or condition a foreign air carrier permit whenever the Board finds that the foreign government or the foreign

---

[515] U.S., House of Representatives, Report on International Air Transportation Competition Act of 1979 (No. 96-716), S. 1300, 96th Cong., 1st session, 1979, p. 23.

[516] CAB, internal memorandum, Summary of the International Air Transportation Competition Act of 1979, February 1980, op. cit.; see also sections 2 and 17 of the IATCA (Appendix J).

carrier has, over the objection of the U.S. government, impaired or denied U.S. carrier operating rights or engaged in unfair, discriminatory, or restrictive practices with a substantial adverse competitive impact upon U.S. carriers. In addition, third country operations between the U.S. and the offending country (this refers to the fifth and perhaps the sixth freedom) may also be restricted if necessary to make the suspension more effective (see Appendix J, section 9).

The International Air Transportation Fair Competitive Practices Act of 1974 (FCPA) was also amended to grant the Board a specific new power to take such actions as in the public interest, ". . . which may include but are not limited to the transfer, alteration, modification, amendment, cancellation, suspension, limitation or revocation of any foreign air carrier permit or tariff pursuant to the powers of the Board under the Federal Aviation Act of 1958 . . ." whenever the Board determines that a ". . . foreign government or instrumentality, including a foreign air carrier has (1) engaged in unjustifiable, discriminatory, predatory or anticompetitive practices against a U.S. carrier, or (2) imposed unjustifiable or unreasonable restrictions on the access of a United States air carrier to foreign markets. . . ." The amendment (FCPA) provides also for filing, by any U.S. air carrier or any U.S. government agency, of complaints under this section and requires that the Board ". . . approve, deny, dismiss, set such complaint for hearing or investigation, or institute other proceedings proposing remedial action within 60 days after receipt of the complaint . . . ." The Board, however, may extend the period for taking action for an additional period or periods of up to thirty days each, ". . . if the

Board concludes that it is likely that the complaint can be satisfactorily resolved through negotiations . . . during such additional periods. . . ." The aggregate period for taking action, however, may not exceed 180 days from receipt of the complaint. The amended FCPA also requires the Board to solicit the views of the DOS and DOT and provide any affected air carrier or foreign air carrier reasonable notice and also ". . . such opportunity to file written evidence and argument as is consistent with acting on the complaint within the time limits set forth . . . ." The amendment also provides that any Board action under this section is subject to presidential review pursuant to Section 801 of the Act (see Appendix J, section 23).

These provisions seem adequate enough to rectify the unsatisfactory situation of U.S. airlines in this respect. The crucial issue, of course, is the efficient implementation of such a legislative law--which remains to be seen.

It should be recalled that our survey showed that the airline industry was dissatisfied with the provisions and implementation of the FCPA before its recent amendment and described the Act as a failure due to its inability to rectify certain discriminatory and anticompetitive practices abroad.

Other Policy Issues

In this section the discussion will touch upon other relevant and important policy issues that have been dealt with in the IATCA and are expected to influence the attitudes and situation of the U.S. airline industry. The issues to be treated briefly are the role of industry in the negotiation process; the newly created observer status

for congressional representatives; the Fly America Act; cabotage; and certain provisions relating to carrier agreements.

The role of the airline industry in the negotiating process. The IATCA has introduced a new provision calling on the DOS, DOT, and the CAB to consult to the "maximum degree practicable" with groups, institutions, and government agencies affected by the international aviation policy concerning both broad policy goals and individual negotiations. Those include, but are not limited to, the DOC, the DOD, airport operators, scheduled and charter air carriers, labor and consumer interest groups, travel agents and tour organizations (see Appendix J, section 17). This new law does not improve the classical role of the airline industry in the negotiation process to the extent that was originally hoped for. It should be recalled that the survey showed strong evidence of dissatisfaction by the industry in connection with the airlines' role in the negotiation process and their wish to see it improved (see Chapter VII). Whether this new provision will have any significant effect on the role of the airlines is uncertain. It may be argued, however, that this new provision is more realistic in its approach for recognizing the important roles of other groups in developing and implementing the broad policy goals and the individual negotiations, if the provision is wisely implemented. The implementation of this statutory provision is, of course, dependent mainly on the attitudes of the two administrative agencies, the DOS, the DOT, and the CAB, and the interpretation of the qualification ". . . to the maximum extent practicable," which will determine the roles of the various groups mentioned, including the airline industry. (For

reflections on the attitudes of the airlines towards the roles of the other groups, see Chapter VII: Summary of the Findings.)

Observer status for congressional representatives. It should be recalled that the survey results indicated that one of the areas showing no-dissatisfaction relates to the belief of the airline industry that it is unnecessary for the Congress to be involved in the pre-negotiation phase of the bilaterals for reasons already explained (see Chapter VII). The new IATCA has introduced a provision calling on the President to ". . . grant to at least one representative of each House of Congress the privilege to attend international aviation negotiations as an observer if such privilege is requested in advance in writing" (see Appendix J, section 17).

It is uncertain at this time what impact this may have on the outcome of individual negotiations or in helping the cause of the airlines. It could be inferred from the survey results that the industry was hopeful to see a change in the attitude of the administration in order to make its role in the negotiation process more constructive, but not by involving the Congress in the process. It is hoped, however, that this will not add a new dimension to the dissatisfaction of the industry towards the policy as verified earlier in Chapter VII.

The Fly America Act. It was indicated earlier that the airlines were opposed to the idea of negotiating the Fly America Act rights in bilateral arrangements. The IATCA, however, did introduce provisions that were not in accord with the industry's wishes. It should be

recalled that the Fly America Act requires that any government transportation of persons or property must be on U.S. air carriers where such service "is available," and the Comptroller General is precluded from making a reimbursement for such expenditures if the requirements are not met. The IATCA amends the restriction (solely insofar as it applies to government transportation between the United States and a foreign point) to make an exception to the prohibition of utilizing foreign carrier transportation, where U.S. carrier service is not "reasonably available." The term "reasonably" is thus added. The IATCA also permits an exemption from the requirements when provided for in an international agreement, provided the agreement is consistent with the goals for international aviation policy as set forth in section 17 (Appendix J), and, in addition, only if the agreement "provides for the exchange of rights or privileges of similar magnitude" (see Appendix J, section 21). Despite the fact that all did not go as the industry would have wished, it could be argued that this provision may in fact result in some economic advantages to the industry in certain, but not many, markets. As a whole, however, this was not the intention of the amendment. The intention was to prove to other governments that restrictions, protections, and inconsistencies of the policy are being removed to bring it in line with the liberal philosophy of the U.S. The intention also is to give the government some leverage in conducting negotiations. The interpretation of the term "similar magnitude" may present some problems and will definitely be subject to the various situations to be faced by negotiators. Due to the fact that U.S. government air transportation expenditure is expected to be

much higher than similar expenditure of other individual governments, economic advantages traded for a liberal bilateral may, as a whole, be gained by foreign rather than U.S. carriers.

Naturally, this amendment to the Fly America Act is not what foreign governments and carriers were hoping for, due to the qualifications involved. It could, however, be argued that it is a fair and square deal until complete relaxation is achieved worldwide.

Cabotage. It should be recalled that the subject of granting cabotage rights to foreign carriers was a most sensitive one for both the airline industry, labor groups, and the American Bar Association (ABA). The IATCA, however, introduced a new provision permitting the Board to exempt any foreign air carrier from the requirements or limitations of section 416(b) of the Federal Aviation Act of 1958, for renewable periods not to exceed thirty days each, to the extent necessary to permit a foreign carrier to engage in interstate and overseas air transportation in emergencies (see Appendix J, section 13). Before issuing such an exemption, however, the Board must consult first with the Secretary of Transportation and must then find that four conditions have been met. These conditions are the existence of an emergency created by unusual circumstances; exhaustion of all possible efforts to accommodate such traffic by utilizing the resources of such air carriers; necessity to avoid undue hardship for the traffic in such market; and finally, proof that such an exemption would not be used to the advantage of any party in a situation created by a labor dispute. Where the Board grants such an exemption after consultation with the Secretary of Transportation and after ascertaining that the

four conditions are met, it is also required to take three actions as follows:

1. Assure that such transportation is made available on fair and reasonable terms;

2. Continuously monitor the passenger load factor of air carriers in the market that holds the section 401 certificate; and

3. Review such authority not less frequently than once every thirty days to assure the existence of the unusual circumstances creating that need.

It must also be noted that such an exemption may not remain in effect for more than five days after the unusual circumstances creating the need have ceased.

The IATCA amended section 1108(b) of the Federal Aviation Act of 1958 to provide an exemption from the cabotage prohibition (1) with respect to exemptions issued under the new section 416(b) (7) mentioned above (Appendix J, section 13); and (2) for U.S. carriers to utilize foreign registered aircraft leased or chartered to them without crew (dry lease), as may be authorized under regulations prescribed by the Secretary of Transportation. (See Appendix J, section 20.) Naturally, to the extent that the operations involve an intercarrier agreement which might be inconsistent with the anti-trust laws, a separate Board approval and exemption from the anti-trust laws might be required under sections 412 and 414 of the Federal Aviation Act of 1958.[517]

---

[517] CAB, internal memorandum, Summary of the International Air Transportation Competition Act of 1979, February 1980, op. cit.

Those conditions qualifying the grant of cabotage rights should make the idea less dissatisfying to the airline industry that has totally and vigorously opposed such a move, a factor also verified by the survey. As for foreign carriers, the provisions are less satisfying, for they expected unqualified cabotage rights if the U.S. should continue to press for liberal agreements and on open skies regime.

Agreements. The IATCA introduced an amendment to section 412 of the Federal Aviation Act of 1958 to apply most of the revisions adopted by the 1978 Deregulation Act to agreements affecting foreign air transportation. Accordingly, agreements which substantially reduce or eliminate competition (the Clayton Act standard) may not be approved unless they are found to meet the so-called modified local cartage standard (mentioned earlier). It should be recalled that the local cartage standard required that the agreement must meet a serious transportation need or must provide important public benefits and that no less anticompetitive alternative is reasonably available. This local cartage standard was modified by the IATCA to specifically include "international comity or foreign policy considerations" within the meaning of "public benefits." This standard designed to widen the scope of authority of both the Board and the President as a matter of necessity, such as in the case of IATA agreements, if the government so desires. The filing of such agreements was made voluntary rather than mandatory. However, anti-trust immunity could not apply in the absence of filing and approval by the Board. The prohibition against approval of agreements which limit capacity or fix rates, fares, or

charges is confined to interstate and overseas air transportation[518] (see Appendix J, section 11).

It is uncertain and unclear at this time how these and other related provisions could influence the situation and attitudes of the airline industry or foreign carriers. However, it seems possible that such provisions would serve to make clear the broad scope and authority involved.

CAB Criticized

The CAB is perhaps the single U.S. government agency that has come to be the recipient of most of the criticism relating to the policy and its implementation. This reaction, of course, is to be expected, since the Board is charged with so many tasks, some of which are explicit and require little discretion and judgment, but the greatest portion of its duties requires a great deal of discretion. This is particularly true of the establishment of criteria and guidelines, such as in the case of the SFFL, to assist in reaching and making important decisions affecting the fate of international air transportation (especially relating to U.S. markets). (See, for example, Appendix J, section 2.) It is thus expected that the actions and decisions of the Board would be the subject of varying degress of criticism, depending on the particular action and those affected by such action. In this section we will look into a sample of criticism directed at the Board to assist in the formulation of a framework to be utilized in the analysis of the implications of the research and in arriving at, and proposing, some relevant and appropriate recommendations by the researcher.

---

[518] Ibid.

To begin with, the IATA show-cause order should be taken as a solid example of the criticism directed at the Board. As was indicated earlier, opposition to the idea of legislative hearings was voiced by the DOT, the DOS, about fifty foreign governments and also by members from within the ranks of the Board itself. The issue of fares; the need for fuel cost pass-through mechanism, as seen by the airlines, both U.S. and foreign; and the refusal of the Board to recognize such a need--all have been the subject of significant criticism.

Sosa de la Vega, former IATA president and head of Mexicana, hinted that CAB policy is costing the United States the friendship of some of its staunchest allies who are strong leaders in international air transportation. He urged the CAB to approve the new IATA organization as a sign of good faith to the world.[519] A good deal of the criticism of CAB policy was directed against its continued disapproval of IATA rate resolutions and, of course, the consequent removal of anti-trust immunity, which resulted in loss or abandonment of IATA membership to almost all U.S. airlines except for trade association activities, where only Flying Tiger participates. Roman Cruz of the Philippines Airlines and former IATA president charged that the CAB's scheme to eliminate the IATA rate-making machinery in favor of open rate competition would clearly favor U.S. airlines over less affluent carriers.[520] CAB policy has also been condemned by U.S. writers and described as vindictive for withholding badly needed fare increases

---

[519] Airline Executive, May 1979, p. 8.

[520] Airline Executive, June 1979, p. 8.

from countries resisting open skies policies. Such CAB policy, it was argued, is bound to wreck U.S. flag airlines and redden the balance sheets of other flag carriers. International routes for some U.S. airlines have been described as a blessing because of ruthless domestic competition which could destroy the profitability of all airlines.[521] Former CAB member Richard O'Melia (who resigned in late February 1980) indicated in one of his many dissents that IATA is, in effect, already dead as far as the U.S. is concerned. He saw no use from upsetting all the foreign governments and their carriers over an issue which cannot survive more than a year or two. O'Melia was addressing the Board proceeding on the IATA show-cause order which was aimed at killing the IATA reorganized rate-setting machinery.[522]

Recently, some kind of disagreement has surfaced between the CAB policy approach, which was characterized as hastily changing the nature of international air transport, and the approach of Senator Howard W. Cannon, who wants to allow time for U.S. claims to prove themselves. Senator Cannon described the CAB policy approach as one that appears to offer other countries a choice between "execution at home" or "death on the battlefield."[523] Most recently also, the CAB received some tough criticism from Senator Cannon over a CAB decision that turned down requested increases. The Senator argued that the Board's actions were inconsistent with pending international legislation

---

[521] Airline Executive, October 1979, p. 4.

[522] Ibid., p. 12.

[523] "CAB, Congress Split Over U.S. Policy Approach," Airline Executive, March 1979, p. 24.

(meaning the IATCA) that permits quick cost pass-through. Senator Cannon indicated to the CAB chairman that it is the Congress that writes the law and that, although the Board has suspended the fares as a weapon in an on-going bilateral dispute, U.S. carriers also would suffer equally with foreign airlines.[524] We have seen earlier that the Board has taken notice of the drastic increases in cost elements, especially fuel costs, and granted carriers certain fare increases effective April 1, 1980.

Fredrick Bradley, Jr., Vice President, Citibank of North America, indicated recently that the use of bilateral negotiations by the CAB to spread the more-competition, lower-fares approach had the effect of already substantially diluting the yields on many international routes. He also indicated that this CAB policy resulted in narrowing the profit margins of both non-U.S. carriers and U.S. international carriers at a time when most governments are pushing their own carriers towards financial independence. He also called for some cost pass-through mechanism similar to that provided for domestic carriers.[525]

This widespread criticism of the Board was also voiced in the Washington Conference sponsored by Aviation Week and Space Technology, specifically by the TWA president, and was expressed later as well in the last ICAO meeting held in Montreal, Canada. This meeting was a replay of a similar conference held by ICAO two years earlier. The criticism here was directed mainly at the CAB's attempt to export its regulation

---

[524] Aviation Daily, Feb. 5, 1980, p. 193.

[525] Aviation Daily, Jan. 18, 1980, pp. 97-98.

philosophy and to withhold North Atlantic tariff coordination, with the consequent result of prohibiting a certain key group of carriers from participating in conferences covering the North Atlantic.[526] The ICAO Special Air Transport Conference voted 55 to 2 to reject the unilateral CAB approach and to insist on multilateral coordination, a position which was subsequently adopted without objection by 101 states in a plenary session.[527]

Criticism of the CAB was also heard from members of the Congress who were displeased and sometimes angered due to events taking place at the CAB since the passage of the 1978 Deregulation Act. Also becoming more vocal in their complaints are states, cities, other civic bodies, and certain segments of the airline industry. Many of the Board's actions being attacked are the product of the deregulatory legislative experiment, but most are the results, it was argued, of the Board's unsuccessful attempts at implementation.[528]

The CAB was also accused of failing to provide the Congress and the public with annual reports for the last two fiscal years or for activities dating back to late 1977, a task which was described as a "statutory mandate."[529]

Not just a few U.S. concerns are hoping for an early CAB sunset, but some international concerns as well are voicing that wish, believing

---

[526] Aviation Daily, Feb. 15, 1980, p. 261.

[527] For details and a list of the recommendations adopted at the ICAO Montreal session, see Bill Henzey, Airline Reports, March 3, 1980, p. 3.

[528] Bill Henzey, Airline Reports, Feb. 28, 1980, p. 7.

[529] Ibid., p. 8.

that dealing with Cabinet level departments may be less cumbersome. It was argued that foreign nations enter into agreements with the U.S. government represented by the DOS, only to find the carpet pulled out from under their feet by the Board, which ". . . is not the government, but an independent agency."[530]

The CAB action in the SFFL investigation, as indicated earlier, was also criticized by a U.S. carrier as being political and criticized for its selection of transatlantic markets as being improper because the carriers serving those regions have suffered very substantial losses in recent months. The Board's international Fare Task Force, it was argued, had initially recommended that the Board pick for consideration ". . . those markets where competition may be hindered due to political considerations." The airlines argued that such a political approach was clearly inconsistent with the IATCA, which was concerned only with ". . . fares that were unjustly or unreasonably high (or low) a standard which has nothing to do with politics . . . ."[531]

This coupled with SFFL investigation results considered unsatisfactory to the airlines, both U.S. and foreign flag, should produce strong opposition. However, the recent increases approved by the Board are bound to temper such attitudes. It is thus clear that any criticism directed at U.S. policy will no doubt have the CAB at its core.

---

[530] Aviation Daily, March 10, 1980, p. 41.

[531] Ibid., p. 43.

E. Implications

This section will first provide some personal comments concerning the domestic deregulation experiment, the U.S. drive for open skies, the IATCA, and the unique status of the CAB within the structure of the government. The analysis will then provide a brief discussion of the importance of the airlines' attitudes and explain why these attitudes should be carefully examined and considered.

The Policy and Its Makers

Since the attitudes of the airlines are shaped and influenced by the environments surrounding the industry, this section will provide brief personal reflections on the policy, both domestic deregulation and open skies, and certain aspects of the U.S. government structure that makes policy implementation unique when compared to the structures of other governments.

Domestic deregulation. The purpose of this section is to attempt to provide an answer to the following question: Will the deregulation experiment be a success?

Although a response to the above question must be impartial, objective, and concerned, objectivity is difficult to achieve due to the complexity of the subject. A sampling of the pros and cons of the deregulation experiment has been presented in earlier pages. It now seems pertinent to establish some kind of criteria to be used as guidelines in the formulation of the response. Any criteria to be used here must unavoidably be subjective. Even the criteria as legislated by the 1978 Deregulation Act are difficult to use for this purpose. On

the positive side of the question of deregulation, there are the factors of safety, efficiency (profitability, healthy growth, economy, energy, frequency, capacity, cost, etc.), availability, national defense, national security, international prestige, national and international logistics, etc. It is obvious that the use of such criteria is beyond the scope of this research, especially if the objective is to analyze the outcome of the deregulation experiment against each of these individual concepts. Perhaps it is best to find one single concept that could be used as a criterion or basic objective. The concept of "national interest" is best suited for this purpose. (See Chapter IV for a definition of this concept.) However, the definition of this concept, in the light of the 1978 Deregulation Act, is not very simple. It is complicated by the role of the CAB in the system and the fact that many of its actions need handling with more discretion and good judgment. Essentially the present actions have resulted in mixed reactions--mainly criticism. Despite the complexity of the situation, and despite the fact that the concept of national interest means different things to different people depending on conflicts of interest, generally those items affecting the national interest are viewed by the researcher as follows:

1. It is in the national interest to maintain the highest standards of safety at all times and at any cost. Anything endangering this objective is <u>not</u> in the national interest.

2. It is also in the national interest to maintain a healthy growth of the airlines industry. Anything hindering this objective (other than safety aspects) is <u>not</u> in the national interest.

3. It is in the national interest to secure and maintain an acceptable balance between the various elements making up air transport efficiency, a balance that should not conflict with the first two objectives.

4. It is also in the national interest to make air transport service available to all levels of people at varying levels of fares, for varying air transport goals, and with varying priorities. This should be dependent on the accomplishment of the first three objectives.

The deregulation experiment, thus far, has resulted in quick surfacing of some possibly serious safety problems. If the attempts to remedy such problems are not sufficient and effective enough to correct the situation, the compounding effect of deregulation will make the situation more serious and may result in deterioration of safety.

The deregulation experiment has also resulted in expansion of the overall fleet or the total system. In other words, it has produced an evident growth in the industry. To describe such growth as healthy, however, requires some qualifications and a look at the future in terms of demand and supply and the various influencing external and internal factors. The general prediction is that capacity will soon exceed demand and the situation will be aggravated by recession, inflation, tight credit, energy problems, etc. The researcher tends to believe this prediction is a realistic one. The task of achieving and maintaining a healthy growth of the industry will be in the hands of the airlines themselves. Judicious management is thus required to resist the temptation of faulty need for expansion. The deregulation experiment at this stage does not show that such is the case; instead, the challenge of profitable opportunities seems to exert a great deal

of pressure on, and results in distraction to, sound management. A continuation of this trend will lead to significant loss and will negatively influence the growth of the industry.

Thus far the deregulation experiment seems to have resulted in slightly more efficient utilization of resources. However, an acceptable balance between the various elements of efficiency may still need improvement. This requires understanding by the Board and cooperation by the industry. If these ends cannot be achieved, perhaps one can conclude against deregulation.

The deregulation experiment has also resulted in more service to more cities at varying prices. This is perhaps the strongest plus for deregulation despite the fact that subsidy figures are growing and loss of service to smaller communities is becoming a decisive political issue.

Can we at this stage answer the question posed at the beginning of this section? Honestly, no. The qualifications are too numerous and the fate of the experiment will depend greatly on regulatory understanding, sound management, as well as on other external factors such as the economy, the energy problem, capital requirements, sympathy of the public, and, of course, politics.

Despite the fact that we could not satisfactorily answer the question, it is believed that the experiment will have to continue with perhaps some legislative modifications, for the simple reason that total retreat is impossible. However, there is the fact that air transport is neither just a business venture nor just another public utility. Instead, it has close ties to national mobility, defense and

security, and thus the nation must be vigilant enough not to permit its demise. The concept of deregulation must be taken as a regulation reform, leaning mainly towards lessening the role of the government in civil air transport, yet not ruling out total regulation.[532]

Open skies. It was indicated earlier that an important and essential element for the success and acceptance of the open skies regime is the fate of the domestic deregulation experiment. However, since we were unable to arrive at a conclusion as to the fate of the deregulation experiment, any conclusion about the fate of the U.S. drive for an open skies regime would not be based on solid ground and would suffer from lack of sound analysis. The question to be posed here should not be whether the drive for an open skies regime would be a success but why would the U.S. wish to press for such a regime? We will propose some grounds for the U.S. attitude as follows:

1. The U.S. was the country that originally proposed this concept in 1944 for reasons explained.

2. Even though the U.S. had settled for a Bermuda I type bilateral arrangement, with concessions on the rate issue, the concept was never totally abandoned.

3. The many problems that the Bermuda Formula had to face and finally the Bermuda II event itself and the reactions to it all have set the stage for the move to push for such a regime.

---

[532]See Aviation Daily, April 4, 1980, p. 198, for results of an Aviation Daily survey which gave the administration and the Congress poor marks on aviation actions, including deregulation.

4. The passage of the 1978 Domestic Deregulation Act should also be considered.

5. The continuous disenchantment with the IATA rate setting (coordination) machinery on one side and the slid stand of most countries on the issue of capacity on the other side have together pushed the U.S. to take a new stand and to return to the 1944 position.

6. The Kahn-Cohen era has also given an additional support to the drive.

7. The continuous growing fleets of other nations and the resultant effect on the competitive stand of the U.S. industry should also be given consideration.

8. The need to stop and dilute the undesirable impact of the Bermuda II Agreement on other bilateral arrangements is likely to be one of the important reasons for the U.S. drive to achieve an open skies regime.

9. The supportive roles and sympathy of the Congress and the President, which were evidenced by the passage of the IATCA should also be a relevant reason.

10. The great leverage the U.S. has in relation to some aviation partners also seems to be a positive factor.

Whether this drive for an open skies regime will remain forceful is a questionable issue. Some claim that the drive for the policy may have run out of steam for two reasons. World airlines are facing a recession and traffic flows are likely to drop, resulting in empty seats and considerable losses which will force concerned governments to impose protective policies. The fuel outlook is bound to result in added pressure to raise fares, causing governments to press for more

protective measures in their attempts to prevent destructive competition. In addition to those problems, even if the economic outlook is brighter, there appears to be a void in leadership in the various government agencies or a "shift in leadership" at the DOT, the DOS, and the CAB. In all three government agencies, the policy seems to be suffering. At the DOT, it is not clear who in the top level is responsible for aviation policy. At the DOS, aviation policy suffers from time and skill considerations at the top level. Finally, at the CAB, it is not clear whether dominance over aviation matters will still continue after the departure of Michael Levine, who played the key role in CAB efforts.[533]

The attitude of the international aviation community, typical of that displayed recently by ICAO conferees in Montreal, Canada may also temper the drive for an open skies regime where foreign policy considerations will have to play a significant role. The fact that important national policies and reactions cannot, and usually are not, divorced from foreign policy will support this contention, especially when economics or the national security is influenced. The so-called unilateral approach of the U.S. in conducting its new bilateral arrangements is not in itself an internationally illegal act as viewed in the framework of the 1944 multilateral Chicago Convention. The only legitimate objection to it is that it is made to invoke a policy that has been multilaterally denounced, an attitude which is in itself opposed because of its tendency to disrupt the multilateral coordination setup established in 1944. It is not wrong

---

[533] Aviation Daily, Dec. 13, 1979, pp. 217-218.

for the United States to adopt policies that are believed to be in accord with the national interest. If the U.S. believes that such a regime will serve the national interest, not only as a regime and a philosophy but because it will achieve end goals that are vital to the national interest, regardless of other consequencies, then the U.S. has no alternative but to adopt such a policy and stick to it. However, because the U.S. is not one of the countries that has a viable air transport system that wishes to compete with other countries and because of the greater and more comprehensive role of the U.S. among non-communist states in keeping international systems intact (including air transport), it is safe to say the U.S. could not divorce air transport policy from other U.S. policies. U.S. reaction to recent events in Afghanistan and the consequent reactions of the U.S., including the Olympic boycott and the strained air transport bilateral relations, supports the above contention.

The issue thus seems to be whether the U.S. will continue to press vigorously for its open skies regime rather than whether the regime would be a success. It is our belief that foreign policy will play a much more significant role in the 1980's whenever the drive for the new open skies policy is deemed a threat to the national interest.

The IATCA and the CAB.[534] We have seen thus far that the new U.S. International Air Transport Policy as set forth by the IATCA is

---

[534]For some official remarks on the new era of the IATCA and the expected role of the CAB, see Marvin S. Cohen, Chairman, CAB, "The Outlook for 1980 Under the International Air Transportation Competition Act," an address before the International Aviation Club, March 18, 1980, Washington, D.C.

just as close to an open skies regime as can be, considering all the circumstances of the international environment. The events and the reactions to such a policy imply that the open skies regime is not acceptable to all U.S. aviation partners, regardless of the fact that some have entered into so-called liberal bilateral agreements with the U.S. The evidence, of course, lies in the fact that such countries do not usually deal with each other on the basis of liberal bilateralism or the open skies regime. In fact, it could safely be argued at this time that most of such countries having liberal bilaterals with the U.S. have actually entered into such agreements only because they felt they could achieve immediate benefits in response to irresistible U.S. persuasion, not because they actually believe in the philosophy of an open skies regime. It could also be argued that the strong multilateral stand taken by the ICAO resolution, as described earlier, is an indication that the weight lies with the miltilateral approach and that such countries, having liberal bilaterals with the U.S., will most likely switch back eventually, i.e., when U.S. market temptations' persuasions cease to be forceful or when foreign policy consideration must prevail. It is expected that the attitudes of the international aviation community will continue to resent the so-called U.S. unilateral approach to achieve its purpose. The reason for this attitude may not lie in the viability of the system itself as much as on the behavior of the U.S., which has been explicitly denounced by the nations participating in the latest ICAO meeting in Montreal, Canada. The withdrawal of the U.S. proposal in that meeting, as was indicated earlier, represents perhaps an additional realization and supportive evidence of the elements playing their roles in shaping the international attitude

towards any individual policy which attempts to take a unilateral stand, and in resisting drastic changes not multilaterally sanctioned. Two aspects of the new policy as reflected by the IATCA deserve consideration. The first of these two aspects is that the IATCA recognizes the need to achieve policy objectives by negotiations whose success depends mainly on negotiation skill and the national leverage of the countries involved. The U.S., of course, with its attractive market, poses as the country with the greatest leverage. This fact adds to the resentment of other countries towards the policy and its forceful persuasive approach.

The other aspect of the policy that is worthy of mention here is that foreign policy considerations will continue to have their effect on policy decisions by the President, being the "sole organ" of the federal government, which leaves room for departure from the objectives set forth in the IATCA.

These two aspects combined describe a realistic side of the policy and imply that policy makers have provided the flexibility to accommodate ends that are not in line with the general spirit nor with some specific provisions of the policy as set forth in the IATCA.

This also leads us to recall the court litigation on Bermuda II. Despite the fact that the Appeals Court's decision was based on lack of standing, foreign policy ends and consideration would have been valid in such litigation, leaving in reality the power of the President unchallenged to enter into such bilateral agreements as in the case of the U.S.-U.S.S.R., and as would be in the case of the bilateral agreement expected to be concluded with the People's Republic of

China (PRC), a country which has flatly stated its restrictive and protectionist stand in the latest ICAO meeting.

Another point which warrants comment relates to the legal position of the CAB within the framework of the U.S. government. It should be recalled that CAB Chairman M. S. Cohen indicated in one of his addresses that lack of familiarity with U.S. procedure may have been one of the reasons for the reactions to the IATA show-cause order. It should also be recalled that IATA's general director commented once that the CAB is not the government. In order to clear this point, the role of the CAB within the U.S. government setup deserves elaboration.

The U.S. Constitution establishes three independent branches for the U.S. government, each having its own role, and all three are molded in a most distinctive fashion. These are the Executive Branch represented by the President, his administrative departments, and other elements reporting directly to him; the Legislative Branch represented by the two houses of Congress; and the Judicial Branch represented by the U.S. Supreme Court and other federal judicial bodies. Another extension of the U.S. government developed lately is represented by independent bodies (commissions, boards, etc.) whose members are usually named by the President and appointed finally by advice and consent of the U.S. Senate. Such bodies are considered arms of Congress, to whom they report. The decisions of such bodies, which function within the bounds of specified statutory laws, are usually independent of both the Congress and the administration, with some checks and balances preserving the constitutional authority of each.

Of course, the Judicial Branch rules on the action of the other two branches and those of the independent government bodies.

The CAB is one such independent administrative body of the government. Its responsibilities, duties, and authorities are usually provided for by legislation such as the IATCA in this connection. As was indicated earlier, much discretion is often required on the part of the Board to dispose of its responsibilities, which include at times judicial rulings by appointed judges. This provides the Board, in addition to its executive action in implementation of the law, with a limited scope of judicial power and, at times, to a limited extent, with some rule-setting authority.

Unfortunately, however, the independent action of the Board is sometimes not coordinated with the actions of the Executive departments such as the DOS and the DOT. Despite the fact that the President must approve certain actions of the Board as set forth in the IATCA (for example, the independent actions of the Board in certain cases, such as that in the IATA show-cause order), this may lead to some confusion and may result in unfavorable foreign reactions which may possibly conflict with foreign policy objectives.

To sum up, the IATCA is now the law of the country governing international air transport. The CAB is perhaps, in accordance with this law, the agency that is charged with the greatest portion of the responsibility, a responsibility as was indicated that requires in most if not all instances decisions based on the personal judgment of the Board. The CAB now has four members, with George Dalley having been sworn in on March 18, 1980, replacing Richard O'Melia who resigned

on February 29, 1980. Awaiting a forum on some important decisions, including the IATA show-cause order, which has been decided recently and which did again reflect some change in CAB attitude in reaction to recent events. It is also uncertain what attitude the DOT may have, or any other agency may have which is named to perform the required residual CAB responsibilities at its sunset. What we wish to say here is that the CAB is a reality of life; its actions are sanctioned by the law as long as they fall within the bounds of the Board's statutory authority, subject of course to some limitations such as required presidential approval in certain cases. In conducting its duties and responsibilities, the Board is not very much influenced by considerations other than those that are closely related to aviation and air transport and listens to no other considerations such as those related to foreign policy. This is why the President in many cases is afforded the authority, either constitutionally or through legislative law, to approve Board actions. In many other cases, however, if the Executive Branch (the President and his Cabinet) finds that Board policy is not consistent with foreign policy, nothing can be done to influence Board decisions if the Board wishes to proceed as was the case in the IATA show-cause legislative hearing. The point here is that foreign governments may want to recognize this distinction between the roles of the various bodies of the government, which may reflect at times some inconsistencies on the part of the U.S. government as a whole. Recognizing this fact may not change the attitude of the U.S. or its policy but should minimize a great deal of disappointment on the part of foreign governments. One may conclude also that

bilateral relations may have to be made more explicit and specific if disappointments are to be minimized, especially where the role of the CAB is concerned.

The Attitudes

In this section we will attempt to examine the importance of considering the attitudes of the airlines and to understand what the dissatisfaction of the airlines means to the nation as a whole. It is important to recognize that the airline industry is not merely a business enterprise not just a public utility. Its survival, health, and efficiency are essential and vital to other aspects of national and international policies. Despite the evident growth in traffic and revenues, cost factors are also increasing at a faster rate, leaving the airlines with meager profits. While the race for increased traffic goes on, the pressure of fewer profits continues to persist and the only incentive that keeps the airlines pressing harder for more traffic, using varieties of promotional means and discounted fares, seems to be a feeling that one must keep in the race, that the opportunities are there, and that one must never fall back in tapping such opportunities. If the airlines permit themselves to be possessed by such feelings, total capacity is bound to go beyond reason. This, complicated by the dim economic outlook, will necessarily lead to decreased load factors and idle capacity, subsequently resulting in tremendous losses to the industry. The fares that continue to increase rapidly in response to unavoidable increases in cost factors will drive out great numbers of the discretionary type travellers, further resulting in higher fares to be borne by the business traveller. Such

high fares are to be ultimately transferred to consumers of the products and services utilizing air transport and they are very significant, again further aggravating the economic situation both nationally and internationally. When demand on airline services decrease and when profits start to reach the very critical stage, the airlines will find themselves in a big jam, creating increased dissatisfaction which may lead to harmful effects on safety, healthy gorwth, efficiency, and desired service. These outcomes will in turn challenge the added capability of the industry to meet needs called for by national defense and security.

It is thus evident that the recognition of the airlines' attitudes towards the policy is essential to the national welfare to prevent deterioration of this vital organ of fast and convenient mobility and assure the continued and proper mix of safety, growth, efficiency, and service.

Policy areas that can stand improvement in this respect include the role of the airlines in the negotiating process, establishing an office at the DOS at the undersecretary level for aviation matters, and a recognition of the problems that arose or may arise from the deregulation experiment, as well as the drive for an open skies regime. In sum, the dissatisfaction of the airline industry towards the policy should not be taken lightly, and the situation of the industry must always be kept under careful vigilance. This naturally calls for a policy attitude that places emphasis on the welfare of the airlines without harmfully influencing other policies having higher levels of priorities.

F. Recommendations

It is evident that the subject of the research involves three major parties that influence, and are influenced by, the policy. These are the U.S. government, the airline industry, and foreign concerns--governments, airlines, airline groups and international associations. Our recommendations will be propsed to each of the three parties mentioned. First, there are a few points that must be kept in mind, for they formulate basic assumptions by, and convictions of, the researcher. These are as follows:

1. The limited scope of this academic research must be kept in mind and further research may also be warranted.

2. States (countries) are entitled to establish policies that fit their individual interests, both nationally and internationally, subject, of source, to the provisions of treaties still in force.

3. When deemed necessary, departure from historically and multilaterally accepted philosophies should be executed gradually to reduce the risk of failure and to prevent total and outright rejection of and the consequent opposition from, other states (countries), especially those that share other similar and important philosophies with the state (country) wishing to exercise such departures. Simply stated, the approach to implement international policies by any state (country), especially when the impact would be somewhat harmful to the interests of other states (countries), should be tactful.

4. The value of the airline industry to national defense and to the national prosperity and welfare must never be underestimated and must be given the priority and consideration it rightfully deserves.

5. It is not uncommon for states (countries) to have other considerations, at times, yield to foreign policy considerations, thus providing essentially needed flexibility.

6. Multilateral coordination should be given an appropriate consideration.

After much study and research, the researcher proposes the following recommendation:

1. The U.S. government

   a. The U.S. government should reevaluate the policy in terms of the concept of national interest as legislated by both the 1978 Deregulation Act and the IATCA of 1979 in order to determine the areas that can stand improvement aimed at rectifying the industry's problems without need for further legislation. This may include improving the role of the industry in policy making and in the negotiating process.

   b. The government should recognize the value of the airline industry and consequently afford it the consideration and attention it deserves. Among the actions recommended here to achieve this objective are the elevation of the level at which aviation affairs are handled at the most important government agencies having the greatest impact on the industry, such as the DOS and the DOT. The element of aviation skill and epxerience is also most essential in the appointment of public officials charged with the making of aviation

policies and with handling important aviation matters with the greatest impact on the operations of the industry. The government agencies to be considered here should include, of course, the DOT, the DOS, the CAB and White House advisors.

c. The government must be judicious in exercising its discretion when implementing the policy in such a way as to afford the industry's affairs, problems, and interests the proper emphasis without subordination to other affairs having lower priorities. This is especially true in the case of the CAB, where the exercise of discretion formulates the greatest portion of the Board's actions and decisions.

d. The government must minimize actions that are essentially political and that may not be in the national interest. Although total elimination of politics is impossible, policy makers should be more patriotic than political.

In sum, it is recommended that the U.S. government change its attitude towards air transport and the industry so that the national objectives are achieved.

2. The airline industry

a. The airlines must recognize the importance of sound management in conducting its affairs and operations and should stage an overall reevaluation of the economics that will determine future demand and consequently reorganize its efforts to satisfy this demand, avoiding

the creation of excess capacity and declining profits. Such recommendations may be difficult to handle because of the desire of each individual airline to meet the challenge of competition. Yet it is believed that each individual airline will come to recognize the necessity to resist the temptation of extension beyond reason and return to sound management decisions--in the long run all would benefit jointly.

b. The industry must also realize the complexity of all international relations, including air transport, especially where foreign interests are affected. The role of the government in conducting international affairs goes beyond the mere interests of the airlines and must recognize other U.S. national and international interests. This, however, does not mean that the industry may not use its legitimate tools to influence the policy-making process and its implementation to the industry's favor.

c. The industry should also give serious consideration to the utilization of more efficient equipment and to higher load factors. These two operational elements are among the most recommended to rectify the problems of the industry. It is recognized that moving to more efficient equipment and achieving higher load factors is neither simple nor inexpensive. The long-term effect should, however, be the objective.

d. The industry may also wish to reconsider the status of its relationship with the rest of the international aviation community, such as the IATA and other airline groups, without prejudice to the industry's interests. This may assist the industry in conducting its affairs abroad without relying heavily on the provisions of the Fair Competitive Practices Act of 1974 as amended by the IATCA of 1979.

e. Individual airlines within the industry may also find it very rewarding to avoid unproductive competition with other individual airlines, competition that is unfounded and is not supported by sound management practices. In sum, it is recommended that the industry take a second hard look at its individual members and its overall situation by exercising sound management and changing its attitude to meet the circumstances.

3. Foreign concerns

a. States (countries) wishing to meet the new economic challenges affecting their air transport system must recognize the dynamic nature of aviation and the competitive pressures of other states. This is true whether a state (country) has bilateral relations with the U.S. or not. The concept of price competition must be given the proper consideration for enhancement of essentially needed efficiency.

b. Those states (countries) having or wishing to have bilateral relations with the United States must accept

the new U.S. policy as a fact of life, to be dealt with in whatever manner will best serve their interests. This is not to say that the U.S. policy and philosophy should be adopted or accepted at any cost. It is merely a recommendation to analyze this era of drastic changes in the aviation or air transport industry to afford each state the opportunity to compare and weigh its policy in the light of such changes.

c. The IATA will need to pursue a course of action that is in line with the changes taking place in the air transport industry, especially if its members continue to be interested in U.S. markets. This becomes more essential if CAB policy continues to hold anti-trust immunity from airlines participating in IATA traffic conferences affecting the North Atlantic and if U.S. airlines continue to refuse IATA membership.

d. Foreign airlines may also need to consider more efficient equipment and higher load factors to help rectify their problems. This is not to say, however, that competition should be abandoned.

e. Foreign concerns will also need to recognize the unique structure of the U.S. government and the legal status of the CAB within that structure. Pending a decision on the fate of the U.S. domestic deregulation, the Board will continue its functions as legislated by the 1978 Deregulation Act and the IATCA until its planned

sunset, if it takes place accordingly. This decision is still in the hands of the Congress, which could legislate otherwise if other circumstances dictate.

In sum, foreign governments, airlines, airline groups, and international air transport associations such as the IATA may need to reconsider their situations in the light of the dynamic changes in the air transport industry and change their attitudes accordingly.

Finally, each of the above three entities or group of entities--the U.S. government, the airline industry, and foreign concerns, must neither sacrifice long range interests for short range benefits, nor ignore the importance and benefits of consistency.

BIBLIOGRAPHY

BIBLIOGRAPHY

I. Books

Bailey, Elizabeth E. "Reform from Within: Civil Aeronautics Board Policy in 1977-1978." In Problems in Public Utility Economics and Regulations. Edited by Michael Crew. Lexington: Lexington Books, 1979.

Bishop, William W., Jr. International Law: Cases and Materials. 3rd Edition. Boston: Little, Brown and Company, 1971.

Corbin, Arthur L. Corbin on Contracts. St. Paul: West Publishing Co., 1975.

Heymann, Hans, Jr. The U.S.-Soviet Civil Air Agreement from Inception to Inauguration: A Case Study. Santa Monica: Rand, 1972.

Kane, Robert M. and Alan O. Vose. Air Transportation. 5th Edition. Dubuque: Kendall/Hunt Publishing Co., 1975.

Keenan, P. B., A. Lester and P. Martin, eds. Showcross and Beaumont on Air Law. Vol. I, 3rd Edition. London: Butterworth, 1966.

Lissitzyn, O. J. International Air Transport and National Policy. New York: Council on Foreign Relations, 1942.

Morgenthau, Hans J. Politics Among Nations: The Struggle for Power and Peace. 5th Edition. New York: Knopf, 1978.

Smith, Henry Ladd. Airways Abroad. Madison: University of Wisconsin Press, 1950.

Taneja, Nawal K. U. S. International Aviation Policy. Lexington, Mass.: D.C. Heath and Co., 1980.

Wassenberg, H. A. Post War International Civil Policy and the Law of the Air, 2nd rev. ed. (The Hague: Martinus, Nijhoff, 1962).

Wassenberg, H. A. Public International Air Transportation Law in a New Era. Deventer: The Netherlands, Kluwer, 1976.

Whellan, John W. and Robert S. Pasley. Federal Government Contracts: Cases and Materials. Mineola, N.Y.: University Casebook Series Foundation Press, 1925.

II. Journals, Reviews, and Periodicals

Ackerman, Lee B. "Executive Agreements, the Treaty Making Clauses, and Strict Constructionism." Loyola of Los Angeles Law Review 29 (1975):587.

"Airlines Jam More Seats on Planes." The Knoxville News-Sentinel, Dec. 2, 1979, p. B-2.

Airline Executive, March 1979, pp. 8, 11-16, 24, 27-30, 41-42; May 1979, p. 8; June 1979, pp. 8, 22-23, 78-81; July 1979, pp. 4, 21-23, 31-33, 44-47; August 1979, p. 7; September 1979, pp. 4, 25; October 1979, pp. 4, 6-7, 22-23; November 1979, pp. 8, 16; December/January 79/80, p. 8; February 1980, p. 6.

Aviation Daily, July 30, 1979, p. 155; July 31, 1979, p. 162; August 22, 1979, p. 289; August 23, 1979, pp. 297-298; August 28, 1979, p. 321; September 13, 1979, p. 58; September 27, 1979, p. 142; October 19, 1979, p. 258; October 22, 1979, p. 265; October 23, 1979, pp. 273-276; October 24, 1979, pp. 284-285; October 25, 1979, pp. 294-296; October 30, 1979, p. 313; October 31, 1979, p. 321; November 2, 1979, p. 12; November 5, 1979, p. 24; November 6, 1979, p. 25; November 20, 1979, pp. 98, 102; November 28, 1979, pp. 130-131; December 3, 1979, p. 157; December 5, 1979, pp. 169, 173; December 13, 1979, pp. 217-218; December 21, 1979, p. 267; December 24, 1979, p. 278; December 28, 1979, p. 290; January 2, 1980, p. 2; January 4, 1980, p. 19; January 7, 1980, p. 26; January 9, 1980, p. 41; January 14, 1980, p. 67; January 15, 1980, p. 78; January 16, 1980, pp. 83, 86; January 18, 1980, pp. 97-98; January 23, 1980, p. 122; January 25, 1980, pp. 137-138, 141; January 29, 1980, pp. 157-158; February 4, 1980, p. 185; February 5, 1980, pp. 189, 193, 196-197; February 7, 1980, pp. 209-210; February 8, 1980, p. 221; February 11, 1980, p. 226; February 12, 1980, p. 237; February 13, 1980, p. 241; February 14, 1980, p. 254; February 15, 1980, pp. 257-258, 261; February 19, 1980, pp. 226, 265, 268-269; February 20, 1980, pp. 274 and back of 274, 276, 278; February 21, 1980, pp. 281, 286; February 23, 1980, p. 301; February 25, 1980, p. 229; February 28, 1980, p. 321; February 29, 1980, p. 332; March 6, 1980, pp. 26, 28; March 27, 1980, p. 34; March 10, 1980, pp. 41, 43-44; March 12, 1980, p. 58; March 13, 1980, pp. 65-66; March 25, 1980, pp. 130-131; April 4, 1980, p. 198; April 7, 1980, p. 203; April 17, 1980, p. 266; April 18, 1980, p. 275.

Aviation Week & Space Technology, July 26, 1977, p. 29; July 27, 1977, p. 27; November 6, 1978, p. 33; November 20, 1978, p. 35.

Aviation Week & Space Technology, International Air Transportation Conference. "Deregulation: Fact vs. Fancy," Washington, D.C., February 11-12, 1980.

Bebchick, Leonard. "The International Air Transport Association and the Civil Aeronautics Board." Journal of Air Law and Commerce 25 (1958):12-13.

Berger, Raoul Charles Warren. "The Presidential Monopoly of Foreign Policy." Michigan Law Review 71 (1972):1.

"Bilateral Agreements." Journal of the Royal Aeronautical Society 69 (1915):473.

Brenner, Melvin A. "An Open Letter to Chairman Cohen Refuting De-Regulation's Myths." Airline Executive (October 1979):22-23.

Brenner, Melvin A. "De-Regulation Creates Airport Crunch." Airline Executive (June 1979):22-23.

Brenner, Melvin A. "U.S. Airlines Ride See-Saw Aviation Policy." Airline Executive (March 1979):41-42.

Brindley, John F. "Deregulation of the Air Transport Industry: Cheered by Some, Condemned by Others." Interavia (April 1979):306.

Brindley, John F. "U.S. Air Transport Policy: International Reactions to Deregulation." Interavia (May 1979):429.

Brown, James L. "Pan American Cooperation in Aeronautics." Journal of Air Law and Commerce 9 (1938):494.

"CAB and State Department Clarify Interest in Foreign Air Transport." Civil Aeronautics Journal 4 (November 15, 1943):153.

"CAB Regulation of International Aviation." Harvard Law Review 75 (1962):579.

"CAB, Congress Split over U.S. Policy Approach." Airline Executive (March 1979):24.

Civil Aeronautics Board. "Airline Split over U.S. Air Policy Approach." Airline Executive (March 1979):24-26.

Civil Aeronautics Board, Handbook of Airline Statistics. Washington, D.C.: Civil Aeronautics Board, 1973.

Civil Aeronautics Board Journal 6 (1943):80, 153; 15 (1952):850, 853.

Cohen, Richard. "Self-Executing Executive Agreements: A Separation of Powers Problem." Buffalo Law Review 24 (1974):139.

Colegrove, Kenneth. "The International Policy of the United States." Journal of Air Law 2 (1931):447-473.

Coor, Milford L. "The Relative Effects of Multiple Designation." Department of State, International Aviation Symposium: Final Report. (Washington, D.C.: Onyx Corp., 1979).

"De-Regulation Fall-Outs: Fewer Points Served, Big Cities Suffer Too." Airline Executive (September 1979):25.

Diamond, Barry R. "The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements." Journal of Air Law 41 (1975):422.

"18 Airlines Give Views on International Policy." Civil Aeronautics Journal 4 (June 6, 1943):80.

Fagg, Fred D., Jr. "National Transportation Policy and Aviation." Journal of Air Law 3 (1936):155-201

"Federal Review: International Air Agreements." Journal of Air Law and Commerce 23 (1956):356.

Forbes (January 8, 1979):41-50.

Gertler, Z. Joseph. "Bilateral Air Transport Agreements: Non-Bermuda Reflections." Journal of Air Law and Commerce 42 (1976):789.

Goldklang, Jack M. "Transatlantic Charter Policy: A Study in Airline Regulations." Journal of Air Law and Commerce 28 (1961/1962): 100.

Gray, Robert R. "The Impact of Bermuda II on Further Bilateral Agreements." Air Law 3 (1978):17.

Grossman, William L. "An American White Paper on Air Transport." Air Transport 3 (November 1945):22-31.

Henzey, Bill. Airline Reports, September 17, 1979, pp. 3-4; September 27, 1979, pp. 1-2; February 14, 1980, pp. 3-4; February 15, 1980, p. 5; February 28, 1980, pp. 1-3, 7-8; March 3, 1980, pp. 3-4.

Heymann, Hans, Jr. "The Soviet Role in International Civil Aviation." Journal of Air Law and Commerce 25 (1958):256-280.

Hill, Harriet Oswalt. "Bermuda II: The British Revolution of 1976." Journal of Air Law and Commerce 44 (1978/1979):122.

Institut Du Transport Aerien (ITA), April 1979, pp. 101-107.

Jones, H. A. "The Equation of Aviation Policy." Journal of Air Law and Commerce 27 (1960):22.

Keyes, Lucile Sheppard. "The Transatlantic Charter Policy of the United States." Journal of Air Law and Commerce 39 (1973):216.

King, John R. and Susan C. Roosevelt. "Civil Aviation Agreement of the People's Republic of China." Harvard International Journal 4 (1973):331.

Lauriac, Jacques. "Air Transport Policies Regarding Public and Private Airlines." Institut Du Transport Aerien (April 1979):101-107.

"Legislative News." Traffic World (August 27, 1979):31,100.

Lissitzyn, O. J. "Bilateral Agreements on Air Transport." Journal of Air Law and Commerce 30 (1964):248.

Lissitzyn, O. J. "The Legal Status of Executive Agreements on Air Transportation." Journal of Air Law and Commerce 17 (1950): 439.

Lowenfield, Andrea F. "The Future Determines the Past: Bermuda I in the Light of Bermuda II." Journal of Air Law 3 (1978):2-10.

McCarroll, J. "The Bermuda Capacity Clauses in the Jet Age." Journal of Air Law and Commerce 29 (1963):115.

McIntosh, Colin Hugh. "U.S. Trunk Profits Reach the Crucial Years." Airline Executive (June 1979):78-81.

Murphy, Joseph S. "Airlines Ad Bill Tops $700 Million." Airline Executive (July 1979):31-33.

Murphy, Joseph S. "A U.S. Debacle in Kingston." Airline Executive (March 1979):8.

Murphy, Joseph S. "De-Regulation Means Get Aggressive at Braniff International Airways." Airline Executive (March 1979):12-16.

Murphy, Joseph S. "International Air Policy Battle--U.S. Loses Round Two." Airline Executive (July 1979):21-23.

Murphy, Joseph S. "The Hypocrisy of U.S. De-Regulation." Airline Executive (September 1979):4.

Nordio, Umberto. "Midway Reflection on Open Skies." Air Transport World (July 1979):86-88.

"Official White House Press Release." Journal of Air Law and Commerce 14 (1947):364, 366-377.

Parrish, Wayne W. "CAB Said to Have Failed Industry, May Be Target of Class Action Suit." Traffic World (October 24, 1977):38.

Parrish, Wayne W. "How Not to Sell A World Aviation Policy." Airline Executive (March 1979):27-30.

Parrish, Wayne W. "U.S. Amateurs Lose 'Think Tank' Debate to International Pros." Airline Executive (July 1979):47.

Rek, Bron. "Can Europe Deregulate?" Flight International (May 26, 1979):1755-1756.

Rek, Bron. "Europe at the Crossroads." Flight International (May 26, 1979):1739.

"Report of the President's Commission on Air Policy." Journal of Air Law and Commerce 15 (1948):80-82.

Rinck, Dr. Gerd. "The International Factors in German Air Transport." Journal of Air Law and Commerce 33 (1967):102-108.

Sackrey, C. M., Jr. "Overcapacity in the U.S. International Air Transport Industry." Journal of Air Law and Commerce 32 (1966): 30.

Schwartz, Adele C. "Airports, Airlines Scramble for Space to Handle De-Regulation Traffic Spurt." Airline Executive (July 1979): 44-46.

"Statement of International Air Transportation Policy." Journal of Air Law and Commerce 36 (1970):651-660.

"Statement on United States International Air Transport Policy." Journal of Air Law and Commerce 30 (1963):76-81.

Stoffel, A. W. "American Bilateral Air Transport Agreements on the Threshold of the Jet Age." Journal of Air Law and Commerce 26 (1959):119.

"The Transatlantic Charter Policy of the United States." Journal of Air Law and Commerce 38 (1973):215-219.

Traffic World, August 22, 1979, pp. 31, 100; August 29, 1979, pp. 31, 100.

Traxler, Arthur E. "International Air Transport Policy." International Conciliation 395 (December 1943):617.

"U.S.-IATA Air Differences at New York Conference." Air Transport World (July 1979):54-59.

Van der Tunk, Adriani. "The Bermuda Capacity Clause." Journal of Air Law and Commerce 22 (1954):406.

Wassenbergh, H. A. "Towards a New Model Air Transport Services Agreement." Air Law 3 (1978):198-200.

"White House Official Release." Journal of Air Law and Commerce 14 (1947):366-377.

Wood, Bernard. "Bilateral Agreements: A Current View." Air Law 3 (1978):24.

III. Reports, Bulletins, Addresses, Acts and Statutes and Unpublished Material

Air Coordinating Committee. "Statement by the President." Report on Civil Air Policy. Washington, D.C.: U.S. Government Printing Office, 1954.

Air Services Transit Agreement. 59 Statute 1693 (1945).

Air Transport Association of America. Airlines' Financial Performance, 1976-1977: A Look at Earnings and Needs.

Air Transport Association of America. Economics of Air Transport: Air Overview. Washington, D.C.: Air Transport Association of America, 1973.

Air Transport Association of America. The Value of Air Transportation to the U.S., to Its People, to Its Economy. Washington, D.C." Air Transport Association of America, 1973.

Air Transport Association of America. "The Airline Industry from 1977 to 2000." Statement by Dr. George W. James to National Transportation Policy Study Commission, Washington, D.C., June 22, 1977.

Air Transport Association of America. Air Transport 1978. Washington, D.C.: Air Transport Association of America, 1978.

Air Transport Association of America, Airline Capital Requirements in the 1980's. Washington, D.C.: Air Transport Association of America, 1979.

Civil Aeronautics Board. Air Carrier Traffic Statistics, December 1978 and February 1979.

Civil Aeronautics Board. First Annual Report. Washington, D.C.: Civil Aeronautics Board, 1939.

Civil Aeronautics Board. Handbook of Airline Statistics. Washington, D.C.: Civil Aeronautics Board, 1973.

Civil Aeronautics Board Orders No. E-16288; 79-5-113.

Civil Aeronautics Board Release Nos. 79-257, Dec. 5, 1979; 79-259, Dec. 6, 1979; 80-13, Jan. 16, 1979; 79-197, Aug. 29, 1979; 80-20, Jan. 29, 1980.

Civil Aeronautics Board. Report to Congress, FY 1939, 1940, 1965, 1971, 1975, 1976.

Civil Aeronautics Board. Summary of the International Air Transportation Competition Act of 1979. Internal Memorandum, February 1980.

Civil Aeronautics Board. The Transatlantic Route Proceeding: Supplementing Opinion and Order. Docket 25908, CAB Order 78-1-118 (1978).

Civil Aeronautics Board. Update: Airline Regulation, The First Year. October 19, 1979.

Cohen, Marvin S. "Competition in International Air Transportation: A Look at the Home Front." Address to International Aviation Club, Washington, D.C., January 23, 1979.

Cohen, Marvin S. "Six Myths About U.S. International Air Transport Policy." Address before ITA Think Tank on International Air Transportation, Paris, France, June 8, 1979.

Cohen, Marvin S. "The Outlook for 1980 Under the International Air Transportation Competition Act." Address before the International Aviation Club, Washington, D.C., March 18, 1980.

Cohen, Marvin S. Letter to the author, April 16, 1979.

Department of State. Bulletin (January 25, 1948):116.

Department of State. Outgoing telegram No. 7491, June 16, 1979.

Driscol, Edward. International Aviation Symposium: Final Report to the Department of State. Washington, D.C.: Onyx Corporation, 1979.

Federal Aviation Act of 1958 as amended; 49 U.S. Code.

Federal Aviation Agency. "Project Horizon." Report on the Task Force on National Aviation Goals. Washington, D.C.: U.S. Government Printing Office, 1961

The International Air Transport Agreement. Appendix 4 of the 1944 Chicago Conference.

International Air Transport Association. 1979 Annual Report: The State of the Air Transport Industry. IATA, 1979.

International Air Transportation Competition Act of 1979, 49 U.S. Code.

International Civil Aviation Conference of 1944. 61 Statute 1180 (1947).

International Civil Aviation Organization. Annual Report of the Council, 1978. Doc. 9266, p. 16.

McDermott, Franklin J. U.S. International Air Transport Policy: Yesterday, Today and Tomorrow. Bureau of International Aviation, Civil Aeronautics Board, Washington, D.C., 1979.

National Air Carrier Association. Annual Report: 1978. Washington, D.C.: National Air Carrier Association, 1978.

Nordio, Umberto. "The Politics of Confrontation Diplomacy." Aviation Week & Space Technology. International Air Transportation Conference, "Deregulation: Fact vs. Fancy," Washington, D.C., Feb. 11-12, 1980.

O'Melia, Richard J. "Major Developments in United States Aviation Policy." Remarks to the Air Transportation Conference, Miami, Florida, April 6, 1978.

Pauker, Guy J. Military Implications of a Possible World Order Crisis in the 1980's. Rand: Santa Monica Report No. R-2003 AF.

Statement by the President, May 20, 1954, accompanying Civil Air Policy. Washington, D.C.: U.S. Government Printing Office, 1954.

Strom, Harold Kjell. "The North Atlantic Air Transport Market--A Study of the American Competitive Position." Dissertation, University of California, Los Angeles, 1964.

U.S. Congress. House. Committee on Public Works and Transportation. Hearings before the Subcommittee on Aviation. 95th Cong., 1st sess., September 29 and December 2, 1977.

U.S. Congress. House. Conference Report, No. 96-76, S. 1300, 96th Cong., 1st sess., December 19, 1979.

U.S. Congress. House. "IATA Practices." Hearings before the Committee on Interstate and Foreign Commerce, H.R. 4648 and H.R. 4677, 84th Cong., 2nd sess., March 18, 1955.

U.S. Congress. House. Report on International Air Transportation Competition Act of 1979, S. 1300, 96th Cong., 1st sess., 1979.

U.S. Congress. House. Report on Public Law 287. H. Doc. 1023, 80th Cong., 1st sess., 1947.

U.S. Congress. House. The Smathers Report to the Senate Interstate and Foreign Commerce Committee. 89th Cong., 2nd sess., April 30, 1956.

U.S. Congress. Senate. Hearing before the Subcommittee on Commerce, Science, and Transportation on S. 3363. 95th Cong., 2nd sess., 1978.

U.S. Court of Appeals for the District of Columbia Circuit. Brief of Plaintiffs-Appellants, Greater Tampa Chamber of Commerce, et al. v. Brock Adams, et al.; 79-1123 March 26, 1979.

U.S. Department of Defense. Military Airlift Command. Civil Reserve Air Fleet (CRAF) Operations MACR 55-8, Vol. 1, October 8, 1976. HQ Form 0-312, January 1, 1980; RSC:SAF-ALG(M) 7301. Forms for Fiscal Years 1977, 1978, 1979.

U.S. Department of State. Air Services Agreement between the United States of America and the United Kingdom of Great Britain and Northern Ireland. Treaties and Other International Acts, TIAS No. 2565, February 11, 1946.

U.S. Department of State. Circular 175. Procedure of the Department of State Foreign Affairs Manual, II. FAM 721.

U.S. Department of State. "Paradox of Foreign Economic Policy." Bulletin by Thorsten V. Kalijarvi, June 1957.

U.S. Department of State. Treaty Series. Treaties and International Agreements Series, 6135 (1966).

U.S., General Accounting Office. The Civil Reserve Air Fleet--An Effective Program to Meet Defense Emergency Airlift Requirements. Report by Comptroller General, December 7, 1978.

U.S. Supreme Court. Chicago and Southern Airlines, Inc., v. Waterman S.S. Corp., 333 U.S. 103 (1948

U.S. Supreme Court. United States v. Belmont, 301 U.S. 324, 330-331 (1937).

White House Press Releases, June 22, 1970; September 8, 1976.

APPENDICES

APPENDIX A

MILESTONES IN AVIATION LEGISLATION AND HISTORY[1]

I. U.S. Actions and International Events

On October 1, 1917, Congress approved the creation of and provided for the maintenance for an Aircraft Board to expand and coordinate the industrial activities concerning aircraft and to facilitate generally the development of air service.

In 1919, the Paris Convention was signed by more than twenty-six countries, including the United States. The U.S., however, did not ratify this convention because it was associated with the League of Nations, to which the U.S. did not belong. The convention was concerned mainly with the theory of sovereignty of air space.

On May 20, 1926, the Air Commerce Act of 1926 (The Bingham-Merritt-Parker Bill) was enacted to foster the development of commercial aviation in the United States.[2]

---

[1]For more details and a general reference to these milestones, see the following references: CAB, Handbook of Airline Statistics, 1973 ed., pp. 510-560; Robert M. Kane and Alan O. Vose, Air Transportation, 5th ed. (Dubuque, Iowa: Kendall/Hunt Publishing Company, 1975), pp. 140-144; P. B. Keenan, A. Lester and P. Martin, eds., Showcross and Beaumont on Air Law, 3rd ed., Vol. I (London: Butterworth, 1966), pp. 5-43.

[2]This Act gave the Department of Commerce full jurisdiction over the licensing of equipment and personnel, as well as the maintenance of safety in aircraft operations. It also authorized the department to build and maintain airways and other navigation facilities, but not airports. For some details on the contribution of this Act to establishing the foundation of civil air transportation in the U.S., see Kane and Vose, Air Transportation, op. cit., pp. 28-30.

On May 24, 1928, the Provisions for Public Airports Act was passed, authorizing the leasing of not more than 640 acres of public lands for use as public aviation fields.

The 1928 Pan American Convention on Commercial Aviation (also known as the Havana Conference) was molded after the Paris Conference and was signed by twenty-one countries, including the United States.

Also in 1928, the International Civil Aeronautics Conference was held in Washington, primarily to honor the Wright brothers. However, it gave 200 delegates from foreign countries an opportunity to discuss mutual problems of operating commercial and private aircraft.

The 1929 Warsaw Convention was the first international convention pertaining to liability and has been been ratified by more than sixty countries, including the United States.

On February 14, 1931, Congress appropriated funds for the support of the development of international aviation to meet the quotas of the U.S. toward the expenses of the International Technical Committee of Aerial legal experts.

On April 10, 1936, the Railway Labor Act of 1925 was extended to cover the air transport industry by the addition of Title II to the Act.

On June 23, 1938, the Civil Aeronautics Act of 1938 was passed, creating a single, independent agency called the Civil Aeronautics Authority to regulate civil aviation.[3]

---

[3]This Act broadened the scope of safety regulation, subjected air carriers to the type of economic regulations normally imposed upon

On October 24, 1938, the Civil Aeronautics Authority established an International Division for general supervision upon those matters relating to overseas and foreign air commerce.

On June 30, 1940, the Civil Aeronautics Board (CAB) and the Civil Aeronautics Administration (CAA) became separate entities as a result of the Reorganization Act of 1939.[4]

On October 9, 1940, Congress appropriated $40 million for the construction, improvement and repair of airports.

On December 13, 1941, the War Department, by presidential proclamation, was placed in complete control of all civil aviation.

On November 1, 1944, fifty-four nations attended the Chicago (International Civil Aviation) Conference at the invitation of the United States to consider the drafting of a multilateral convention governing international air rights and air operations.[5]

On April 19, 1945, the International Air Transport Association (IATA) was formally inaugurated at Havana, Cuba, superceding the original organization, the International Air Traffic Association,

---

public utilities, and authorized subsidy assistance to air carriers in the form of mail pay; also see Kane and Vose, op. cit., pp. 34-36, for details.

[4]The Civil Aeronautics Authority was changed to the Civil Aeronautics Board (CAB) whose functions consisted of the economic regulation of air carriers by adjudication and rule making, the prescribing of safety regulations, the revocation and suspension of safety certificates, and the investigations of aircraft accidents. The Civil Aeronautics Administration (CAA) which was transferred to the Department of Commerce had functions including construction, operation, and maintenance of air navigation facilities, the issuance of airmen and aircraft certificates, and the enforcement of air safety regulations and standards.

[5]61 Stat. 1180 (1947).

which was founded in 1919. On June 6, 1945, the Provisional Civil Aviation Organization (PICAO) came into being.[6]

II. The Air Mail

On June 14, 1910, the first air mail bill was introduced, proposing the investigation of the cost of air mail service.[7]

On September 23, 1911, mail was carried for the first time in the United States by airplane with the official approval of the Post Office Department.[8] The Congress, however, did not choose to encourage some experiments and thus did not appropriate funds for air mail carriage until 1916. The National Advisory Committee for Aeronautics also persuaded Congress to permit the Post Office to fly less difficult routes[9] in order to develop this new mode through appropriation of funds. The Congress finally yielded and appropriated $50,000 for fiscal year 1917 and $100,000 for fiscal year 1918 to permit the Post Office Department to experiment with air mail including the purchase, operation, and maintenance of aircraft.

---

[6]This PICAO was replaced later by the permanent organization, the International Civil Aviation Organization (ICAO) on April 4, 1947.

[7]This bill was introduced by Congressman Morris Sheppard of Texas, but was not enacted. Other air mail bills introduced between 1900 and 1915 were also defeated.

[8]This was the first U.S. air mail experiment, not of very significant value. The distance was only 10 miles and mail pouches were dropped from the aircraft. This service did not continue for more than one week.

[9]At that time, the prevalent thinking seemed to be that the airplane was best used where other means of transportation were impossible, difficult, or very costly.

On May 10, 1918, the Post Master General was authorized by Congress to require the payment of postage on mail carried by airplane at a rate not exceeding 24 cents per ounce. In fact, it is claimed that the first air mail service in the world on a regular basis was begun by the United States Post Office Department at the height of World War I, using military airplanes flown by U.S. army personnel.

World War I, which formally ended on November 11, 1918, had a significant effect on both military and civil aviation in the United States. It showed how far the U.S. was behind Europe in the development of aviation and resulted in a greatly increased tempo for military aircraft and engine production and research, in addition to pilot training.

On May 15, 1919, air mail was extended to include more cities.

In the fall of 1919, the first U.S.-British mail was flown between Miami, Florida and Nassau, Bahamas.

On April 24, 1920, Congress authorized the Post Office Department to spend no more than $100,000 for carrying foreign mail by aircraft. However, appropriations for this purpose were increased gradually through the years until it reached $4,300,000 for the fiscal year ending June 30, 1930.

On November 1, 1920, Aeromarine West Indies Airways (later called Aeromarine Airways) by virtue of a contract with the Post Office Department started scheduled airmail operations between Key West, Florida and Havana, Cuba, creating the first regular U.S. carrier international commercial air mail service.

The first Alaskan mail was flown on February 21, 1924.

On February 2, 1925, the Kelly Act was passed, turning the carriage of mail to private carriers through the granting of air mail contracts on the basis of competitive bids. This Act stimulated the formation of a number of strongly financed companies. It also eventually ended the introductory nine-year period of air mail carriage in government planes.

On February 15, 1925, the Ford Motor Company was the first of five contractors to start air mail service under the Kelly Act, using a Ford (Stout) 2-AT single engine monoplane.

The Alaskan Emergency Mail Service Act was also passed on February 21, 1925, authorizing the Post Master General to provide emergency mail service to Alaska.

The Kelly Act was amended on June 3, 1926, to provide payment for carriage of mail on a poundage instead of a postage-count basis.

In 1927 the first International Air Mail Conference was held at the Hague.

On March 8, 1928, the Foreign Air Mail Act of 1928 was passed, authorizing the contracting of transporting mail by air to foreign countries and the insular possessions of the United States.

On May 17, 1928, the second amendment to the Kelly Act was passed. This act (a) reduced the minimum rate of postage on air mail from 10 to 5 cents per ounce, and (b) provided for exchange of contract for an air mail route certificate, in case of unsatisfactory operation by a contractor for two years or more. No certificate, however, was issued under this amendment.

On March 2, 1929, the Foreign Air Mail Act of 1928 was amended to broaden the authority of the Post Master General to provide for the carriage of mail overseas.

On April 29, 1930, the Waters Act (McNary-Waters Act) was passed as a third amendment to the Air Mail Act of 1925, which marked a turning point in the history of air mail service and the development of air passenger transportation.[10]

On February 9, 1934, all air mail contracts were cancelled because of what was thought to be strong evidence of fraud and collusion.

On March 27, 1934, the carriage of mail was conducted by the Army upon authorization by Congress and executive order by the President.[11] The Air Mail Act of 1934 (the Black-McKellar Bill) provided, among other things, for a special Federal Aviation Commission to study the air transport industry and recommend broad policy as to government relationships with all phases of aviation.[12]

---

[10]Under this Act, air mail contracts were exchanged for air mail route certificates. The basis of compensation for the carriage of mail was changed from a poundage to a space-mile basis, thus opening the door to subsidizing passenger operations. Also under this Act, the Post Master General was given broad authority to determine the compensation for the carriage of mail and to extend consolidated routes.

[11]The actual carriage of air mail by the Army Air Corps started on February 19, 1934, and continued until March 10, 1943, when it was stopped as a result of nine pilot and passenger deaths. It was resumed again on March 19, 1934, but was terminated on June 1, 1934.

[12]This Act was passed by Congress on an outgrowth of the cancellation of air mail contracts. It provided for competitive bidding in the award of contracts by the Post Master General for the carriage of mail. It did provide for the regulation of rates of payments for the carriage of mail by the Interstate Commerce Commission (ICC) upon expiration of the initial contract period.

On August 14, 1935, an amendment to the Air Mail Act of 1934 was passed requiring the ICC, among other things, to disregard any losses incurred by the carrier for the maintenance of non-mail schedules and placed upon the carriers the burden of proof with respect to the insufficiency of rates.

On January 14, 1938, another amendment to the Air Mail Act of 1934 was passed, raising the limitation on air mail routes and plane mileage.[13]

On April 15, 1938, the Post Master General was authorized to supervise experimental air mail and start route airplane service. The object of this experiment was to develop safety, efficiency, and economy in air mail transportation, collection, and delivery.

On April 14, 1939, the first carrier to be granted an air mail rate under the 1938 Civil Aeronautics Act was Mid-Continent Airlines (later merged with Braniff Airways).[14]

---

[13]This amendment raised the ceiling on the aggregate number of air mail route miles for which the Post Master General could amend contracts from 29,000 to 35,000 miles. It also raised the ceiling on the aggregate number of airplane miles on which the Post Master General could pay for air mail transportation from 40 million to 52 million miles.

[14]The Board pointed out that the standard for fixing fair and reasonable air mail rates under the Act differed from those that had controlled public utility and common carrier rate making during the preceeding 40 years. According to the opinion of the Board, the rate had to be fairly compensatory, and had to assure the stable and economic development of the carrier to meet the needs, not only of the domestic and foreign commerce and the postal service of the United States, but also of the national defense.

In May 1939, the Civil Aeronautics Authority awarded All American Aviation (later to become Allegheny Airlines) a temporary certificate to carry mail and express.[15]

On July 6, 1939, Eastern Airlines started the first scheduled air mail service flown with rotary wing aircraft.

On July 22, 1940, the Board approved the issuance of a certificate of public convenience and necessity on a permanent basis to All American Aviation for air mail pick-up and delivery service on Route No. 49, comprising eighty-six cities.

On January 8, 1942, the Board established a new procedure, the Show-Cause Procedure, in air mail rate cases, the objective of which is to accord the carrier and any other interested party an opportunity for a full hearing, which at the same time allows expediting final disposition of the case.[16]

---

[15] This was the first air mail pick-up and delivery service. The carrier operated small single-engine Stinson Reliant monoplanes, flying over a 15,000 mile route, swooping low over a "depot" without stopping and snaring a mail sack or package with a trailing hook from the plane. The hook engaged a rope stretched between two uprights, and reeled in the sack. Deliveries were made by dropping shockproof cartons while swooping low.

[16] This new procedure achieved that end by placing before the carrier a complete statement of proposed disposition of the rate proceedings by the Board and thus offering the carrier an opportunity to contest such portions of the statement that did not meet with its approval. Accordingly, the issues in any hearing in a rate case were effectively limited to those about which there was real controversy.

APPENDIX B

UNITED STATES POLICY FOR THE CONDUCT OF INTERNATIONAL AIR TRANSPORTATION NEGOTIATIONS

PRESIDENTIAL STATEMENT ACCOMPANYING ISSUANCE OF THE POLICY STATEMENT

Ever since I became President, I have been seeking to introduce the airline industry to the benefits of competition both at home and abroad.

Two events highlight that effort. I am today releasing a formal statement of international aviation policy for the United States. Recently, representatives of the U.S. and Israel signed a new air service agreement which reflects the spirit of that policy.

Our policy seeks to encourage vigorous competition, with the goals of permitting lower fares, better service to more cities, and fewer government restrictions on charter travel. Travelers of many countries have already benefited from recent agreements which reflect our competitive policy. I hope that our formal statement, by making our position clear, will ease the difficult process of negotiating additional air agreements with other countries.

The U.S.-Israeli agreement signed recently achieves these goals of reducing government restrictions. It will permit healthy competition among our airlines, and, by giving Israel authority to serve four additional U.S. cities, it will greatly expand Israel's opportunity to provide air service between our countries.

August 21, 1978

UNITED STATES POLICY FOR THE CONDUCT OF INTERNATIONAL AIR TRANSPORTATION NEGOTIATIONS

Introduction

United States international air transportation policy is designed to provide the greatest possible benefit to travelers and shippers. Our primary aim is furthering the maintenance and continued development of affordable, safe, convenient, efficient and environmentally acceptable air services. Our policy for negotiating civil air transport agreements reflects our national goals in international air transportation. This policy provides a set of general objectives, designed particularly for major international air markets, on the basis of which United States negotiators can develop specific negotiating strategies.

Maximum consumer benefits can be best achieved through the preservation and extension of competition between airlines in a fair marketplace. Reliance on competitive market forces to the greatest extent possible in our international air transportation agreements will allow the public to receive improved service at low costs that reflect economically efficient operations. Competition and low prices are also fully compatible with a prosperous U.S. air transport industry and our national defense, foreign policy, international commerce, and energy efficiency objectives.

Bilateral aviation agreements, like other international agreements, should serve the interests of both parties. Other countries have an interest in the economic prosperity of their airline industries, as we do in the prosperity of ours. The United States believes this interest is best served by a policy of expansion of competitive opportunity rather than restriction. By offering more services to the public, in a healthy and fair competitive environment, the international air transport industry can stimulate the growth in traffic which contributes both to profitable industry operations and to maximum public benefits.

Goals of U.S. International Air Transportation Policy

The U.S. will work to achieve a system of international air transportation that places its principal reliance on actual and potential competition to determine the variety, quality, and price of air service. An essential means for carrying out our international air transportation policy will be to allow greater competitive opportunities for U.S. and foreign airlines and to pro-

mote new low-cost transportation options for travelers and shippers. Especially in major international air transport markets, there can be substantial benefits for travelers, shippers, airlines and labor from increasing competitive opportunities and reducing protectionist restrictions. Increasing opportunities for U.S. flag transportation to and from the United States will contribute to the development of our foreign commerce, assure that more airlift resources are available for our defense needs, and promote and expand productivity and job opportunities in our international air transport industry.

Translating Goals into Negotiating Objectives

U.S. International Air Transportation Policy cannot be implemented unilaterally. Our objectives have to be achieved in the system of international agreements that form the basic framework for the international air transportation system.

Routes, prices, capacity, scheduled and charter rules, and competition in the marketplace are interrelated, not isolated problems to be resolved independently. Thus, the following objectives will be presented in negotiations as an integrated U.S. position:

1. Creation of new and greater opportunities for innovative and competitive pricing that will encourage and permit the use of new price and service options to meet the needs of different travelers and shippers.
2. Liberalization of charter rules and elimination of restrictions on charter operations.
3. Expansion of scheduled service through elimination of restrictions on capacity, frequency, and route and operating rights.
4. Elimination of discrimination and unfair competitive practices faced by U.S. airlines in international transportation.
5. Flexibility to designate multiple U.S. airlines in international air markets.
6. Encouragement of maximum traveler and shipper access to international markets by authorizing more cities for non-stop or direct service, and by improving the integration of domestic and international airline services.
7. Flexibility to permit the development and facilitation of competitive air cargo services.

Explanation of Objectives

1. *Pricing.* The U.S. will develop new bilateral procedures to encourage a more competitive system for establishing scheduled air fares and rates. Charter pricing must continue to be competitive. Fares, rates, and prices should be determined by individual airlines based primarily on competitive considerations in the marketplace. Governmental regulation should not be more than the minimum necessary to prevent predatory or dis-

criminatory practices to protect consumers from the abuse of monopoly position, or to protect competitors from prices that are artifically low because of direct or indirect governmental subsidy or support. Reliance on competition and encouragement of pricing based on commercial considerations in the marketplace provides the best means of assuring that the needs of consumers will be met and that prices will be as low as possible given the costs of providing efficient air service.

2. *Charters.* The introduction of charters acted as a major catalyst to the expansion of international air transportation in the 1960's. Charters are a competitive spur and exert downward pressure on the pricing of scheduled services. Charters generate new traffic and help stimulate expansion in all sectors of the industry. Restrictions which have been imposed on the volume, frequency, and regularity of charter services as well as requirements for approval of individual charter flights have restrained the growth of traffic and tourism and do not serve the interests of either party to an aviation agreement. Strong efforts will be made to obtain liberal charter provisions in bilateral agreements.

3. *Scheduled Services.* We will seek to increase the freedom of airlines from capacity and frequency restrictions. We will also work to maintain or increase the route and operating rights of our airlines where such actions improve international route systems and offer the consumer more convenient and efficient air transportation.

4. *Discrimination and Unfair Competitive Practices.* U.S. airlines must have the flexibility to conduct operations and market their services in a manner consistent with a fair and equal opportunity to compete with the airlines of other nations. We will insist that U.S. airlines have the business, commercial, and operational opportunities to compete fairly. The United States will seek to eliminate unfair or destructive competitive practices that prevent U.S. airlines from competing on an equal basis with the airlines of other nations. Charges for providing airway and airport properties and facilities should be related to the costs due to airline operations and should not discriminate against U.S. airlines. These objectives were recognized by the Congress in legislation enacted in 1975, and their attainment is required if consumers, airlines, and employees are to obtain the benefits of an otherwise competitive international aviation system.

5. *Multiple Airline Designations.* The designation of new U.S. airlines in international markets that will support additional service is a way to create a more competitive environment and thus encourage improved service and competitive pricing. Privately owned airlines have traditionally been the source of innovation and competition in international aviation, and it is, therefore, particularly important to preserve for the U.S. the right of multiple designation.

6. *Maximum Access to International Markets.* Increasing the number of gateway cities for non-stop or direct air service offers the potential for increasing the convenience of air transportation for passengers and shippers and improving routing and market opportunities for international airlines. In addition, enhancing the integration of U.S. airline domestic and international air services benefits both consumers and airlines.
7. *Cargo Services.* We will seek the opportunity for the full development of cargo services. Frequently demand for such services requires special equipment and routes. Cargo services should be permitted to develop freely as trade expands. Also important in the development of cargo services are improved facilitation, including customs clearance, integration of surface and air movements, and flexibility in ground support services.

Negotiating Principles

The guiding principle of United States aviation negotiating policy will be to trade competitive opportunities, rather than restrictions, with our negotiating partners. We will aggressively pursue our interests in expanded air transportation and reduced prices rather than accept the self-defeating accommodation of protectionism. Our concessions in negotiations will be given in return for progress toward competitive objectives, and these concessions themselves will be of a liberalizing character.

Proposed bilateral agreements which do not meet our minimum competitive objectives will not be signed without prior Presidential approval.

INTERAGENCY COMMITTEE ON INTERNATIONAL AIR TRANSPORTATION POLICY

Chaired by: Department of Transportation

Member Agencies: Department of State
Department of Justice
Department of Defense
Department of Commerce
Civil Aeronautics Board
Council of Economic Advisors
Council on Wage and Price Stability
Domestic Policy Staff—The White House
National Security Council
Office of Management and Budget

APPENDIX C

FREEDOMS OF THE AIR

I. The Five Freedoms of the Air provided for in the 1944 Chicago Convention are privileges granted by one contracting state to another with respect to scheduled international services as follows:

1. The privilege to fly across another contracting state without landing.

2. The privilege to land for non-traffic purposes.

3. The privilege to put down passengers, mail and cargo taken on in the territory of the state whose nationality the aircraft possesses.

4. The privilege to take on passengers, mail and cargo destined for the territory of the state whose nationality the aircraft possesses.

5. 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.[17]

II. One more freedom of the air that has been cited recently by some as the sixth freedom is defined as follows:

---

[17]Article 1, Section 1, of the Convention. The first two freedoms are called the technical freedoms and the last three are called the commercial freedoms.

The right of an airline to combine routes and carry traffic from a point of origin in one foreign country to a destination in another foreign country via the airline's home country.[18]

---

[18] Wayne W. Parrish, "CAB Said to Have Failed Industry, May Be Target of Class Action Suit," Traffic World (October 24, 1977), p. 38. This kind of traffic was not contemplated in the Convention nor in bilateral agreements. However, some European airlines have been accused of using such freedom without any bilateral provision.

APPENDIX D

SURVEY QUESTIONNAIRE

The Measurement of Your Response*

Agreement						Disagreement
6	5	4	3	2	1	0
TA	SA	MA	U	MD	SD	NA

Please use a check mark (✓)

Please use the above instrument to reflect the degree of your agreement or disagreement with each of the issues at hand which are explained as follows:

6 TA = Total agreement

5 SA = Strong agreement

4 MA = Mild agreement

3 U = Undecided = Uncertain

2 MD = Mild disagreement

1 SD = Strong disagreement

0 NA = No agreement = Total disagreement

---

*In retyping the questions, and for purposes of brevity, the individual scales were omitted from the text of the questionnaire.

A. THE POLICY:

1. Would you agree that, in negotiating bilaterals with other governments, the U.S. team must be instructed:

   (a) to place emphasis on U.S. carriers' interests?

   (b) to place emphasis on consumers' interests?

   (c) to place emphasis on the interests of both carriers and consumers?

   (d) to emphasize that market forces must be given the greatest possible opportunity to play their role?

   (e) that an agreement on charters should be a pre-condition to an agreement on scheduled operations?

2. Would you agree that emphasis on future bilaterals will shift to consumers' interests, rather than the specific interests of U.S. carriers as was the case in almost all the negotiations that were made in the past?

3. Would you agree that the U.S. Government, in its attempt to focus on consumers' interests, may lose track of and may endanger carriers' chances for better deals in future bilaterals?

4. Would you agree that it is best to establish an office of aviation policy at the Assistant Secretary level within the State Department, and charge that Office with the coordination of policy among the various agencies concerned?

5. Would you recommend that a staff from the Congressional aviation sub-committees participate in pre-negotiation meetings at the State Department Policy sessions?

6. Would you agree that high policy and other non-airlines' considerations will continue to be involved in important bilaterals?

7. Would you agree that the United States should not resort again to the approach utilized in the final stages of the negotiations of Bermuda II, by naming a special negotiator or ambassador from outside of the ordinary negotiating team?

8. If you agree that a change in the existing policy would help improve the situations of U.S. air carriers, would you agree with the following:

   (a) this change should center around a national economic policy?

   (b) the change should center around the negotiating process?

   (c) the change should come from the U.S. Legislative Branch?

   (d) the change should come from the Executive Branch?

   (e) the change should include a more constructive role for the air transport industry in negotiating bilaterals?

9. Would you agree that the U.S. policy on international air transport as it exists now (what it is, how it is made, and how it is implemented) is generally satisfactory?

B. AIRLINES' ROLE IN THE NEGOTIATION PROCESS

1. The Committee on Interstate and Foreign Commerce of the U.S. Senate in its Report No. 1875 (1956), recommended with respect to aviation industry observers/advisors' role in international negotiations the following principles:

   (a) "Interested carriers should be advised by the Government prior to any discussion . . ."
   (b) "Full and complete opportunity for discussion . . . should precede any formal negotiations . . ."
   (c) "Prior to any discussion . . . representatives of all interested carriers should consult fully with U.S. Government representatives."
   (d) "Prior to the formal negotiations . . . a representative of interested carriers should be made a duly accredited member of any delegation . . ."
   (e) "Also, throughout the negotiations, the interested carriers' representative should be consulted . . ."

Please indicate your agreement or disagreement concerning the role of the air transport industry representation in the bilaterals, in the light of the above REPORT:

(a) Would you agree that the principles listed in the REPORT were still reasonably appropriate today as they were in 1956?

(b) Would you agree that those principles have not been adhered to in the negotiation of Bermuda II?

(c) Would you agree that the small working group concept utilized in Bermuda II negotiations tends to exclude carriers' representatives of effective participation in the process?

(d) As a general rule, and disregarding Bermuda II negotiations, would you agree that the principles recommended by the REPORT are usually and reasonably considered by the Government in the negotiations of bilaterals?

2. In his testimony in the Bermuda II Hearings of 1977 (hereinafter called the TESTIMONY), Mr. J. W. Biller, Deputy Assistant Secretary of State for Transportation, Telecommunications, and Commercial Affairs, indicated that it is not the intention of the U.S. Government to exclude the technical advisors from the U.S. airline industry from any negotiating sessions at which their technical advice would be desirable or necessary?

(a) Would you agree, as a general rule and not considering the events of Bermuda II, that the technical advice of the airlines is invited and accorded reasonably sufficient attention and consideration by the Government before arriving at a decision?

(b) Would you agree that the qualification desirable or necessary as used in the TESTIMONY does not guarantee sufficient participation by the airline industry in the process of negotiating bilaterals?

3. The TESTIMONY also indicated that the Government can also see a role as technical advisors for experts in the areas of labor, airport management, and consumers, and that the Government intends to broaden the scope of the U.S. delegation to include these kinds of experts.

(a) Would you agree that the participation of experts from those areas may result in better understanding of the problems involved where their interests are involved?

(b) Would you consider any of the above areas or concerns as having an equally important vested interest in the outcome of the negotiations as that of the airline industry?

4. Would you agree that the principles listed in the REPORT may imply a clear intrusion on the discretion of the Government to decide when and how representatives from the private sectors might be involved in the negotiations?

5. Would you agree that both statements of the TESTIMONY clearly indicate that the Government wishes to make it understood that it has total authority over what decisions to be made, and final responsibility for the outcome?

6. Would you agree that the extent of the participative role of the airline industry in the negotiation of bilaterals has improved through time since that REPORT was released?

7. Would you agree that the participative role of the airline industry in the negotiation of bilaterals may in the 80's be somewhere between the total involvement recommended by the REPORT, on the one hand, and the mere when desirable or necessary indicated by the TESTIMONY, on the other hand?

8. Would you agree that the present role of the airline industry in the negotiation of bilaterals is generally satisfactory?

C. BERMUDA II

1. Would you classify Bermuda II, in general, as unsatisfactory to U.S. interests?

2. Has Bermuda II restrictive provisions affected your operations financially in any way?

3. Would you agree that Bermuda II was the best possibly achievable agreement under the circumstances?

4. Would you agree that the restrictive provisions of Bermuda II might become a model for further restrictive agreements in the future?

5. Would you agree that the new liberal bilaterals, such as the Dutch agreement, will have a diluting effect on the restrictive nature and provisions of Bermuda II?

6. Would you agree that the U.S. may have a strong reason and forceful cause to denounce Bermuda II in the 80's?

D. OTHER GENERAL ISSUES

1. Do you have concern that the situation of U.S. international air transport, and of U.S. international air carriers, as a whole, might soon be hurt and declining if restrictive agreements crowd other liberal and Bermuda I type agreements?

2. Would you agree that the 1945 proposed and rejected concept for a chosen instrument will not surface to life again in the 80's even if restriction becomes the mode of bilaterals in the future?

3. Would you agree that it is more preferable for U.S. air transport bilaterals to remain as executive agreements rather than take the form of treaties?

4. Would you classify the Fair Competitive Practices Act of 1974 as a reasonable success in its attempt to remedy such foreign acts abroad?

5. If restriction becomes the mode in future air transport bilaterals, would you agree that airline efforts may tend to shift from the international market to the domestic market due to recent deregulation of this sector?

6. Would you agree that the increasing opposition to the Bermuda formula abroad, the various difficulties associated with the interpretation of its terms by the parties concerned such as that relating to the sixth freedom, and the formula's inability to remedy the extensive restrictive measures available to governments are bound to result in its total collapse in the 80's, and that a suitably acceptable alternative must be found to accommodate U.S. air transport interests?

7. Would you support a policy of exchanging CABOTAGE rights with ECAC (European) Countries?

APPENDIX E

TALLY OF RESPONSES

Tally of Responses (E-1): International and Territorial, All-Cargo and ATA (Group A)

Group A Coded	Question A-1a 6 5 4 3 2 1 0	Question A-1b 6 5 4 3 2 1 0	Question A-1c 6 5 4 3 2 1 0	Question A-1d 6 5 4 3 2 1 0
00	✓	✓	✓	✓
01	✓	✓	✓	✓
02	✓	✓	✓	✓
03	✓	✓	✓	×
04	✓	✓	✓	✓
05	•	•	✓	✓
06	✓	✓	✓	✓
07	✓	✓	✓	✓
08	✓	✓	✓	✓
09	✓	✓	✓	✓

Group A Coded	Question A-1e 6 5 4 3 2 1 0	Question A-2 6 5 4 3 2 1 0	Question A-3 6 5 4 3 2 1 0	Question A-4 6 5 4 3 2 1 0
00	×	×	✓	✓
01	✓	✓	✓	•
02	✓	✓	✓	✓
03	✓	✓	✓	✓
04	✓	✓	✓	✓
05	×	✓	•	✓
06	×	✓	✓	×
07	×	✓	✓	✓
08	×	✓	✓	✓
09	×	✓	✓	✓

Group A Coded	Question A-5 6 5 4 3 2 1 0	Question A-6 6 5 4 3 2 1 0	Question A-7 6 5 4 3 2 1 0	Question A-8a 6 5 4 3 2 1 0
00	×	✓	×	✓
01	×	✓	✓	✓
02	•	✓	×	✓
03	×	✓	•	✓
04	×	✓	×	•
05	×	✓	✓	✓
06	•	✓	✓	•
07	×	•	✓	×
08	•	✓	•	✓
09	×	✓	×	•

Group A Coded	Question A-8b 6 5 4 3 2 1 0	Question A-8c 6 5 4 3 2 1 0	Question A-8d 6 5 4 3 2 1 0	Question A-8e 6 5 4 3 2 1 0
00	✓	•	×	✓
01	✓	•	✓	✓
02	×	×	✓	✓
03	×	×	✓	✓
04	•	•	•	•
05	×	•	✓	✓
06	•	•	•	✓
07	✓	✓	✓	•
08	✓	✓	×	✓
09	✓	×	✓	✓

Group A Coded	Question A-9 6 5 4 3 2 1 0	Question B-1a 6 5 4 3 2 1 0	Question B-1b 6 5 4 3 2 1 0	Question B-1c 6 5 4 3 2 1 0
00	×	✓	×	✓
01	✓	✓	✓	✓
02	×	✓	✓	✓
03	×	×	✓	✓
04	•	✓	×	•
05	✓	✓	✓	✓
06	×	✓	•	•
07	•	✓	✓	✓
08	×	✓	✓	✓
09	×	✓	✓	✓

Group A Coded	Question B-1d 6 5 4 3 2 1 0	Question B-2a 6 5 4 3 2 1 0	Question B-2b 6 5 4 3 2 1 0	Question B-3a 6 5 4 3 2 1 0
00	✓	✓	✓	✓
01	✓	✓	✓	×
02	×	×	✓	✓
03	×	✓	✓	✓
04	✓	×	✓	✓
05	✓	✓	✓	•
06	✓	•	✓	•
07	×	•	✓	•
08	×	×	✓	✓
09	×	×	✓	✓

Group A Coded	Question B-3b 6 5 4 3 2 1 0	Question B-4 6 5 4 3 2 1 0	Question B-5 6 5 4 3 2 1 0	Question B-6 6 5 4 3 2 1 0
00	✓	✓	×	×
01	×	✓	✓	×
02	×	✓	✓	•
03	×	•	✓	×
04	✓	•	•	×
05	×	×	✓	✓
06	×	✓	✓	×
07	•	•	✓	•
08	•	✓	✓	×
09	×	×	✓	×

Group A Coded	Question B-7 6 5 4 3 2 1 0	Question B-8 6 5 4 3 2 1 0	Question C-1 6 5 4 3 2 1 0	Question C-2 6 5 4 3 2 1 0
00	×	×	✓	✓
01	•	×	✓	•
02	•	×	✓	✓
03	×	×	•	✓
04	•	×	•	•
05	•	✓	✓	•
06	✓	×	✓	×
07	•	•	×	•
08	•	×	×	×
09	•	×	×	•

Group A Coded	Question C-3 6 5 4 3 2 1 0	Question C-4 6 5 4 3 2 1 0	Question C-5 6 5 4 3 2 1 0	Question C-6 6 5 4 3 2 1 0
00	×	×	✓	✓
01	×	✓	✓	✓
02	✓	×	✓	•
03	×	×	✓	•
04	•	•	•	•
05	×	×	✓	•
06	•	×	✓	✓
07	•	•	✓	×
08	•	×	✓	×
09	✓	✓	✓	•

Group A Coded	Question D-1 6 5 4 3 2 1 0	Question D-2 6 5 4 3 2 1 0	Question D-3 6 5 4 3 2 1 0	Question D-4 6 5 4 3 2 1 0
00	×	•	✓	×
01	✓	✓	✓	✓
02	•	✓	✓	×
03	✓	×	•	×
04	•	✓	✓	•
05	•	✓	✓	✓
06	✓	✓	✓	•
07	•	✓	✓	×
08	×	✓	✓	×
09	×	✓	✓	×

Group A Coded	Question D-5 6 5 4 3 2 1 0	Question D-6 6 5 4 3 2 1 0	Question D-7 6 5 4 3 2 1 0
00	×	•	×
01	×	•	×
02	✓	×	×
03	✓	•	×
04	×	×	×
05	×	×	×
06	✓	✓	×
07	•	•	×
08	✓	×	×
09	•	•	×

The following symbols are used for easier distinction of responses: ✓ = agreement; • = lack of agreement or disagreement; × = disagreement.

Tally of Responses (E-2): Supplementals and NACA (Group B)

Group B Coded	Question A-1a 6 5 4 3 2 1 0	Question A-1b 6 5 4 3 2 1 0	Question A-1c 6 5 4 3 2 1 0	Question A-1d 6 5 4 3 2 1 0	Question A-1e 6 5 4 3 2 1 0	Question A-2 6 5 4 3 2 1 0
11	✓	✓	✓	✓	✓	✓
12	✓	✓	✓	✓	✓	✓
13	✓	✓	✓	✓	✓	✓
14	✓	✓	✓	✓	✓	✓
Group B Coded	**Question A-3 6 5 4 3 2 1 0**	**Question A-4 6 5 4 3 2 1 0**	**Question A-5 6 5 4 3 2 1 0**	**Question A-6 6 5 4 3 2 1 0**	**Question A-7 6 5 4 3 2 1 0**	**Question A-8a 6 5 4 3 2 1 0**
11	✓	•	×	✓	✓	✓
12	✓	•	×	✓	✓	•
13	✓	✓	✓	✓	×	×
14	✓	✓	✓	✓	✓	•
Group B Coded	**Question A-8b 6 5 4 3 2 1 0**	**Question A-8c 6 5 4 3 2 1 0**	**Question A-8d 6 5 4 3 2 1 0**	**Question A-8e 6 5 4 3 2 1 0**	**Question A-9 6 5 4 3 2 1 0**	**Question B-1a 6 5 4 3 2 1 0**
11	✓	✓	×	✓	×	✓
12	•	•	•	•	✓	✓
13	×	✓	✓	✓	×	✓
14	✓	✓	•	✓	×	✓
Group B Coded	**Question B-1b 6 5 4 3 2 1 0**	**Question B-1c 6 5 4 3 2 1 0**	**Question B-1d 6 5 4 3 2 1 0**	**Question B-2a 6 5 4 3 2 1 0**	**Question B-2b 6 5 4 3 2 1 0**	**Question B-3a 6 5 4 3 2 1 0**
11	✓	✓	×	×	✓	✓
12	✓	✓	✓	✓	✓	✓
13	✓	✓	✓	✓	✓	✓
14	✓	✓	✓	✓	✓	×

Group B Coded	Question B-3b 6 5 4 3 2 1 0	Question B-4 6 5 4 3 2 1 0	Question B-5 6 5 4 3 2 1 0	Question B-6 6 5 4 3 2 1 0	Question B-7 6 5 4 3 2 1 0	Question B-8 6 5 4 3 2 1 0
11	✓	✓	✓	×	✓	×
12	✓	•	✓	✓	✓	✓
13	✓	×	✓	✓	✓	×
14	×	✓	✓	×	✓	×

Group B Coded	Question C-1 6 5 4 3 2 1 0	Question C-2 6 5 4 3 2 1 0	Question C-3 6 5 4 3 2 1 0	Question C-4 6 5 4 3 2 1 0	Question C-5 6 5 4 3 2 1 0	Question C-6 6 5 4 3 2 1 0
11	✓	✓	×	✓	•	✓
12	✓	✓	×	✓	✓	•
13	✓	✓	×	X	✓	✓
14	✓	•	×	•	×	✓

Group B Coded	Question D-1 6 5 4 3 2 1 0	Question D-2 6 5 4 3 2 1 0	Question D-3 6 5 4 3 2 1 0	Question D-4 6 5 4 3 2 1 0	Question D-5 6 5 4 3 2 1 0	Question D-6 6 5 4 3 2 1 0
11	✓	✓	✓	×	✓	✓
12	✓	•	•	×	×	•
13	✓	•	✓	•	×	✓
14	✓	✓	✓	•	•	✓

Group B Coded	Question D-7 6 5 4 3 2 1 0
11	✓
12	×
13	✓
14	×

The following symbols are used for easier distinction of responses: ✓ = agreement; • = lack of agreement or disagreement; × = disagreement.

APPENDIX F

TABULATION OF RESPONSES IN PROPORTIONS

(PERCENTAGE)

Question: A-4, Hyp NR: 1

Group	6,5,4	3	2,1,0	Mode
A	80	10	10	5
B	50	50	0	6,4
C	72	21	7	5,4

Question: A-5, Hyp NR: 2

Group	6,5,4	3	2,1,0	Mode
A	0	30	70	2
B	50	0	50	-
C	14	21	65	2

Question: D-3, Hyp NR: 3

Group	6,5,4	3	2,1,0	Mode
A	90	10	0	5,4
B	75	25	0	4
C	86	14	0	4

Question: B-1a, Hyp NR: 4

Group	6,5,4	3	2,1,0	Mode
A	90	0	10	6,5
B	100	0	0	6
C	93	0	7	6

Question: B-1b, Hyp NR: 4

Group	6,5,4	3	2,1,0	Mode
A	70	10	20	5
B	100	0	0	6,5
C	79	7	14	5

Question: B-1c, Hyp NR: 4

Group	6,5,4	3	2,1,0	Mode
A	80	20	0	5,4
B	100	0	0	6,5
C	86	14	0	5

Question: B-1d, Hyp NR: 4

Group	6,5,4	3	2,1,0	Mode
A	50	0	50	-
B	75	0	25	4
C	57	0	43	4

Question: B-2a, Hyp NR: 4

Group	6,5,4	3	2,1,0	Mode
A	40	20	40	-
B	75	0	25	4
C	50	14	36	4

Question: B-2b, Hyp NR: 4				
Group	6,5,4	3	2,1,0	Mode
A	100	0	0	5
B	100	0	0	5
C	100	0	0	5

Question: B-4, Hyp NR: 4				
Group	6,5,4	3	2,1,0	Mode
A	50	20	30	6,5
B	50	25	25	5,4
C	50	21	29	5

Question: B-5, Hyp NR: 4				
Group	6,5,4	3	2,1,0	Mode
A	80	10	10	5
B	100	0	0	5
C	86	7	7	5

Question: B-6, Hyp NR: 4				
Group	6,5,4	3	2,1,0	Mode
A	10	20	70	2
B	50	0	50	-
C	21	14	65	2

Question: B-7, Hyp NR: 4				
Group	6,5,4	3	2,1,0	Mode
A	10	70	20	2,0
B	100	0	0	5
C	36	50	14	5

Question: B-8, Hyp NR: 4				
Group	6,5,4	3	2,1,0	Mode
A	10	10	80	2,1
B	25	0	75	2
C	14	7	79	2

Question: A-8a, Hyp NR: 5				
Group	6,5,4	3	2,1,0	Mode
A	60	30	10	4
B	25	50	25	-
C	50	36	14	4

Question: A-8b, Hyp NR: 5				
Group	6,5,4	3	2,1,0	Mode
A	50	20	30	5
B	50	25	25	5
C	50	21	29	5

Question: A-8c, Hyp NR: 5				
Group	6,5,4	3	2,1,0	Mode
A	20	50	30	2
B	75	25	0	5
C	36	43	21	5

Question: A-8d, Hyp NR: 5				
Group	6,5,4	3	2,1,0	Mode
A	60	20	20	4
B	25	50	25	-
C	50	29	21	4

Question A-8e, Hyp NR: 5

Group	6,5,4	3	2,1,0	Mode
A	80	20	0	5
B	75	25	0	6
C	79	21	0	6,5

Question: B-3a, Hyp NR: 6

Group	6.5,4	3	2,1,0	Mode
A	60	30	10	4
B	75	0	25	4
C	65	21	14	4

Question: B-3b, Hyp NR: 6

Group	6,5,4	3	2,1,0	Mode
A	20	20	60	2
B	75	0	25	6,5,4
C	36	14	50	2

Question: C-1, Hyp NR: 7

Group	6,5,4	3	2,1,0	Mode
A	50	20	30	5
B	100	0	0	6
C	65	14	21	5

Question: C-2, Hyp NR: 7

Group	6,5,4	3	2,1,0	Mode
A	39	59	20	6,4
B	75	25	0	6
C	43	43	14	6

Question: C-3, Hyp NR: 7

Group	6,5,4	3	2,1,0	Mode
A	20	40	40	1
B	0	0	100	1,0
C	14	29	57	1

Question: C-4, Hyp NR: 7

Group	6,5,4	3	2,1,0	Mode
A	20	20	60	2
B	50	25	50	6,5
C	29	21	50	2,1

Question: C-5, Hyp NR: 7

Group	6,5,4	3	2,1,0	Mode
A	90	10	0	4
B	50	25	25	5
C	79	14	7	4

Question: C-6, Hyp NR: 7

Group	6,5,4	3	2,1,0	Mode
A	30	50	20	4
B	75	25	0	6
C	43	43	14	6,5,4

Question: A-7, Hyp NR: 8

Group	6,5,4	3	2,1,0	Mode
A	40	20	40	-
B	75	0	25	6
C	50	14	36	6,5

Question: A-1a, Hyp NR: 9

Group	6,5,4	3	2,1,0	Mode
A	90	10	0	5
B	100	0	0	6
C	93	7	0	5

Question: A-1b, Hyp NR: 9

Group	6,5,4	3	2,1,0	Mode
A	90	10	0	5
B	100	0	0	6,5
C	93	7	0	5

Question: A-1c, Hyp NR: 9

Group	6,5,4	3	2,1,0	Mode
A	100	0	0	6
B	100	0	0	6
C	100	0	0	6

Question: A-1d, Hyp NR: 9

Group	6,5,4	3	2,1,0	Mode
A	90	0	10	5
B	100	0	0	6
C	93	0	7	6

Question: A-1e, Hyp NR: 9

Group	6,5,4	3	2,1,0	Mode
A	40	0	60	2
B	100	0	0	6
C	57	0	43	6

Question: A-2, Hyp NR: 9

Group	6,5,4	3	2,1,0	Mode
A	90	0	10	5
B	100	0	0	5
C	93	0	7	5

Question: A-3, Hyp NR: 9

Group	6,5,4	3	2,1,0	Mode
A	90	10	0	5
B	100	0	0	4
C	93	7	0	5

Question: D-4, Hyp NR: 10

Group	6,5,4	3	2,1,0	Mode
A	20	20	60	1
B	0	50	50	0
C	14	29	57	2,1

Question: D-7, Hyp NR: 11

Group	6,5,4	3	2,1,0	Mode
A	0	0	100	0
B	50	0	50	-
C	14	0	86	0

Question: A-6, Hyp NR: 12

Group	6,5,4	3	2,1,0	Mode
A	90	10	0	4
B	100	0	0	5
C	93	7	0	4,5

Question: D-1, Hyp NR: 13

Group	6,5,4	3	2,1,0	Mode
A	30	40	30	-
B	100	0	0	6
C	50	29	21	4

Question: D-2, Hyp NR: 14

Group	6,5,4	3	2,1,0	Mode
A	80	10	10	5,4
B	50	50	0	4
C	72	21	7	4

Question: D-5, Hyp NR: 15

Group	6,5,4	3	2,1,0	Mode
A	40	20	40	-
B	25	25	50	2,1
C	36	21	43	1

Question: D-6, Hyp NR: 16

Group	6,5,4	3	2,1,0	Mode
A	10	40	50	2
B	75	25	0	6,5,4
C	29	35	36	2

Question: A-9, Hyp NR: 17

Group	6,5,4	3	2,1,0	Mode
A	20	20	60	1
B	25	0	75	2
C	21	14	65	2,1

Notes: (1) See page 420 for cross reference listing.

(2) Group A: International and territorial (trunks) 7/11 + All-cargo 2/3 + ATA = 10/15.

Group B: Supplementals 3/7 + NACA = 4/8.

Group C: A+B = 14/23 whose results are used for verification.

(3) Refer to Appendix D for measurement of responses 6 through 0.

(4) The term "mode" will be used only when there is a greater proportion of agreement over disagreement or vice versa and will indicate the most dominant measure/s of the greater proportion.

(5) Opposing arrows within a box indicate possible A-B conflict.

(6) Group A includes United.

Cross Reference Listing NR (1)

Hypotheses : Survey Questions

Hyp NR	Question NR
1	A-4
2	A-5
3	D-3
4	B-1a through B-1d B-2a through B-2b B-4 through B-8
5	A-8a through A-8e
6	B-3a through B-3b
7	C-1 through C-6
8	A-7
9	A-1a through A-1e A-2, A-3
10	D-4
11	D-7
12	A-6
13	D-1
14	D-2
15	D-5
16	D-6
17	A-9

Cross Reference Listing NR (2)

Survey Questions : Hypotheses

Question NR	Hyp NR
A-1a through A-1e, A-2, A-3	9
A-4	1
A-5	2
A-6	12
A-7	8
A-8 through A-8e	5
A-9	17
B-1a through B-1d B-2a through B-2b	4
B-3	6
B-4 through B-8	4
C-1 through C-6	7
D-1	13
D-2	14
D-3	3
D-4	10
D-5	15
D-6	16
D-7	11

APPENDIX G

TABLE G-1

VERIFICATION OF HYPOTHESES

Hyp NR	Question NR	Issue Involved	Conclusions						Verification			End Result
			Group A			Group B			Group C			
			Evidence	Response	Mode	Evidence	Response	Mode	Evidence	Response	Mode	
1	A-4	Establishing a high level office at DOS	C	Agr	St	S	Agr	St	C	Agr	St, Md	D
2	A-5	Congress participating in pre-negotiation meetings	C	Dis	TL	N	-	-	C	Dis	TL	ND
3	D-3	Retaining legal status of bilaterals as executive agreements (CEA)	C	Agr	St	C	Agr	St	C	Agr	St	ND
4	B-1a	Current appropriateness of principles listed in the 1956 Senate report	C	Agr	TL	C	Agr	TL	C	Agr	TL	+
	B-1b	Such principles not adhered to in negotiating Bermuda II	C	Agr	St	C	Agr	St	C	Agr	St	+
	B-1c	The small working group concept tends to exclude carriers from effective participation in the negotiation process (CEA)	C	Agr	St	C	Agr	St	C	Agr	St	+
	B-1d	Above principles usually and reasonably considered by government as a general rule and disregarding Bermuda II negotiations	N	-	-	C	Agr	Md	C	Agr	Md	+
	B-2a	Technical advice of airlines invited and accorded sufficient attention by government before deciding	N	-	-	C	Agr	Md	S	Agr	Md	+

TABLE G-1 (Continued)

Hyp NR	Question NR	Issue Involved	Conclusions Group A Evidence	Group A Response	Group A Mode	Conclusions Group B Evidence	Group B Response	Group B Mode	Verification Group C Evidence	Verification Group C Response	Verification Group C Mode	End Result
4	B-2b	The qualification "when desirable or necessary" as used in a DOS testimony does not guarantee sufficient participation by the airlines in the negotiation process (CEA)	C	Agr	St	C	Agr	St	C	Agr	St	+
	B-4	Above principles imply intrusion by the private sector on discretion of government to decide	S	Agr	St	S	Agr	St	S	Agr	St	+
	B-5	DOS testimony indicates government wishes to make it understood that it has total authority over decisions and final responsibility for outcome	C	Agr	St	C	Agr	St	C	Agr	St	+
	B-6	Role of airlines in the negotiation process has improved since the release of the 1956 report	C	Dis	Md	N	-	-	C	Dis	Md	+
	B-7	Role of airlines in the negotiation process may improve in the 80's	N	-	-	C	Agr	St	N	-	-	+
	B-8	The present role of the airlines industry in the process of negotiation is generally satisfactory	C	Dis	Md	C	Dis	Md	C	Dis	Md	D
5	A-8a	A change in the existing policy centered around national economic policy would help improve the situation of the airlines	C	Agr	Md	N	-	-	S	Agr	Md	+
	A-8b	A change in the existing policy centered around the negotiating process would improve the situation of the airlines	S	Agr	St	S	Agr	St	S	Agr	St	+
	A-8c	A change in the existing policy aiming at improving airlines' situation should come from Congress	N	-	-	C	Agr	St	N	-	-	+

TABLE G-1 (Continued)

Hyp NR	Question NR	Issue Involved	Conclusions						Verification			End Result
			Group A			Group B			Group C			
			Evidence	Response	Mode	Evidence	Response	Mode	Evidence	Response	Mode	
5	A-8d	A change in the existing policy aiming at improving airlines' situation should come from the Executive Branch	C	Agr	Md	N	-	-	S	Agr	Md	+
	A-8e	A change in the existing policy aiming at improving airlines' situation should include a more constructive role for the industry in the negotiation process (CEA)	C	Agr	St	C	Agr	St	C	Agr	St	D
6	B-3a	Participation of experts from other areas may result in better understanding of problems	C	Agr	Md	C	Agr	Md	C	Agr	Md	+
	B-3b	(Possible A-B conflict) Entities other than airlines have an equally important vested interest in the outcome of the negotiation as that of the airline industry	C	Dis	Md	C	Agr	St	S	Dis	Md	D
7	C-1	Bermuda II is generally unsatisfactory to U.S. interests	S	Agr	St	C	Agr	TL	C	Agr	St	+
	C-2	Bermuda II restrictive provisions had a financial impact on airlines' operations	N	-	-	C	Agr	TL	W	Agr	TL	+
	C-3	Bermuda II was best possible agreement under the circumstances	N	-	-	C	Dis	St	C	Dis	St	+
	C-4	Bermuda II restrictive provisions may become a model for future restrictive agreements	C	Dis	Md	S	Agr	St	S	Dis	Md	+
	C-5	The new liberal bilaterals will have a diluting effect on Bermuda II restrictive nature and provisions	C	Agr	Md	S	Agr	St	C	Agr	Md	+

TABLE C-1 (Continued)

Hyp NR	Question NR	Issue Involved	Conclusions Group A Evidence	Group A Response	Group A Mode	Conclusions Group B Evidence	Group B Response	Group B Mode	Verification Group C Evidence	Group C Response	Group C Mode	End Result
7	C-6	U.S. may denounce Bermuda II in the 80's	N	-	-	C	Agr	TL	W	Agr	St	D
8	A-7	U.S. should not resort to the use of a special negotiator from outside of the ordinary negotiating team	N	-	-	C	Agr	TL	S	Agr	St	D
9	A-1a	In negotiating bilaterals, emphasis should be placed on U.S. carriers' interests (CEA)	C	Agr	St	C	Agr	TL	C	Agr	St	+
	A-1b	In negotiating bilaterals, emphasis should be placed on consumers' interests (CEA)	C	Agr	St	C	Agr	St	C	Agr	St	+
	A-1c	In negotiating bilerarals, emphasis should be placed on the interests of both carriers and consumers (CEA)	C	Agr	TL	C	Agr	TL	C	Agr	TL	+
	A-1d	In negotiating bilaterals, emphasis should be placed on market forces to play their role	C	Agr	St	C	Agr	TL	C	Agr	TL	+
	A-1e	(Possible A-B conflict) In negotiating bilaterals, an agreement on charters should be a pre-condition to an agreement on scheduled operations	C	Dis	Md	C	Agr	TL	C	Agr	TL	+
	A-2	Emphasis on future bilaterals will be placed on consumers' rather than carriers' interests	C	Agr	St	C	Agr	St	C	Agr	St	+
	A-3	The U.S. government, in its attempt to focus on consumers' interests, may jeopardize the interests of carriers (CEA)	C	Agr	St	C	Agr	Md	C	Agr	St	D
10	D-4	The Fair Competitive Practices Act of 1974 is a success	C	Dis	St	S	Dis	TL	C	Dis	St	D

TABLE G-1 (Continued)

Hyp NR	Question NR	Issue Involved	Conclusions: Group A Evidence	Group A Response	Group A Mode	Group B Evidence	Group B Response	Group B Mode	Verification: Group C Evidence	Group C Response	Group C Mode	End Result
11	D-7	Airline industry would support a policy of exchanging cabotage rights with European countries	C	Dis	TL	N	-	-	C	Dis	TL	D
12	A-6	High policy and other non-airline considerations will continue to be involved in negotiating important bilaterals (CEA)	C	Agr	Md	C	Agr	St	C	Agr	Md	D
13	D-1	Airlines' situations may decline if restrictive agreements crowd other liberal and Bermuda I type agreements	N	-	-	C	Agr	TL	S	Agr	Md	D
14	D-2	The Chosen Instrument Concept will not become an issue again in the 80's if restriction becomes the mode	C	Agr	Md	S	Agr	Md	C	Agr	Md	ND
15	D-5	Airlines' efforts may shift from international to domestic markets if restriction becomes the mode	N	-	-	S	Dis	St	N	-	-	ND
16	D-6	(Possible A-B conflict) Difficulties associated with the Bermuda Formula should result in its total collapse in the 80's and the necessity to find an alternative	S	Dis	Md	C	Agr	St	N	-	-	ND
17	A-9	U.S. policy on international air transport is generally satisfactory	C	Dis	St	C	Dis	Md	C	Dis	St	D

Symbols used: Evidence: C = Conclusive, S = Sufficient, W = Weak, N = No evidence, CEA = Complete Evidence of Agreement; Responses: Agr = Agreement, Dis = Disagreement; Mode: TL = Total, St = Strong; Md = Mild; End Result: D = Dissatisfaction, ND = No-Dissatisfaction.

Remarks: (1) See Appendix F for mathematical details and for definitions of the Groups A, B, and C, and the term mode; (2) refer to Chapter VII for a list of the individual hypotheses; (3) refer to Appendix D for a text of the individual questions; (4) see Chapter VII for the definitions of evidence measurements used here and for definition of possible A-B conflicts of interests; (5) for comments on the findings of no-dissatisfaction, see Chapter VII; (6) responses to the following questions were associated with the measure: Complete Evidence of Agreement: Questions D-3, B-1c, B-2b, A-8e, A-1a, A-1b, A-1c, A-3 and A-6.

APPENDIX H

SUMMARY OF ANALYSIS

Hyp NR	Major Subject	Verification	Dissatisfaction
1	High level office at DOS	Yes	Yes
2	Congressional participation in pre-negotiation meetings	No	No
3	Legal status of bilaterals	No	No
4	Airlines' role in negotiations	Yes	Yes
5	Policy changes of different magnitudes	Yes	Yes
6	Experts from other areas of aviation	Yes	Yes
7	Unhappiness with Bermuda II	Yes	Yes
8	Use of special negotiators	Yes	Yes
9	Airlines' interests vs consumers' interests	Yes	Yes
10	Fair Competitive Practices Act	Yes	Yes
11	Cabotage	Yes	Yes
12	Non-airline consideration in negotiation	Yes	Yes
13	Possible decline of airlines' situation	Yes	Yes
14	The chosen instrument concept	Yes	No
15	Shifting efforts to domestic markets	No	No
16	Finding an alternative to the Bermuda Formula	No	No
17	General attitude towards policy	Yes	Yes

Notes: Hypotheses not verified are 2, 3, 14, 15, and 16.

Verification of other hypotheses was based on conclusive evidence, except for hypotheses 8 and 13 which were verified only by sufficient evidence.

Possible A-B conflict found with hypotheses 6, 9, and 16.

Dissatisfaction was based on end results attached to each hypothesis.

APPENDIX I

ATTITUDES: POST SURVEY EFFORTS*

1. In your opinion, what is <u>one</u> important issue relating to the U.S. International Air Transport Policy, which you consider <u>most</u> dissatisfying to the airline industry?

   Lack of an effective pass through mechanism for price increases to offset rapidly rising operating costs, particularly as to fuel.

2. What should the government do about it?

   Legislate automatic pass through of such costs.

3. What could the industry do about it?

   Urge passage of such legislation.

*Each respondent was advised: "P.S. If you wish to keep the identity of both yourself and the organization you belong to absolutely confidential, please use the enclosed pre-stamped, pre-addressed return envelope." Answers to questions are typed as they appeared in the original response.

1. In your opinion, what is one important issue relating to the U.S. International Air Transport Policy, which you consider most dissatisfying to the airline industry?

   No fuel cost pass through arrangement which is most necessary the way fuel is constantly increasing.

2. What should the government do about it?

   CAB should authorize a fuel cost pass through immediately and the new law should allow for such a pass through.

3. What could the industry do about it?

   The industry is working on the CAB (industry has filed) for a fuel pass through and is also working with the Congress on the legislation.

1. In your opinion, what is one important issue relating to the U.S. International Air Transport Policy, which you consider most dissatisfying to the airline industry?

   Excessive growth of route inlets to foreign airlines in exchange for adoption of U.S. policy philosophy.

2. What should the government do about it?

   Reevaluate this in view of long term future; i.e., if U.S. carriers abandon markets due to predatory nature of foreign airlines owned and/or subsidized by their governments, is this in the interest of the U.S. public?

3. What could the industry do about it?

   Protest with U.S. government agencies, Congress, etc.

1. In your opinion, what is <u>one</u> important issue relating to the U.S. International Air Transport Policy, which you consider <u>most</u> dissatisfying to the airline industry?

   The overriding emphasis placed on political issues rather than commercial issues by the U.S. negotiating delegations.

2. What should the government do about it?

   Realistically, probably nothing can be done. The only possible solution that comes to mind might be the establishment of an independent U.S. negotiating Board on somewhat the same basis as the Federal Reserve Board's status, with possible override authority by the president to assure essential relativity to other national interests.

3. What could the industry do about it?

   The industry can only apply its own political courses to attempt to offset these non-commercial political demands.

1. In your opinion, what is <u>one</u> important issue relating to the U.S. International Air Transport Policy, which you consider <u>most</u> dissatisfying to the airline industry?

   The proliferation of airlines with the possible consequences of over capacity and huge losses.

2. What should the government do about it?

   Completely change its policy to one of realistic competition.

3. What could the industry do about it?

   Self constraint--which is almost impossible although the cost of fuel might leave no other alternative.

1. In your opinion, what is one important issue relating to the U.S. International Air Transport Policy, which you consider most dissatisfying to the airline industry?

   The U.S. government's willingness to give up valuable market areas without receiving sufficient considerations for American carriers in return.

2. What should the government do about it?

   Develop a firmer policy in dealing with foreign governments; a policy that should be developed with input from the American carriers.

3. What could the industry do about it?

   Industry could and should press the government through its trade organizations and elected representatives to participate in the development of the above policy and be ready to fully participate when invited.

1. In your opinion, what is <u>one</u> important issue relating to the U.S. International Air Transport Policy, which you consider <u>most</u> dissatisfying to the airline industry?

   The reluctance and/or inability of government to turn over air transportation to airline management even though in all recent speeches high officials have said that they have done so, i.e., deregulation is a misnomer. Moreover, government officials have no intention of getting out of the business of regulating. It would mean the loss of their jobs, and particularly a loss of power. They are still not interested in what the views of the airlines are and stage "public" meetings before bilaterals for public relations purposes only.

2. What should the government do about it?

   Get out of the business of regulating!!

3. What could the industry do about it?

   Nothing.

   It should be noted that despite so-called deregulation (which has helped some airlines expand), airlines are really no better off from a profit standpoint. This is so despite fantastic increases in traffic. The fact is the U.S.G. does not care if airline stockholders are happy. This is ironic, of course, since the U.S. is supposed to be a capitalistic nation.

1. In your opinion, what is one important issue relating to the U.S. International Air Transport Policy, which you consider most dissatisfying to the airline industry?

   The U.S. government's attempt to arbitrarily impose upon foreign governments the U.S. "deregulation" policy as applied domestically.

2. What should the government do about it?

   Recognize that in most cases other governments "sponsor" flag airlines, frequently with heavy direct or indirect subsidies, and so are inclined to strongly resist "open" competition in international air travel--as opposed to the U.S. current policy of "deregulating" international aviation.

3. What could the industry do about it?

   Attempt to help educate the U.S. government about the realities of international aviation.

1. In your opinion, what is <u>one</u> important issue relating to the U.S. International Air Transport Policy, which you consider <u>most</u> dissatisfying to the airline industry?

In our opinion, the most important issue relating to the U.S. International Air Transport Policy is the question of political considerations in negotiation of international air bilaterals. The industry finds that in many cases the U.S. Government, particularly the U.S. State Department, does not consider the size and strength of various international markets when negotiating international bilaterals for expanded U.S. service; but considers, as primary, the wishes of members of Congress. An example is the recent renegotiation of the U.S./British bilateral in which the U.S. Government gave exclusive rights to important U.S. gateways to the British, getting in return an additional carrier for Miami and an additional carrier for Boston, neither of which should have been high on our list of priorities. These markets were negotiated for political reasons.

2. What should the government do about it?

The Government should give much greater consideration to the position of the carriers on the strength of various markets in negotiating bilaterals, rather than political considerations.

3. What could the industry do about it?

There is very little the Industry can do about this problem, except continue to make the State Department and CAB aware of the industry's needs in international markets.

APPENDIX J

INTERNATIONAL AIR TRANSPORTATION COMPETITION ACT OF 1979

Public Law 96-192
96th Congress

An Act

To amend the Federal Aviation Act of 1958 in order to promote competition in international air transportation, provide greater opportunities for United States air carriers, establish goals for developing United States international aviation negotiating policy, and for other purposes.

Feb. 15, 1980
[S. 1300]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "International Air Transportation Competition Act of 1979".

International Air Transportation Competition Act of 1979.
49 USC 1301 note.

SEC. 2. Section 102(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1302(a)) is amended to read as follows:

"DECLARATION OF POLICY: THE BOARD

"FACTORS FOR INTERSTATE, OVERSEAS, AND FOREIGN AIR TRANSPORTATION

"SEC. 102. (a) In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(1) The assignment and maintenance of safety as the highest priority in air commerce, and prior to the authorization of new air transportation services, full evaluation of the recommendations of the Secretary of Transportation on the safety implications of such new services and full evaluation of any report or recommendation submitted under section 107 of this Act. 49 USC 1307.

"(2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public.

"(3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers and foreign air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, the need to improve relations among, and coordinate transportation by, air carriers, and the need to encourage fair wages and equitable working conditions for air carriers.

"(4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital, taking account, nevertheless, of material differences, if any, which may exist between interstate and overseas air transportation, on the one hand, and foreign air transportation, on the other.

"(5) The development and maintenance of a sound regulatory environment which is responsive to the needs of the public and in which decisions are reached promptly in order to facilitate adaption of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States, the Postal Service, and the national defense.

"(6) The encouragement of air service at major urban areas in the United States through secondary or satellite airports, where consistent with regional airport plans of regional and local authorities, and when such encouragement is endorsed by appropriate State entities encouraging such service by air carriers whose sole responsibility in any specific market is to provide service exclusively at the secondary or satellite airport, and fostering an environment which reasonably enables such carriers to establish themselves and to develop their secondary or satellite airport services.

"(7) The prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation, and the avoidance of—

"(A) unreasonable industry concentration, excessive market domination, and monopoly power; and

"(B) other conditions;

that would tend to allow one or more air carriers or foreign air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation.

"(8) The maintenance of a comprehensive and convenient system of continuous scheduled interstate and overseas airline service for small communities and for isolated areas in the United States, with direct Federal assistance where appropriate.

"(9) The encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services.

"(10) The encouragement of entry into air transportation markets by new air carriers, the encouragement of entry into additional air transportation markets by existing air carriers, and the continued strengthening of small air carriers so as to assure a more effective, competitive airline industry.

"(11) The promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry.

"(12) The strengthening of the competitive position of United States air carriers to at least assure equality with foreign air carriers, including the attainment of opportunities for United States air carriers to maintain and increase their profitability, in foreign air transportation.".

Repeal.

SEC. 3. (a) Section 102(c) of the Federal Aviation Act of 1958 (49 U.S.C. 1302(c)) is repealed.

(b) That portion of the table of contents contained in the first section of the Federal Aviation Act of 1958 which appears under the side heading

"Sec. 102. Declaration of policy: The Board."

is amended by striking out

"(a) Factors for interstate and overseas air transportation.
"(b) Factors for all-cargo service.
"(c) Factors for foreign air transportation."

and inserting in lieu thereof

"(a) Factors for interstate, overseas, and foreign air transportation.
"(b) Factors for all-cargo service.".

SEC. 4. Sections 401(d)(1) through 401(d)(3) of the Federal Aviation Act of 1958 (49 U.S.C. 1371 (d)(1) through (d)(3)) are amended to read as follows:

"ISSUANCE OF CERTIFICATE

"(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is consistent with the public convenience and necessity; otherwise such application shall be denied.

Temporary air transportation.

"(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as is consistent with the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

Charter air transportation.

"(3) In the case of an application for a certificate to engage in charter air transportation, the Board may issue a certificate to any applicant, not holding a certificate under paragraph (1) or (2) of this subsection on January 1, 1977, authorizing interstate air transportation of persons, which authorizes the whole or any part thereof for such periods, as is consistent with the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.".

SEC. 5. The first sentence of section 401(e)(2) of the Federal Aviation Act of 1958 (49 U.S.C. 1371(e)(2)) is amended by striking out the words ", insofar as the operation is to take place without the United States,".

SEC. 6. Section 401(g) of the Federal Aviation Act of 1958 (49 U.S.C. 1371(g)) is amended to read as follows:

"AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

"(g)(1) The Board upon petition or complaint or upon its own initiative, after notice and hearings, or pursuant to the simplified procedures under subsection (p) of this section, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate. No such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this sentence), rule, regulation, term, condition, or limitation found by the Board to have been violated. No certificate to engage in foreign air transportation may be altered, amended, modified, suspended, or revoked pursuant to the simplified procedures of subsection (p) of this section if the holder of such certificate requests an oral evidentiary hearing

Foreign air transportation, oral hearing.

or the Board finds that, under all the facts and circumstances, an oral evidentiary hearing is required in the public interest.

Protest or memorandum.

"(2) Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate pursuant to paragraph (1) of this subsection.

Foreign air transportation.

"(3) Notwithstanding the provisions of paragraph (1) of this subsection, the Board may suspend or revoke authority of an air carrier to serve any point in foreign air transportation authorized in a certificate issued under this section, upon notice and with a reasonable opportunity for the affected carrier to present its views, but without hearing, if the carrier has notified the Board in accordance with subsection (j) of this section or any regulation of the Board that it proposes to suspend all service provided by that carrier to such point, or, except at a point which is provided seasonal service comparable to that provided during the previous year, if the carrier has failed to provide any regularly scheduled service to the point for 90 days preceding the date of the Board's notice to the carrier of its proposed action.".

SEC. 7. Section 402(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1372(b)) is amended to read as follows:

"ISSUANCE OF PERMIT

"(b) The Board is empowered to issue such a permit if it finds (1) that the applicant is fit, willing, and able properly to perform such foreign air transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder and (2) either that the applicant is qualified, and has been designated by its government, to perform such foreign air transportation under the terms of an agreement with the United States, or that such transportation will be in the public interest.".

SEC. 8. The third sentence of section 402(d) of the Federal Aviation Act of 1958 (49 U.S.C. 1372(d)) is amended by striking out "Such application shall be set for public hearing and the" and inserting in lieu thereof "The".

SEC. 9. Section 402(f) of the Federal Aviation Act of 1958 (49 U.S.C. 1372(f)) is amended by inserting "(1)" immediately after "(f)" and by adding at the end thereof the following new paragraph:

Foreign air carriers.

"(2) Whenever the Board finds that the government, aeronautical authorities, or foreign air carriers of any foreign country have, over the objections of the Government of the United States, impaired, limited, or denied the operating rights of United States air carriers, or engaged in unfair, discriminatory, or restrictive practices with a substantial adverse competitive impact upon United States carriers, with respect to air transportation services to, from, through, or over the territory of such country, the Board may, without hearing but subject to the approval of the President of the United States, summarily suspend the permits of the foreign air carriers of such country, or alter, modify, amend, condition, or limit operations under such permits, if it finds such action to be in the public interest. The Board may also, without hearing but subject to Presidential approval, to the extent necessary to make the operation of this paragraph effective, restrict operations between such foreign country and the United States by any foreign air carrier of a third country.".

SEC. 10. Section 407(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1377(a)) is amended by inserting the phrase "or foreign air carrier"

immediately after the words "air carrier" each time those words appear therein.

SEC. 11. Section 412 of the Federal Aviation Act of 1958 (49 U.S.C. 1382) is amended by—

(1) striking subsections (a) and (b) thereof;

(2) redesignating subsections (c), (d), and (e) as subsections (a), (b), and (c), respectively;

(3) striking the words ", affecting interstate or overseas air transportation and" in subsection (a)(1), as so redesignated by this section;

(4) inserting the words ", including international comity or foreign policy considerations," immediately after "public benefits" in paragraph (a)(2)(A)(i), as so redesignated by this section;

(5) inserting the words "affecting interstate or overseas air transportation," immediately after the word "agreement," in paragraph (a)(2)(A)(iii), as so redesignated by this section;

(6) inserting the words "or foreign air carrier" immediately after the words "air carrier" the first two times those words appear in subsection (a)(1), as so redesignated by this section; and

(7) striking out "or (c)", inserting ", the Secretary of State," after "shall provide to the Attorney General", and striking out "such Secretary" and inserting in lieu thereof "either Secretary", in subsection (b), as redesignated by this section.

SEC. 12. (a) The center heading for section 412(a) of the Federal Aviation Act of 1958, as redesignated by section 11 of this Act, is amended by striking out

"AFFECTING INTERSTATE OR OVERSEAS AIR TRANSPORTATION".

(b) That portion of the table of contents contained in the first section of the Federal Aviation Act of 1958 which appears under the side heading

"Sec. 412. Pooling and other agreements."

is amended to read as follows:

"(a) Filing and approval of agreements.
"(b) Proceedings upon filing.
"(c) Mutual aid agreement.".

SEC. 13. Section 416(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1386) is amended by adding at the end thereof the following new paragraph:

Foreign air carrier exemption.

"(7) The Board may by order, to the extent it finds that such action is required in the public interest, exempt any foreign air carrier for a period not to exceed 30 days from the requirements or limitations of this Act, to the extent necessary to authorize the foreign air carrier to carry passengers, cargo, or mail in interstate or overseas air transportation in certain markets if the Board, after consultation with the Secretary of Transportation, finds that—

"(A) because of an emergency created by unusual circumstances not arising in the normal course of business, traffic in such markets cannot be accommodated by air carriers holding certificates under section 401 of this Act;

Ante, p. 37.
49 USC 1371.

"(B) all possible efforts have been made to accommodate such traffic by utilizing the resources of such air carriers (including, for example, the use of foreign aircraft, or sections of foreign aircraft, that are under lease or charter to such air carriers, and the use of such air carriers' reservation systems to the extent practicable);

"(C) such authorization is necessary to avoid undue hardship for the traffic in such market that cannot be accommodated by air carriers holding certificates under section 401 of this Act; and

Ante, p. 37.
49 USC 1371.

"(D) in any case where the inability to accommodate traffic in a market results from a labor dispute, the granting of such an exemption will not result in an undue advantage to any party to such dispute.

Whenever the Board grants such authority to a foreign air carrier under this paragraph, the Board shall—

"(i) assure that any air transportation provided by the foreign carrier under such authority is made available on fair and reasonable terms;

"(ii) continuously monitor the passenger load factor of air carriers in such market that hold certificates under section 401 of this Act; and

"(iii) review such authority no less frequently than once every 30 days to assure that the unusual circumstances that created the need for such authority still exist.

The Board may renew any exemption under this paragraph (including any renewal thereof) for a period not to exceed 30 days. In no event shall any authorization to a foreign air carrier under this paragraph remain in effect for more than 5 days after the unusual circumstances that created the need for such authorization have ceased.".

SEC. 14. Section 1002(j)(1) of the Federal Aviation Act of 1958 (49 U.S.C. 1482(j)(1)) is amended to read as follows:

"SUSPENSION AND REJECTION OF RATES IN FOREIGN AIR TRANSPORTATION

"(j)(1) Whenever any air carrier or foreign air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers, between foreign air carriers, or between an air carrier or carriers and a foreign air carrier or carriers) rate, fare, or charge for foreign air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or other formal pleading by the air carrier or foreign air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, or in the case of a tariff filed by a foreign air carrier if such action is in the public interest, the Board, by filing with such tariff, and delivering to the air carrier or foreign air carrier affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, for a period or periods not exceeding 365 days in the aggregate beyond the time when such tariff would otherwise go into effect. If, after hearing, the Board shall be of the opinion that such rate, fare, or charge, or such classification, rule, regulation, or practice, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, or in the case of a tariff filed by a foreign air carrier if the Board concludes with or without hearing that such action is in the public interest, the Board may take action to reject or cancel such tariff and prevent the use of such rate, fare, or charge, or such classification, rule, regulation, or practice. The Board may at any time rescind the

suspension of such tariff and permit the use of such rate, fare, or charge, or such classification, rule, regulation, or practice. If the proceeding has not been concluded and an order made within the period of suspension or suspensions, or if the Board shall otherwise so direct, the proposed rate, fare, charge, classification, rule, regulation, or practice shall go into effect subject, however, to being canceled when the proceeding is concluded. During the period of any suspension or suspensions, or following rejection or cancellation of a tariff, including tariffs which have gone into effect provisionally, the affected air carrier or foreign air carrier shall maintain in effect and use the rate, fare, or charge, or the classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of service thereunder which was in effect immediately prior to the filing of the new tariff or such other rate, fare or charge as may be provided for under an applicable intergovernmental agreement or understanding. If the suspension, rejection, or cancellation is of an initial tariff, the affected air carrier or foreign air carrier may file for purposes of operations pending effectiveness of a new tariff, a tariff embodying any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of service thereunder, that may be currently in effect (and not subject to a suspension order) for any air carrier engaged in the same foreign air transportation.".

SEC. 15. Section 1002(j)(2) of the Federal Aviation Act of 1958 (49 U.S.C. 1482(j)(2)) is amended to read as follows:

Suspension of tariff.

"(2) With respect to any existing tariff of an air carrier or foreign air carrier stating rates, fares, or charges for foreign air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once and, if it so orders, without answer or other formal pleading by the air carrier or foreign air carrier, but upon reasonable notice, to enter into a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, or in the case of a tariff filed by a foreign air carrier if such action is in the public interest, the Board upon reasonable notice, and by filing with such tariff, and delivering to the air carrier or foreign air carrier affected thereby, a statement in writing of its reasons for such suspension, and the effective date thereof, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, following the effective date of such suspension, for a period or periods not exceeding 365 days in the aggregate from the effective date of such suspension. If, after hearing, the Board shall be of the opinion that such rate, fare, or charge, or such classification, rule, regulation, or practice, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, or in the case of a tariff filed by a foreign air carrier if the Board concludes with or without hearing that such action is in the public interest, the Board may take action to cancel such tariff and prevent the use of such rate, fare, or charge, or such classification, rule, regulation, or practice. If the proceeding has not been concluded within the period of suspension or suspensions, the tariff shall again go into effect subject, however, to being canceled when the proceeding is concluded. For the purposes of operation during the period of such suspension, or the period following cancellation of an existing tariff pending effectiveness of a new tariff, the air carrier or foreign air carrier may file a tariff embodying any rate, fare, or charge, or any

classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of service thereunder, that may be currently in effect (and not subject to a suspension order) for any air carrier engaged in the same foreign air transportation.".

SEC. 16. Section 1002(j)(5) of the Federal Aviation Act of 1958 (49 U.S.C. 1482(j)(5)) is amended by (1) striking the word "and" at the end of subparagraph (E) thereof, (2) striking the period at the end of subparagraph (F) and inserting in lieu thereof "; and", and (3) adding at the end thereof the following new subparagraph:

"(G) reasonably estimated or foreseeable future costs and revenues for such air carrier or foreign air carrier for a reasonably limited future period during which the rate at issue would be in effect.".

SEC. 17. Section 1102 of the Federal Aviation Act of 1958 (49 U.S.C. 1502) is amended by inserting "(a)" immediately after "SEC. 1102." and by adding at the end thereof the following new subsections:

"GOALS FOR INTERNATIONAL AVIATION POLICY

"(b) In formulating United States international air transportation policy, the Congress intends that the Secretary of State, the Secretary of Transportation, and the Civil Aeronautics Board shall develop a negotiating policy which emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system. This includes, among other things:

"(1) the strengthening of the competitive position of United States air carriers to at least assure equality with foreign air carriers, including the attainment of opportunities for United States air carriers to maintain and increase their profitability, in foreign air transportation;

"(2) freedom of air carriers and foreign air carriers to offer fares and rates which correspond with consumer demand;

"(3) the fewest possible restrictions on charter air transportation;

"(4) the maximum degree of multiple and permissive international authority for United States air carriers so that they will be able to respond quickly to shifts in market demand;

"(5) the elimination of operational and marketing restrictions to the greatest extent possible;

"(6) the integration of domestic and international air transportation;

"(7) an increase in the number of nonstop United States gateway cities;

"(8) opportunities for carriers of foreign countries to increase their access to United States points if exchanged for benefits of similar magnitude for United States carriers or the traveling public with permanent linkage between rights granted and rights given away;

"(9) the elimination of discrimination and unfair competitive practices faced by United States airlines in foreign air transportation, including excessive landing and user fees, unreasonable ground handling requirements, undue restrictions on operations, prohibitions against change of gauge, and similar restrictive practices; and

"(10) the promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry.

"CONSULTATION WITH AFFECTED GROUPS

"(c) To assist in developing and implementing such an international aviation negotiating policy, the Secretaries of State and Transportation and the Civil Aeronautics Board shall consult, to the maximum extent practicable, with the Secretary of Commerce, the Secretary of Defense, airport operators, scheduled air carriers, charter air carriers, airline labor, consumer interest groups, travel agents and tour organizers, and other groups, institutions, and government agencies affected by international aviation policy concerning both broad policy goals and individual negotiations.

"OBSERVER STATUS FOR CONGRESSIONAL REPRESENTATIVES

"(d) The President shall grant to at least one representative of each House of Congress the privilege to attend international aviation negotiations as an observer if such privilege is requested in advance in writing.".

SEC. 18. (a) The center heading for section 1102 of the Federal Aviation Act of 1958 is amended to read as follows: 49 USC 1502.

"INTERNATIONAL AGREEMENTS

"ACTIONS OF THE BOARD AND SECRETARY OF TRANSPORTATION".

(b) That portion of the table of contents contained in the first section of the Federal Aviation Act of 1958 which appears under the center heading

"TITLE XI—MISCELLANEOUS"

is amended by striking out

"Sec. 1102. International agreements."

and inserting in lieu thereof

"Sec. 1102. International agreements.
"(a) Actions of the Board and Secretary of Transportation.
"(b) Goals for international aviation policy.
"(c) Consultation with affected groups.
"(d) Observer status for Congressional representatives.".

SEC. 19. Section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504) is amended by striking the words "international negotiations and" and inserting in lieu thereof "international negotiations or".

SEC. 20. The third sentence of section 1108(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1508(b)) is amended by inserting immediately before the period at the end thereof the following: ", unless specifically authorized under section 416(b)(7) of this Act or under regulations prescribed by the Secretary authorizing United States air carriers to engage in otherwise authorized common carriage and carriage of mail with foreign registered aircraft under lease or charter to them without crew". 49 USC 1386.

SEC. 21. Section 1117 of the Federal Aviation Act of 1958 (49 U.S.C. 1517) is amended to read as follows:

"TRANSPORTATION OF GOVERNMENT-FINANCED PASSENGERS AND PROPERTY

"TRANSPORTATION BETWEEN THE UNITED STATES AND A PLACE OUTSIDE THEREOF

"SEC. 1117. (a) Except as provided in subsection (c) of this section, whenever any executive department or other agency or instrumentality of the United States shall procure, contract for, or otherwise obtain for its own account or in furtherance of the purposes or pursuant to the terms of any contract, agreement, or other special arrangement made or entered into under which payment is made by the United States or payment is made from funds appropriated, owned, controlled, granted, or conditionally granted or utilized by or otherwise established for the account of the United States, or shall furnish to or for the account of any foreign nation, or any international agency, or other organization, of whatever nationality, without provisions for reimbursement, any transportation of persons (and their personal effects) or property by air between a place in the United States and a place outside thereof, the appropriate agency or agencies shall take such steps as may be necessary to assure that such transportation is provided by air carriers holding certificates under section 401 of this Act to the extent authorized by such certificates or by regulations or exemption of the Civil Aeronautics Board and to the extent service by such carriers is available.

49 USC 1371.

"TRANSPORTATION BETWEEN TWO PLACES OUTSIDE THE UNITED STATES

"(b) Except as provided in subsection (c) of this section, whenever persons (and their personal effects) or property described in subsection (a) of this section are transported by air between two places both of which are outside the United States, the appropriate agency or agencies shall take such steps as may be necessary to assure that such transportation is provided by air carriers holding certificates under section 401 of this Act to the extent authorized by such certificates or by regulations or exemption of the Civil Aeronautics Board and to the extent service by such carriers is reasonably available.

"TRANSPORTATION PURSUANT TO BILATERAL AGREEMENT

"(c) Nothing in this section shall preclude the transportation of persons (and their personal effects) or property by foreign air carriers if such transportation is provided for under the terms of a bilateral or multilateral air transport agreement between the United States and a foreign government or governments and if such agreement (1) is consistent with the goals for international aviation policy set forth in section 1102(b) of this Act and (2) provides for the exchange of rights or benefits of similar magnitude.

49 USC 1502.

"DISALLOWANCE OF IMPROPER EXPENDITURE BY COMPTROLLER GENERAL

"(d) The Comptroller General of the United States shall disallow any expenditure from appropriated funds for payment for personnel or cargo transportation in violation of this section in the absence of satisfactory proof of the necessity therefor. Nothing in this section shall prevent the application to such traffic of the antidiscrimination provisions of this Act.".

SEC. 22. That portion of the table of contents contained in the first section of the Federal Aviation Act of 1958 which appears under the center heading

"TITLE XI—MISCELLANEOUS"

is amended by striking out

"Sec. 1117. Transportation of Government-financed passengers and property."

and inserting in lieu thereof

"Sec. 1117. Transportation of Government-financed passengers and property.
"(a) Transportation between the United States and a place outside thereof.
"(b) Transportation between two places outside the United States.
"(c) Transportation pursuant to bilateral agreement.
"(d) Disallowance of improper expenditure by Comptroller General.".

SEC. 23. Section 2 of the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 1159b) is amended by redesignating subsections (b) and (c) as subsections (c) and (d), respectively, and adding a new subsection (b) as follows:

Discriminatory, predatory, or anticompetitive practices.

"(b)(1) Whenever the Civil Aeronautics Board, upon complaint or upon its own initiative, determines that a foreign government or instrumentality, including a foreign air carrier (A) engages in unjustifiable or unreasonable discriminatory, predatory, or anticompetitive practices against a United States air carrier or (B) imposes unjustifiable or unreasonable restrictions on access of a United States air carrier to foreign markets, the Board may take such action as it deems to be in the public interest to eliminate such practices or restrictions. Such actions may include, but are not limited to, the denial, transfer, alteration, modification, amendment, cancellation, suspension, limitation, or revocation of any foreign air carrier permit or tariff pursuant to the powers of the Board under the Federal Aviation Act of 1958.

49 USC 1301 note.
Complaint, filing.

"(2) Any United States air carrier or any agency of the Government of the United States may file a complaint under this section with the Civil Aeronautics Board. The Board shall approve, deny, dismiss, set such complaint for hearing or investigation, or institute other proceedings proposing remedial action within 60 days after receipt of the complaint. The Board may extend the period for taking such action for an additional period or periods of up to 30 days each if the Board concludes that it is likely that the complaint can be satisfactorily resolved through negotiations with the foreign government or instrumentality during such additional period, but in no event may the aggregate period for taking action under this subsection exceed 180 days from receipt of the complaint. In considering any complaint, or in any proceedings under its own initiative, under this subsection the Board shall (A) solicit the views of the Department of State and the Department of Transportation and (B) provide any affected air carrier or foreign air carrier with reasonable notice and such opportunity to file written evidence and argument as is consistent with acting on the complaint within the time limits set forth in this subsection.

Solicitation of views.

Transmittal to President.

"(3) Any action proposed by the Board pursuant to this section shall be transmitted to the President pursuant to section 801 of the Federal Aviation Act of 1958 (49 U.S.C. 1461).".

SEC. 24. (a) Section 1002(j) of the Federal Aviation Act of 1958 (49 U.S.C. 1482(j)) is amended by adding at the end thereof the following new paragraphs:

Foreign air fares.

"(6) The Board shall not have authority to find any fare for foreign air transportation of persons to be unjust or unreasonable on the basis that such fare is too low or too high if—

"(A) with respect to any proposed increase filed with the Board on or after the date of enactment of this paragraph, and before the 180th day after such date of enactment, such proposed fare would not be more than the standard foreign fare level for the same or essentially similar class of service. No such fare shall be suspended, unless the Board determines that it may be unduly preferential, unduly prejudicial, or unjustly discriminatory or that suspension is in the public interest because of unreasonable regulatory actions by a foreign government with respect to fare proposals of an air carrier; or

"(B) with respect to any proposed increase filed with the Board after the 180th day after the date of enactment of this paragraph such proposed fare would not be more than 5 percent higher than the standard foreign fare level for the same or essentially similar class of service. No such fare shall be suspended, unless the Board determines that it may be unduly preferential, unduly prejudicial, or unjustly discriminatory or that suspension is in the public interest because of unreasonable regulatory actions by a foreign government with respect to fare proposals of an air carrier; or

"(C) with respect to any proposed decrease filed after the date of enactment of this paragraph, the fare would not be more than 50 percent lower than the standard foreign fare level for the same or essentially similar class of service, except that this provision shall not apply to any proposed decrease in any fare if the Board determines that such proposed fare may be predatory or discriminatory or that suspension of any such fare is required because of unreasonable regulatory actions by a foreign government with respect to fare proposals by an air carrier.

"Standard foreign fare level."

"(7) For purposes of this subsection, 'standard foreign fare level' means that fare level (as adjusted only in accordance with paragraph (9) of this subsection) filed for and permitted by the Civil Aeronautics Board to go into effect on or after October 1, 1979 and before the 180th day after the date of enactment of this paragraph (with seasonal fares adjusted by the percentage difference that prevailed between seasons in 1978), or the fare level established under paragraph (8), for each pair of points, for each class of fare existing on that date, and in effect on the effective date of the establishment of each additional class of fare established after October 1, 1979.

Unjust or unreasonable fares, determination.

"(8)(A) The Board is authorized, on the basis of oral evidentiary hearings before an administrative law judge, to determine that a fare between two points on October 1, 1979 is unjust or unreasonable. Such oral evidentiary hearing shall be completed within 180 days of enactment of this section, and the Board may establish such deadlines including the deadline for the judge's decision as the Board may deem necessary to meet such requirement. If the Board determines that such a fare is unjust or unreasonable, the Board shall, on the basis of such hearing record, establish the standard foreign fare level between such points.

"(B) Standard foreign fare levels shall not be established under this paragraph for points between which the passengers carried by United States carriers in foreign air transportation are, in the aggregate, more than 25 percent of the total passengers carried by United States air carriers in foreign air transportation during the most recent 12-month period for which data is available.

"(C) The establishment of a standard foreign fare level under this paragraph does not permit a reduction in fares.

"(D) No standard foreign fare level established under this paragraph shall take effect on or before the 180th day after the date of enactment of this paragraph.

"(E) The authority given the Board by subparagraph (A) of this paragraph shall expire on the 180th day after the date of enactment of this paragraph.

"(9) The Board shall, within 30 days after the date of enactment of this paragraph, and not less often than every 60 days thereafter with respect to fuel costs and not less often than every 180 days with respect to all other costs, adjust each standard foreign fare level for the particular foreign air transportation to which such standard foreign fare level applies by increasing or decreasing such standard foreign fare level, as the case may be, by the percentage change from the last previous period in the actual operating cost per available seatmile. In determining the standard foreign fare level, the Board shall make no adjustment to costs acutally incurred. In establishing standard foreign fare levels and making the adjustments called for in this paragraph, the Board may use all relevant or appropriate information reasonably available to it. Fare adjustment.

"(10) The Board may by rule increase the percentage specified in paragraph (6)(C) of this subsection.".

(b) Section 403(c)(1) of the Federal Aviation Act of 1958 (49 U.S.C. 1373(c)(1)) is amended by (1) inserting the words "or foreign air carrier" after the words "air carrier" each time those words appear therein and (2) inserting the words "or foreign air carrier's" after the words "air carrier's".

(c) Section 403(c)(2) of the Federal Aviation Act of 1958 (49 U.S.C. 1373(c)(2)) is amended to read as follows:

"(2) If the effect of any proposed tariff change would be to institute a fare that is outside of the applicable range of fares specified in subparagraphs (A) and (B) of section 1002(d)(4) or subparagraphs (A), (B), and (C) of section 1002(j)(6) of this Act, or specified by the Board under section 1002(d)(7) or section 1002(j)(9) of this Act, or would be to institute a fare to which such range of fares does not apply, then such proposed change shall not be implemented except after 60 days' notice filed in accordance with regulations prescribed by the Board.". 49 USC 1482.

SEC. 25. Section 1002(c) of the Federal Aviation Act of 1958 (49 U.S.C. 1482(c)) is amended by inserting the words ", subject to section 1102(a) of this Act," immediately before the words "issue an appropriate order". 49 USC 1502.

SEC. 26. (a) Paragraph (1) of section 401(n) of the Federal Aviation Act of 1958 (49 U.S.C. 1371(n)(1)) is amended to read as follows:

"(1) Notwithstanding any other provision of this title, no air carrier providing air transportation under a certificate issued under this section shall commingle, on the same flight, passengers being transported in interstate, overseas, or foreign charter air transportation with passengers being transported in scheduled interstate, overseas, or foreign air transportation, except that this subsection shall not apply to the carriage of passengers in air transportation under group fare tariffs.". Commingling of passengers.

(b) Paragraph (1) of section 401(n) of the Federal Aviation Act of 1958 (49 U.S.C. 1371(n)(1)) and the authority of the Civil Aeronautics Board with respect to such paragraph shall cease to be in effect on December 31, 1981.

SEC. 27. Section 414 of the Federal Aviation Act of 1958 (49 U.S.C. 1384) is amended by adding at the end thereof the following new

sentence: "Notwithstanding the preceding sentence, on the basis of the findings required by subsection (a)(2)(A)(i) of section 412, the Board shall, as part of any order under such section which approves any contract, agreement, or request or any modification or cancellation thereof, exempt any person affected by such order from the operations of the 'anti-trust laws' set forth in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12) to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and with those transactions necessarily contemplated by such order.".

"Anti-trust laws."

SEC. 28. Section 45 of the Airline Deregulation Act of 1978 (49 U.S.C. 1341 note) is amended by inserting "(a)" after "SEC. 45." and by adding at the end thereof the following new subsections:

Fee collection.

"(b) Nothing in this section shall prohibit the Secretary of Transportation or the Administrator of the Federal Aviation Administration from collecting a fee, charge, or price for any test, authorization, certificate, permit, or rating, administered or issued outside the United States, relating to any airman or repair station.

"United States."

"(c) For purposes of this section, the term 'United States' shall have the meaning given such term in section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301).".

Love Field, Tex.

SEC. 29. (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

(d) This section shall not take effect if enacted after the enactment of the Aviation Safety and Noise Abatement Act of 1979. Effective date. *Post*, p. 50.

Approved February 15, 1980.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 96-602 accompanying H.R. 5481 (Comm. on Public Works and Transportation) and No. 96-716 (Comm. of Conference).
SENATE REPORTS: No. 96-329 (Comm. on Commerce, Science, and Transportation) and No. 96-531 (Comm. of Conference).
CONGRESSIONAL RECORD:
Vol. 125 (1979): Sept. 29, considered and passed Senate.
Nov. 13, H.R. 5481 considered and passed Senate; passage vacated and S. 1300, amended, passed in lieu.
Vol. 126 (1980): Jan. 31, Senate agreed to conference report.
Feb. 4, House agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:
Vol. 16, No. 7 (1980): Feb. 15, Presidential statement.

VITA

Omar Borhan Edrees was born in Mecca, Saudi Arabia on May 1, 1935. He attended public schools in Mecca and Jeddah and entered Riyadh University, Riyadh, Saudi Arabia where he received a Bachelor of Commerce degree in 1966. In 1971 he earned a Master's degree in Business Administration (MBA) from Texas Christian University, Fort Worth, Texas and in 1979, another MBA degree from The University of Tennessee, Knoxville.

The author has also fulfilled requirements of a program of study with La Salle Extension University, Chicago, Illinois (1975) which will lead to the award of a Bachelor of Law degree (LL.B) after completion of a supervised examination to be taken soon. In addition, he has taken several upper division courses in the Law School at The University of Tennessee, Knoxville (1976-1978).

The author's military training includes basic and advanced schooling in Saudi Arabia and various other specialized training at several U.S. Air Force bases. Currently, he is an officer in the Royal Saudi Air Force with the rank of Colonel.

The author is knowledgeable in three non-Arabic languages and has published articles and short stories in his own country.

After graduation from The University of Tennessee, Knoxville, he plans to continue his military career in addition to devoting time to the study of the Saudi Arabian Transportation System, especially air transport for defense and civil purposes.

Col. Edrees is married and has two children.