International Air Transportation: The Effect of the Airline Deregulation Act of 1978 and the Bermuda II Agreement

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INTRODUCTION

In an effort to assess the future of United States international air transportation, this article will focus upon the historic private, as well as recently enacted statutory and administrative, mechanisms which have brought U.S. international air transportation to its present status.[1] It will be seen that there are a considerable number of often conflicting or competing interests which must be balanced, such as those of the consumer, U.S. scheduled international and domestic air carriers, U.S. charter and cargo air carriers, U.S. foreign policy, foreign air carriers, and foreign governments. The Bermuda agreements[2] between the U.S. and the United Kingdom of Great Britain and Northern Ireland will be studied with emphasis upon Bermuda II,

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1. Though nonexistent at the beginning of this century, the air transportation industry generated passenger revenues on United States international trunk carriers for the 12 months ending in June 1978 of $2,985,000,000, and over 3,927,783 passengers were enplaned. CIVIL AERONAUTICS BOARD, XI-2 AIRLINE INDUSTRY QUARTERLY ECONOMIC REPORT 8 (Sept. 1, 1978); CIVIL AERONAUTICS BOARD, XXIV-6 AIR CARRIER TRAFFIC STATISTICS 15 (June 1978).

2. Air Services Agreement, Feb. 11, 1946, United States-United Kingdom, 60 Stat. 1499, T.I.A.S. No. 1507 [hereinafter cited as Bermuda I]; Air Services Agreement, July 23, 1977, United States-United Kingdom, T.I.A.S. No. 8641 [hereinafter cited as Bermuda II].

which has been characterized as "the greatest step backward in forty years of attempting to bring market-oriented competition to international aviation."[3] Part of the problem will be found to be a result of the changing and often fragmented approach to negotiations by the U.S. Departments of State and Transportation, the Civil Aeronautics Board, and other interested parties. Finally, recommendations will be made to remedy defects in the current structure used for negotiations in the international air arena.

I. HISTORICAL

The establishment of the principle of sovereignty over national airspace[4] has served to check and regulate the admission of aircraft over a state's territory as well as requiring that permission to cross it be obtained. Thus, the establishment of international airways and landing rights has become a matter of negotiation or diplomacy between states and, in a number of cases, between states and private airlines or associations.

In an attempt to reach a multilateral agreement, the United States convened the International Civil Aviation Conference in Chicago in 1944.[5] While the U.S. advocated virtually unfettered freedom of the air through the so-called "five freedoms,"[6] only the first and second freedoms were even-

3. 124 CONG. REC. §12,265 (daily ed. Aug. 1, 1978) (remarks of Sen. Cannon). Senator Cannon stated on the Senate floor that Bermuda II resulted from "a new, make-shift negotiating structure . . . ." *Id.*

4. For a history of the development of this now settled principle, *see generally* Sand, Freitas & Pratt, *An Historical Survey of International Air Law Before the Second World War*, 7 MCGILL L.J. 24, 33-42 (1960) [hereinafter cited as *Historical Survey*]; Goedhuis, *Air Sovereignty Concept and United States Influence on Its Future Development*, 22 J. AIR L. & COM. 209 (1955); Cooper, *Roman Law and the Maxim Cujus Est Solumn in International Air Law*, 1 MCGILL L.J. 23 (1952).

5. U.S. DEP'T OF STATE, 1 PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE (1948) [hereinafter cited as CHICAGO CONFERENCE]. The Soviet Union was not represented because Portugal, Spain and Switzerland participated. These countries were accused by the Soviet Union of possessing Axis sympathies. W. O'CONNOR, ECONOMIC REGULATION OF THE WORLD'S AIRLINES 29 (1971).

6. The "five freedoms" were set forth in the International Air Transport Agreement. Under it, each contracting state grants to the other contracting states the following freedoms of the air in respect of scheduled international air services:

(1) The privilege to fly across its territory 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.

International Air Transport Agreement, Dec. 7, 1944, art. I, § 1, 59 Stat. 1701, E. A. S. No. 488. The U.S. subsequently denounced the International Air Transport Agreement effective July 25, 1947. U.S. Dep't of State Circular Telegram 800:796/7-2546 (July 25, 1946). For a more complete discussion of this agreement and its imperfections, *see* W. O'CONNOR, ECONOMIC REGULATION

tually adopted because of the regulatory requirements espoused by the Europeans. The Chicago Conference did attempt, however, to partially bypass the stalemate concerning the third, fourth, and fifth freedoms by promulgating a provisional agreement form to be used by those negotiating these rights bilaterally.[7]

The U.S. proposed that economic decisions as to fares, frequencies, and routes would be left to the will of the affected airlines subject only to restrictions placed on the airlines by their own governments. Aside from the CAB certification to fly a particular route, U.S. international airlines would legally be subject to no economic regulation since the CAB was powerless to control international fares. Although the U.S. envisioned this proposal as the international implementation of the American free enterprise system which provided for competitive pricing and ease of entry, U.S. domestic aviation was heavily subsidized through concealed operating subsidies, and other nations recognized this.[8]

Because the Europeans possessed devastated economies and obsolete aircraft and related equipment, they believed that a competitive market would have meant extinction of their meager aviation resources. Additionally, the Europeans had long resorted to adopting anti-competitive devices as an accepted method of protecting national interests. The British, who then articulated the European position, have remained consistent to the present in demanding a regulatory authority over the control of routes, rates, and schedules.[9]

Although the Chicago Conference did not resolve matters involving economic regulation, it did set up the International Civil Aviation Organization (ICAO) to "study any matters affecting the organization and operation of international air transport, including the international ownership and operation of international air services on . . . routes . . . ."[10] The ICAO has

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OF THE WORLD'S AIRLINES 42-45 (1971). *See generally* Cooper, *Proposed Multilateral Agreement on Commercial Rights in International Civil Air Transport*, 14 J. AIR L. & COM. 125 (1947).

7. CHICAGO CONFERENCE, *supra* note 5, at 127-129.

8. Note, *The Ins and Outs of IATA: Improving the Role of the United States in the Regulation of International Air Fares*, 81 YALE L.J. 1102, 1111 (1972) [hereinafter cited as *Ins and Outs of IATA*]. The federal government gave Pan American and its subsidiary Pan American-Grace $47,202,000 in subsidy for the 11 fiscal years July 1, 1929, through June 30, 1940. Curiously, the subsidy received by all U.S. domestic carriers during this same period was $59,852,000 even though the domestic carriers had flown eight times the passenger miles that Pan American flew. The federal government had also expended some $126,468,000 on the construction and maintenance of domestic airway facilities. W. BURDEN, THE STRUGGLE FOR AIRWAYS IN LATIN AMERICA 116-17 (1943).

9. Address by Lord Swinton, Chairman, United Kingdom delegation to Chicago Conference (Nov. 2, 1944), CHICAGO CONFERENCE, *supra* note 5, at 63-67. *Compare* Lord Swinton's speech *with* Bermuda II, *supra* note 2.

10. Convention on International Civil Aviation, Dec. 7, 1944, art. 55(d), 61 Stat. 1180, T.I.A.S. No. 1591.

avoided, thus far, any participation in international ratemaking.[11]

Because the governments were unable to solve the economic problems, the International Air Transportation Association (IATA) was resurrected in 1944 from its prewar demise.[12] The airlines had originally formed IATA in 1919 "with a view to cooperate to mutual advantage in preparing and organizing international aerial traffic."[13] It originated as a private association of airline operators and remains such today. It must be recognized that most of the airlines in the association are solely or largely owned by their governments. The unwritten reason for the revival of this organization was that IATA would provide informal ratemaking and allocation of the air passenger and cargo market.[14]

Shortly after Articles of Association were approved for IATA in April 1945, Pan American Airways announced plans to reduce its transatlantic fares by approximately thirty percent.[15] This act was responsible for consternation on the part of Great Britain, which had been active in lobbying for rate control in international aviation. Pan American's act provided, in part, the impetus for the first Bermuda agreement.[16]

A. Bermuda I.

The first Bermuda bilateral [hereinafter Bermuda I] agreement arose as a result of a conference between the United States and Great Britain in Bermuda in January 1946.[17] This agreement served as a model for most of the bilateral agreements to which the United States has been a party. The significance of this agreement was that the United States agreed to IATA's economic regulation in return for Great Britain's dropping of its demand for control over the number of flights over any specific route which would be offered by either party's airlines.[18] Bermuda I provided, in effect, that each nation's airlines would be allowed to provide capacity based upon their estimates of traffic demands.

IATA was to be the moving force in the setting of fares in international

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11. K. Pillai, The Air Net 122-36 (1969).

12. S. Cohen, IATA: The First Three Decades 77, 80 (1949).

13. *Historical Survey*, *supra* note 4, at 42.

14. IATA Traffic Conference Resolution, 6 C.A.B. 639, 640 (1946). The specifics of IATA tariff negotiations are described in Gazdik, *Rate-Making and the IATA Traffic Conferences*, 16 J. Air L & Com. 298 (1949). *See also*, Note, *Impact of Technology on IATA Ratemaking: Problems, Prognostications, Proposals*, 39 Geo. Wash. L. Rev. 1167 (1971).

15. The one-way fare was to be $275.00. *See* H. J. Smith, Airways Abroad 10-14 (1950).

16. *Id.*

17. Bermuda I, *supra* note 2. Bermuda I is actually the Chicago Conference form with an "annex" which contains the provisions of the routes and rate controls. In 1948, the U.S. incorporated the "annex" provisions involving IATA into a new form currently known as the "Bermuda form." Both "Chicago" and "Bermuda" forms can be found at 3 Av. L. Rep. (CCH) ¶ 26,306-26,307 (June 9, 1958).

18. Bermuda I, *supra* note 2, at annex § II.

air travel under the Bermuda I agreement, which was designed in the belief that IATA would normally reach such agreement. Additionally, it was contemplated that the agreed fares would be approved by the governments whose carriers negotiated them. Paragraphs (e) and (f) of Bermuda I reserved to governments party to Bermuda I-type agreements the right to disappove IATA rate agreements.[19] Although these provisons had the effect of allowing party governments to regulate fares directly, the provisions were impractical means of rate setting. In regard to the U.S., these powers were largely meaningless, at least as far as the CAB was concerned, since the CAB has never possessed the power to invoke paragraph (e)[20] and has only recently explicitly possessed any power to wield authority concerning the right of summary action under paragraph (f).[21]

B. The Domestic Background

Before launching into a discussion of the current approach to international air negotiations, it will be helpful to briefly survey the domestic regulatory climate from a historical and current perspective. Such an approach will reveal many of the current conflicting demands which have arisen as a result of past regulatory practices. Until recently, the approach to international aviation regulation stemmed in large part from the economic and political climate of the 1920's and 1930's.[22] The Transportation Act of 1920[23] shifted the regulatory philosophy toward the encouragement of the orderly development of the air industry and away from attacking concentrated power. The Civil Aeronautics Act of 1938[24] arose from the philosophy produced by the forces responsible for the Transportation Act of 1920.[25] The purpose of the 1938 Act was to thwart existing competitive forces and limit entry, in addition to fostering orderly promotion and devel-

19. Bermuda I, *supra* note 2, at annex § II, ¶¶ (e) and (f).

20. This is the view of the CAB and the Department of State. *See* G. Edles, Legal Bases for Scheduled and Charter Air Transportation and the Future Direction of International Aviation Policy 20 (1975) (unpublished S.J.D. thesis, George Washington Univ.) [hereinafter cited as Edles]; M. Straszheim, The International Airline Industry 214 (1969) [hereinafter cited as Straszheim]. Some commentators have focused on the lack of this power in the CAB prior to 1972, but have failed to realize that it may reside in either Congress or the Executive Branch, although not delegated. *See, e.g., Ins and Outs of IATA*, *supra* note 8, at 1145. *But see* R. Berger, Executive Privilege 117-62 (1974), where Professor Berger concludes that Congress is the repository of such power. Regardless of who possesses such power, it is clear that the United States does have the power to suspend.

21. *International Air Fares: Hearings on H.R. 465 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 10-14 (1965).

22. Edles, *supra* note 20, at 22.

23. Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456 (1920).

24. Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938).

25. Edles, *supra* note 20, at 22.

opment of the existing airline industry. The clamor for regulation came surprisingly from the fledgling airline industry and not from consumers or government.[26]

There were, however, unsuccessful attempts made by Pan American during the 1930's to achieve legislation which would directly or indirectly allow the carrier to possess unregulated control over its international operations.[27] Had Pan American's view been accepted it would have burdened the Executive Branch with understandings and agreements between foreign nations and Pan American or other private carriers. Fortunately, the Civil Aeronautics Act of 1938 provided that the CAB must conduct its business in conformity with United States international commitments.[28] However, the international airlines were left to their own devices to a much greater extent than domestic airlines since international airlines were not regulated in regard to adequacy of service or fares and rates. Because of the foreign policy implications of international air traffic, the President has ultimate control of entry. This power has been criticized as too broad since the President has not been limited solely to foreign policy considerations.[29] In fact, the Standing Committee on Aeronautics Law of the American Bar Association in 1974 supported legislation which would remove presidential review of CAB actions concerning overseas or foreign air transportation based on economic and domestic political considerations.[30] Under the ABA proposal the President would retain his "rights and obligations in the fields of national defense and foreign relations . . . ," and a plaintiff would also be assured of the availability of judicial review.[31]

Although it is reasonable to remove domestic political considerations from the President's decision-making process, removing economic factors is impossible since economic factors are the paramount reasons for bilateral and multilateral agreements. It appears that the ABA did not want economic factors of either domestic or international import to be considered since the resolution speaks of "removing economic and *domestic* political

26. *See, e.g.*, Letter from Ass't Secretary of Commerce J.M. Johnson to Senator McCarran (Dec. 16, 1936); letter from Postmaster General J.A. Farley to Senator Wheeler (Mar. 11, 1937), both *reprinted in Regulation of Transportation of Passengers and Property by Aircraft: Hearings Before the Subcomm. on S.2 and S.1760 of the Senate Comm. on Interstate Commerce*, 75th Cong., 1st Sess. 89, 140 (1937) [hereinafter cited as *1937 Senate Hearings*]. The War Dep't was neutral concerning the proposed legislation. *1937 Senate Hearings* at 47.

27. *See* testimony of Comm'r Joseph Eastman, *id.* at 70; testimony of Edgar S. Gorrell, *id.* at 511.

28. Civil Aeronautics Act of 1938, Pub. L. No. 75-706, § 1102, 52 Stat. 973 (1938).

29. *See* 49 U.S.C. § 1461 (1976) (statute defining Presidential power to suspend and reject rates in foreign air transportation).

30. AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION AND REPORTS TO HOUSE OF DELEGATES, Resolution No. 133A (1974) [hereinafter cited as ABA]. *See also*, Leising, *Presidential Powers Over the Awarding of International Air Routes*, 48 TUL. L. REV. 1176 (1974).

31. ABA, *supra* note 30.

considerations . . . ,"[32] so only political considerations were limited in a domestic sense. Not allowing the President to consider international economic factors would deny the President the power to consider the single most important element of the decision-making process in international relations. By so limiting his considerations, situations may result in which a foreign flag or U.S. airline would be added to a list of carriers operating between the U.S. and other countries even though the economics dictated otherwise. One such situation arose when Pakistan International Airlines was granted a route between the U.S. and Pakistan solely because the Executive Branch had a bilateral agreement with Pakistan, despite the fact that economic conditions did not support such entry.[33]

The Airline Deregulaion Act of 1978,[34] signed by the President on October 24, 1978, has incorporated the provisions of the ABA resolution by use of the following language:

> The President shall have the right to disapprove any such Board [CAB] action . . . solely upon the basis of foreign relations or national defense considerations . . . , but not upon the basis of economic or carrier selection considerations.[35]

The "economic" statutory limitation appears to be ill-advised and will no doubt be the cause of a great deal of litigation and controversy since foreign policy concerns embrace economic issues as well as narrowly political ones. Additionally, this provision could force the President to use the more cumbersome, and less sure, bilateral negotiating process to accomplish foreign policy objectives based on economic issues. The President could use this authority to negotiate bilateral air transport agreements to circumvent decisions of the CAB involving carrier selection or economic considerations, and the CAB would be obligated to accede to the resulting agreement since it must exercise its duties in compliance with treaties, conventions, or agreements in force between the U.S. and foreign govern-

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32. *Id.* (emphasis added).

33. Pakistan Int'l Airlines Corp., Foreign Air Carrier Permit, 33 C.A.B. 687, 691 (1961). This author does not insist that economic considerations should prevail over other considerations; allowing Pakistan to enter the market may well have been a correct decision in that instance. Although this decision was made at a time when the President was permitted to consider international economic factors, logic dictates that, if economics is not to be considered, the problem will arise much more frequently.

34. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

35. *Id.* at § 34. The "carrier selection" language was added largely due to the controversy surrounding the President's disapproval of a route award between Dallas-Fort Worth and London by the CAB to Pan American in 1977. President's Announcement to Expand Air Service between the U.S. and Europe, 13 WEEKLY COMP. OF PRES. DOC. 1910 (Dec. 21, 1977). Pan American argued that the CAB should have allowed a period for reconsideration prior to its order implementing the President's dictates. Pan American felt that the President had acted on "legally defective data and a misconception of his authority." The CAB denied Pan American's request for further consideration citing Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 109 (1948).

ments.[36] Since the agenda in formal bilateral negotiations cannot be unilaterally determined by the U.S., legislation which forces the President to resort to that mechanism will certainly be more costly to the U.S. than if the problem were resolved in the course of section 801[37] review of the CAB decision.[38]

Under the President's review of CAB decisions, where the President disapproves the "issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in foreign air transportation, or any permit . . . to any foreign carrier . . . ," the President must set forth his reasons in a public document to the extent that national security permits, within sixty days of submission of the CAB's action to the President.[39] Whereas the previous statute[40] gave the President power over both overseas air transportation (between or within the U.S. and its territories and possessions) as well as in foreign air transportation (between the U.S. and its territories and possessions and any place outside it), the current statute limits the President's power to foreign air transportation.[41] However, as in the previous statute, foreign air transportation includes U.S. international carriers as well as non-U.S. citizen international carriers.[42]

Normally, judicial review of CAB orders is vested in the federal courts of appeals, upon petition filed within sixty days after entry of the order, by "any person disclosing a substantial interest in such order," or later upon a showing of "reasonable grounds" for failure to file within the required time.[43] An exception is in respect to orders relating to foreign air transportation subject to the President's approval under 49 U.S.C. § 1461(a). These orders cannot be reviewed unless the CAB action is not disapproved within sixty days and the action takes effect as a CAB action and not one of the President.[44]

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36. 49 U.S.C. § 1502 (1976).

37. § 801 of the Federal Aviation Act of 1958, 49 U.S.C. § 1461 (1976).

38. *See Hearing on International Aviation before the Subcomm. on Aviation of the Senate Commerce Comm.*, 95th Cong., 2d Sess. 11 (1978) [hereinafter cited as *Hearing on Int'l Aviation*] (statement of Hon. Brock Adams, Sec. of Transp.).

39. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 34, 92 Stat. 1705 (to be codified in 49 U.S.C. § 1461).

40. 49 U.S.C. §§ 1461, 1301(21) (1976).

41. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 34, 92 Stat. 1705 (to be codified in 49 U.S.C. § 1461(a)).

42. 49 U.S.C. § 1301(3), (19) (1976).

43. 49 U.S.C. § 1486(a) (1976).

44. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 34, 92 Stat. 1705 (to be codified in 49 U.S.C. § 1461(a)). A pertinent portion of this provision reads: "Any such [CAB] action not disapproved within the foregoing time limits shall take effect as action of the [CAB], not the President, and as such shall be subject to judicial review as provided in [49 U.S.C. § 1486] of this Act."

This language from the 1978 Act attempts to avoid some of the effects of *Chicago & Southern Air Lines v. Waterman Steam Ship Corporation*[45] by further subjecting certain CAB orders to judicial review. *Waterman* held that orders of the CAB as to certificates for overseas or foreign air transportation are not mature and are therefore not susceptible to judicial review. Also, they are not reviewable after approval by the President since they then embody Presidential discretion beyond the competence of courts to adjudicate.[46] It is significant that the President's powers under 49 U.S.C. § 1461 have remained unchanged from *Waterman* until the 1978 Act. The 1978 Act curiously states that the President "shall have the right to disapprove" CAB actions within his purview, but nowhere does this 1978 Act mention that the CAB action shall be "subject to the approval of the President" as did the 1958 Act.[47] Thus, it could be argued that even if the President approves the CAB action, the action is judicially reviewable as an action of the CAB under a strict reading of the 1978 Act which denies judicial review only to presidentially disapproved actions of the CAB. Such an interpretation would allow virtually every presidential act to be litigated including disapprovals, indirectly, because disapproved CAB actions are normally modified in accordance with the President's desires and will be subsequently approved in modified form. It would appear that such review would be an unconstitutional infringement on the President's foreign relations and national defense prerogatives. At the least, the difference in language between the two acts is striking and further litigation will be necessary to determine proper legal parameters. It is suggested that the proper interpretation of this provision is that judicial review is proper only when no action is taken by the President or the President's approval or disapproval was clearly not based on his foreign relations or national defense powers.

There is also legal authority allowing judicial review of CAB action where it is alleged that the CAB acted in excess of its powers and notwithstanding the President's prior approval.[48]

Under S.3363, a bill introduced by Senators Cannon and Pearson in

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To compound the problem, Executive Order No. 11,920, 3 C.F.R. 121 (1977), issued by President Ford, states in part:

> Orders involving foreign and overseas air transportation certificates of U.S. carriers that are subject to the approval of the President are not subject to judicial review when the President approves or disapproves an order for reasons of defense or foreign policy. All disapprovals necessarily are based on such a Presidential decision, but approval by the President does not necessarily imply the existence of any defense or foreign policy reason.

45. 333 U.S. 103, 114 (1948).

46. *Id.*

47. *Compare* Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 34, 92 Stat. 1705 *with* 49 U.S.C. § 1461 (1976).

48. Pan American World Airways, Inc. v. CAB, 380 F.2d 770 (2d Cir. 1967), *aff'd* 391 U.S.

1978, the President would have power over only non-U.S. citizen carriers and he would have only ten days in which to disapprove a CAB order in connection with international air transportation.[49] It is not clear whether some portions of S.3363 may be reintroduced in the 1979 session of the Senate. There are, however, some provisions of the Senate bill which the Airline Deregulation Act of 1978 did not address, so it is reasonable to believe that S.3363 is not completely dead.

II. Airline Deregulation Act of 1978

Certain aspects of the Airline Deregulation Act of 1978[50] have been briefly touched upon previously. Because it is anticipated that this Act will in the future create significant changes in foreign air commerce and that its effect will no doubt be reflected in bilateral and multilateral negotiations, significant features of this far-reaching Act will be set forth coupled with contrasting aspects of the Federal Aviation Act of 1958[51] which have been superseded as well as those which survive. Among the major provisions of the Airline Deregulation Act of 1978 [hereinafter 1978 Act] are those eliminating the CAB by 1985 and the move away from economic regulation toward free competition. This sweeping change toward complete competition was apparent even prior to the 1978 Act in actions of the CAB. Such changes may be welcome in the domestic area, but could cause problems in the international area by creating pressures which privately owned and financed U.S. airlines may not be capable of withstanding. This author concludes that although some competition should be the goal in the international sector, close scrutiny of foreign governmental action should be employed during the transitional and later periods.

When Pan American asked for freedom from governmental regulation in the 1940's, that airline was in the preeminent position competitively and could vie effectively with other nations' airlines. By mid-1970, Pan American had been forced to furlough large numbers of its flight crews due to depressed economic conditions and over-capacity created by introduction of the jumbo jets. As of August 1978, despite nearly two years of strong growth in international air transportation, Pan American has been unable to recall forty percent of these flight crews.[52] Also, U.S. airlines' share of in-

461, *reh. denied* 393 U.S. 956; American Airlines, Inc. v. CAB, 348 F.2d 349 (D.C. Cir. 1965). *But see* Diggs v. CAB, 516 F.2d 1248 (D.C. Cir. 1975).

49. S.3363, 95th Cong., 2d Sess., § 8 (to amend § 801(a) & (b) of the Federal Aviation Act of 1958, 49 U.S.C. § 1461 (1976)).

50. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

51. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958).

52. *Hearing on Int'l Aviation*, *supra* note 38, at 152 (statement of Richard Smith, Director of Legislative Affairs, Flight Engineers Int'l Ass'n).

ternational traffic is now down to forty percent.[53] On the other hand, the foreign flag carriers across the North Atlantic are subsidized either directly or indirectly in the acquisition of equipment and other expenses. In fact, almost all European airlines are now state-owned, as are most other airlines outside the U.S.[54] The Export-Import Bank also subsidizes competition by foreign airlines against U.S. airlines by making available favorable financial terms unavailable to U.S. carriers in our own "free market" financial centers.[55] Other factors which affect U.S. airlines' ability to compete effectively internationally are the relatively higher U.S. labor costs and the conscious effort of foreign governments to give their "chosen instruments"[56] the choicest "feed-in" and "beyond" route systems that funnel traffic over their transatlantic routes.[57]

An illustration of the situation which existed as of August 1978 between Germany and the U.S. will show the changing balance. Lufthansa provides nonstop service to four German and four U.S. cities. Pan American provides nonstop service to only one of each. Lufthansa operates forty-five nonstop frequencies weekly each way compared to only thirteen by Pan American, none by TWA, and two by National.[58] The same imbalance exists in a number of other markets.[59] Whether the Airline Deregulation Act of 1978 will ameliorate or exacerbate this problem is as yet undetermined. Hopefully, the airline industry will not suffer the fate of the U.S. maritime industry.[60]

The statement of the joint House and Senate conferees on S.2493, amending the Federal Aviation Act of 1958, indicated that the 1978 Act would "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services . . . ."[61] Specifically, the 1978 Act has added cer-

53. *Id.* at 2.

54. STRASZHEIM, *supra* note 20, at 19.

55. *See Hearings before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transp.*, 95th Cong., 1st Sess. 20-21 (1977) [hereinafter cited as *Senate Aviation Hearings-1977*].

56. Flag carriers owned and subsidized by the state are normally called "chosen instruments."

57. *Hearings on Int'l Aviation*, *supra* note 38, at 6 (statement of R. Smith). "Feed-in" normally describes traffic ducted into specific routes, while "beyond" traffic, in relation to Country A, for example, is that traffic which is being carried on Country B's aircraft to a destination beyond Country A.

58. *Id.* at 7 (statement of R. Smith). TWA operates to Frankfurt via Paris, but is not a real factor in the market.

59. *Id.* at 8 (statement of R. Smith). Airlines which overwhelm the market with more service than all U.S. carriers combined are: SAS, KLM, and Swissair.

60. Twenty-five years ago the U.S. merchant marine carried 60% of our national ocean commerce whereas today its share is about 5%. *See id.* at 5.

61. S. REP. NO. 95-1779, 95th Cong., 2d Sess. 53 (1978) [hereinafter cited as CONFERENCE REPORT].

tain factors which the CAB shall consider "among other things, as being in the public interest, and in . . . the public convenience and necessity . . . ."[62] By separately setting forth "Factors For Foreign Air Transportation,"[63] the 1978 Act indicates the distinctiveness which embraces foreign air commerce. The earlier act as amended in 1977 had no such separate provision. The language in the 1978 Act is designed to promote "adequate, economical, and efficient service . . . at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."[64] Competition was apparently believed by the legislation's authors to be needed "to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."[65] The significant differences between the domestic portion of the 1978 Act and the foreign air portion are reflected by the fact that the CAB is obligated to consider the following factors,[66] among others, in respect to interstate and overseas air transportation (both considered domestic aspects): (1) availability of adequate, economic, efficient, and low-priced services by air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices; (2) need to coordinate transportation by air carriers; (3) need to encourage fair wages and equitable working conditions; (4) placement of maximum reliance on competitive market forces and on actual and potential competition; (5) need for prompt decision-making; (6) responsiveness to the public; (7) adaptation to needs of domestic and foreign commerce of the United States, the Postal Service, and the national defense; (8) prevention of unfair, deceptive, predatory, or anticompetitive practices; (9) avoidance of unreasonable industry concentration, excessive market domination, and monopoly power; (10) other (unnamed) conditions that would allow carriers unreasonably to increase prices, reduce services, or exclude competition; (11) reliance on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services, and (12) encouragement of entry into new markets, additional markets, and the continued strengthening of small air carriers.

In contrast, the portion of the new legislation regarding foreign air transportation contains less of an emphasis than does the domestic portion on the prevention or avoidance of "unreasonable industry concentration,

62. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 3(a), 92 Stat. 1705 (to be codified in 49 U.S.C. § 1302(a)).

63. *Id.* § 3(c) (to be codified in 49 U.S.C. § 1302).

64. *Id.* § 3(b) (to be codified in 49 U.S.C. § 1302).

65. *Id.*

66. *Id.* § 3(a) (to be codified in 49 U.S.C. § 1302(a)).

excessive market domination, and monopoly power . . . ."[67] Additionally, there is basically the same emphasis on competition, but with the use of considerably fewer words. The domestic legislation is cluttered with redundancies,[68] which may nevertheless be determined judicially or administratively to possess inherent and distinctive meaning. In any event, much litigation will likely ensue over the meaning of the 1978 Act's terminology.

Previous caselaw shows that the courts apply a presumption against competition. It is not clear to what extent the current legislation will revise this presumption. If it is concluded that the legislation, contrary to the caselaw, creates a presumption in favor of competition, then cases such as *Continental Air Lines, Inc. v. CAB*[69] and *Big Bear Cartage, Inc. v. Air Cargo, Inc.*,[70] would no longer appear to be dispositive, at least as far as their holdings that there is no presumption in favor of competition. Even if a presumption favoring competition is invoked, it can be rebutted by showing, at least in the international area, that the questioned practice is unreasonable; is unjustly discriminatory; creates undue preferences or advantages; is unfair or destructive; does not contribute to the sound development of air transportation adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, or of the national defense; does not promote air safety; does not promote sound economic conditions in air transportation; does not improve relations between air carriers; does not coordinate transportation by air carriers; and does not promote, encourage, and develop civil aeronautics.[71]

It should not be concluded that even if such a presumption of competition has preeminence in the domestic area that it should also prevail in the foreign air circumstance. Foreign policy, at least at present, requires nations to agree upon a common course to meet problems. Competition is not the only consideration internationally. That is not to say that negotiations should not attempt to create conditions in which legitimate competition can exist. Unfortunately, the present international climate does not allow competition to predominate.[72]

Aside from pure economic regulation, entry into international air carriage must be "*required* by the public convenience and necessity" before a

67. *Id. See generally* Keyes, *Notes on the History of Federal Regulation of Airline Mergers*, 37 J. AIR L. & COM. 357 (1971).

68. *Compare* Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 3(a), 92 Stat. 1705 *with id.* § 3(b).

69. 519 F.2d 944 (D.C. Cir. 1975), *cert. denied* 424 U.S. 958 (1975).

70. 419 F. Supp. 982 (D. Ill. 1976).

71. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 3(c), 92 Stat. 1705 (to be codified in 49 U.S.C. § 1302). *See also* Transcontinental Bus System, Inc. v. CAB, 383 F.2d 466 (5th Cir. 1967), *cert. denied* 390 U.S. 920 (1967); Pacific Northern Airlines v. Alaska Airlines, 12 Alaska 65, 80 F. Supp. 592 (1948).

72. J. FRIEDMAN, A NEW AIR TRANSPORT POLICY FOR THE NORTH ATLANTIC 21 (1976).

certificate can be issued to a U.S. carrier.[73] In the domestic sector, such transportation must be merely "*consistent* with the public convenience and necessity . . . ."[74] Thus, the burden under the new law is much greater for a U.S. carrier to prove that it is "required" to enter the foreign market than for it to enter the domestic or overseas market. Although the present administration and the CAB are favorably disposed to freedom of entry into foreign markets, this statute, under less favorable views, could be used to deny entry. Also, this provision favors existing U.S. international carriers by preserving current foreign markets at least for the short term. At the same time, non-U.S. carriers are not required to meet the onerous "required by the public convenience and necessity" order of proof before permits are issued to them.[75] Thus, even currently certificated U.S. international carriers will ultimately suffer due to these differing legal standards of treatment. Realism requires that foreign policy interests be considered in international air traffic; however, it does not appear to be in the best interests of the United States, from both a competitive and foreign policy viewpoint, to impose this additional impediment on U.S. carriers and not on foreign carriers. This disparate standard forces the CAB to discriminate against U.S. carriers in favor of foreign citizens and current international carriers.

U.S. carriers operating in foreign transportation have been subjected to a variety of "discriminatory and unfair competitive practices in their competition with foreign air carriers."[76] Under the International Air Transportation

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73. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 8, 92 Stat. 1705 (to be codified in 49 U.S.C. § 1371(d)(1)(B)) (emphasis added). *See, e.g.*, Pan American-Grace Airways, Inc. v. CAB, 342 F.2d 905 (D.C. Cir. 1964), *cert. denied* 380 U.S. 934 (1964). However, the "public interest" involved in an obligation under a bilateral agreement between sovereigns cannot be equated with the "public convenience and necessity" which is the criterion for granting air routes to domestic carriers.

74. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 8, 92 Stat. 1705 (to be codified in 49 U.S.C. § 1371(d)(1)(A), (B)) (emphasis added).

75. 49 U.S.C. § 1372 (1976), which pertains to permits to non-U.S. citizen foreign air carriers, provides:

> The [CAB] is empowered to issue such a permit if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the [CAB] hereunder, and that such transportation will be in the public interest.

See generally Whitney, *Integrity of Agency Judicial Process Under the Federal Aviation Act: The Special Problem Posed By International Route Awards*, 14 WM. & MARY L. REV. 787 (1973).

76. 49 U.S.C. § 1159b (1976). Airport user fees are weighted against transatlantic traffic. Great Britain adds on a 15% return in order to provide it a profit. Considering the fact that the British government owns British Airways, its major airline, this fee appears to be particularly discriminatory. In 1974, TWA was charged $4.5 million at Heathrow airport for landing fees, parking charges, and terminal traffic control. In 1978, that charge is estimated to be approximately $7 million. Enroute navigational charges, which are not assessed by the U.S., have been increased 300% by the British. *Senate Aviation Hearings-1977*, *supra* note 55, at 25 (statement of C.E. Meyer, Jr., president, Trans World Airlines).

Fair Competitive Practices Act of 1974,[77] the Congress has required the Department of State, the Department of the Treasury, the Department of Transportation, the CAB, and other departments or agencies to review these practices and to "take all appropriate actions within [their] jurisdiction to eliminate . . . discrimination or unfair competitive practices . . . ."[78]

During the latest reported year, the CAB notified Congress, as required by 49 U.S.C. § 1159b(c), of complaints of discriminatory and unfair competitive practices on the part of twenty-one foreign jurisdictions against U.S. carriers.[79] Little was accomplished in response to the complaints due to the inertia of foreign bureaucracies. What is surprising, however, is that there was little action taken other than note passing even in some cases which warranted retaliatory action. For example, an unfavorable competitive position is imposed on Pan American vis-à-vis Aeroflot, the Soviet airline, due to currency and ticketing restrictions imposed by the Soviet Union. Civil negotiations, at the time of the latest report to Congress, had proved unproductive.[80]

In an effort to strengthen U.S. international carriers, the CAB had prior to the 1978 Act granted authority to these carriers to carry domestic passengers on some domestic legs of their foreign flights.[81] In addition, Congress has enacted a broadening of this right by allowing such carriers to transport persons, property, and mail between domestic U.S. points.[82] This legislation will enable Pan American in particular, and other U.S. international carriers in general, to benefit from the additional revenues these domestic passengers and cargoes will provide in filling up previously wasted space. Additionally, travelers will benefit from the anticipated lower fares.

Probably the most significant feature of the 1978 Act is the provision for eventual transfer, on January 1, 1985, of CAB authority over foreign air transportation to the Department of Transportation. The statute provides that this power will be exercised by DOT in "consultation" with the Depart-

77. 49 U.S.C. § 1159b (1976).

78. *Id.*

79. [1977] CAB ANN. REP. 102-12. Complaints were lodged in fiscal year 1976 against the following countries: Argentina, Australia, Brazil, Canada, Chile, Columbia, Egypt, Federal Republic of Germany, Greece, India, Indonesia, Iran, Italy, Japan, Mexico, Philippines, Poland, Singapore, United Kingdom, U.S.S.R., and Venezuela.

80. *Id.* at 107. Pan American announced on Oct. 25, 1978 that it had cancelled its flight no. 67 from Moscow. WGMS Radio, Wash., D.C., Oct. 25, 1978. Another example is that although Hungary had agreed, in 1975, to act as the sales agent for the U.S. designated airline, Hungary had made not one sale for the U.S. airline even though the U.S. airline had operated out of Budapest during the two years in which no sale had been made. *See* note from the U.S. Embassy to the Hungarian Ministry of Foreign Affairs, May 24, 1977, T.I.A.S. No. 8617.

81. *See, e.g.*, CAB Orders 78-7-96, 103, 104 in CAB MONTHLY REPORT, (Aug. 1978, at 6).

82. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 11, 92 Stat. 1705 (to be codified in 49 U.S.C. § 1371(d)(6)).

ment of State.[83] One unanswered question is how the DOT will administer its responsibility and authority. It is likely that many of the employees and officers of the CAB will move to the DOT and that, in some respects, the DOT will function much as did the CAB. Close study of the 1978 Act reveals that the DOT will apparently receive considerable authority in regard to foreign air transportation, such as: (1) issuing certificates to U.S. carriers for foreign scheduled and charter air transportation for both permanent and temporary transportation based on the DOT determination that the carrier is "fit, willing and able" to perform such transportation and that the service is required;[84] (2) designating terminal and intermediate points where it is deemed practicable;[85] (3) attaching "closed-door restrictions" to certificates;[86] (4) granting permits subject to Presidential approval to noncitizen foreign air carriers;[87] (5) rejecting tariffs;[88] (6) transportation of mail,[89] and (7) other statutory duties of the CAB.[90] Significantly, most of the domestic regulatory schemata concerning interstate and overseas air transportation are phased out in the time period between 1979 and 1985 while being retained in the foreign arena. One major easing of restrictions in foreign air transportation is that U.S. international charter carriers will not be barred by statute from carrying foreign charter pssengers on the same flight with scheduled passengers.[91] By January 1981 charter certificate holders may

83. *Id.* § 40(a) (to be codified in 49 U.S.C. § 1551).

84. *Id.* § 8 (to be codified in 49 U.S.C. § 1371(d)(1)(B), (2)(B), (3)(B).

85. *Id.* § 40(a) (to be codified in 49 U.S.C. § 1551).

86. *Id.* § 16 (to be codified in 49 U.S.C. § 1371(e)(7)). Closed door restrictions are defined as "any condition attached to a certificate to provide *interstate or overseas* air transportation . . . which prohibits such air carrier from providing local passenger service between any pair of points between which it is authorized to operate . . . " (emphasis added). This amendment takes away power to impose "closed door restrictions" on such certificates. Since by definition such restrictions are not legal in foreign air transportation, international carriers must file to remove such restrictions. If competition is truly desired, "close door restrictions" should not be imposed on U.S. international carriers except where exigent circumstances such as bilateral or multilateral agreements require them.

87. *Id.* § 40(a) (to be codified in 49 U.S.C. § 1551).

88. *Id.*

89. *Id.* The 1978 Act does not make clear how much the Postal Service is to participate with the DOT in this area. The Sunset Provisions (Title XVI of the Act, providing for transfer of CAB authority) are ambiguous and any of the following propositions could be argued: (1) the DOT has the complete authority, (2) the Postal Service has the complete authority, or (3) both share the authority in some undefined manner. The question results because section 40(a) of the 1978 Act gives the authority of the CAB to the Postal Service only with respect to "interstate and overseas air transportation." Both are domestic types of air transportation. 49 U.S.C. § 1301(21) (1976).

90. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 40(a), 92 Stat. 1705 (to be codified in 49 U.S.C. § 1551).

91. *See id.*, § 20. The reader is reminded that "overseas" and "foreign" are not the same. The omission of this provision with regard to foreign transportation appears significant. In any event, even overseas or domestic charter flights will not be limited by this restriction after 1981. *Id.*, at § 40(a).

sell or offer for sale individual tickets for an inclusive tour directly or indirectly to the general public. This is something the Air Charter Tour Operators of America have opposed on the ground that a charter- or airline-controlled tour operator is anticompetitive.[92]

The legislation, although purporting to give all the authority of the CAB to the DOT, recites in a subsequent provision that the authority of the CAB relating to foreign air pooling and other anticompetitive-type practices is transferred to the Justice Department.[93]

The provisions of the 1978 Act relating to pooling and similar anticompetitive agreements require approval by the CAB of any agreement affecting foreign air transportation.[94]

Pooling agreements may be to the benefit of the U.S. in the international sphere especially where without such agreements a U.S. carrier would withdraw from a route leaving only foreign carriers to serve it. Pan American ended its Moscow-New York service on October 25, 1978, after ten years of unsuccessfully attempting to make a profit. Pan American was barred by diplomatic arrangements from selling its own tickets and was prevented by antitrust regulations from pooling its revenues with Aeroflot, the Soviet airline, even though other foreign airlines flying into the Soviet Union engaged in that practice. Pooling arrangements should be allowed in particular situations where without them the U.S. would lose a market.[95] The CAB is empowered to and should approve such agreements where they are not "adverse" to the public interest.[96]

In contrast, any air carrier entering into an agreement affecting interstate or overseas air transportation is not required to file such agreement before the CAB even though the CAB is required to disapprove such parts which are "adverse to the public interest, or in violation of [the 1978 Act] . . . ."[97] By placing the mandatory filing requirement only on international agreements, the 1978 Act misplaces the emphasis because there are fewer reasons to disapprove such pacts external to the U.S. This requirement connotes that such pacts affecting foreign air commerce are less fa-

92. *Hearings on Int'l Aviation*, *supra* note 38, at 129 (statement of Howard S. Boros, Air Charter Tour Operators of America). *See, e.g.*, Application of Kuoni Travel Ltd., Docket No. 27233 (CAB Order No. 75-11-111, Nov. 26, 1975).

93. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 40(a), 92 Stat. 1705 (to be codified in 49 U.S.C. § 1551).

94. *Id.* § 28(a) (to be codified in 49 U.S.C. § 1382(a)) states that "every carrier *shall* file [memoranda, contracts or agreements] affecting foreign air transportation . . ." (emphasis added). Pooling is a practice that permits companies to combine passenger revenues to equalize income.

95. *See* Wash. Post, Oct. 26, 1978, at F1, col. 4.

96. 49 U.S.C. § 1382(b) (1976).

97. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 28(c), 92 Stat. 1705 (to be codified in 49 U.S.C. § 1382(c)), which states "[any] carrier *may* file with [the CAB] . . . under 49 U.S.C. § 1382(c)(1) . . . but the CAB *shall* disapprove any [such pact] . . ." (emphasis added).

vored than are domestic pacts when the reverse is implied by other provisions of the 1978 Act.[98]

A third transfer of authority from the CAB concerns mail rates in foreign air transportation. The transfer will be to the DOT since the statute specifically empowers the Postal Service to exercise authority only over interstate and overseas air transportation.[99] It is not clear why Congress apparently gave the mail rate power over foreign air transportation to the DOT.[100] It may have been an unintentional omission to exempt mail in foreign air transportation as a Postal Service responsibility especially since the DOT presumably has no particular expertise in postal rate negotiations or competitive bidding. Since the Postal Service currently has developed the procedures and organization to implement the law[101] concerning interstate, overseas and foreign airmail transportation, it would be wasteful and duplicative to require the DOT to set up an organization and procedures for only the foreign sector.[102] Since the Secretary of State and the Postal Service currently negotiate with the Universal Postal Union and foreign countries concerning mail rates, it would be preferable not to inject another government agency into the process.[103]

Congress recognized the revolutionary aspects of the 1978 Act and thoughtfully gave itself an opportunity for retrenchment or revision by requiring periodic assessments and reports by the CAB during a series of dates up through January 1, 1984.[104] The CAB is required to assess items pertinent to international air commerce, such as competition, pricing, agreements affecting the degree of competition within the industry, the degree to which the administrative process has been expedited under the 1978 Act, the degree to which beneficial or detrimental changes have been made upon the traveling and shipping public, Postal Service, national defense, and air carriers, the impact upon the United States-flag foreign air transportation system, and a comparative analysis of procedures in regard to Presidential approval or disapproval of foreign air routes under 49 U.S.C. § 1461 as amended by the 1978 Act.

Additionally, the CAB must provide the Congress with a "detailed

98. *Compare* 49 U.S.C. § 1302(a) (1976) *with* Airline Deregulaton Act of 1978, Pub. L. No. 95-504, § 3, 92 Stat. 1705 (to be codified in 49 U.S.C. § 1302(c)).

99. *Id.* § 40(a) (to be codified in 49 U.S.C. § 1551).

100. *See* CONFERENCE REPORT, *supra* note 61, at 120. The conference report states simply that the "CAB's authority to set mail rates is transferred to the Postal Service."

101. 49 U.S.C. § 1375 (1976).

102. The Postal Service could consult with the Department of State just as easily as can the DOT. Thus, where negotiations are required with foreign governments, the Postal Service, which is familiar with the requirements of mail handling, would be the logical choice rather than the DOT.

103. *See* 49 U.S.C. § 1376(h)(3) (1976).

104. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 40(a), 92 Stat. 1705 (to be codified in 49 U.S.C. § 1551).

opinion" as to whether the public interest requires continuation of the CAB beyond its currently scheduled termination in 1985. If the CAB concludes that it should continue to exist, then "detailed recommendations" concerning revisions to the 1978 Act are required by Congress in order to insure "continued improvement of the United States air transportation system." Finally, there are listed a number of procedural elements outlining how the CAB should prepare its submission of the comprehensive review.

It is hoped that before 1985 there will be clarification of how transfer of authority under the 1978 Act will take place, exactly what authority will be transferred, which agency or agencies will wield it, and, procedurally, how airlines and consumers will obtain administrative relief from problems that arise. Nevertheless, the 1978 Act is a good beginning toward fostering the goals of the U.S., and Congress is apparently prepared to revise its method in reaching those goals should conditions so require.

III. Foreign Policy Aspects of Air Transportation

As previously discussed, the current political climate dictates that competition be a paramount aim to the extent compatible with the public interest. An additional element generally not considered in regard to interstate or overseas air transportation is that of foreign policy. The President's power and critical role in this regard has been discussed above,[105] and the CAB's limited control over suspension and rejection of rates in international air transportation has been examined. Because of these limitations, the manner in which routes, capacity, and other economic aspects have been decided is through the use of bilateral and multilateral agreements along with IATA agreements. The Bermuda I-type agreement is still the basic agreement between the U.S. and foreign governments even though the Bermuda II agreement has supplanted the original Bermuda I agreement between the United States and the United Kingdom.

A review of statements of international air transportation policies by Presidents during the 1970's reveals that competition among and between U.S. carriers and foreign carriers has been the primary goal. For example, competition,

> tends to improve the quality and variety of service to the public, keeps prices reasonable, and enlarges the market for all carriers. The United States should maintain a flexible policy on certificating competition among U.S. carriers on international routes. The policy should also distinguish between point to point competition of U.S. carriers and services to a particular foreign country from different sections of the United States. Within this framework, there may be future route possibilities for new U.S. carriers, as well as the present ones. U.S. carriers should adequately serve their certificated routes and every effort should be made to improve U.S. carrier competitive performance vis-a-vis for-

105. *See* text accompanying note 35 *supra*.

eign carriers.[106]

The U.S. policy for the conduct of international air transportation negotiations has translated goals into negotiating objectives which, although sketchy, provide the negotiator with at least an articulated objective. These objectives will presumably be presented in negotiations as an integrated U.S. position, but it must be recognized that this policy cannot be implemented unilaterally and must be achieved within the international framework:

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 service, and
7. flexibility to permit the development and facilitation of competitive air cargo services.[107]

The latest policy statement was issued partially in response to outrage voiced by carriers, consumers, shippers, and Congress over the Bermuda II agreement. This statement was an effort to tell foreign governments that the U.S. would not be using the Bermuda II agreement as the new model. However, it must be noted that policy statements do not have the binding effect of legislation.

Specifically, Bermunda II did the following:

1. It imposed a restriction on the number of U.S. flag carriers that the U.S. could designate in United Kingdom markets.
2. It established a mechanism that allowed the British government to control increases in frequency—and thus capacity—on the North Atlantic.
3. It sharply limited the beyond points to which U.S. airlines could carry United Kingdom fill-up traffic, including stopover or interline connecting traffic, although the loss of these rights was partially offset by allowing U.S. airlines to carry online passengers to any beyond points.
4. It provided for specific frequency restrictions on certain operations in the Pacific and in round-the-world operations.

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106. International Air Transportation Policy, 6 WEEKLY COMP. OF PRES. DOC. 804 (June 22, 1970). For earlier policy issues *see generally* Ryan, *Policy Issues in International Air Transportation*, 16 GEO. WASH. L. REV. 443 (1948).

107. Briefing by President Carter, United States Policy for the Conduct of International Air Tranportation Negotiations (Aug. 21, 1978) (press release, Office of the White House Press Secretary).

5. It prohibited nonstop service from a number of U.S. cities.
6. It restricted the ability of carriers to change schedules to meet public demand.[108]

This agreement represents a substantial departure from the kind of system envisioned by Congress and generally incorporated into other bilateral agreements. President Carter intially lauded the Bermuda II agreement as being "consistent with [the] objective [of] healthy economic competition among all air carriers . . . [and its] quality, its fairness, and its benefits to the consumer and to the airlines should make it last as long as the original 1946 Bermuda agreement."[109] However, the President later impliedly denounced the Bermuda II agreement in a letter to the Honorable Griffin Bell as Bell was preparing to negotiate with the Japanese, who are extremely protective of their carriers and restrictive in regard to other countries' carriers:

> We should seek international aviation agreements that permit low-fare innovations in scheduled service, expanded and liberalized charter operations, nonstop international service, and competition among multiple U.S. carriers in markets of sufficient size. We should also avoid government restrictions on airline capacity. While keeping in mind the importance of a healthy U.S. flag carrier industry, we should be bold in granting liberal and expanded access to foreign carriers in the United States in exchange for equally valuable benefits we receive from those countries. Our policy should be to trade opportunities rather than restrictions.[110]

Notwithstanding the rhetoric, at least one principal question remains unanswered. Who should be responsible for making, carrying out, and reviewing international aviation policy? The Bermuda II negotiations displayed serious defects in the organization of the U.S. negotiating team, the advice which it received from its advisors, and its actual negotiations with the other government. Alan S. Boyd was detailed as a special ambassador on a short-term basis for the negotiations. Such a practice "is an aberration and should be seen as such."[111] Generally, such a procedure should be avoided since it can lead to agreements at odds with the overall U.S. policy. Additionally, there were key affected parties, such as the airport operators and charter operators, who were not regularly consulted. As a result, many of the U.S. proposals were "inconsistent with, or contradictory to, existing legal, contractual, historical and practical circumstances. . . ."[112] As a

108. *See generally*, Bermuda II, *supra* note 2.
109. *Hearings on Int'l Aviation*, *supra* note 38, at 84.
110. *Id.* at 42-43.
111. *Id.* at 74.
112. *Id.* at 55-58, 32-43. The Airport Operators Council International, Inc. adopted the following in response to the Bermuda II negotiations:

> Policies to be advocated by the U.S. government in bilateral air services agreement negotiations with other governments should only be developed after consultation with AOCI to ensure proper recognition of U.S. airport operator interests. Consultation on policies involving airport user charges and other operational considerations affecting airport eco-

consequence, Bermuda II may be viewed as creating the potential for the following situations:

1. The restrictions on capacity and number of U.S. carriers able to serve particular pairs of cities constitute a serious reduction in U.S. carrier competitive opportunities which will seriously deteriorate service and market development.
2. Bermuda II may induce other countries to pressure the U.S. to negotiate agreements with them on similar terms.
3. The agreement will decrease U.S. flag carriers' market share with associated U.S. balance of payments consequences.[113]

Although it is too early to discover whether the ultimate effect of Bermuda II will be detrimental, the U.S. has recently concluded agreements which have been heralded as "significantly [expanding] the opportunities for low-fare competitive services, both scheduled and charter . . . ."[114] As an example, the Netherlands agreement generally provides that fares and rates for traffic moving from one country to the other on scheduled air services are subject to the sole control of the first country. The belief is that since presumably there will be a minimum of governmental interference, the "free play of normal market forces [will be] to the benefit of the consumer."[115]

It is significant that these agreements have been negotiated with small countries who have much to gain from expanded opportunities in serving the U.S. with its vastly greater traffic potential and multiple gateways.[116]

In an effort to demonstrate to European nations that airline competition can work in international markets, the CAB recently granted scheduled flight authority to two charter and two scheduled airlines to fly between several U.S. cities and Belgium and Amsterdam.[117] There is no doubt that all other countries will be watching this experiment to see if it might benefit

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nomics is essential, since such policies must be consistent with existing statutes, precedents, contracts, bond ordinances and longstanding practices relating to user charges at U.S. airports.

113. *Senate Aviation Hearings-1977*, *supra* note 55, at 104 (statement of M. Straszheim). *Compare* Bermuda II *with* Diamond, *Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, 41 J. AIR L. & COM. 419 (1975).

114. *See, e.g.*, Dep't of State Press Release No. 142, U.S., Netherlands Sign Aviation Agreement, (March 31, 1978) [hereinafter cited as Netherlands' Press Release]; Dep't of State Press Release No. 333, U.S., Israel Sign Air Transport Agreement, (August 16, 1978) (may be obtained from Office of Press Relations, Dep't of State, Washington D.C. 20520).

115. Netherlands' Press Release, *supra* note 114.

116. As an example, the U.S. will have the right to serve Amsterdam and points beyond, while the Netherlands will be able to serve New York, Chicago, Houston, Los Angeles and another point to be selected by the Netherlands. *Id.* Thus, the Netherlands' potential for increasing its share of the traffic market is greatly improved by this agreement while the U.S. appears to gain acceptance of its view that "protectionism and cartelization are anachronisms . . . and are an inefficient way of achieving [its] national aviation objectives." Wash. Post, Sept. 6, 1978, at D1, col. 1.

117. *See id.* The article said that the CAB wanted to show that international competition could work as well as domestic competition. Perhaps the CAB was referring to non-price competition

them. The U.S. must remember in analyzing the results that although competition is desired, such competition must not be accompanied by predatory pricing and other policies which may be instituted by foreign governments on their chosen instruments in an effort to attract a larger share of the market than could be obtained by normal competition.

An additional area of conflict concerns which agency should have primary responsibility for negotiating international air agreements. The recent negotiating team has consisted of a head negotiator from the Department of State, and others from the CAB and DOT.[118] S.3363 would modify this by establishing within the office of the President an Office of International Aviation Negotiations headed by a Director and Chief Negotiator [hereinafter Director] who would be appointed by the President with the advice and consent of the Senate.[119] The Director would have the rank of ambassador, thereby avoiding the problem of disparate ranks which forced the President to appoint a special ambassador to the Bermuda II negotiations.[120]

Assisting the Director would be special counsels appointed by the CAB, the DOT and the Secretary of State. These four parties would be collectively known as the Aviation Policy Committee and would be responsible for formulating a U.S. international air transportation policy which shall "[emphasize] the greatest degree of competition that is compatible with a well-functioning international air transportation system."[121]

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because until recently no price competition existed. Additionally, it is too early to say that domestic competition is working.

118. *Hearing on Int'l Aviation*, *supra* note 38, at 23.

119. S.3363, 95th Cong., 2d Sess. § 9 (1978).

120. There were conflicts between agencies within the U.S. delegation and, in fact, within one agency. Joel Biller, chairman of the U.S. delegation, was in the unfortunate position of being outranked on the delegation. Those who considered this situation felt that because of the personality conflicts that developed, it would be impossible to hope to reach a reasonable agreement with the then head of the British delegation, and that the only way to effect a change in the constitution of the U.K. delegation was to bring about a change in the constitution of the U.S. delegation. *Hearing on Int'l Aviation*, *supra* note 38, at 75.

121. S.3363, *supra* note 119, § 9(g), (h). The proposed statute sets forth the following goals:

(1) freedom of air carriers and foreign air carriers to offer fares and rates which correspond with consumer demand;
(2) the fewest possible restrictions on charter air transportation;
(3) 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;
(4) the elimination of operational restrictions to the greatest extent possible;
(5) the integration of domestic and international air transportation;
(6) an increase in the number of non-stop United States gateway cities;
(7) 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 and the traveling public with permanent linkage between rights granted and rights given away; and
(8) the elimination of discrimination and unfair user fees, unreasonable ground handling requirements, undue restrictions on operations, prohibitions against change of gauge, and similar restrictive practices.

Since Congress has the power under the Constitution to "regulate . . . foreign commerce,"[122] S.3363 has provided a means for exercise of this power. In order to insure Congressional oversight, at least one member of each House of Congress can attend international negotiations.[123] This provision is apparently an effort to counteract the thirty-year policy of precluding the Senate from considering executive agreements in international aviation,[124] and it reflects a renewed interest by the Congress in such negotiations.

The Aviation Policy Committee is obligated under S.3363 to "consult on a regular basis" with the International Aviation Advisory Council, which is composed of interested groups, and to "advise the Aviation Policy Committee on both broad policy goals and individual negotiations . . . ."[125]

International aviation involves mixed questions of foreign policy and interstate and foreign commerce. Both the President and the Congress share responsibility within the Constitutional framework. Conflicts will arise as to whether the President or the Congress has usurped prerogatives not within the ambit of the asserting party. The Congress has sent a message to the President, in the form of the 1978 Act and S.3363, that his powers will be limited at least to foreign policy and defense considerations and that the Congress plans to play a more active role in regulating foreign commerce. If

122. *See* U.S. CONST. art I, § 8; United States v. Guy W. Capps, Inc., 204 F.2d 655, 659 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

123. S.3363, *supra* note 119, § 9(i).

124. In the immediate post-war era, the International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693, E.A.S. No. 487, which grants overflight and landing rights in scheduled service for non-traffic purposes, was submitted as a treaty and was ratified by the Senate. The Senate also ratified the Convention on International Civil Aviation (the Chicago Convention), Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, which grants rights of non-scheduled flights for both traffic and non-traffic purposes. Both before and after this period, the following aviation agreements were submitted to the Senate: Convention on International Air Transportation (Warsaw Convention) June 27, 1934, 49 Stat. 3000; Hijacking Convention, Oct. 18, 1971, 22 U.S.T. 1641, T.I.A.S. No. 7192; Sabotage Convention, Feb. 28, 1973, 24 U.S.T. 564, T.I.A.S. No. 7570; Convention on the International Recognition of Rights in Aircraft, Aug. 30, 1949, 4 U.S.T. 1830, T.I.A.S. No. 2847.

Pending in the Senate Foreign Relations Committee presently are Montreal Protocols 3 and 4 of 1975, which would incorporate the Guatemala City Protocol to the Warsaw Convention pertaining to liability of the carrier for damages to international passengers.

When President Truman submitted the Chicago Convention to the Senate for ratification, his accompanying message acknowledged that other civil aviation agreements—including Bermuda I—had been consummated "under authority vested in me" but without submission to the Senate for ratification. International Civil Aviation Conference, message from the President, 92 CONG. REC. 6661-62 (1946).

125. S.3363, *supra* note 119, § 9(G). "[These groups] shall include representatives of the President's Domestic Council, the Department of Commerce, the Department of Defense, airport operators, scheduled air carriers, charter air carriers, airline labor, consumer interest groups, travel agents and tour organizers, and any other groups, institutions, or interest groups which the Director deems appropriate."

Congress intends to play this part, the first step should be for it to enact clear legislation setting forth the goals to be achieved in international air commerce. S.3363 does this. Additionally, Congress should be consulted before negotiations begin and observers should attend these negotiations on a regular basis. Although the Congress desires to be consulted, the Senate may require that it ratify any executive agreement, especially if another agreement similar to Bermuda II results. However, the President's responsibility for foreign policy and national defense must be given deference by the Senate and the Courts in order to preserve the delicate balance between the branches of government. Foreign policy will contain economic elements which are inseparably intertwined and a recognition of that fact must exist. It is legally permissible for the Congress to deny the President the right to consider economics solely without regard to foreign policy, but the Congress cannot deprive the President of the right to consider the economic implications of foreign policy.

IV. Other Considerations Affecting Foreign Policy

The Bermuda I-type bilaterals have relied on IATA to perform ratemaking functions since 1946. The IATA arrangement has been accepted largely because, until 1972, the CAB claimed that this arrangement was "the only opportunity available to it under existing legislation."[126] Since 1972, the CAB has had the power to suspend and reject international fares.[127] In 1978, after urging by the U.S. Department of Justice, the CAB began an appraisal of IATA carrier agreements when it issued an Order to Show Cause why the CAB should continue to approve such agreements.[128]

One of the reasons that the CAB had approved previous agreements even though it disagreed with them was an effort "to avoid an open rate situation."[129] "Open rate" is the term used for a situation where there is no agreement on rates, and the CAB feared that the result could be "an intergovernmental confrontation which could lead to a cessation of air services."[130]

An illustration of a recent potential "open rate" situation occurred in mid-1972 which eighteen IATA North Atlantic carriers could not reach a consensus on revised fares, and intergovernmental consultations similarly did not result in an accommodation generally acceptable to all govern-

126. IATA Traffic Conference Resolution, 6 C.A.B. 639, 645 (1946).
127. 49 U.S.C. § 1482(j) (1976).
128. Agreements Adopted by the Int'l Air Transport Ass'n Relating to the Traffic Conference, Docket No. 32851 (CAB Order 78-6-78, June 9, 1978).
129. *See* CAB Order 73-4-64 at 4-5, (filed Apr. 13, 1973), 38 Fed. Reg. 10127 (1973).
130. *Id.*

ments.[131] As a result, major foreign carriers filed individual tariffs reflecting the sharp fundamental disagreement on scheduled airline rate policy which had stalemated the multilateral negotiations. Because these tariffs were unacceptable to the CAB, it exercised its newly-granted statutory power[132] to suspend the tariffs, finding that they bore little or no relationship to cost and would have a deleterious effect on carrier yield. Consequently, tariffs filed by Pan American, TWA and National were protested and rejected by several European governments pursuant to their respective bilateral agreements with the U.S. After consultation with the foreign governments, the CAB concluded that no agreement was possible and the failure of the CAB to approve the IATA carriers' agreement to extend the *status quo* through 1973 would create an unacceptable condition.[133] The CAB then approved the North Atlantic rate ageements, dismissed a complaint against the fare structure and declined to institute an investigation into the rate structure of North Atlantic air fares. As a result, a petition was brought by users of transatlantic air services who were connected with the Aviation Consumer Action Project.[134] The Court which reviewed the CAB action held that vague and unsubstantiated CAB fears anticipating chaos resulting from an open rate situation were insufficient to warrant automatic approval of unjustified IATA price hikes.[135] The holding of the Court was based on the lack of "substantial evidence" that an "open rate" situation could cause significant harm to support the CAB order.[136] Also, the Court felt that if the CAB's decision was adverse to foreign policy, the President could act under 49 U.S.C. § 1461 to set aside the CAB's suspension of any foreign airline's tariffs or landing rights in the United States.[137]

A more recent case reflects the authority of the CAB to issue directives in respect to conduct of foreign nations in a foreign country, where such

131. *Id.* at 3.

132. 49 U.S.C. § 1482(j) (1976).

133. *Id. See also* Pillai v. CAB, 485 F.2d 1018 (D.C. Cir. 1973). *See generally* 47 TEMP. L.Q. 620 (1974).

134. A non-profit public interest group formed by Ralph Nader.

135. *See* Pillai v. CAB, 485 F.2d 1018 (D.C. Cir. 1973).

136. In the year 1972, 582,411 United States citizens flew United Kingdom aircraft across the North Atlantic; U.S. passengers on the airlines of Germany, France, the Netherlands, Italy and Switzerland in the North Atlantic ranged from 364,803 to 214,520 passengers each. Two-thirds of the passengers on all eighteen carriers on the North Atlantic route are U.S. citizens. In these foreign countries the stake of the tourist industry—hotels, restaurants, bus and tour services, etc.—in addition to the U.S. passengers carried by their national airlines, is enormous.

Id. at 1024.

137. Bilateral negotiations might well be preferable from the United States' point of view. Along any single given route, the net amount of tourist travel and spending flows from the U.S. to the foreign country. In addition, the overall importance of foreign tourist dollars probably in each instance represents a much greater percentage in the economy of the foreign country than in the U.S.

conduct impinges upon commerce to or from the United States.[138] In *Civil Aeronautics Board v. British Airways Board*,[139] the suit arose when the United Kingdom Civil Aviation Authority (CAA), the equivalent of our CAB, directed British Airways to charge certain rates notwithstanding the CAB's suspension of the rates. British Airways argued that the Federal Aviation Act should not be construed to apply extraterritorially to the charging of rates "in Britain by British Airways at the direction of the British Government . . . ."[140] It also argued alternatively that international law precluded the U.S. court "from enjoining conduct of foreign nationals in a foreign country which is required by the foreign sovereign."[141] Superficially, it appears that British Airways had been given a "Hobson's choice" of either charging rates not approved by the CAB or of violating the directive of the British CAA. However, since British Airways is an instrumentality of the British government there was a unity of interest and not simply a situation of a private independent carrier being ordered to do something by its government. The U.S. District Court judge ruled that the British CAA directive could not "relieve British Airways from the generally recognized rule that one wishing to take advantage of the facilities of the United States commerce 'must be willing to comply fully with United States law.' "[142] It is thus clear that Congress could delegate, under the Commerce Clause,[143] to the CAB, power to make extraterritorial application of the Federal Aviation Act.[144]

These CAB powers of course do not extend to control of U.S. airlines landing or traversing a foreign country to the extent that foreign law governs.[145] The case points out the difficulties inherent in international aviation

138. This principle is well recognized. *See, e.g.*, Deutsche Lufthansa Aktiengesellschaft v. CAB, 479 F.2d 912 (D.C. Clr. 1973).

139. 433 F. Supp. 1379 (S.D.N.Y. 1977). The CAB had rejected the British tariffs which proposed lower, discount rates in certain circumstances. Among other reasons given, the CAB stated that the tariffs violated its "seven cities" order which determined that a system of add-on charges to New York rates was an improper mode of arriving at rates for shipments destined for other U.S. cities. The CAB preferred a system of mileage-related charges which was designed to avoid shipper discrimination against certain less economical destination cities from the point of view of overall transportation costs.

140. Brief for Defendant in Opposition to Preliminary Injunction at 23, CAB v. British Airways Bd., 433 F. Supp. 1379 (S.D.N.Y. 1977).

141. *Id.* at 32.

142. CAB v. British Airways Bd., 433 F. Supp. 1379 (S.D.N.Y. 1977). *Accord*, Fontaine v. Sec. & Exch. Comm'n, 259 F. Supp. 880 (D.P.R. 1966).

143. U.S. CONST. art. I, § 8.

144. Deutsche Lufthausa Aktiengesellschaft v. CAB, 479 F.2d 912 (D.C. Cir. 1973). *Cf.* United States v. Pacific & Arctic Co., 228 U.S. 87 (1913) (antitrust case); Armement Deppe, S.A. v. United States, 399 F.2d 794 (5th Cir. 1968), *cert. denied*, 393 U.S. 1094 (1968) (federal admiralty case). For an article dealing with the constitutional considerations, *see generally* 29 OKLAHOMA L. REV. 409 (1976).

145. *See, e.g.*, 14 C.F.R. § 399.12 (1978).

and relations with governing bodies, and it indicates that foreign airlines generally have three options: (1) compliance with the laws of this country; (2) foregoing the pursuit of commerce with the U.S.,[146] or (3) its government can renew diplomatic efforts to achieve a mutually satisfactory agreement.[147] U.S. carriers are faced with the same choices in regard to foreign countries. The meaning of this is clear—foreign diplomacy may be the only practical means to achieve a satisfactory solution to international aviation problems, especially if organizations such as IATA are unable to function.[148]

Conclusion

The United States has long espoused competition under the free enterprise system. In practice, however, U.S. international carriers have operated under the aegis of IATA which has set fares and has been described as a "cartel."[149] Although there has been some justification for this organization to set fares by private agreement which could not be legislated unilaterally, there is now some question whether IATA can continue to act in this manner. The CAB is investigating this IATA function, and if IATA ratemaking does not survive, then the U.S. will be forced into active international ratemaking by negotiation.

U.S. airlines will be competing more openly with foreign airlines. However, foreign airlines in most cases are government-owned or subsidized, so U.S. airlines will have difficulty if foreign governments choose to infuse money into their airlines in a predatory or uneconomical manner in order to drive U.S. carriers out of the market. As U.S. markets are opened to foreign airlines, the domestic consumer will benefit, at least during the short term, from decreased fares and greater availability of flights. Since the U.S. market is the largest in the world in terms of number of air travelers, the U.S. stands to lose its market share to other countries. The result may be a further decrease in U.S. carrier capacity in relation to foreign airlines. The balance of payments will likely be more adversely affected.

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146. *Cf.* First Nat. City Bank of N.Y. v. Internal Revenue Serv., 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1959) (I.R.S. subpoena to produce records of U.S. bank branch in Panama).

147. *Cf.* Kerr Steamship Co. v. United States, 284 F.2d 61 (2d Cir. 1960) (ICC inquiry into secret foreign contracts).

148. The Wall Street Journal reported that the airlines have approved a reorganization of IATA that would allow them to set their own fares. Under the new regulations, which still have to be approved by the respective governments, members will be required to adhere to standards of aircraft safety, baggage processing and interairline financial transactions, but participation in faresetting, called "tariff coordination" by IATA, would be on an optional basis. Wall St. J., Nov. 15, 1978, at 4, col. 3.

149. *Hearings on Int'l Aviation*, *supra* note 38, at 5 (statement of Aviation Consumer Action Project).

In any event, the Airline Deregulation Act of 1978 reflects the current mood that economic regulation over air transportation should be relaxed and that true compeition should prevail. The international market is much different from the domestic market, and true competition will not be possible in the current international arena. In order to avoid complete economic decimation of our private international carriers, close scrutiny must be maintained over this situation to avoid predatory and detrimental practices by foreign governments. At the same time, we must recognize the legitimate aims asserted by other countries. The coming years will show whether international aviation will become a "free enterprise" arena or whether it will be forced to continue to reflect the economics of IATA.