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THE BERMUDA AGREEMENT REVISITED: A LOOK AT THE PAST, PRESENT AND FUTURE OF BILATERAL AIR TRANSPORT AGREEMENTS

BARRY R. DIAMOND*

INTRODUCTION

THE BERMUDA Agreement between the United States and the United Kingdom has governed both countries' policy concerning the exchange of international commercial air traffic rights since its negotiation in 1946. The Bermuda Agreement operates, in the larger context of bilateral air transport agreements (BATA's), and has been present in international civil aviation since the period prior to World War I. The aim of this article is to examine the operation of the Bermuda Agreement, past and present, and to venture some predictions as to its future role in international air transportation.

To achieve this aim the following approach has been adopted. First, the general subject of BATA's is considered, with attention being focused on their background, elements, types, and manner of negotiation. Secondly, the Chicago Convention of 1944, which set the stage for the Bermuda Agreement, is examined. Thirdly, the Bermuda Agreement itself is analyzed. Although the Bermuda Agreement has many different aspects and provisions, the Ber-

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1 Air Services Agreement with the United Kingdom, Feb. 11, 1946, 60 Stat. 1499, T.I.A.S. No. 1507 [hereinafter cited as Bermuda Agreement].

2 "Bilateral air transport agreements" will hereinafter be referred to as BATA's.


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muda capacity principles are perhaps the most important. It is on the capacity principles of the Bermuda Agreement, and the subject of capacity regulation in BATA's in general, that this article will primarily focus. Fourthly, the quest for a multilateral air transport agreement is examined. Fifthly, the problem areas which have arisen under Bermuda-type agreements are explored. Sixthly, attention is focused on the attitude of the United States toward the Bermuda Agreement over the years since 1946. Finally, some speculations on the future of BATA's in general and the Bermuda Agreement in particular are offered.

It is well known that the so-called freedoms of the air are in fact restrictions on aerial activity which must be removed at a price. The Bermuda Agreement was the result of a compromise between the "freedom of the air" U.S. position and the "order in the air" United Kingdom position and never fully removed these restrictions. On a limited and carefully negotiated bilateral basis, the Bermuda Agreement merely suspended them subject to certain conditions with enforcement by ex post facto review of the conduct of the respective airlines by the parties. Thus, the Bermuda Agreement offers not freedom of the air, but only a "liberal" rather than a "protectionist" approach to the subject of capacity control. The real basis in all bilateral negotiations for the exchange of commercial air rights is being economic (subject to such political or strategic considerations as states may wish to bargain for in lieu of economic objectives), the Bermuda Agreement's "liberal" approach means only that the state in question is satisfied to regulate capacity on

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6 See text accompanying note 28 infra.
8 S. Wheatcroft, Air Transport Policy at 73-74 (19—).
the basis of principles which will ensure it an appropriate share of
the market.\textsuperscript{11} While the Bermuda approach does stand in contrast
to approaches based on predetermination schemes, which provide
an ironclad numerical guarantee of the traffic to be carried by each
side, the Bermuda Agreement still falls far short of providing what
has been called "the freedom of the air."\textsuperscript{12} Yet even when capacity
has been regulated on the basis of the Bermuda principles, the in-
crease in the number and employment of restrictions in recent
years\textsuperscript{13} has served to raise the question in the United States whether
the Bermuda capacity principles still represent the best approach
for the United States to take in negotiating BATA's.\textsuperscript{14}

In light of these observations, certain basic questions are raised
from the outset of this inquiry:

(1) Is the Bermuda Agreement immutably the best approach to
BATA's available to the United States?
(2) If not, is there another approach to the exchange of interna-
tional commercial air rights which might prove more advan-
tageous to the United States?
(3) Will the United States be able to maintain the Bermuda ap-
proach to BATA's in the face of growing opposition from other
countries, should it desire to do so?
(4) Is the preservation or overthrow of Bermuda type agreements
even a significant issue any more, given the restrictions which
have crept in?

Answers to these questions are ventured at the conclusion of this
article.

I. Bilateral Agreements

A. Background

The Chicago Convention merely codified existing customary

\textsuperscript{11} S. Wheatcroft, \textit{supra} note 8.
\textsuperscript{12} See, e.g., \textit{The Freedom of the Air, supra} note 9, at 123-28.
\textsuperscript{13} CAB, \textit{Bureau of Int'l Affairs, Restrictive Practices Used by Foreign
\textsuperscript{14} Jones, \textit{The Equation of Aviation Policy, 27 J. Air L. & Com.} 221, 234
international law when it stated that "every state has complete and exclusive sovereignty over the airspace above its territory." Thus "from its beginnings and by its very nature, international aviation has been bound up with fundamental issues of national sovereignty and with international relationships generally." In considering bilateral agreements it is therefore essential to bear in mind the context in which these agreements exist: negotiations between states over granting to each other, mutually and reciprocally, certain rights and privileges on a mutual and reciprocal bilateral basis, in derogation of that most jealously guarded prerogative of states—sovereignty. Not surprisingly, it has been observed that, "[i]n the public law sector, modern international commercial aviation is still in . . . 'the stone age of bilateral negotiations'." The exchange of commercial rights in international air transportation involves more, however, than bilateral agreements.

The regime of law and policy within which world air transport continues to operate and develop is quite complex. It consists of a few multilateral treaties, of a multitude of bilateral agreements and informal arrangements, and of a mass of national laws, regulations and policies. This regime of law and policy rests, however, "on customary international law which includes the principle of national sovereignty in airspace." It should be borne in mind that "all endeavors to weaken this citadel of sovereignty in airspace have failed."

The modern era of BATA's dates from the Chicago Convention of 1944. One of the basic thrusts of the Chicago Convention is Article 6 of the 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 per-

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13 See note 4 supra. See also THE FREEDOM OF THE AIR, supra note 9, at 89; W. Wagner, INTERNATIONAL AIR TRANSPORTATION AS AFFECTED BY STATE SOVEREIGNTY 14-16 (1970).


16 THE FREEDOM OF THE AIR, supra note 9, at 89.

17 Id.


19 Johnson, supra note 16, at 366.
mission or other authorization of that State, and in accordance with
the terms of such permission or authorization.

The International Air Transport Agreement,\(^2\) which was appended
to the Final Act of the Chicago Convention, exchanges traffic rights
(i.e., the third, fourth and fifth freedoms) on a multilateral basis,
but this agreement has “secured only very limited support.”\(^3\) This
limited support has caused most traffic rights to be awarded by a
network of BATA’s through bargaining between states.\(^4\) This bar-
gaining process has been described as follows:

Permission for commercial landings must be obtained for each
airline from all states concerned. This permission is always a matter
of intensive bargaining. Here, prestige and protectionist interests of
the States combine to produce the narrow and unsystematic net-
work of (today’s) bilateral agreements. This method leads to slow
and hard bargaining for each service, and the result is a diversified
and disunified law which is difficult to survey.\(^5\)

Once an agreement is reached, the BATA’s generally bestow
on the contracting parties on a bilateral basis the third, fourth, and
fifth freedoms of the air which they were unable to exchange on
a multilateral basis at Chicago in 1944. These freedoms in the
form of reciprocal rights, particularly as established in the Ber-
muda Agreement between England and the United States, are:

(1) The right of exploitation, by the air companies specified by
each party, of the air services mentioned in the route chart.
(2) The right to embark and disembark international passen-
gers, mail, and cargo at the scheduled stops and over the routes
designated by each country.
(3) ... respect for the principle of equal division of the capability
of competing for the exploitation of the approved services.\(^6\)

There are two further aspects of BATA’s which merit mention.
First, most agreements contain a clause rarely resorted to in prac-

\(^2\) International Civil Aviation Conference, Cmd. 6614 at App. IV, pp. 57-60
(1971).
\(^3\) Yearbook of Air and Space Law, 1965 at 184 (R. Mankiewicz ed. 1965).
Report, supra note 9, at 3.
\(^5\) Rinck, supra note 20, at 109-10.
\(^6\) Pourcelet, The International Elements in Air Transportation, 33 J. Air L.
& Com. 77 (1967). For a brief analysis of the three parts of the Bermuda Agree-
ment, i.e. The Final Act, The Agreement, and the Annex, and the matters therein
contained, see G. Seabrooke, Air Law 113-16 (1964).
tice, providing for an arbitral procedure, or in exceptional cases, recourse to the ICAO Council. Secondly, BATA's and "amendments thereto must be registered with ICAO by its member states under Article 83 of the Chicago Convention."

1. Criticisms of Bilateral Bargaining

While the regime of BATA's in scheduled international air transport is firmly established, it does have its critics. In the imperfect world we live in it is axiomatic that "the system of bilateral bargaining is far from satisfactory." Much of the criticism centers on the fact that BATA's "sectionalize the world and make air transportation both more expensive and less convenient than it should be." Another criticism is that BATA's constitute a "serious problem to international law, as they serve as an instrument of economic discrimination." This criticism is itself vulnerable to the objection that economic discrimination is precisely the point of the exercise in negotiating these agreements.

"[T]he problem is the division of scheduling and capacity in such a manner and in such amounts as might rationalize the operation of an intercontinental airline by any small nation or consortium of small nations which consider it necessary to fly, but are not really capable of competing with the major flying nations." In short, acceptance or rejection of the economic discrimination criticism is much more a matter of whose international civil aviation "ox" is being gored than it is a matter of pure logic. The major criticisms of the framework of BATA's have been

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27 Pourcelet, supra note 26, at 77.
31 P. SAND, supra note 29, at 35.
32 Address by Robert Henri Binder, Assistant Secretary of Transportation for Policy, Plan, and International Affairs, Canadian Air Line Pilots Association Industrial Seminar, Montreal, Canada (June 18, 1975).
33 Geography is another important factor to be taken into account in evaluating the economic discrimination criticism of BATA's. Persons from the Netherlands, for instance, tend to have a remarkably uniform position in support of this criticism. See, e.g., H. WASSENBERGH, 1970, supra note 9, at 50; Goedhuis, supra note 13, at 26-27.
summarized by Lissitzyn. The first of these that he mentions is the restrictive route grants. Secondly, on many routes, BATA's prevent the most efficient air carriers from operating or subject them to rigid limitation making them less economical and useful to the public than would be the case if greater freedom were allowed. Thirdly, the present system perpetuates the existence of inefficient carriers through competitive shield and costly subsidies. Fourthly, an airline is prevented from offering services at the lowest economic costs to the public unless it has the backing of its own government. Finally, the present regime prevents competition from fully playing its role as a stimulus to the reduction of costs and greater efficiency.

2. Justification and Inevitability of Bilateral Bargaining

Lissitzyn has also stated what he feels are "the reasons and justifications for the existence of the present regime." Chief among these is "the policy pursued in varying degrees by most nations of promoting their own air transport enterprises and protecting them in some measure against the competition of foreign, perhaps more efficient, operators." No doubt this is because "there comes a time when states decide that it is foolish to pay subsidies which might be reduced or eliminated by applying restrictions to the capability offered, or the traffic carried, by the foreign competitors of the local subsidized airline."

Praised or damned, there is no alternative to BATA's as a means of regulating scheduled international air transport currently in view. It is almost universally recognized that "[t]oday, in order to foster and regulate the traffic of international airlines, there is no other practical bypass to the deadlock (caused by Article 6 of the Chicago Convention) than the bilateral convention (i.e. agree-

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24 The Freedom of the Air, supra note 9, at 95-97.
25 Id. at 95-96.
26 Id. at 96-97. This problem is further considered in the section entitled "Bermuda Type Agreements in Operation—The Major Problem Areas" infra.
27 Id. at 97.
28 Id. See also Edwards Report, supra note 9, at 3; Wassenbergh, 1962, supra note 13, at 179; Wassenbergh, 1970, supra note 9, at 17; Rinck, supra note 20, at 108; Stoffel, supra note 13, at 129.
29 Stoffel, supra note 13, at 129. For Lissitzyn's other reasons and justifications for the present regime of BATA's see The Freedom of the Air, supra note 9, at 97-99.
In considering the alternative approaches, Professor Thornton has remarked, "If the free-market approach is not acceptable and multilateral approaches are not practicable, there seems to be no other way to secure international air travel than by bilateral agreement." Even the most futuristic predictions as to international air transport regulation allocate the dominant role to BATA's. Thus,

The long-range outlook for the exchange of air traffic rights internationally may be that a limited number of services will be internationalized on a global scale; a somewhat greater number of services will be internationalized on a regional basis and the not inconsiderable remaining international services will be founded on a network of bilateral air transport agreements. That could occur by the beginning of the next century.

B. Elements

There are two basic elements in all BATA's:

(1) An exchange between the two contracting parties of rights and privileges for scheduled air services by their airlines, and

(2) A system of regulatory devices for regulating the rights that are granted.

The rights to be granted are of four types:

(1) The promise by the grantor states to grant to specific airlines of the grantee states an operating permission;

(2) The confirmation of transit rights;

(3) The conferral of traffic rights; and,

(4) The conferral of auxiliary privileges to facilitate the above granted rights.

The regulatory measures likewise fall into four categories:

(1) Designation of an airline by the grantee state and the granting of an operating permit by the grantor state;

(2) Route control;

(3) Capacity regulation; and,

(4) The tariff.

40 J. VERPLAETSE, INTERNATIONAL LAW IN VERTICAL SPACE 33 (19 —).
41 R. THORNTON, supra note 10, at 33-34.
42 Fitzgerald, supra note 24, at 272.
44 Class Notes, supra note 43 (March 6, 1974).
Thus,

it may be said that every international air agreement now in force, and every plan proposed, involves one or more of the following factors: routes, privileges (accord to an air carrier of one nation in the airspace of the second), rates, frequency of operation, capacity of aircraft, and degree of economic control accorded to an international authority. The full list of privileges is called the five freedoms.45

As has already been stated, this article will deal primarily with the issues raised by the Bermuda capacity principles. These principles are a form of the regulatory measure of capacity control. The various other aspects of BATA's will be considered only as they bear on capacity control.40 Capacity control has been selected as the focus of this inquiry not only because it was "the dominant feature of the Bermuda Agreement,"7 but also because it is "the means of creating economic order in the air fairly generally upheld by States."44 Capacity has been defined as follows:

[I]n relation to an aircraft [capacity] means the pay load of that aircraft available on the route or the section of a route. In relation to a specified air service [capacity] means the capacity of the aircraft used on such service, multiplied by the frequency operated by such aircraft over a given period and route or section of a route.49

Capacity control is "the regulation of capacity, i.e. of the amount of carriage offered, via a formula for the allocation of commercial rights."50

C. Types

The conceptual analysis of bilateral agreements is based on the type of capacity control utilized in the agreement because:

45 EXPLORATIONS IN AEROSPACE LAW, supra note 9, at 383.
46 Jack, supra note 9, at 471.
47 H. Wassenbergh, 1962, supra note 13, at 46. In addition, the Bermuda capacity principles are today "an extremely contentious issue as the United States seeks to enforce them against countries such as the Netherlands, Belgium, Ireland, Switzerland and Scandinavia." Air Transportation Association Memorandum No. 75-23 at 7 (June 24, 1975).
48 H. Wassenbergh, 1962, supra note 13, at 46.
49 B. Cheng, supra note 7, at 411-12.
50 H. Wassenbergh, 1962, supra note 13, at 46.
There is no generally accepted system for classifying air transport agreements. Broadly speaking, they fall into four classes:

(1) Agreements without capacity clauses
(2) Agreements with Bermuda-type capacity clauses
(3) Agreements with predetermination-type clauses
(4) Agreements with capacity clauses which are neither Bermuda nor predetermination type.  

It has been observed that

about one-third of all the bilateral air transport agreements which are in existence today are based on the Bermuda provisions, and another third are very similar in character. Some of them are of the "light Bermuda" type, i.e. less restrictive. Most of them are, however, of the "heavy Bermuda" type, i.e. containing more restrictive clauses. The additional restrictions concern the nature of the traffic, and especially the preliminary fixing of capacity (depending on the type of aircraft) and frequencies.  

Restrictions on the nature of the traffic most commonly involve "a limitation of the percentage of Fifth Freedom traffic." This is called predetermination of traffic. Thus, "heavy Bermuda" agreements are characterized by the way in which they 

stringently limit each party's percentage of fifth freedom traffic, and provide for the preliminary fixing of capacity. Predetermination of capacity and frequency of service in these "heavy Bermudas" differs from the Bermuda ex post facto review to such an extent that, when applied to the numbers of seats offered, it is analogous to an import quota.  

BATA's without capacity clauses may be quickly disposed of, as such agreements are quite uncommon. When such agreements do

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53 P. Sand, supra note 29, at 35 n.99.
54 Id. at 35 nn.99-100. Cf. Comment, supra note 52, at 331; Little, Control of International Air Transport, 3 Int'l Organ. 29 (1949).
55 Comment, supra note 52, at 331. The problem of restrictions is considered in detail infra in the section entitled "Bermuda Type Agreements in Operation—The Major Problem Areas."
56 Yearbook of Air and Space Law, 1965, supra note 23, at 185. The absence of any bilateral agreement whatever between two countries which nonetheless exchange air traffic is less uncommon. Where no agreement exists air relations are conducted on the basis of reciprocity or unilateral grants of operating authority. CAB, Rep. to Congress, Fiscal Year 1974 at 15 (1974).
occur,"57 "the airlines of the Contracting Parties are entitled to pro-
provide as much capacity as they desire over the routes specified in the
agreement."58

In considering the three remaining types of bilateral agreements
it is helpful to bear in mind that there are two problems involved
in capacity regulation:

(a) The principles governing the capacity to be offered as set out
in the agreements; and
(b) The allocation of the permitted capacity to the contracting
parties and procedures for ensuring the implementation and
observance of the governing principles and of this allocation.59

These problems are solved by reference to what are called primary
and supplementary capacity criteria.

The stream of traffic in question will be the primary factor in decid-
ing the amount of the capacity to be provided. It may be called the
primary capacity criterion . . . from the practical point of view, there
are three important primary capacity criteria:

(1) total route traffic;
(2) inter-partes traffic; and
(3) national traffic.

Where the latter two criteria are adopted, supplementary capacity
criteria may be employed in order to augment the permitted capac-
ity so as to accommodate additional streams of traffic in a purely
subsidiary manner.60

These primary and secondary capacity criteria have come to be
associated with particular types of BATA's. Thus, "the inter-partes
traffic criterion is usually associated with the procedure of control
and allocation of capacity by predetermination,"61 while "one of
the main features of the Bermuda Agreement . . . is the introduc-
tion of national traffic as the primary traffic criterion."62

It is useful to separate the notions of route control and capacity
control. The granting of routes may be viewed as the threshold
problem determining "the initial question of access to the mar-

57 "An example is that between the Netherlands and Guinea [392 U.N.T.S.
58 Id.
59 B. CHENG, supra note 7, at 412.
60 E.g., fifth freedom traffic. B. CHENG, supra note 46, at 415.
61 Id. at 419.
62 Id.
Capacity control, on the other hand, relates to the operation of the designated carriers on the routes granted.

D. Negotiation

A bilateral agreement is typically a treaty negotiated between two governments, but "the actual negotiation of the agreement is delegated almost universally to the department within a country responsible for civil aviation." Before delving into the economic criteria which influence the course of those negotiations, it is useful to look briefly at the regulatory framework within which bilateral agreements must exist. This regulatory framework consists of the supervisory agencies and laws which governments have created to regulate their airlines. Wheatcroft considers the following to be the three propositions which underlie the regulatory framework of international aviation:

There are compelling reasons why governments wish airlines to do things which they would not do for normal commercial reasons.

The natural conditions of supply in the industry are such that unregulated competition is unlikely to produce the sort of air transport development which governments think desirable.

Economic regulation, particularly by control of entry and control of tariffs, is, therefore, generally accepted as an essential framework for the industry.

International airlines are by definition both businesses and public utilities. Not surprisingly, air carriers consider themselves to be hybrids. The public utility aspect of air carriers has led Wassenburgh to state:

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64 Id.
65 Jack, supra note 9, at 473. It should be noted, however, that in the United States, bilateral agreements are negotiated exclusively as executive agreements, which are not subject to the advice and consent of the Senate. See Lissitzyn, The Legal Status of Executive Agreements on Air Transportation, 17 J. AIR LAW & COM. 436 (1950).
66 Id. In the United States, however, the Department of State is the lead agency, providing the chairman for the U.S. delegation and formulating the U.S. position after receiving from the Civil Aeronautics Board the Board's recommended position on the air transport issues involved. The C.A.B. provides the Vice Chairman for the U.S. delegations as well as the technical staff support. Air Transportation Assoc. Memorandum No. 75-23, at 7-8 (June 24, 1975).
67 S. WHEATCROFT, supra note 11, at 66.
69 Id. at 10.
Governments are prepared to support and, if necessary, subsidize the air carriers. But since air carriers are not public utilities, they strive for profitable operations and independent managements. The mixed character of airlines explains, at least partly, the unique international regime governing international air services.

In this light air policy is based on the national interest in international air transportation and on the value of the national air traffic market. Thus a system has been created which regulates the admission by a state of carriers to its national market in return for admission of its own carriers to other national markets.

The fact that governments often refer to their national carriers as the national instrument, thus identifying themselves with the management of the carriers, illustrates the protectionist (or national) approach of states to international civil aviation regulation.70

In addition to the hybrid character of international airlines, the governments which regulate the airlines may be said to be “faced with conflicting objectives: the protection of national carriers and the promotion of international air traffic to their country.”71 As has already been noted,72 priority is most often given to protection of national carriers.73 This protectionist attitude of states towards their national air carriers has important ramifications in the negotiations over BATA's. This attitude influences both the form and often the details of international air services with the effects being most apparent in the regulation of capacity and prices.74

An examination of negotiations necessarily requires a study of power. After defining power as “the ability of one nation to enforce its will on another nation,” Professor Thornton rightly observed that “most power is economic or political.”75 These views are readily applicable to the negotiation of BATA's. As the Edwards Report has noted:

All countries are in a position to ‘sell’ traffic rights to other countries, and it is generally accepted that deals are struck by way of exchanges of these rights. The bargaining power of any country depends essentially on the desires of the airlines of other countries

70 Id.
71 Id. at 17.
72 See text at note 38 supra.
73 S. Wassenbergh, 1970, supra note 9, at 17.
74 Edwards Report, supra note 9, at 3.
75 R. Thornton, supra note 10, at 46.
to operate to and from it, and commercially this means the business offering in terms of traffic on routes to and from it.\textsuperscript{76}

Thus, in the crudest economic sense:

The basic source of power of the commercial airline industry is its airline traffic generating capacity . . . Since by international convention, a state has full control over which airlines will serve its territory, each state has control over the use of the power resulting from traffic generated within its borders. The right to serve a traffic point then becomes a valuable property, fully within the control of the governing state, and capable of being granted or withheld in accordance with governmental desires.\textsuperscript{77}

One writer has gone so far as to liken this situation to that prevailing under the Navigation Act of 1651, which stipulated that the "right to carry traffic between two countries belongs equally and exclusively to the carriers of those countries."\textsuperscript{78} Indeed, this view is not very far removed from that of Professor Ferreira, the influential Argentine authority on BATA's, who holds that air traffic is "the property of the State and traffic between two countries accrues to them in equal shares."\textsuperscript{79}

The view of air traffic rights as articles of commerce is a natural extension of the proprietary theory regarding the carriage of traffic put forward in the Navigation Act of 1651 and by Professor Ferreira. Furthermore, such a view of air traffic rights is implicitly accepted even by those who do not carry that theory so far as Professor Ferreira. Frank Loy, in setting forth the American view of what constitutes a fair route exchange, stated:

[I]t is our belief that bilateral air transport route exchanges must be viewed within the general framework of over-all commercial policy, and that we should follow similar commercial trading concepts in making route exchanges. Under these principles the appropriate test for route exchanges, we are convinced, is an equitable exchange of economic benefits.\textsuperscript{80}

\textsuperscript{76} Edwards Report, supra note 9, at 3.
\textsuperscript{77} Thornton, supra note 9, at 675-76.
\textsuperscript{78} H. Wassenergh, 1970, supra note 9, at 29.
\textsuperscript{80} The Freedom of the Air, supra note 9, at 189. Cf. Stoffel, supra note 13, at 127.
In fact, the standard of an equitable exchange of economic benefits is almost uniformly used by nations in negotiating their BATA's.81

It is possible to see how this economic benefit test is utilized by directing attention to the "two key concepts for the granting of air routes and the determination of capacity: the value of the market and access to it (the granting of routes); and the traffic to which a carrier has a primary entitlement (Bermuda capacity principles, the granting of traffic rights)."82 Loy analyzed the analytical steps which must be employed to yield an equitable exchange of economic benefits in effecting a fair route exchange.83 First, in the case of a revision of an existing agreement, the actual experience of the carriers in operating the routes is the best guide.84 Secondly, in the case of the negotiation of a new agreement, or the expansion of an existing one, four analytical steps should be followed:

1. Determining the kinds of traffic properly included in evaluating the market potential of the route.
2. Determining the proportion of the potential market that can properly be attributed to the carriers of the two countries.
3. Calculating the projected numbers of passengers or tons of cargo that are attributable to each country, based on the foregoing steps.
4. Converting the resulting volume of traffic into potential revenues.85

When this is done, the result obtained will, based on present experience and trends, be favorable to the United States.86 Therefore, it is not surprising that "the guiding principle of U.S. air policy is

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81 "Under the influence of U.S. theories on the equal exchange of economic benefits in bilateral air relations, modern air policy has become a system of bargaining between flag carriers who have been given the right by their governments to exploit the highways of the sky and to exact tolls from foreign carriers for the use of their international routes and the carriage of their legitimate traffic." H. Was senbergh, 1970, supra note 9, at 8. Cf. Gazdik, supra note 63, at 33.
82 H. Was senbergh, 1970, supra note 9, at 18.
83 The Freedom of the Air, supra note 9, at 180-89.
84 Id. at 179. Cf. Jack, supra note 9, at 473.
to arrive at an "equal exchange of economic benefits" under bi-
lateral air agreements . . ."^{87}

This principle of negotiating BATA's has been criticized by
those for whom it produces less favorable results.^{88} Wassenbergh
approvingly quotes Albert Plessman's view that "[t]raffic is not an
article of commerce."^{89} The affiliation of both men with KLM, the
Dutch airline which carries far more American passengers than
Holland yields up to American international carriers^{90} is hardly a
coincidence. More to the point, though still very much the prod-
uct of a sectarian view, is Wassenbergh's criticism of this method
of exchanging air rights as being dependent upon what Loy has
called "the accident of geography."^{91} This criticism is correct in the
sense that "the value of most franchises is heavily dependent on
accidents of geography."^{92} To place a negative valuation on the
equitable exchange of economic benefits bargaining formula solely
on account of the role of geography in route exchanges, however,
is more indicative of a critic's unfortunate accident of geography
than it is of a critic's studied objectivity on the matter.

Politics are always a part of the negotiation of BATA's. It has
been observed that "[t]he work (of negotiating bilateral agreements)
is never done: politics see to that."^{93} Ostensibly, the negotiation of
BATA's is simply the exchange of commercial air rights for com-
mercial air rights. At Bermuda the government's objective was to
trade commercial air rights for commercial air rights and they ex-
cluded from the bargaining other elements in the over-all relations
between the United States and the U.K."^{94} Not long ago a spokes-

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^{87} H. Wassenbergh, 1970, supra note 9, at 21-22.

^{88} The actual experience of the U.S., which has been far less favorable than
simple application of the "equal exchange of economic benefits" principle would
indicate is considered infra in the section entitled "The United States Attitude
Toward the Bermuda Agreement." Cf. note 86 supra.

^{89} H. Wassenbergh, 1962, supra note 13, at 61.

^{90} It is noteworthy that KLM carries more American than Dutch passengers.
See Dept. of State, United States-Netherlands Civil Aviation Discussions, No. 236
(Press Release, May 6, 1975); Civil Aeronautics Board Information Statement
(undated).

^{91} H. Wassenbergh, 1970, supra note 9, at 18-22; The Freedom of the Air,
supra note 9, at 183.

^{92} The Freedom of the Air, supra note 9, at 183.

^{93} Jack, supra note 9, at 475.

^{94} The Freedom of the Air, supra note 9, at 176. Cf. Gazdik, supra note 63,
at 33.
man for BOAC stated that the exchange of bilateral traffic rights stands on its own and should not be used to further objectives unconnected with civil aviation.95

Significantly, though, this same spokesman went on to add that "political considerations do affect the issue sometimes."96 An American writer, Professor Thornton, has been more direct in noting that international air negotiations can include items that are totally unrelated to aviation, such as a wheat agreement effecting an air right.97 It is not necessary to look very far to find examples of this phenomenon. At the Bermuda Conference itself, the United Kingdom

was in a severe crisis over its balance of payments and was concurrently negotiating to obtain a 3.75 billion dollar loan from the U.S. on easy terms. The U.S. was engaged in a conference with Britain and its Commonwealth partners regarding telecommunications rights and roles, and its hope was to eliminate empire preferences that were discriminating against the U.S. The timing of the three conferences makes it clear that the U.S. was using the desperate need of the U.K. for dollar credits as a way of getting commercial rights which this country (the U.S.) urgently wanted.98

Thornton has sought to identify the external factors which modify a state's intrinsic airline power.99 They are important because they "may absorb a portion of a nation's bargaining strength and divert it to the achievement of goals external to the airline industry."100 Thornton lists these factors under the headings of military objectives,101 economic objectives,102 and aircraft sales considerations,103 and gives examples of each.104 Therefore, even though states recog-

95 Jack, supra note 9, at 473.
96 Id.
97 R. THORNTON, supra note 10, at 35. This example, written in 1970, has an ironic quality in view of the 1972 and 1975 U.S.-U.S.S.R. wheat sales.
98 Id. at 38.
99 Id. at 79.
100 Id.
101 Id. at 80-86.
102 I.e., economic objectives external to the exchange of commercial air rights. Id. at 87-101.
104 Thus, as an example of the exchange of air rights for military objectives he cites the quid pro quo of U.S. N.A.T.O. bases in the Netherlands in return
nize air traffic carriage as a valuable potential source of revenue to the national economy,\(^{10}\) factors other than airline generated revenues can play an important or even decisive role in the negotiation by states of their BATA's.\(^{10}\)

Notwithstanding the preceding observations, bilateral negotiations in the post-war period have, to a remarkable degree, hinged on the relative economic bargaining strengths of the contracting parties within the context of air transportation.

By far the most important asset of a nation engaging in international airline bargaining is that nation's contribution to the total demand for air travel. This contribution consists of the amount of revenue traffic which will move either from the country or to the country. Thus, there are two parts to the traffic market in any international flight. Each customer who wishes to go from Country A to Country B contributes to the bargaining strength of both A and B. A nation which offers a large number of originating passengers will, of course, emphasize the percentage of total traffic which is composed of its citizens. The country attracting traffic will, conversely, emphasize the strong appeal which it offers to travelers. Quite naturally, U.S. writers usually make a strong point of the number of U.S. citizens who travel internationally. During 1966, for example, over 62% of all air travelers between the U.S. and foreign countries were U.S. citizens.\(^{17}\)

Although "there are, of course, two sides to this question: the traf-

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\(^{10}\) H. Wassenbergh, 1970, \textit{supra} note 9, at 9.

\(^{10}\) As is the case with any theory, it is always possible that attempts will be made to stretch this notion too far, to employ it as a single causal reason for phenomena which are in fact caused by a variety of factors. Thus Thayer has observed that the U.S. role in the international aviation "system as a whole has been largely dependent upon the separate decisions which promote the sale to foreign airlines of U.S. built transports. The vested interest thus acquired makes it inevitable that the U.S. permit entry into markets which enable those airlines to pay on their loans. In a sense, the Ex-Im Bank has acted for some years as a promoter of freer entry (of foreign airlines into the U.S. market), a factor often officially stated when new routes are awarded." Thayer, \textit{supra} note 103, at 669.

The author is of the view that considerations of aircraft sales abroad have entered into the formulation of U.S. international civil air transportation policy. But, as Thornton points out, so have economic and military objectives of the U.S. which are extraneous to the U.S. airline industry. There can be no doubt, however, that in the aggregate these external considerations have greatly affected the negotiating posture of the United States in the post-war period.

fic rights one may oneself acquire and those which other airlines have to be conceded in return.\textsuperscript{108} As between traffic generating capability and traffic attracting capability, the former is the more important bargaining counter. This greater bargaining strength is subject to what may be termed considerations of elasticity. Thus, while a traffic generating state may be able to choose alternative landing sites upon the refusal of a given traffic attracting state to capitulate to its terms, it can not bargain so vigorously with all traffic attracting states. Otherwise it will wind up with no place to land its airplanes.\textsuperscript{109} Relative bargaining strengths are further equalized by the uniqueness of landing sites—Paris simply will not do for London, London will not do for Rome, Rome will not do for Vienna, etc.

Thus far in this section the focus of attention has been on route exchanges in BATA's. This has been a necessary prelude to a consideration of capacity control. A few further observations on route exchanges are in order.

The terms "liberal" and "protectionist" have been used in regard to both route control and capacity control. They are useful terms, provided that their meanings are kept clearly in mind:

A protectionist policy aims at obtaining a 50\% share of the traffic on the routes to and from the home country. A liberal policy allows commercial competition to determine market shares, \textit{at least to a point}.\textsuperscript{110}

Wheatcroft has attempted to calculate the location of the point at which a liberal policy becomes protectionist by stating:

The 'liberal' nations have been willing to accept that commercial competition should be the arbiter of market shares, but only within certain limits. . . . [T]he evidence suggests that the most which 'liberal' countries have been willing to accept is that their share of traffic on major routes might be permitted to fall as low as 40\% of the total before they turned towards measures for restricting foreign competitors. The difference between 'liberal' and 'protectionist' policies may therefore be thought of as a willingness, on the one

\textsuperscript{108} Jack, \textit{supra} note 9, at 472.

\textsuperscript{109} The necessity in international air transportation of both a take-off and a landing state is forever a constraint on absolutist theoretical positions!

hand, to compete for 20 per cent of the total market, compared with an insistence upon a 50/50 division of traffic, on the other.\textsuperscript{111}

It is now possible to perceive the role of capacity controls in the negotiation and operation of bilateral agreements. Capacity controls can be liberal or protectionist to the same extent as route controls. As was noted earlier, capacity controls determine “how the designated carriers operate on the routes granted.”\textsuperscript{112} In exercising capacity controls, governments may limit the frequencies operated by foreign carriers, restrict the number of passengers, impose restrictions on the days and hours when foreign carriers may operate, curtail the number of all-cargo flights or the amount of freight carried, etc.\textsuperscript{113} The Bermuda capacity controls and the restrictions which have been imposed to counteract these government restrictions are considered in detail below.\textsuperscript{114}

One further observation about the negotiation of BATA's should be made. Seldom are grants of commercial air rights reviewed.\textsuperscript{115} The lack of review of BATA's is enhanced by the fact that usually “in international negotiations for new rights the only thing being discussed is the relationship between the new rights desired by each side.”\textsuperscript{116} Hence, it is unrealistic to expect any immediate or dramatic results from the current International Aviation Policy Review, regardless of what recommendations for changes in U.S. policy, if any, that body might make.

II. THE CHICAGO CONVENTION OF 1944

A. Background

The International Civil Aviation Conference, or the Chicago

\textsuperscript{111} S. Wheatcroft, supra note 8, at 73-74. In 1974, U.S. flag carriers carried 47.5 per cent of all transatlantic passenger traffic to and from the U.S., scheduled and charter, with scheduled U.S. carriers carrying 29.5 percent, and U.S. supplemental carriers carrying the remaining 18 percent of the U.S. market share. Foreign air carriers, scheduled and supplemental, carried 45.5 and 7 percent, respectively, for a 52.5 percent share of the traffic in this market. 40 Fed. Reg. 33435 (1975). This chart is reproduced in the text infra at note 246. The most recent estimate of the percentage of U.S. citizens traveling abroad on U.S. flag airlines is about 46%. Bill Henzey's Airline Reports 5 (Aug. 18, 1975).

\textsuperscript{112} Gazdik, supra note 63, at 34.

\textsuperscript{113} Id. Cf. Goedhuis, supra note 13, at 26.

\textsuperscript{114} See subsection entitled “Restrictions Applied under Bermuda Type Agreements” infra.

\textsuperscript{115} R. Thornton, supra note 10, at 74.

\textsuperscript{116} Id. at 75.
Conference, as it has come to be known, was charged with the performance of many tasks.\textsuperscript{117} There can be no doubt, however, that the objective of all the major participants was to ensure, so far as possible, that they secured operating and traffic rights for their own international air services. Without exception, they believed that this could best be achieved by an all embracing international agreement. The hidden obstacle was that some sought complete freedom of operation, others control by an overriding international authority. The conflict of these aims kept the Chicago Conference going for seven weeks and subsequent conferences, studies and other efforts for nearly as many years.\textsuperscript{118}

The United States and the United Kingdom came to Chicago with their pre-War positions having been reversed.

Before the War, the UK had been better equipped than the USA in operating experience, particularly in the pilots and aircraft available, to operate international long-haul services. At that time, the USA preached predetermination, while the UK was all for freedom. It is a paradox of history that these roles were completely reversed as the War ended. The USA, with its Transport Command and numerous transport aircraft available, was ready: the UK had little but experience to offer with resources pitifully reduced in a war effort which had been sustained so much longer.\textsuperscript{119}

The strategies of the two countries were dictated by the realities of their respective positions. Thus concerning the strategy of the United States, it has been said:

In general the Chicago Conference can be described with reasonable accuracy as an attempt by the U.S. to capitalize on its overwhelmingly strong bargaining position in international aviation by securing for itself a near monopoly of long haul air transport. . . . (i.e. the U.S.'s) objectives was unrestricted operating rights for all nations on international routes, that is, all routes not confined to a single country. Apparently the U.S. proposals presumed that frequencies and fares would be set by market forces, without international interference. While freedom of competition has a ring of justice to it, there is some absurdity in its being espoused by a

\textsuperscript{117} For a detailed treatment of this conference, see J. Schenkman, International Civil Aviation Organization 68-100 (19—); cf. R. Chuang, The International Air Transport Association 22-26 (1972); Jones, supra note 14, at 227-30.

\textsuperscript{118} Tymms, supra note 3, at 269.

\textsuperscript{119} Jack, supra note 9, at 471. Cf. B. Cheng, supra note 7, at 6-7.
competitor who has a commanding lead in an industry characterized by strong economies of scale and considerable restriction of entry. As Charles M. Sackrey put it, the U.S. position was "similar to that taken by the proverbial elephant, who, while he danced through the chicken yard, cried 'Everyone for himself.'"\textsuperscript{129}

The United Kingdom's position has been accurately described as follows:

The official British policy . . . was set out in a White Paper laid before Parliament in October, 1944, where the establishment of an International Air Authority was proposed. This Authority was to have power to set up a monopoly in international air transport by excluding unlicensed operators, to license operators, to determine and allocate frequencies, and to fix tariffs, while reaffirming the principle of airspace sovereignty. 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."\textsuperscript{131}

The head-on clash between these two strategies was over the issue of capacity control with the United Kingdom approaching the problem as one of "order of the air" while the United States viewed it as an issue of "freedom of the air."\textsuperscript{132} 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."\textsuperscript{133} The plan was attractive to the United States because the U.S. had the capability to operate, within a network of free enterprise, a worldwide system.\textsuperscript{134}

The U.S. and U.K. proposals were not the only ones put before


\textsuperscript{131} B. Cheng, supra note 7, at 18-19. Another possible reason which has been recited for the U.K. favoring an international body to assure order in the air was the "cartelist possibilities" of such a plan perceived by "the hard-nosed realists" in Her Majesty's Government. Thornton, supra note 10, at 27.

\textsuperscript{132} R. Thornton, supra note 10, at 27 quoting from 1 Chicago Conference Proceedings 111 (19—).

\textsuperscript{133} Jones, supra note 14, at 228.

\textsuperscript{134} Id. at 227.
the Chicago Conference. Other important proposals were made by Canada and, jointly, by Australia and New Zealand. The latter called for "an international air transport authority responsible for the operation of air services on prescribed international trunk routes." This authority was to have considerable powers, with "ownership of the aircraft and facilities on these routes to be in the authority." This plan proved to be far too visionary for the delegates at Chicago.

B. Results

As appeared likely at the outset, the stumbling block for the Chicago Convention was the question of control of the frequency and capacity of the services offered by international airlines. The impasse over this issue resulted in Article 6 of the Chicago Convention, which states that "[n]o 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." In essence, having failed to obtain the desired multilateral agreement for the exchange of commercial traffic rights, the contracting parties fell back on the principle of sovereignty of airspace enunciated in Article 1 of the Convention, and this ensured the perpetuation of the system of bilateral agreements for the exchange of these rights.

The disposition of the controversial fifth freedom was at the root of this Article 6 controversy. It was not the grant of the fifth freedom which was at issue because a modicum of fifth freedom

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120 J. SCHENKMAN, supra note 117, at 85-88.
121 Id.
122 Id.
123 EXPLORATIONS IN AEROSPACE LAW, supra note 9, at 388.
124 Wheatcroft, supra note 11, at 68.
125 See text accompanying note 26 supra.
126 The fifth freedom has been defined as "the privilege of picking up or setting down by a carrier of State A in State B (of) traffic which is destined for or has come from State C. As an example BEA operates on route London-Athens-Beirut with full traffic rights; it is entitled to carry third and fourth freedom traffic between London and Athens, and between London and Beirut, and fifth freedom traffic between Athens and Beirut." The EDWARDS Report, supra note 9, at 284. It is the fifth freedom traffic rights which are essential to the economic viability of international air routes. See THORNTON, supra note 10, at 30-33.
127 B. CHENG, supra note 7, at 423.
rights are essential to the operation of an international air route network. Rather, "the crucial disagreement was over the regulation of capacity in relation to the fifth freedom." It was this issue, "the main unfinished business at Chicago," which the U.S. and the U.K. were able to satisfactorily resolve at Bermuda and which perpetuated the pre-World War II system with its dependency on bilateral negotiations between nations trying to secure their national interest.

Along these lines, an important discovery, "the extreme importance of controlling the access to markets," was made during the Chicago Conference by the United States. Meanwhile, prior to the conclusion of the conference, the U.S. position had evoked this editorial reaction from The Economist: "This would seem to be another instance in which the fine moral principles proclaimed in Washington turn out to have very special definitions, tailored to self-interest." Self-interest was, of course, no stranger to the U.K. The pursuit of self-interest by all of the Chicago contracting parties accounts for the following judgment of the conference: "The Chicago Conference is a classical demonstration of the postulate that nations, no matter how enlightened, are not capable of understanding and comprehending anything beyond their own national interest."

Although the Chicago Conference failed to achieve a multilateral exchange of commercial traffic rights it has had a more significant impact on subsequent bilateral agreements than is often acknowledged. The form of modern bilateral agreements is still essentially that of the so-called Chicago Standard Form. The substance of modern bilateral agreements, however, is mainly derived from the Bermuda Agreement. The substantive aspects of BATA's were

133 Id.
135 See subsection entitled "The Bermuda Compromise" infra.
136 R. THORNTON, supra note 10, at 33.
137 Id. at 34.
138 Id. at 26, quoting from Chicago Bargaining, ECONOMIST, Dec. 2, 1944.
139 Id., supra note 14, at 227.
140 Standard Form of Agreement for Provisional Air Routes, Chicago Convention, supra note 4, Final Act, Sec. VIII, Cmd. 6614, at 15; B. CHENG, supra note 7, at 26, 233-37; cf. P. SAND, supra note 29, at 34.
141 See text at note 52 supra.
therefore unresolved until the Bermuda Agreement had been concluded. Thus, after the Chicago Conference two patterns of bilateral negotiations emerged.

The United States made agreements with a number of countries embodying the Five Freedoms without restriction. Britain and some other European countries negotiated agreements specifying the air routes and the frequency (or capacity) of the air services permitted to be operated—predetermination. Finding this unsatisfactory the United States and the United Kingdom negotiated the famous compromise Bermuda Agreement in 1946.143

It is to the Bermuda agreement that attention is now turned.

III. THE BERMUDA AGREEMENT

A. Background

It was due to the impracticality of the multilateral approach to civil aviation that the British and American Governments met at Bermuda in 1946 to work out a bilateral system which would start the international airlines traffic moving with speed in the post-war period.144 Representatives of the United States and the United Kingdom met at Bermuda in order to formulate a standard agreement which was later to serve as a model for all air transport agreements between the two countries, and which actually became a model for agreements between other countries as well.145 Although ostensibly the delegates had come to Bermuda merely “to negotiate bilaterally the exchange of commercial rights between their countries,”146 the Bermuda Conference “proved to be one of the most important events in international aviation history.”147 The singular achievement of the delegates in resolving the deadlock reached at Chicago justifies this judgment of the importance of the Bermuda Agreement.148 It is for this reason that “from Bermuda emerged not merely a bilateral agreement between the two major air trans-

143 Tymms, supra note 3, at 272.
144 Jack, supra note 9, at 471.
145 P. Sand, supra note 29, at 34.
146 S. Wheatcroft, supra note 8, at 69-70.
147 Id. Cf. P. Sand, supra note 29, at 34.
148 S. Wheatcroft, supra note 8, at 69-70.
port nations, but a general philosophy on the way in which the eco-
nomic regulation of the industry should be achieved.\textsuperscript{148}

These lofty results were not readily perceptible to those nations
who were merely onlookers to the proceedings at Bermuda.\textsuperscript{149} Nor
did lofty results seem a likely outcome, given the basic similarity in
bargaining positions of the parties at Bermuda to the positions they
had taken at Chicago.\textsuperscript{150} The details in the bargaining positions of
the American and British positions respectively have been sum-
marized as follows:\textsuperscript{151}

(1) No limitation of frequencies vs. predetermination
(2) No division of capacity vs. a 50-50 division of capacity
(3) No regulation of rates vs. regulation of rates
(4) A complete grant of the fifth freedom vs. no grant of the fifth
freedom
(5) An international body with advisory powers only vs. an inter-
national body with executive power over international air
services.\textsuperscript{152}

The gulf between these two positions suggests the scope of the
achievement of the delegates in achieving a compromise.

B. The Bermuda Compromise

In retrospect, the terms of the Bermuda Agreement seem emi-
nently logical and, indeed, almost inevitable. But it took seven
weeks of negotiating to come up with the compromise which cleared
the way for the actual agreement.\textsuperscript{153} Cooper described thusly the
essentials of that compromise:

The United States of America accepted the international control
of fares which they were most reluctant to concede and parameters
within which the services could be operated; the United Kingdom,
on the other hand, abandoned predetermination of capacity. Gov-
ernments could intervene and seek discussion with each other, but
they could not act unilaterally without consultation; this was, in

\textsuperscript{148} Id.

\textsuperscript{149} THE FREEDOM OF THE AIR, supra note 9, at 127.

\textsuperscript{150} Jones, supra note 14, at 230.

\textsuperscript{151} The United States position is given first.

\textsuperscript{152} H. WASSENBERGH, 1962, supra note 13, at 59, quoting from Masefield,
Some Aspects of Anglo-American Civil Aviation, UNITED EMPIRE, Jan.-Feb.,
1947, at 29, with slight alterations made by the author.

\textsuperscript{153} Tymms, supra note 3, at 269.
fact the vital element in the whole Agreement and an element which has stood the test of time well.\textsuperscript{134}

Specifically, it was the issues of fares and capacity controls which were the keys to the compromise. Thus, in drafting the agreement, cutthroat competition was avoided.

(1) The U.S. agreed to permit the fares to be fixed by a rate conference method conducted by the airlines through the International Air Transportation Association (IATA), subject to review as it related to our (U.S.) carriers by the CAB;

(2) Capacity was to be regulated on the principle that the primary objective of each nation's airlines should be the provision of capacity adequate to the traffic demands between the country of which such air carrier was a national and the countries of ultimate destination of the traffic, that is, third and fourth freedom traffic. Pickup traffic, or fifth freedom traffic, was to be allowed subject to this general principle, and subject to review and negotiations if a nation thought, retroactively, that this freedom had been abused.\textsuperscript{135}

In essence, then, the Bermuda Agreement

is a compromise of the American and British positions at the Chicago Conference. According to the Agreement, air routes have to be exchanged. In principle, the number of flights offered by the carrier of each Contracting Party over a certain route and within a certain period is to be set unilaterally by each Contracting Party.

This is a concession made by Great Britain to the United States. However, this right cannot be exercised excessively; otherwise the British as well as other European carriers would soon be driven out of the market. The limitation is provided in an often overlooked provision contained in the Final Act of the Bermuda Agreement: "in the operation by the air carriers of either Government of the trunk services described in the Annex to the Agreement, the interest of the air carriers of the other government 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.\textsuperscript{136}

In actuality, all of the Bermuda capacity principles\textsuperscript{137} play a role in limiting the operation of its granted routes by a given contracting

\textsuperscript{134} Jack, supra note 9, at 471. Cf. A. Thomas, Economic Regulation of Scheduled Air Transport—National and International 218 (1951).

\textsuperscript{135} Jones, supra note 14, at 231.

\textsuperscript{136} R. Chuang, supra note 117, at 28-29, quoting from the Bermuda Agreement, Final Act, sec. 5 (See App. A, infra.).

\textsuperscript{137} Bermuda Agreement, supra note 1, Final Act, sec. 4-6. For the text of the capacity principles see App. A infra.
party. Together, they constitute perhaps the single most important part of the agreement.\textsuperscript{158} These clauses have often been criticized for their vagueness,\textsuperscript{159} which permits diverse, and often conflicting interpretations.\textsuperscript{160} Yet it is an inescapable fact that the very lack of precision in the great number of formula allowed a compromise to be reached.\textsuperscript{161}

In sum, 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."\textsuperscript{162} The compromise allowed each party to demand a joint review of the operations of the other rather than imposing a system of either rigid control or unregulated freedom.\textsuperscript{163}

C. Capacity Control in the Bermuda Agreement

It has rightly been observed that capacity determination is undoubtedly one of the most thorny problems in international civil aviation today.\textsuperscript{164} Since it was signed in 1946, the Bermuda Agreement, with its carefully phrased but general capacity principles, has provided the basis for most of the solutions to this problem.\textsuperscript{165} These principles are not the abstract metaphysical formulations but rather are "a compromise between two conflicting and representative philosophies, \textit{i.e.} on the one hand, a strong desire for a large amount of freedom for commercial activity, and on the other hand, an equally strong desire for protection of national civil aviation interests."\textsuperscript{166}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{158} Gazdik, \textit{supra} note 63, at 34.
\item \textsuperscript{159} \textit{Id.}; Rinck, \textit{supra} note 20, at 110-11; Adriani, \textit{supra} note 5, at 406.
\item \textsuperscript{160} Gazdik, \textit{supra} note 63, at 34.
\item \textsuperscript{161} Rinck, \textit{supra} note 20, at 110-11.
\item \textsuperscript{162} McCarroll, \textit{The Bermuda Capacity Clauses in the Jet Age}, 29 J. Air L. \& Com. 115 (1963).
\item \textsuperscript{163} Tymms, \textit{supra} note 3, at 272. \textit{Cf.} S. Wheatcroft, \textit{supra} note 8, at 70-71; \textit{Explorations in Aerospace Law}, \textit{supra} note 9, at 384, 390; \textit{Edwards Report}, \textit{supra} note 9, at 88.
\item \textsuperscript{164} Stoffel, \textit{supra} note 13, at 129.
\item \textsuperscript{166} Adriani, \textit{supra} note 5, at 406. An excellent analysis of the Bermuda capacity clauses can be found at 406-13, \textit{Id. Cf.} McCarroll, \textit{supra} note 162, at 118-21.
\end{itemize}
\end{footnotesize}
Practically speaking, the dominant feature of the Bermuda Agreement was—and remains—the freedom given airlines to operate services at the frequency/capacity they consider justified, provided they comply with the general provisions of the Agreement since it is the airlines that control the situation, once the agreement has been reached and the airlines designated.\textsuperscript{167}

In contrast to predetermination and prior allocation of capacity, the Bermuda Agreement has introduced a regime of controlled competition. The designated airlines of the contracting parties are no longer tied down to a rigid allocation, but are granted “fair and equal opportunity . . . to operate on any route between their respective territories . . . covered by the Agreement and its Annex.”\textsuperscript{168}

This regime of controlled competition remains subject, of course, to the capacity principles laid down in the respective agreements.\textsuperscript{169}

Analyzed in the framework of the liberal/protectionist dichotomy discussed earlier,\textsuperscript{170} “the Bermuda principles approach international air transport from a basically liberal point of view.”\textsuperscript{171}

The treatment of the fifth freedom\textsuperscript{172} in the Bermuda Agreement is governed by the Bermuda capacity principles. Although “the Bermuda Agreement and all subsequent agreements negotiated by the United States have been based on the exchange of all the five freedoms,”\textsuperscript{173} the exchange of these freedoms is subject to the Bermuda capacity principles, which may be said to provide “standards for relating capacity to traffic needs, taking into consideration both the public’s requirements for air service and the requirements of both trunk-line operations and local or regional operations.”\textsuperscript{174}

In relation to the carriage of fifth freedom traffic, section 6 of the Final Act of the Bermuda Agreement makes clear that the capacity for the carriage of fifth freedom traffic should have a primary effect on third and fourth freedom traffic.\textsuperscript{175} But neither section 6

\textsuperscript{167} Jack, supra note 9, at 471.

\textsuperscript{168} B. Cheng, supra note 7, at 429. Cf. Comment, supra note 52, at 336.

\textsuperscript{169} B. Cheng, supra note 7, at 429.

\textsuperscript{170} See accompanying text at notes 110 & 111 supra.

\textsuperscript{171} Stoffel, supra note 13, at 122.

\textsuperscript{172} See text accompanying note 26 supra.

\textsuperscript{173} Stoffel, supra note 13, at 122.

\textsuperscript{174} Id. at 123.

\textsuperscript{175} Adriani, supra note 5, at 407.
nor any other part of the Bermuda Agreement offers a "concrete answer to the question of the quantity of fifth freedom allowed in relation to the quantity of third and fourth freedom"\textsuperscript{176} because "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."\textsuperscript{177} Thus, "the most controversial of all economic problems in negotiating bilateral agreements, the granting of Fifth-Freedom rights, depends . . . on airlines privately agreeing to live and let live under bilateral agreements worded in a way which is intentionally self-contradictory and general."\textsuperscript{178}

Adriani posed, and then answered, the question of "how it was possible that the Bermuda clauses, drafted in a very special case, could be copied on so many other occasions."\textsuperscript{179} He answers that the general terms of Bermuda clauses merely formulate some broad ideas and are therefore to a certain extent vague and flexible, which creates possibilities for protection as well as for a necessary amount of freedom.\textsuperscript{180} This potential of the Bermuda capacity clauses to yield a protectionist as well as a liberal approach to capacity control is exceedingly important. It is a potential which was recognized at the time of the negotiation of the Bermuda Agreement. John Cobb Cooper, writing in \textit{Foreign Affairs} in October, 1946, observed that "it may well be, therefore, that in actual practice the Bermuda plan will result in a certain amount of control of frequencies and capacities, as Lord Winster stated, by 'ex post facto review'."\textsuperscript{181} More recently, it has been observed that the Bermuda capacity principles "provide certain safeguards for those countries which fear their more powerful competitors and would prefer to exercise considerable control over the operation of foreign airlines serving their countries."\textsuperscript{182}

\textsuperscript{176} \textit{Id.} at 408 (emphasis in original).
\textsuperscript{177} \textit{Id.} (emphasis in original).
\textsuperscript{178} R. \textsc{Thorton}, \textit{supra} note 10, at 40.
\textsuperscript{179} Adriani, \textit{supra} note 5, at 406.
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textsc{Ex}plorations in \textsc{aerospace} \textsc{law}, \textit{supra} note 9, at 392.
\textsuperscript{182} \textsc{Stoffel}, \textit{supra} note 13, at 122.
The above mentioned safeguards are in the form of "general restrictions." 183

Probably the most significant element in the formula is the "understanding" that "the primary objective" of a service is to provide "capacity adequate to the traffic demands between the country of ultimate destination of the traffic," that is, Third and Fourth Freedom traffic, which has consequently come to be called "primary justification" or "primary entitlement" traffic. If either government felt that an airline of the other party was not conforming to these restrictions, there was to be consultation between the aeronautical authorities of the two parties—or what came to be known as ex post facto review. Provision was thus made for a flexible administration of the capacity standards, which are evidently open to more than one interpretation in practice. Subject to these standards, the Fifth Freedom was mutually accorded. 184

As the preceding observations suggest, in the post-war period the commercial freedoms of the unsuccessful International Air Transport Agreement 185 have been restored through the medium of bilateral agreements, most commonly of the Bermuda type. 186 Yet it must be borne in mind that "the Bermuda Agreement entails significant qualifications of the commercial freedoms, e.g. government approval of rates and ex post facto governmental review of traffic capacity."

The adequacy of the Bermuda capacity clauses to their task of capacity control has been increasingly called into question. 187 They are often criticized for the general and contradictory way in which they were couched, making them unsatisfactory from a legal point of view and resulting in little restriction on capacity or frequency. 188 Yet one critic's vice is another critic's virtue. It has also been said that the broad framing of the Bermuda principles is an act of wisdom which has a sound basis of reasonableness. 189

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184 Id.
185 International Civil Aviation Conference, supra note 22, at 57-60.
186 Civil Aviation Agreements of the People's Republic of China, supra note 52, at 330. Cf. P. Sand, supra note 29, at 34.
187 Civil Aviation Agreements of the People's Republic of China, supra note 52, at 330. Cf. P. Sand, supra note 29, at 34.
188 R. Thornton, supra note 10, at 37; Av. Week, supra note 14; Doty, supra note 13, at 25-26.
189 R. Thornton, supra note 10, at 37.
The implications of these criticisms and praises are worthy of consideration in order to better appreciate the problems which have arisen in the operation of the Bermuda principles. To begin with, "the advantages and difficulties of the Bermuda plan can best be understood by comparing it with other agreements and plans for economic control . . ." Predetermination and Bermuda have been compared as follows:

Predetermination spelt out what one might do. The Bermuda formula was different. It said one might operate as many services as one liked within certain rules. The reasons for the adoption of one or the other of these policies have been set forth in the Edwards Report:

Most countries . . . give a high priority to their own airline interests. In the bargaining process many of them aim to secure the right of their own airlines to a half-share of the traffic on the routes exchanged. A number of countries actually ensure by the terms of their bilateral agreements that foreign airlines are prevented from offering more capacity than their own airlines on the routes agreed. Other countries, including Britain and the United States, favour a more liberal policy based on the broad principles of 'fair and equal opportunity' for the airlines of either side. There is a need, however, to further consider the reasons for the selection of one or the other of these policies.

In another context, this author has observed that certain treaty relationships are not meant to be subject to interpretation by third parties (i.e. courts or arbitration panels). There are also examples in municipal law of agreements which are not meant to be subject to interpretation and are entered into with neither the hope nor the expectation of obtaining external enforcement of the agreement in the event of a breach by one of the contracting parties. Yet such agreements are entered into on a municipal level, and may increasingly be said to characterize treaty relationships on the internation-

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191 Explorations in Aerospace Law, supra note 9, at 385.
192 Jack, supra note 9, at 476.
193 Edwards Report, supra note 9, at 4.
194 See B. Diamond, Treaty Interpretation and the International Court of Justice: A Methodological Inquiry into the South West Africa Cases, May 21, 1974 (unpublished paper submitted to Professor Bin Cheng and the seminar on Methods and Sources of International Law, University College London, University of London).
These agreements are still agreements between the parties, having as much validity as the parties wish to accord them. They differ from the traditional concept of a contract in that they can neither be enforced nor definitely interpreted because they are basically non-binding. What is left is self-interpretation of the agreement by the parties themselves.

This analysis can be applied with equal force to BATA's. As will be seen shortly, nearly all BATA's of the Bermuda type provide for either an arbitration panel or referral of the dispute to the Council of the International Civil Aviation Organization in the case of a disagreement and after the authorized *ex post facto* consultation between the contracting parties. Yet, utilizing the United States for the purposes of illustration, only two disputes involving United States BATA's have ever gone to arbitration, and the United States has never denounced a BATA. This implies that the parties to BATA's are *their own law*, and act and react to events solely on the basis of bargaining strength. Nations engaged in international air transport need a fairly high degree of co-operation from one another and this cooperation has allowed the system of BATA's to run reasonably smoothly since the Second World War. This has occurred, however, because nations have voluntarily chosen to behave in this fashion, and not because any machinery exists to force them to behave reasonably. It does not.

By analyzing the language of the Bermuda principles, it can be observed that the language is more than adequate for the essentially self-regulatory regime which they comprise. Although the language would not be precise enough for a system in which an external authority were enforcing them as statutes, the principles are not statutes and there is no external international authority to enforce them. Instead, there are only the parties to interpret and enforce them. Thornton has correctly identified power, as manifested in bargaining strength, as the basis for the negotiation of BATA's.

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195 Id. at 72.

196 Or from the concept of a treaty, in a legal system of world integration at the supranational level, where there is a World Court with compulsory jurisdiction. See G. Schwarzenberger, *A Manual of International Law* 13 (5th ed. 1967).

197 See the subsection entitled "The Bermuda Agreement—Other Provisions" infra.

198 R. Thornton, supra note 10, at 46.
In the present context, power can likewise be viewed as the basis for the interpretation and enforcement of BATA's.

Some things in life are simply understood without the necessity of words or written agreements. The Bermuda principles have lent themselves to such understandings. By leaving unstated all details regarding frequency and capacity control, they have been well suited to their task of controlling capacity in a basically self-regulating system of BATA's in accordance with the relative bargaining power of the parties. Currently, however, the increasing utilization of restrictions being employed under the guise of the Bermuda principles has caused even such a strong advocate of the Bermuda approach as the United States to reconsider its position and begin searching for a system which spells out clearly the capacity control measures available to the parties of a BATA.

Even when such a new approach is decided upon, the problem of the lack of an external international enforcement authority in the event of a breach by the other contracting party to the agreement will still remain. All that will have been gained is greater clarity in delineating the rights and obligations of the parties. What will have been lost, which may prove to be of far greater value than that which stands to be gained, is the flexibility the Bermuda approach provides. In its place will come rigorous bargaining over each minute aspect of the agreement, and particularly over the question of capacity allocation, with nothing left either to chance or to the operation of broad general principles. The "cure" (negotiating predetermination or other types of BATA's with very specific terms) will probably prove worse than the disease (the Bermuda Agreement). Even more to the point, it may prove to be impossible to negotiate BATA's of a highly specific type on a bilateral basis. For the United States to embark upon such a course of action would prove to be quite misguided. In this context, it is inter-

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198 Doty, Foreign Restrictions Align U.S. Reaction, AVIATION WEEK, Jul. 9, 1973, at 26; Doty, supra note 13; Bureau of International Affairs (CAB), RESTRICTIVE PRACTICES USED BY FOREIGN COUNTRIES TO FAVOR THEIR NATIONAL AIR CARRIERS (1973).


201 G. SEABROOKE, supra note 26, at 116.
est to note that the so-called Harbridge House Study does not ad-

dress itself to the foregoing considerations in its rather artificial list-
ing of the alternative bilateral agreement policies open to the United
States. 292

D. The Bermuda Agreement—Other Provisions

Before leaving this examination of the Bermuda Agreement, con-
sideration should be given to those other provisions of the agree-
ment which bear, to a greater or lesser extent, on capacity control.
The sanctions under the Bermuda Agreement for an operator who

floods a route with capacity were not written in the Agreement, but

it was quite clear that consultations within the following framework

between the Governments would result. 293

Each side would assemble the facts and figures, and the gov-
ernments would then try and reach an amicable arrangement. Fail-
ing this, the Government might denounce the Agreement. There
was a clause under which one party might give 12 months’ notice
of determination and at the end of 12 months all services would

then theoretically stop. What would happen is that within the 12
months new negotiations would start and a new Agreement would

be formulated. 294

Although the strong remedy of denunciation is present in all Ber-
muda type agreements, 295 the sanctity of agreements has remarkably
prevailed to a large extent, considering the serious disputes which
have arisen. 296 Thus, “despite all the problems attendant upon re-

negotiation and the uncompromising attitudes often adopted by the

Governments of newly independent countries an agreement once

signed is rarely denounced . . . ” 297

A rate-making system is established by part II of the Annex to

the Bermuda Agreement

under which rates are set within IATA (the International Air
Transport Association) and approved by governments before going
into effect. In a situation where IATA fails to agree on a rate, or

292 See the section entitled “The United States’ Attitude Toward the Bermuda
Agreement” infra.
293 Jack, supra note 9, at 476 n.77 et seq.
294 Id.
295 Id. at 473.
296 Id. at 473-74.
297 Id. at 473.
one of the two governments fails to approve a rate set by IATA, the contracting parties themselves must negotiate. If they fail to reach an agreement on a rate proposed by either carrier, this proposed rate goes into effect pending an advisory opinion from ICAO (the International Civil Aviation Organization). As noted earlier, it was acceptance of this rate-making scheme by the United States, coupled with abandonment by the United Kingdom of its insistence on pre-determination, which constituted the Bermuda compromise.

Finally, a brief word concerning the treatment of routes under the Bermuda Agreement. The Bermuda plan, in contrast with the Chicago Air Transport Agreement, provides for an elaborate route chart with specific definite international routes and airports, and trading privileges are valid only within these specific designations. It is on account of this treatment of routes in the Bermuda Agreement that small countries must resort to capacity and frequency limitations in their negotiations with big countries. Route controls are not available to them under the Bermuda scheme, because in all likelihood they only have one, or at most two, "worthwhile" cities in terms of international air traffic.

IV. THE QUEST FOR A MULTILATERAL AIR TRANSPORT AGREEMENT

"'Tis not that we loved bilaterals more, 'tis that we loved the alternatives less."

Epitaph of the Geneva Conference of 1947

Later in 1946 after the Bermuda Agreement had been signed, both parties agreed not to enter into any other agreements con-

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209 See the text accompanying the subsection entitled "The Bermuda Compromise" supra.

210 A. THOMAS, supra note 154, at 219.

211 McCarroll, supra note 162, at 118-20.

212 Id. For a listing of the standard provisions of Bermuda type bilateral agreements see Yearbook of Air and Space Law, 1965, supra note 23, at 186-87. And for a detailed treatment of each of these provisions see Cheng, supra note 7.

213 For a detailed treatment of the elusive search for a multilateral agreement
flicting with the principles of Bermuda, with the natural result that
the pattern spread widely. Both believed that the principles of Ber-
muda could form the basis for a multilateral agreement and, for
many years, others were so persuaded. 214

This view that the Bermuda Agreement could provide the basis
for a multilateral agreement for the exchange of commercial air
traffic rights proved, of course, to be in error. But there can be no
denying that it received wide currency during the years 1944-1947
and, to a somewhat lesser extent, during the period up to the mid-
1950's. For example, the famous article by John Cobb Cooper in
the October, 1946, issue of Foreign Affairs was "intended only to
consider whether the Bermuda plan is suitable for incorporation in
a widely accepted multilateral convention." 215 Cooper believed that
Bermuda was suitable for incorporation in a multilateral conven-
tion. 216

After examining the question of whether the Bermuda principles
could form the basis for a multilateral agreement Tymms stated:

A truer view, I think, is to regard "Bermuda" as a gentleman's
agreement. As such, it is not a suitable basis for an agreement be-
tween many parties. It is always possible to find two gentlemen.
Three is more difficult. More is improbable! 217

This modern view stands in sharp contrast to the hope of one of
the Canadian delegates at the Chicago Conference, Mr. H. J. Sym-
ington, who is quoted as saying, "After all, the purpose of the trans-
port section was to set up some form of regulations so that things
might not run wild in the air, and by means of a convention to
avoid a series of bilateral agreements." 218

The first effort to obtain a multilateral agreement was the Inter-
ational Air Transport Agreement, 219 which was appended to the

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214 Tymms, supra note 3, at 272.
215 EXPLORATIONS IN AEROSPACE LAW, supra note 9, at 393.
216 Id.
217 Tymms, supra note 3, at 272.
218 THE FREEDOM OF THE AIR, supra note 9, at 123, quoting from the Pro-
ceedings of the International Civil Aviation Conference, 1944, U.S. Dept. of State
Pub. 2820 (1948), at 453.
219 The so-called Five Freedoms Agreement.
Final Act of the International Civil Aviation Conference. After the failure of this agreement to gain widespread acceptance, the ICAO made efforts "to develop a multilateral agreement for the exchange of commercial rights." The Geneva Conference of 1947 originated with the hope that the Bermuda Agreement could provide a framework for a multilateral agreement on commercial rights. Specifically, it was hoped that this conference would be able to resolve the stalemate which had resulted in Article 6 of the Chicago Convention. Thirty-three states attended the Geneva Conference but, after twenty days of discussions, they concluded that no agreement was possible. In short, the Geneva Conference ended in failure.

The reasons for the failure of the Geneva Conference were not hard to find:

The United States and the United Kingdom had concluded the Bermuda Agreement, and, being quite satisfied with its effect in practice, did not want a multilateral agreement to replace it. This attitude was resented by other states. On the other hand, the small countries wanted to reserve their rights to contract out of the "fifth freedom," in order to maintain their bargaining position in bilateral route negotiations. Since the inclusion of a clause to this effect was unacceptable to the United States and the United Kingdom, the draft (multilateral agreement) itself was not accepted.

The moment for the successful conclusion of a multilateral agreement, if it had ever existed at all, thus passed from view although the Geneva Conference did come closest to preparing an agreeable multilateral system of air transport regulation. The quest for a multilateral agreement, however, did not end at Geneva in 1947.

As late as the Conference on European Air Transport at Strasbourg in 1954 it was still being emphatically declared that the only satisfactory basis for the operation of international air transport was a multilateral agreement on the exchange of commercial rights: and all the multitudinous variations of the traffic and route

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220 The Chicago Convention, supra note 4, Appendix IV, Cmd. 6614, at 57.
222 Wheatcroft, supra note 8, at 71.
224 P. Sand, supra note 29, at 36.
225 S. Wheatcroft, supra note 8, at 72.
Inevitably, there is a difference of opinion whether a multilateral agreement would in fact be better for international civil aviation than the system of BATA's. Sand has observed that "the failure of the Chicago Conference to achieve a multilateral agreement in air transportation has proved a hindrance to the development of post-war international air law." Verplaetse has echoed that opinion, categorically stating: "The failure to reach an agreement on the Transport Agreement contained in the Final Act of the Chicago Convention has had an unfavorable impact on the development of air navigation." Other writers, however, are of the view that international civil aviation has done as well or better under the regime of BATA's as it would have done under a multilateral agreement. Tymms has stated that "it seems doubtful if a regime of complete freedom would have served well the interests of air transport (including the users) of any country." Indeed, certain advantages in the system of BATA's have been discerned in the more frequent and thorough discussions between the states and ease of amendment which creates adaptability to meet changing circumstances. The assertion is also made that BATA's have worked out better than a multilateral agreement for the exchange of commercial air traffic rights but it is not likely to be empirically tested in our lifetimes since today, and for the foreseeable future, "in order to foster and regulate the traffic of international airlines, there is no other practical bypass to the deadlock (posed by Article 6 of the Chicago Convention) than the bilateral" agreement.

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226 Tymms, supra note 3, at 272.
227 P. Sand, supra note 29, at 37.
228 J. Verplaetse, supra note 40, at 33.
229 The Freedom of the Air, supra note 9, at 125; Tymms, supra note 3, at 472.
230 Tymms, supra note 3, at 472.
231 The Freedom of the Air, supra note 9, at 125.
232 The statement by Seabrooke that, "In point of fact, many bilateral treaties have now been superseded by the multilateral convention, a notable example of this being the Chicago Convention of 1944 . . . " is patently in error, at least insofar as the exchange of commercial air traffic rights is concerned. If Seabrooke meant to restrict this observation to the context of transit or technical rights, no such qualifying phrase was included to that effect. G. Seabrooke, supra note 26, at 103; J. Verplaetse, supra note 40, at 33.
Wheatcroft has analyzed the reasons for the continued likelihood of nations failing to agree on a multilateral agreement and he states:

So long as it remains true that governments regard it desirable to support their own national airlines—and often behave as though the strength of their own national airline were more important than the adequacy of the air services available to the public—the international aviation industry will continue to be dominated by considerations which rule out any form of supra-national regulation. These reasons reduce themselves to the observation that: “Alternative ways of regulation, that is, reliance on something other than market forces, depend on the creation of some authority to do the regulating, and this would require a surrender of sovereignty by great powers which is difficult to visualize.”

Of course, nations may voluntarily choose to relinquish sovereignty in this matter, on grounds of self-interest. But “nations will not enter into multilateral agreements unless the resulting situation is more satisfactory for that nation than the bilateral alternative.”

The events of today, centering on the restrictive practices which have been adopted by many states, are equally powerful in militating toward the preservation of the system of BATA’s. Thus, it appears today that international scheduled aviation is without any general international regulation and shows every sign of remaining unregulated.

V. BERMUDA TYPE AGREEMENTS IN OPERATION—
THE MAJOR PROBLEM AREAS

A. Restrictions Applied Under Bermuda Type Agreements

Air transport is a form of commerce, bearing strong similarities to other forms of commerce, and should not be considered, as it often is, as a thoroughly unique form of commercial enterprise in which the ordinary rules of economics do not apply. Hence in considering the restrictions which have been applied in the context of

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233 S. Wheatcroft, supra note 8, at 66-67.
234 R. Thornton, supra note 10, at 33.
235 Id. at 34.
236 See the section entitled “Bermuda Type Agreements in Operation—The Major Problem Areas” infra.
237 Rinck, supra note 20, at 109.
238 Bermuda type agreements will sometimes be abbreviated as BTA.
BERMUDA AGREEMENT REVISITED

BATA'S it must be borne in mind "air transport becomes a subprocess of the world process of international exchange of goods and services."²³⁹ Only when the role of international civil aviation as a component in the world trade equation has been acknowledged does it become meaningful to examine the restrictive practices which are unique to international aviation.

An analysis of restrictions which have been applied under BTA's must begin by observing that the Bermuda capacity clauses serve as precedents for traffic restrictions within the present system of international civil aviation regulation.²⁴⁰ Problems over restrictions have arisen, however, between many governments seeking to protect national airlines through demands for amendment or renegotiation or by favorable interpretation of Bermuda principles and U.S. air industry which resents the gains that this foreign competition has made in America's international air market under Bermuda type agreements.²⁴¹

The restrictions which have been imposed, although ostensibly within the framework of the Bermuda principles, have in fact gone beyond what the parties to the Bermuda Agreement could reasonably be presumed to have intended. Examples of these more extreme types of restrictions are numerous. For instance, Wassenbergh has made the point that

[s]ince it is still regarded as more or less a question of "boni mores" not to go any further than the Bermuda restrictions, the vast majority of bilateral aviation agreements are of the Bermuda type, although in practice more far-reaching restrictions are often in force. Thus the number of route restrictions and frequency limitations is legion, and there are many "no local traffic" sections, i.e. sections on which certain airlines are not allowed to embark local traffic.²⁴²

The total range of restrictive measures available to governments is extensive. They can impose restrictions

by allowing only a limited number of foreign airlines to operate into

²³⁹ The Freedom of the Air, supra note 9, at 92.
²⁴⁰ H. Wassenbergh, 1970, supra note 9, at 22.
²⁴¹ Stoffel, supra note 13, at 119; cf. Jones, supra note 14, at 233. And for a description of the practical economic considerations which contributed to the deteriorating position of Bermuda type agreements in the period 1946-1960 see Jones, supra note 14, at 233-35.
²⁴² H. Wassenbergh, 1962, supra note 13, at 65.
their territory, by limiting the granting of routes to foreign carriers, limiting the number of frequencies operated by foreign carriers over existing routes, restricting the number of passengers which may be carried on routes or route segments, limiting the operation of all-cargo services or the amount of freight to be carried, limiting the days and hours foreign carriers may operate over routes also operated by national carriers (to avoid duplication of services), restricting the operation of charter flights by foreign carriers, etc.  

It is necessary to reflect on the types of regulatory systems in which restrictions can appear. There are essentially three systems for the regulation of capacity. The first of these, which may be called laissez-faire competition, is actually a system of non-regulation. The second of these is predetermination in which the share of the traffic to be carried by each contracting party to the agreement is determined by them in advance. This method, of course, is totally restrictive. The third system, somewhere in between the other two, is that of the Bermuda Agreement. It provides for controlled competition, subject to the guidelines of the Bermuda principles. Wheatcroft has observed that the lowest percentage of the traffic which a country operating under a Bermuda type agreement will be willing to accept on major routes where it generates fifty percent of the traffic is forty percent. Since the other contracting party to such a BATA will likewise be unwilling to accept less than a forty percent share in a market in which it generates fifty percent of the traffic, the two parties can be said to be effectively competing for just this “middle” twenty percent of the traffic. On either side of this middle portion, the traffic restrictions will be imposed by the party carrying less than forty percent in order to boost its share. This analysis, of course, has been based on the situation prevailing when each party generates one-half of the traffic. It is equally applicable, however, with appropriate mathematical adjustments, to the situation prevailing when one party generates more traffic than the other. For example, in a situation in which one party generates sixty percent of the traffic and the other party only forty percent, the party generating sixty percent is likely to begin imposing restrictions when its share of the traffic hits forty-eight percent of the traffic. This is based on the twenty percent competitive zone of the

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243 H. Wassenbergh, 1970, supra note 9, at 17.

244 S. Wheatcroft, supra note 8, at 74. Eighty percent of the sixty percent of
preceding example remaining constant, a reasonable assumption. This example bears a close resemblance to the actual United States position on the North Atlantic, as the accompanying chart makes clear, and it is interesting to note the increasing moves toward restrictions by the United States, which are in accord with Wheatcroft's hypothesis.

TRANSATLANTIC PASSENGER TRAFFIC TO AND FROM THE U.S., SCHEDULED AND CHARTER OPERATIONS, U.S.-AND FOREIGN-FLAG CARRIERS
CALENDAR YEARS 1963-74

<table>
<thead>
<tr>
<th>Year</th>
<th>U.S. Foreign</th>
<th>U.S. Foreign</th>
<th>U.S. Foreign</th>
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<tr>
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<td>Charter</td>
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<td>1974</td>
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<td>52.5</td>
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</tbody>
</table>

Note — Totals may not add due to rounding.

Seen in this light, self-regulation and the Bermuda principles are revealed as being only a slightly more elegant way of dividing economic benefits with the division based on the relative competitive strengths of the parties within a narrow zone rather than on the basis of the more crass and heavy-handed predetermination approach. Thus in a predetermination arrangement with an equal di-

the traffic generated by the dominant party is forty-eight percent of the total traffic on the route. (Eighty percent of sixty percent being forty-eight percent.)

See, e.g., H. Wassenbergh, 1970, supra note 9, at 27 n.14, and the chart in the text.

The Board (in FY 1974) hardened its negotiating positions with the demands of foreign governments for new or additional rights, and will seek to adjust existing exchanges of air rights with other countries under circumstances where exchanges are clearly out of balance. 1974 CAB ANN. REP. 14.
vision of the traffic virtually no variation from a 50-50 division of
the traffic is permitted, but in a BATA a twenty percent competitive
tolerance is built into a regulatory regime in which eighty percent
of the traffic is de facto predetermined on the basis of traffic gen-
nerating capability.

The freedom of the air the United States has long advocated
under the Bermuda principles is a special kind of freedom: the
freedom of the stronger (in terms of traffic generating capability
and bargaining power) to freely compete with the weaker. This
Darwinian notion of freedom has understandably not set well with
that large body politic of countries which together comprise the
category of "the weaker." Like weaker species in nature, these
countries have fought back with whatever weapons they happened
to have at hand. This arsenal of weapons (i.e. restrictions) has
been more than a match for the single big weapon in the U.S. ar-
senal—traffic generating capability. The reasons for this, noted
above, stem from the fact that, to paraphrase John Donne, no na-
tion is an island unto itself in international air transportation.

The United States position, calls to mind the famous statement of
Oscar Wilde that, "The Ritz is open to all," provided, of course,
that the patrons can foot the bill! The U.S. view, has consistently
been that it desires "only" to have a fair and equal opportunity to
carry an amount of traffic equal to the amount of traffic it gen-
erates. Out of deference to the Bermuda principles to which it
has long been committed, the United States has even been willing
to accept situations in which it carries twenty percent less traffic
than it generates, but beyond that point the United States is under-
standably adamant. Since traffic statistics reveal that it has al-
ready been pushed to this point by the restrictions imposed by forei-
gn governments, the United States is currently looking for ways in
which to redress this adverse balance. It is submitted that the

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247 This is not to suggest that collectively these nations are weaker than the
United States; rather the point here is to re-emphasize that the exchange of com-
cmercial air rights is made on an exclusively bilateral basis, in which each of the
countries with whom the U.S. has BATA's must negotiate with the United States
on a "one to one" basis.

248 See text accompanying the subsection entitled "Bilateral Agreements," supra.

249 That is, the lion only deserves a lion's share. See note 10 supra.

250 See note 11 supra.

251 See notes 10 and 11 supra.

252 See note 11 supra.
United States is now seeking a regulatory system capable of obtaining the statistical results which have heretofore been achieved under the Bermuda Agreement, i.e. the carriage by U.S. carriers of an amount of traffic equal to at least eighty percent of the traffic the U.S. generates, rather than the preservation of the Bermuda plan itself. Belatedly, it is being recognized in the United States that the Bermuda plan is a means, and not an end in itself. As Loy has stated:

[N]ations, having been saddled with the task of entering into bilateral agreements, had better decide rather clearly what their objective is in making these agreements. It seems to me there is a dual objective, at least for those countries that have national carriers: first, the creation of an expanding network of air services under conditions which permit economic and efficient operations for the benefit of the public; and second, assurance that the flag carriers of the nations have a fair opportunity to compete for business in that route network.\footnote{553}

The analysis suggests why the Bermuda type of agreement is well suited to states of relatively equal bargaining strength, and poorly suited to states which are inherently unequal in bargaining strength. This is because

[It]he 20 per cent air traffic available for competitive capture under a normal Bermuda would go to the stronger airline. For this reason, many of the smaller states have preferred tighter economic airline regulation by the respective governments.\footnote{554}

Wassenbergh put this matter into philosophical perspective when he stated: “Man is as equal as he makes himself. The problem is the regulation of inequality.”\footnote{555} Gazid has stated that in the process of regulating this inequality

\ldots states have tried to safeguard the interests of their own carriers and, at the same time, foster development of scheduled inter-

\footnote{553} The Freedom of the Air, \textit{supra} note 9, at 175.

\footnote{554} Civil Aviation Agreements of the People's Republic of China, \textit{supra} note 52, at 335.

Different and more restrictive applications of the Bermuda capacity clauses may be explained by the fear that strong carriers will make use of the rights granted to them without regard to sound commercial principles and operate services without sufficient economic justification (dumping).

H. Wassenbergh, 1970, \textit{supra} note 9, at 23.

\footnote{555} H. Wassenbergh, 1970, \textit{supra} note 9, at xii.
national air services for the public transport of passengers, mail and cargo. In view of the complexity of these bilateral controls, it would be difficult to assess what restrictive effects [capacity controls have] had on development of scheduled services. In an ideal world perhaps these controls would not need to exist, but then we do not live in an ideal world. 256

The above observations suggest an emerging pattern toward restrictionism in international civil aviation coinciding with similar patterns in other fields of international economic relations. This pattern has grown progressively over the years since 1946, and at present the flexibility of the Bermuda plan is being torn asunder by the increasingly heavy burden of restrictions.

Whether the latitude provided by the Bermuda principles has brought about this increase in restrictions, or whether the frequent consultations BTA's call for have slowed the trend toward restrictionism, is inherently less important than that the compromise Bermuda principles are at present giving way to some other form of capacity regulation, as yet unknown. 257 As an example of this deficiency of the Bermuda Agreement, it has been observed that "[o]wing to the fact that stress is being laid more and more on subparagraph (c) of paragraph 6 of the Bermuda Agreement, priority is being given to local and regional services at the expense of long-distance services." 258 In any event, there can be no doubt that, "Since Geneva (in 1947) there has been a steadily increasing differentiation of bilateral aviation agreements, with a tendency towards an ever more precise definition of what is being reciprocally granted." 259

The above may be said to constitute the major reasons for the growing trend toward restrictionism, which in practice has meant the restrictive application of the Bermuda principles. Regarding the means of applying these restrictions it should be noted that restrictions which go further than those in Bermuda clauses, are often embodied in secret letters or notes between the aviation services of the countries. 260 This same secretiveness applies to consultations between

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256 Gadzik, supra note 63, at 35; cf. the text of the section entitled "Bilateral Agreements" supra.
257 H. WASSENBERGH, 1962, supra note 13, at 58.
258 Id.
259 Id.
260 Id. at 64.
the parties over restrictions which have been imposed. Yet it is also true that many of these restrictions do become generally known.

Often the objective of restrictions is to shift the regulatory framework of the BATA away from Bermuda and closer to a predetermination scheme. Professor Cheng, who has called this process "predetermination through the back door," described it as follows:

[When pooling or similar arrangements exist, the effect is to reintroduce predetermination by the airlines through a back door, with the proviso that this type of predetermination is entirely voluntary. The case is different in agreements which subordinate the operation of the agreed services to agreement between the respective designated airlines with or without overt government control, for in that event predetermination is only very thinly disguised.]

The latter type of agreement described by Professor Cheng is that used most frequently by the Communist countries, and particularly the People's Republic of China.

Predetermination schemes have heretofore been vigorously resisted by the United States. The European states began to stress "equality of opportunity" when they recognized the United States' total antagonism toward predetermination, and the Europeans interpreted this equality to mean reciprocity in routes on a route-for-route basis and reciprocity in traffic centers served. Predetermina-

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261 The Freedom of the Air, supra note 9, at 165.
263 Cheng, supra note 7, at 443.
264 For a breakdown of the various European countries on the basis of the degree of predetermination in their air transport policy, see Edwards Report, supra note 9, at 89. And for a description of the operation of pooling arrangements, see Edwards Report, supra note 9, at 94-97. Concerning pooling and joint ventures cf. Wasseenbergh, 1970, supra note 9, at 9, 107 et seq. Specific national approaches to the subject of capacity control are examined in the author's Master's Thesis, in the chapter entitled A Brief Look at Capacity Control in the Bilateral Agreements of Five Countries, at 87-100.
266 Jones, supra note 14, at 234. See also The Freedom of the Air, supra note 9, at 177-78 and H. Wasseenbergh, 1970, supra note 9, at 37-40.
tion inevitably leads to pooling, i.e. agreements between airlines normally involving "the pooling of revenues derived from operations on a common route, the revenue share each partner obtains being dependent upon its production share." Through these agreements between airlines "it is sometimes possible to modify the limitations of a predeterminist agreement."  

One form of restriction which promises to become even more common in a time of monetary instability is "the growing tendency among certain countries with weak currencies to control expenditure in their own currency on foreign travel: in exercising this control, it is a relatively simple matter to make it easier for passengers to obtain a currency permit if they travel on the national carrier." Of this restrictive practice it has been said, "Here, true reciprocity—fair and equal opportunity—ceases to exist as between the national airlines."  

Whether the sixth freedom (the carriage of traffic between two foreign countries via the homeland of the carrier) is really the fifth freedom (the carriage of traffic between two foreign countries not via the homeland of the carrier) or a combination of the third and fourth freedoms (the privileges of setting down or picking up in one contracting state traffic picked up in or destined for the other contracting state) has been an important question in applying restrictions under the Bermuda capacity principles. If it is considered as fifth freedom traffic, then it falls under the Bermuda capacity principles, which restrict fifth freedom traffic by definition to the role of secondary justification traffic. If, on the other hand, it is merely a combination of the third and fourth freedoms, then it constitutes traffic which may be taken into account in determining what constitutes a state's primary justification traffic. The United States is virtually alone in considering sixth freedom traffic to be a form of fifth freedom traffic. Part of the problem lies with the sta-

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267 H. Wassenberg, 1970, supra note 9, at 108. The U.S. attitude toward pooling may be changing. See Henzey's Airline Reports 6 (July 28, 1975) and CAB Order No. 75-7-27 (July 3, 1975) and CAB Order No. 75-9-11 (September 4, 1975).

268 Edwards Report, supra note 9, at 89.

269 Jack, supra note 9, at 474. Cf. note 27, supra.

270 Jack, supra note 9, at 474. Cf. note 27, supra.

271 See section entitled "The Chicago Convention" supra.

272 This paragraph is based on H. Wassenberg, 1970, supra note 9, at 23-24; Edwards Report, supra note 9, at 284. See note 27 supra.
tistics concerning origin and destination of traffic.\textsuperscript{273} This problem, in turn, is based on the lack of agreed definitions for the terms origin and destination.\textsuperscript{274} Of this problem it has been said:

[The Sixth Freedom] problem will remain with us since the Bermuda principles are deliberately vague and their application continues to be not wholly satisfactory to any party to this agreement . . . . Some solution is called for and it may lie in the direction of a refinement and further spelling out of the Bermuda principles, since the faults in the Bermuda principles do not appear to lie in what they say but rather in what they do not say. On the basis of experience in the last ten years it should now be possible to further evolve the principles so that they will at least be clearer to everyone, even though they may not satisfy everyone.\textsuperscript{276}

This suggested solution is one which has already been considered,\textsuperscript{276} and one which receives further consideration below.\textsuperscript{277}

The restrictions outlined above operate in what Lissitzyn has called the framework of the characteristic restrictions of air commerce.\textsuperscript{278} These characteristic restrictions are the basic fabric of international civil aviation, as opposed to the competitive restrictions discussed above which are as yet far from uniform in their application. These characteristic restrictions are the prohibition of cabotage traffic (Article 7 of the Chicago Convention), the requirement of obtaining the express permission of a state for the operation of scheduled international flights over or into that state (Article 6 of the Chicago Convention), the principle of primary justification traffic, the tendency to segregate bilateral bargaining for air transport privileges from bargaining for the exchanges of other services and goods, the absence of principles of non-discrimination or any most-favoured-nation clauses, the "ownership and control" clauses in BATA's, the practice of subsidizing national airlines, and price-fixing on a world-wide basis by the International Air Transport Association (IATA).\textsuperscript{279} These characteristic restric-

\textsuperscript{273} H. Wassenbergh, 1970, supra note 9, at 25.
\textsuperscript{274} Id.
\textsuperscript{275} Stoffel, supra note 13, at 130.
\textsuperscript{276} See the section entitled "The Bermuda Agreement" supra.
\textsuperscript{277} See the section entitled "The United States Attitude Toward the Bermuda Agreement" infra.
\textsuperscript{278} THE FREEDOM OF THE AIR, supra note 9, at 92-95.
\textsuperscript{279} Id.
tions have themselves come under criticism, not from aggrieved governments or airlines, but rather from what may be termed "consumer-minded" critics. The thrust of the criticisms is that international civil aviation, even without frequency and capacity restrictions, is, on the basis of its characteristic restrictions, basically anti-competitive.

Typical of this criticism is this observation by Worcester:

It is by no means certain that the complicated Bermuda-style horsetrading of franchises, frequencies and special rights between points, or gateways or points-beyond is in the best interests of the traveling public. These are all devices that variously inhibit price competition, whereas the public has grown to expect for itself the benefits coming from occasional bouts of oppressive competition in most mass consumer trades.280

Worcester even extols the virtues of oppressive competition:

Oppressive competition is a ghoul frequently cited in cases of economic regulation, but it is by no means always harmful, and can be of lasting benefit both to the public and the operators. In any case oppressive periods seldom last very long—their duration is dictated by the rules of economic survival of the fittest; clear limits to the periods that uneconomic operations can be sustained are part of the built-in economic checks and balances in all industries dealing with the public.281

Worcester's is, of course, a doctrinaire position, since it can just as readily be argued that bouts of oppressive competition cause uncertainty over price, and, more significantly in a competitive sense, a reduction in the number of participants in the enterprise leading to oligopoly or even monopoly.

There is more to Worcester's criticism of the present structure of international civil aviation. He professes to be disturbed that a net of restrictive practices has intensified and become more uniform, extending to standards, service and equipment.282 It can only be wondered why the aviation industry should be different in regard to increasing standardization than the automobile, watchmaking, bak-

280 Id. at 134.
281 Id. This is the same argument as the one often made in the current domestic "deregulation" controversy. See, e.g., EVALUATION OF ECONOMIC BEHAVIOR AND OTHER CONSEQUENCES OF CIVIL AVIATION SYSTEMS OPERATING WITH LIMITED OR NO REGULATORY CONSTRAINTS at 29-37 (1975).
282 Id. at 119.
ing and candlestick-making industries. More to the point, Worcester has said:

IATA fare negotiations led first of all to a price cartel . . . It was followed by a quota cartel, with the connivance of govern-
ments, which sought to divide the world’s traffic so that each coun-
try could carry its “own” traffic. A country’s ability to generate traf-
ic has in general been the controlling factor in deciding how gate-
way points, and Bermuda-type points beyond should best be serv-
ed.283

There are clearly a number of problems with this statement. First,
although the IATA has often been criticized as being a cartel,284 it is
a strange cartel which gives a veto power over pricing decisions to
its weakest as well as its strongest members. In any case, this IATA
rate-making machinery did not develop in a vacuum,285 and replac-
ing it at the present time on a multilateral basis would be at least
as formidable a task as that confronting the United Nations Con-
ference on the Law of the Sea which is expected to continue at least
for several years. As for the “quota cartel,” it has been observed
how far short of carrying its “own” traffic the United States has
fallen under the Bermuda principles.286 A restrictive system in
which the largest participant cannot manage to carry even eighty
percent of the traffic it generates is plainly not overly restrictive.

There are, of course, aspects of Worcester’s criticisms which have
a solid factual basis. He is correct in asserting that the basis for
negotiating BATA’s is the equitable exchange of economic bene-
fits.287 His criticism is deficient, however, in that it does not point
out alternative ways of organizing international civil aviation.
Wheatcroft notwithstanding,288 international civil aviation is becom-
ing more restrictive than ever. If, as has been said, “The answer to
growing restrictionism, from whatever cause, is to make even more
clear that the world today is one,”289 it still remains necessary to

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283 Id. at 119-20.
284 For an evaluation of these criticisms, see R. CHUANG, supra note 117. A book by K. PILLAI, THE AIR NET: THE CASE AGAINST THE WORLD AVIATION CARTEL (19-) is premised on this criticism.
285 Id. Cf., text accompanying the subsection entitled “The Bermuda Com-
promise” infra.
287 See text accompanying note 80 supra.
288 See text accompanying note 18 supra.
289 Jack, supra note 8, at 475.
provide a blueprint in order for that unity to be built. At present, restrictions are viewed very much from a national, rather than an international, perspective. Thus, Peter Jack, of British Airways, author of the preceding statement, and the United States, may both want freedom from restrictions so that considerations of bargaining power, economic and otherwise, can hold sway. On the other hand, Worcester and Dr. Wassenbergh of KLM, desire freedom from all restrictions, including those of the Bermuda principles, so that the "pure" economic considerations of competitiveness and efficiency will be the sole criteria for the carriage of international air traffic. Small countries, of course, are not at all upset by any pejorative notions of restrictionism put forward by the major air powers. Their primary concern is to protect their own national airlines, which, they correctly feel, will be under a competitive disadvantage in the absence of restrictions. Not until considerations of these kind are taken into account can criticisms such as Worcester's and Wassenbergh's be taken seriously. Indeed, there is a special reason for disregarding Dr. Wassenbergh's criticisms—namely, what might be called a conflict of interest, based on the self-interest of the Netherlands and KLM.

B. Some Structural Problems in International Civil Aviation Which Bear on the Bermuda Agreement

Brief mention should be made of what might be called the structural problems in international civil aviation which bear on the Bermuda Agreement. Three of these, the proliferation in the number of international airlines, the rapid changeovers in equipment brought about by new technology, and the problem of over-capacity are all closely related.

That "the proliferation of airlines creates difficulties" is a definite

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289 See text accompanying note 21 supra.

291 See subsection entitled "Bilateral Agreements—How Negotiated" supra.

292 These remarks are not meant in any way to derogate the valuable contributions of Dr. Wassenbergh to the literature. Their only purpose is to label as special pleading that which clearly meets that description. In fairness, I hereby quote Dr. Wassenbergh's none too convincing disclaimer of special pleading. "The fact that Dutch shipping and Dutch civil aviation would profit from this liberal policy (i.e. the "internationalization" of international civil aviation) if it were also followed by other countries cannot be seen as an explanation of the Dutch liberal approach but merely as a coincidence and only partly a consequence." H. Wassenbergh 1970, supra note 8, at 11. See subsection "Bilateral Agreements—How Negotiated" supra.
understatement. This statement hints at the reality that the proliferation of airlines is a wholly unavoidable process. This is so because:

There are many reasons why the requirement of a ‘National Airline’ is so strongly felt throughout the world. Prestige and political communication are perhaps the most obvious. But there has also been the strategic consideration that aircraft available to carry civilians in time of peace are also available to carry military equipment and personnel in time of war. Furthermore, while it may be possible for a country to get cheaper services by leaving them to the airlines of other countries to operate, no country cares to feel entirely dependent on another for the transport of people and goods across its boundaries, especially when this dependence represents a permanent drain on foreign exchange resources. Some countries go so far as to regard air traffic to and from their country as a sort of national property.

Since the constituency of states with national airlines virtually coincides with the total number of states, it is altogether understandable that the constituency for Dr. Wassenbergh’s “purely international approach” is as small as it is.

It has been said that the dynamic technology of aviation has prevented a full adjustment between states. This has been true not only of the legal aspects of international aviation, but also for the political and managerial aspects of the industry. Perhaps the biggest problem dynamic technology has caused has been that of overcapacity. Yet bigger airplanes are only a part of this problem. It is undeniably true that the current regulatory system based on bilateral agreements has played a role in producing overcapacity. Changing the system of regulation to root out the problem of overcapacity has proved to be most difficult. Some of the means which have been tried are considered below.

Like the proliferation of airlines, overcapacity seems to be an

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292 Jack, supra note 8, at 474.
295 H. Wassenbergh, 1970, supra note 8, at 11.
296 Johnson, supra note 16, at 366.
intractable problem and reactions to it have varied. McCarroll described some of the approaches to the problem:

First, some have urged significant rate cuts to generate new traffic. Second, various lines and countries, particularly in Europe, have considered forms of multi-national and interline cooperation. Third, the European countries have demanded access to interior American cities, considered by the American carriers to be domestic markets. They argue that the U.S. policy of seeking equal economic value in traffic rights received for American lines in return for the grants given foreign lines is outmoded and that their lines should have the same freedom of access to the U.S. market that American carriers have to the European market. Finally, there has been a renewed tendency to resort to capacity restrictions when national lines are in trouble. This tendency is notable even in the U.S. where the concern both in the industry and in the government over a sagging share of the market may be leading towards a more restrictive American policy towards commercial freedoms. 299

Even this listing does not exhaust all of the suggestions for solving the problem which have been made. 300

Another structural problem which has great potential implication for the system of BATA's is the steady increase in charter operations. 301 The great increase in charter operations has unquestionably eroded scheduled traffic rights, 302 It is possible that separate BATA's for non-scheduled service will become a reality with the result that these separate BATA's would be merged into the existing BATA system for scheduled services. 303 Although Mr. Secor Browne's proposal for separate BATA's for non-scheduled traffic

299 See McCarrol, supra note 162, at 117-18.
300 See Wheatcroft, supra note 298; see also at 627 for some additional suggestions.
303 See Wheatcroft, supra note 298.
has received little acceptance, it is nonetheless true that such traffic, simply by virtue of its increasing share in the total air traffic market, may bring about certain changes in existing BATA's.

One further structural problem merits discussion: the danger posed to the BATA system by the forming of regional blocs, and the consequent possibility of crippling cabotage restrictions coming into existence by virtue of the formation of these larger blocs. Regional groupings are considered to be a likely response if the United States tries to flex its bilateral negotiating muscles and regain a larger share of the international air traffic market. Along these lines, the question has been posed:

Will the cooperating European airlines define operations within the Common Market as cabotage, under which the entire Common Market area would be established as domestic territory?

This would prevent non-Common Market carriers such as the U.S. from operating fifth freedom routes such as London-Frankfurt or Paris-Rome. This action, if taken, would indeed "present an effective economic blocking action that would dilute United States superiority in the area of bilateral route and capacity negotiations."

There are, of course, good reasons for the European states not to take such a step. Retaliation by the U.S. could be made by equating entry rights from Common Market countries into the U.S. to the number of U.S. airlines serving the Common Market area which would result in a reduction of Common Market airlines with traffic rights into the U.S. from 9 to 3 passenger carriers and 1 all-cargo carrier. In addition, it should be remembered that it is an understood phenomenon that aeronautical matters such as

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204 See, e.g., AIR TRANSPORT ASSOCIATION COMMENTS ON INTERNATIONAL AVIATION POLICY REVIEW, April 11, 1975, at 2.

206 See Jack supra note 9, at 475. For a very good early treatment of the potential threat to the United States' dominant position in international civil aviation posed by trading blocs and airline combinations, see Jones supra note 14, at 235-39.


309 Robinson, supra note 306, at 554-55.

310 Doty, supra note 307, at 23.
routes, capacity, aircraft type, beyond points, to name a few, are not the only items considered negotiable within the framework of bilateral air transport agreements. Unrelated economic resources and even nonaviation political alignments are fair game as well. In view of this, the effectiveness of a cabotage pooling arrangement, or international cabotage area, may be successfully countered and nullified by the well-developed aviation countries. On the other hand, depending upon what is available for renegotiation, the effectiveness of such a pooling agreement could be strengthened substantially.

The preceding analysis loses some of its cogency when it is a group of the well-developed aviation countries themselves who set up the international cabotage area. The United States would probably stand to lose as much in such "escalated" bargaining as it could hope to bring to bear. The legitimate U.S. response of restricting the number of Common Market carriers with access to the U.S. to the number of U.S. carriers with access to the Common Market remains fully valid, and reveals the focal issue—relative bargaining strength as between the United States and the Common Market countries in negotiations over a replacement of the Bermuda system.

It is possible to argue that recent events make such "post-Bermuda" negotiations more and more likely. For instance, at the time of the fuel crisis in early 1974 forced "international airlines and governments into unprecedented actions that promise a drastic reshaping of traditional concepts of competition and an expansion of regulatory control into the international field." This view was corroborated in March, 1974, when the following was reported:

European air carriers are moving to maximize their areas of cooperation—short of sacrificing national image or political prerogatives—as a means of combating sharply rising costs led by fuel prices and extending to all areas of operation.

Current efforts include not only traditional bilateral agreements but encompass both expanded activities within existing mainten-
ance consortiums and a new movement toward an all-European approach to all management questions.\footnote{Winston, \textit{Rising Costs Spur Carrier Cooperation}, \textit{Av. Week}, March 11, 1974, at 91.}

Also worth noting is that the European Civil Aviation Conference, composed of government aviation officials, has influenced the Common Market carriers with a resulting emerging to "negotiate on such issues as charters and fares on a multilateral rather than a bilateral basis."\footnote{Doty, \textit{supra} note 307, at 23.}

The gist of the foregoing observations is that an expanded cabotage concept, like predetermination, can creep in through the back door\footnote{See text accompanying note 263 \textit{supra}.} "by pooling arrangements, interchange arrangements, common ticket service arrangements, border crossing arrangements, and other devices" between European carriers.\footnote{Jones, \textit{supra} note 14, at 237.} Of course, and this is a point that bears repeating, the introduction of an expanded cabotage concept would be either in response to a vigorous bargaining initiated by the United States to improve its position in the carriage of international air traffic, or would itself trigger such an initiative by the U.S.\footnote{Doty, \textit{Drastic Bilateral Shifts Speeded}, \textit{Av. Week}, Oct. 23, 1972, at 25-26; Doty, \textit{Foreign Restrictions Align U.S. Reaction}, \textit{Av. Week}, July 9, 1973, at 26; \textit{Av. Week}, \textit{supra} note 14, at 21; Department of Transportation Announcement, International Aviation Policy Review, \textit{supra}.}

VI. THE U.S. ATTITUDE TOWARD THE BERMUDA AGREEMENT

The United States' attitude toward Bermuda type agreements, long unquestionably favorable is finally in the process of undergoing a change.\footnote{Doty, \textit{supra} note 307, at 23.} The evolutionary nature of this change in attitude is worth tracing, both to understand why it has come about and to better venture a guess as to the outlines of future U.S. policy in this area.

In negotiating its BATA's the United States has always "transposed into the international field her domestic concept of slightly regulated free enterprise spelled out in the Civil Aeronautics Act, with as little restriction on schedules and equipment as possible
as long as competition remains fair.\(^{320}\) This conception led the United States to negotiate the Bermuda Agreement, which enabled the United States to dominate world aviation through its economic resources under a framework that has remained unchanged.\(^{321}\)

The way in which the decision to base U.S. policy on the Bermuda plan has been implemented, however, has not always had the approval of those within the international aviation industry in the United States.\(^{322}\) Jones has observed:

The most amazing thing about the "Bermuda principles" was that the U.S. came to believe that the capacity clauses were indeed "principles," possessing some sort of moral or legal sanction, when they were, in fact, only political-commercial clauses drafted in a very special agreement to meet a unique situation existing between the two great contracting powers . . . Certainly, the U.K. did not consider the capacity clauses as "principles," nor did the Commonwealth nations. The U.K. continued to make agreements with European nations (France, for example) limiting and allocating capacity and frequencies . . .

(The U.S.) hadn't changed the basic civil air transport concepts of most of the European nations one iota, and we were soon to find this out.\(^ {323}\)

In short, the Bermuda Agreement came to have a meaning for the United States which was not shared by other countries.

For a very long time the pragmatic attitude toward the Bermuda plan on the part of the European states had no impact whatever on U.S. adherence to the Bermuda approach.\(^ {324}\) The essentials of U.S. policy, and the dates of their adoption, have been set forth by Sackrey:

In 1940, the CAB, by certifying American Export Airlines to compete with Pan American on the transatlantic route, established a policy of regulated competition on all international routes where such competition was justified by sufficient traffic. In 1945, this

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\(^{320}\) Jones, supra note 14, at 241.

\(^{321}\) Jack, supra note 9, at 471. See also H. Wassenbergh, 1970, supra note 9, at 4.

\(^{322}\) Lissitzyn, Bilateral Agreements on Air Transport, 30 J. Air L. & Com. 252-56 (1967); Jones, supra note 14, at 232.

\(^{323}\) Jones, supra note 14, at 232. See also H. Wassenbergh, 1970, supra note 9, at 5.

\(^{324}\) Jones, supra note 14, at 221; Sackrey, supra note —, at 51-52; H. Wassenbergh, 1970, supra note 9, at 22.
country adopted the bilateral agreement as the chief instrument for establishing international routes. In the following year, the CAB lent its support to the International Air Transportation Association, giving that organization the power to establish rates on the great majority of all international commercial flights. Thus, by 1946, the U.S. government had developed an international air transport policy which, in all of its important features, has remained unchanged to the present time.335

The focus of this policy was to restrict foreign carriers and reserve the American market for American carriers, as much as possible.336 It is only at the present time that this defensive posture by the United States may be said to be coming to an end.337

In legalistic terms, the United States, by accepting restrictions imposed by European and other states without either requesting renegotiation or denouncing the BATA’s in question, may be said to have de facto acquiesced in a rescission of the Bermuda type agreements as negotiated, and to have effectively agreed to a novation of these agreements, incorporating the restrictions being utilized by the European and other countries. The United States would never accept such an argument, but since U.S. civil aviation policy is shifting from restricting foreign operators to enhancing the position of U.S. carriers in other countries,338 the United States should be prepared to encounter this attitude in its dealings with the European states, even if those states do not expressly voice such a view.

Behind this change in U.S. aviation policy is the single basic fact that the Bermuda principles were becoming unprofitable in operation. Harold Jones, former U.S. Representative to ICAO stated the problem thus:

The sacred “Bermuda principles” were beginning to cost the U.S. a lot of money. They were fine in 1946 when we generated about 70% of the transatlantic and transpacific traffic, and carried about 80% of it. Now, these same “principles,”—“fifth freedom,” plus “reciprocity of rates,” “reciprocity of traffic centers” and “dog leg routes” exposed the great U.S. traffic market to dozens of international airlines of other nations, many of which generated little traffic, operating chiefly for reasons of politics and pride, and de-

335 SACKREY, supra note 297, at 51-52.
336 H. Wassenbergh, 1970, supra note 9, at 22.
337 Id. at 28, see also note 319 supra.
338 H. Wassenbergh, 1970, supra note 9, at 28; see also note 319 supra.
dependent on the American tourist dollar. Our own airlines were carrying about 40% of the transatlantic traffic, although the U.S. generated about 71% of it. Were we trading transatlantic dollars for Paris and Rome "fifth freedom" nickels?^{329}

This view has long been shared by U.S. international carriers.^{330}

What is perhaps even more significant in this regard are the Presidential Statements on U.S. international air transport policy of 1963 and 1970.^{331} In the 1963 Statement the United States predictably came down "on the side of expansion not restriction."^{332} The Statement took the view that:

> Any policy of arbitrarily restricting capacity, dividing markets by carrier agreements . . . would be harmful to our national interests. Such a policy would not be in accord with our basic attitudes toward private enterprise.^{333}

Reading that statement now one cannot help but smile at the implied notion that if only the states imposing such restrictions realized that in so doing they were acting contrary to basic U.S. attitudes toward private enterprise, they would surely cease and desist such restrictive activities immediately! In similar language, the Statement went on to say:

> During recent years, United States international carriers, and others associated with United States aviation, have expressed growing concern over a phenomenon clearly related to these and other changes: the decline in the United States' share of world air transport activities. This concern has been accentuated by relatively low earnings for a number of United States international carriers.^{334}

One can only wonder how the author of that statement would char-

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^{329} Jones, supra note 14, at 234. An example of the "dog leg routes" referred to is a route going "to New York and beyond to Latin America, which is in fact a separate route hinged on New York, and almost 2000 miles longer to the heart of Latin America." Id.

^{330} See, e.g., Stoffel, supra note 13, at 130; for a consideration of the related concepts of statistics, multiple designation and change of aircraft, see Stoffel, supra note 13, at 131-34; Ellingsworth, Atlantic Aid Plans Start to Converge, Av. Week, June 17, 1941 at 31; Pan American Airways, Inc., 1975 Annual Report at 3-14.

^{331} See note 265 supra.

^{332} See supra note 265, the 1963 Statement.

^{333} Id.

^{334} Id.
acterize the present concern of Pan American and Trans World Airlines over their current and projected losses.\textsuperscript{525}

Although foreign carriers were growing more rapidly than domestic carriers, the 1963 Statement did correctly perceive that, the growth is "the natural consequence of the growing strength of our friends and allies around the world,"\textsuperscript{526} and was therefore not a wholly lamentable development from the American standpoint. The question of how the United States could have healthy and thriving allies and at the same time maintain the share in the traffic it had obtained during the time when those allies were in the process of recovery from the damages of war was not reached in the Statement.

The more important provisions of the 1963 Statement are as follows:

The United States will maintain the present framework of bilateral agreements by which air routes are exchanged among nations and the rights to carry traffic on them are determined according to certain broad principles. The substitution of a multilateral agreement seems even less feasible or acceptable today than when first attempted at the Chicago Conference of 1944.

This framework of agreements rejects the extreme positions considered both at the Chicago Conference and subsequently. On the one hand it rejects as completely impractical unregulated freedom of the skies, and recognizes that the exchange of routes is a useful tool in building sound and economic growth of air transport. On the other hand, this framework rejects the concept that agreements should divide the market or allocate to the carriers of a particular country a certain share of the traffic. The latter concept would surely restrict the growth of international aviation and would result in endless bickering among nations as to their proper share of the traffic . . .

The United States supports the "Bermuda" capacity principles which flexibly govern the amount of service individual carriers may offer to the travelling and shipping public . . .

. . . Our policy, then, will be to oppose both arbitrary capacity restrictions and the stretching of those principles to the point of abuse. We shall continue to take the initiative in resisting predeter-

\textsuperscript{525} Pan Am posted an $81.8 million loss in 1974, while TWA lost $23.6 million in 1974. Av. Daily, February 28, 1975 at 321. In the first half of 1975, Pan Am's loss was $55 million, and TWA's was a hefty $86.8 million. Av. Daily, July 28, 1975 at 145.

\textsuperscript{526} See note 265 supra, the 1963 Statement.
mined capacity levels. We shall also take the initiative to seek agreement to a reasonable and fair interpretation of what constitutes secondary justification traffic under "Bermuda" capacity principles.

Past efforts to resolve the latter problem have not been successful . . .

If despite our best efforts we were to be confronted with serious abuses of the capacity principles, recourse will be had to the procedures available under our bilateral agreements. These including consultation, arbitration, and in the last analysis, denunciation and renegotiation of such agreements.\textsuperscript{327}

Johnson, a draftsman of that Statement, summarized, "After looking at the alternatives, in effect, the statement harks back to Bermuda and to Chicago and finds the policy-makers of those days were in the main on the right track."\textsuperscript{338} In other words, the 1963 Statement was "to all intents and purposes, a tacit advocacy of maintaining the status quo in the international air transport industry."\textsuperscript{339} Mr. Johnson, who was the Assistant Secretary of State for Economic Affairs, in writing about the Statement came to grips with the crux of the United States' problem with regard to the Bermuda Agreement when he said:

\textbf{[A]lthough the industry is worldwide, one market, the United States, is overwhelmingly important. Our large population and our relatively high income levels make it inevitable that we will provide more passengers and more cargo than any other national unit. But we are sovereign only over our own airspace. If we wish to fly elsewhere in the world, then we must get permission from other sovereign states. Typically, the other sovereigns consider that rights to enter their air space should be exchangeable for reciprocal rights into the United States.}\textsuperscript{340}

It is on account of the factors mentioned above that Johnson went on to defend the United States' performance in bilateral bargaining in the following terms:

\textbf{If we had insisted on absolute economic equivalence in all of our bilateral agreements, we would have had very few agreements, or routes.} What we set out to get, and what we did get, is a network

\textsuperscript{327} Id.

\textsuperscript{328} Johnson, supra note 16.

\textsuperscript{339} SACKREY, supra note 297.

\textsuperscript{340} Johnson, supra note 16. See text of the subsection entitled "Bilateral Agreements—How Negotiated" supra. See text accompanying note 359 infra.
of rights for our flag carriers which makes it possible for an American traveler to go by air in an American-owned and operated aircraft to most of the places in the world that he is likely to wish to visit.\textsuperscript{341}

This quotation represents the basic BATA negotiating strategy of the United States. Coupled with the preceding quotation, it reveals that the policy of the United States has been, first, to decide which routes it desires, and then, second, to obtain those routes by granting to the foreign carriers in question reciprocal routes as determined by the standard of an equitable exchange of economic values. In practice, this has resulted in the American traveler being able in the most cases to "fly American" if he desires, but it has also meant that he has open to him a vast number of alternatives, some of which are inevitably more convenient or enticing than the available American carrier. All this raises the question of whether the U.S. policy as outlined in the 1963 Statement and in the article by Johnson are still appropriate for today's requirements. This question has been officially answered on one occasion since the 1963 Statement in the 1970 "Statement on International Air Transportation Policy."\textsuperscript{342}

The more important provisions of the 1970 Statement are as follows:

1. \textit{The Exchange of Air Transport Rights}

The basic system of exchanging air transportation rights through a structure of bilateral agreements embodying the Bermuda provisions should be continued, although further studies should be made as to the feasibility of exchanging rights on a multilateral basis. The rights exchanged in these agreements should be designed to meet the needs of the public for air transportation and to assure U.S. air carriers the opportunity to achieve no less (rights) than those available to the foreign air carriers. However, in the negotiation of agreements, care should be taken not to pay an excessive price for rights for which there is little near term requirement. In order to avoid the wasteful introduction of excess capacity, caution should be exercised in granting routes on which the traffic potential is limited. The Bermuda provisions have served both the United States and international air transportation well in providing a liberal economic environment for the conduct of international air services. Attempts to restrict United States carrier operations

\textsuperscript{341} Johnson, \textit{supra} note 16. \textit{See also} note 340 \textit{supra}.

\textsuperscript{342} \textit{See} note 331 \textit{supra}.
abroad should be vigorously opposed, and where required, the United States should take appropriate measures against the carriers of foreign countries restricting U.S. carrier operations in violation of the terms of bilateral agreements or of the principle of reciprocity.\textsuperscript{343}

This excerpt is sufficient to indicate that although awareness of the problems caused by Bermuda for U.S. carriers had increased, no shifts in policy were at that time contemplated as a consequence.

The differences between the 1963 Statement and the 1970 Statement are not very great. The 1970 Statement does resurrect the idea of a multilateral agreement, which the 1963 Statement had rejected outright, but does not seem to take it too seriously. Probably "the most noteworthy implication of the draft policy is the attack on the traditional privileged position of the scheduled air carriers under inter-governmental agreements and the fare-setting monopoly of IATA,"\textsuperscript{344} although in practice this passage seems not to have meant very much. In contrast to the approach in the 1963 Statement, the 1970 Statement "takes a hard line on a larger share of world air traffic for U.S. carriers."\textsuperscript{345} Aside from these minor differences, the 1970 Statement simply reaffirms "the need to encourage open competition; the Bermuda provisions as the basis for the exchange of air transport rights and the need to ensure 'fair and equal opportunity' for U.S. carriers."\textsuperscript{346} Thus, the 1970 Statement, like its predecessor, was basically in favour of maintaining the status quo in international civil aviation.

Serious governmental interest in a changed approach to BATA's dates from the latter part of 1972 with some observers noting a possible shift in the future away from Bermuda principles toward strengthening the earning and revenue-producing powers of U.S. carriers on high-density international routes.\textsuperscript{347} Judging from recent statements of government policy, it now appears that the United States government is prepared to take affirmative action, if need

\textsuperscript{343} Supra note 265, 1970 Statement at 653-54. See also 1970 Statement at 652-53.

\textsuperscript{344} H. WASSENBERGH, 1970, supra note 9, at 158.

\textsuperscript{345} Id. at 156.

\textsuperscript{346} Id.

\textsuperscript{347} Doty, Drastic Bilateral Shifts Speeded, Av. Week, October 23, 1972, at 26. See also sources cited in note 319 supra.
be, in order to achieve the objectives set forth in the 1970 Statement.  

More recently, the nature of the shift in U.S. policy was pinpointed when it was reported:

[The] CAB's influence on negotiations conducted by the State Department with other governments has increased substantially in recent months, principally because of its stand that exchanges of routes or traffic rights should be considered only if they are shown to be economically beneficial to the U.S. [This compares to the] State Department's former view that airline operations are business ventures, subordinate to foreign relations, [which] is being rapidly revised as the U.S. economic position abroad continues to weaken.

Thus, it is now possible to say that all U.S. agencies and carriers desire to protect U.S. carriers from the unfair competition of foreign carriers which are either wholly owned or heavily subsidized by government.

Certain steps have already been taken to implement this resolve to provide greater protection for U.S. international airlines from foreign restrictions. Thus, the CAB now has the power to monitor and control schedules of foreign flag carriers, as well as statutory authority to suspend international fares. In addition, for the first time in its history, the CAB has allowed discussions to take place between Pan American and T.W.A. concerning the consolidation of their operations over the North Atlantic. Although the CAB has thus far rejected all requests to allow the discussion of pooling agreements between U.S. and foreign flag carriers, the fact that

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349 Doty, Foreign Restrictions Align U.S. Reaction, Av. Week, July 9, 1973, at 26. For a listing of the restrictions against U.S. airlines which have prompted this change in policy, see Doty, supra note 13, at 20-21, and Doty, North Atlantic Studies Intensify, Av. Week, May 27, 1974 at 22-23. For a listing of proposed CAB rules and congressional legislation bearing on BATA's, see Doty, Fuel Problems Hit Flags' Policies, Av. Week, November 19, 1973, at 22-23.
352 Doty, supra note 349, at 22-23. These discussions led to a major route exchange, thereby drastically reducing head-to-head competition between Pan Am and TWA. See CAB Order No. 75-1-133 (Jan. 30, 1975).
353 Doty, supra note 349, at 23. One of the most recent proposals of this kind
pooling was seriously mentioned by a Chairman of the CAB means that the priority of fostering competition has given some ground to the priority of bolstering the position of U.S. international carriers.

This shift in priorities prompted the State Department to initiate the Harbridge House study to consider possible changes in the provisions of BATA's to deal more effectively with the problems of excess capacity and restrictionist measures imposed on U.S. carriers by foreign governments. In announcing that this study would be made:

[The] deputy Assistant Secretary of State, said [that] ... a number of countries have been getting more out of bilateral agreements than “we think they are due.” He suggested imbalances in traffic rights could be corrected by taking away authority some nations now hold. He admitted this would be a “difficult solution at best” but noted the U.S. does hold the option of denouncing and renegotiating bilateral air transport pacts.

[The] State Department, he said, is determined to protect U.S. airline interests abroad and expand services where benefits can be shown. But he added that U.S. must pay for what it gets. 

Here, once again, the hard core of the problem is exposed. The

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354 Doty, Justice Department Policy Role Grows, Av. Week, April 22, 1974, at 24-25. In this article then Chairman Timm of the CAB was quoted as saying “that there are basically four tools available to U.S. international carriers to repair damage done by mounting fuel prices. These are (a) increased fares; (b) reduction of services; (c) pooling of revenues and services in some markets.” Id. at 24. Cf. Doty, International Capacity Acts Urged, Av. Week, May 7, 1973, at 26-27; Bill Henzy's Airline Reports, July 24, 1975, at 6; Id., July 28, 1975, at 6.


356 Doty, supra note 354, at 21. For a radical proposal as to what the U.S. negotiating position should be in regard to bargaining over route structures in forthcoming bilateral agreement negotiations, see Thayer, Air Transport Policy: A Crisis in Theory and Practice, 36 J. Air L. & Com. 669, 671 (1960). Recent events indicate that although the CAB is not willing to contemplate a complete changeover in its regulatory outlook toward international aviation, it is becoming quite pragmatic on such hitherto doctrinaire subjects as international capacity reduction agreements. See CAB Order No. 75-6-105, denying a Dept. of Justice request for an investigation of U.S. international aviation policy, and CAB Order Nos. 75-7-27 and 75-9-11 which respectively approve a Pan Am/Qantas capacity reduction agreement and authorize Pan Am to conduct further inter-carrier discussions toward agreements on capacity limitation.
United States can denounce and renegotiate its existing BATA's, but it will have to pay for what it gets in the new agreements. The very real question is whether the exercise of negotiating new agreements will be worthwhile.

There can be no question that the status of the United States as the biggest air traffic market in the Western World allows it to exercise substantial influence over the development of international air law policy. Nor can there be any real dispute over the reasons for a change in U.S. international aviation policy, which have been known and discussed for many years. Likewise, "[d]iscriminatory tactics forcing marketing and operational restrictions on U.S. flag carriers by most of the world's nations are now consolidating the positions of U.S. federal government agencies in the adoption of stiff retaliatory measures against such practices. The question

357 H. Wassenbergh, 1970, supra note 9, at 9.
358 See Jones, supra note 14, which states four reasons why U.S. international aviation policy should be changed: (1) The growth in the number of new airlines; (2) The increase in the capacity and speed of aircraft brought about by new technology; (3) The formation of trading blocs, such as the E.E.C.; (4) The Soviet Union as a competitor. The policy advocated by Jones was that "the U.S. continue with the present plan of bilateral agreements, with spot adjustments, such as more closely relating 'Fifth Freedom' traffic to actual traffic originated." Id. at 243-44. However, the real impetus to change in U.S. thinking on international civil aviation policy has been the discriminatory practices of foreign governments against U.S. carriers. It has been reported that "[d]iscriminatory practices by foreign governments are increasingly preventing United States airlines from being fully competitive abroad, according to the annual report of the Air Transport Association of America." Reed, The Times (London), July 29, 1974, at 15. According to the report these practices include "payment for carriage of international mail at far higher rates to foreign carriers than to United States carriers; requirements that corporate travel of nationalized companies should be with the nationalized carrier; differences in amounts of hard currency a traveler is allowed if travel is on an American airline rather than the national carrier; exorbitant airport/airways user charges or exemption for national carrier from paying landing fees at its country's principal airports." Id. Other restrictive practices listed in the report are "discriminatory income taxes; preferential treatment of national carriers at their airports; requirement that American airlines use ground handling services provided by national carriers so that they cannot independently contract for such services; prohibition against local sales for local currency, and currency conversion and remittance delays, sometimes of six months to a year." Id. It should be added that the sharp increase in jet fuel costs since the October, 1973, Mid-East War has aggravated the impact of these restrictive practices. It has been reported that U.S. airlines are paying $1 billion more for fuel in 1975 than in 1974 despite using one million fewer gallons of fuel. Likewise, each increase of one cent in the cost of aviation fuel is said to raise airline costs $100 million. See CAB Form 41 Reports, Air Transportation Association.
for the United States is now, quite simply, what should a United States international civil aviation policy not based on the Bermuda plan be like?

The question posed above has been considered by Thornton, who has written that:

The U.S. Government will have to determine the appropriate bargaining tactics to employ should it wish to use more of its bargaining power in the international airline sphere. It must be presumed that the current airline routes, frequencies and operating restrictions represent a portion of a rough balance which has been drawn between U.S. overall objectives met and concessions given in exchange to foreigners, on a bilateral basis. Where a U.S. objective is no longer required, the balance disappears, and a renegotiation of the situation is logical.

... Where the U.S. is the party on the short end of the bargain, the U.S. must denounce the agreement... 366

But these observations do not indicate which overall approach by the United States is best suited to the achievement of its policy objectives.

The United States, in adopting a new approach to bilateral agreements, faces resistance to change by nations which stand to lose from a transition in U.S. policy away from the flexible Bermuda principles toward an approach where rights and obligations are clearly spelled out. There is every reason to believe that these nations would resist changes adverse to their interests with all the resources at their command, and understandably, it has been reported that "there is still some conflict here (in Washington) as to how much restraint and control can be imposed on overseas airlines before clashing with foreign policy considerations." 361 The United States may well be on the path toward minimizing U.S. effectiveness "in bilateral negotiations, i.e. alteration of the traditional concept of a cabotage area and what constitutes domestic traffic." 362

The situation confronting the United States at the present time

366 Thornton, supra note 9, at 684-85.

361 Doty, supra note 199.

362 Robinson, supra note 306, at 555. See also text following note 292 supra.
can be summarized as follows: So long as both the United States and the European countries operate within the framework of the Bermuda plan, the status quo in international civil aviation will be maintained. There is, however, growing pressure within many U.S. government and industry circles "to arrest the steadily deteriorating competitive posture of U.S. flag carriers in international operations," a deterioration which has occurred under the Bermuda based international civil aviation policy of the United States. This impatience is in keeping with the theory of Wheatcroft that Bermuda based policies can be expected to turn restrictionist. The United States, perceiving an erosion both in the Bermuda principles and in its own competitive position, is now willing to depart from the status quo (i.e. Bermuda) in search of a more favourable arrangement, but it must first decide the direction in which it wishes to point its new policy.

There are two broad types of choices open to the United States. Either it can

(a) seek to retain the Bermuda system, and attempt to undo the restrictions which have increasingly been imposed under it, or

(b) it can abandon the Bermuda system, *de facto* or *de jure*, and adopt measures similar to those of the European nations, imposing restrictions on frequencies and capacity, entering into pooling agreements, etc.

Unfortunately, there are formidable problems posed by both of these alternatives. Concerning the first, there are simply too many airlines and too much overcapacity in the international civil aviation industry, for the United States, even generating as much traffic as it does, to restore the *status quo ante* of the Bermuda system as it operated in 1946. Concerning the second, if a mixed metaphor may be permitted, it is simply not appropriate for the lion, having abandoned his sheep's clothing (the Bermuda principles), to come right out and demand, in writing, that henceforth he is to receive the lion's share. The question confronting the United States then becomes whether the U.S. can force its way on either of these alternatives, or some combination of them, and if it attempts to do

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363 Doty, *supra* note 199.
364 See text accompanying notes 65 and 234 *supra*. 
so, what “escalations” by the other major air powers are likely.

It was not very long ago that the observation could be made that the State Department would continue a policy of “being unreasonably nice to competing, but friendly foreign powers.”5 At that time it was observed that State Department officials “are proud of their history of never having denounced a bilateral agreement—an attitude which has no support in international law.”5

Now that the U.S. government stands willing to take some affirmative action in response to the cries of the U.S. international airlines to impose capacity restrictions on countries such as the Netherlands and Belgium and the Scandinavian countries for their abuses of fifth and sixth freedom rights,6 it must find a way to achieve U.S. objectives in a manner which will not precipitate unacceptable levels of retaliation by the other major air powers.7 Should the United States discard the Bermuda system and then fail in its efforts to establish a new regulatory framework for international civil aviation, the consequences of that failure would be a severe and mutually undesirable state of disequilibrium for all of the world’s governments and airlines.

The basis of the preceding conclusion is that any system of international regulation which is universally accepted is better than the total lack of any system. A system based on BATA’s within the framework of which nations consult and disagree is better than a system in which nations, owing to fundamental disagreements among themselves, are unable to establish a universal network of such agreements. It is further submitted that in an era in which increased protectionism seems to be the order of the day in all fields, it would be exceedingly hard to reconstruct a universally acceptable regulatory system for international civil aviation in the event that the Bermuda system of BATA’s is precipitously torn down. If the Bermuda system were to be discarded in this fashion, protracted,

5 At Thornton, supra note 9, at 684-85.
6 See text accompanying note 238 supra.
7 The military tone of these remarks is probably to be lamented, given that this discussion concerns America’s allies, but in an economic sense the military analogy is not so far from the mark. The amount of traffic and revenues available in international civil aviation, however large, is finite, and like other international economic rewards, are increasingly reserved for those nations which compete for them most vigorously on the basis of their relative bargaining strength, strategies, and tactics.
acrimonious, and divisive debate would result, even if BATA's, which would restore a fully functional BATA system, between the United States and the other major air powers were eventually reached. The United States must therefore seek a policy which is deft enough to achieve U.S. objectives without causing disruptive effects.

If the United States were to do away with the Bermuda principles altogether, substitute in their stead the clearest possible delineation of the rights and obligations of the contracting parties to BATA's, and couple this approach with a requirement for the exchange of all pertinent traffic information to be interpreted in accordance with an agreed statistical formula, its problems with regard to BATA's would be solved, provided it could get other nations to sign such an agreement on a bilateral basis! In all likelihood, however, if the United States were to boldly announce adoption of such a policy tomorrow, and couple that announcement with a statement that henceforth the United States will only enter into agreements of the new type and will shift its old agreements to the new type as they come up for re-negotiation, it would be inviting “massive” retaliation from the other major air powers. This retaliation, at least insofar as the Common Market countries are concerned, could take the form of the international cabotage area discussed earlier. They might retaliate by imposing new and harsher restrictions on U.S. international carriers. But they would surely resist such a blatant U.S. move, and the consequent “escalation” of the conflict could only have deleterious effects on all parties concerned.

The nucleus of the type of bargaining strategy the United States seeks can be gleaned from the preceding analysis. Since “force majeure” is inappropriate, the trick for the United States is to find a way to apply its negotiating “squeeze” slowly but surely, in such a way so not to precipitate hasty retaliatory moves on the part of the countries concerned. Just as restrictionism within the Bermuda framework grew by a process of accretion, the United States will have to remove those restrictions in a gradual fashion.

The Montreal Agreement of 1966 offers some useful guidance.

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369 See, e.g., Joint Statement by the United Kingdom and United States Delegations, 14 DEP'T STATE BULL. No. 347 (Feb. 24, 1946), at 302-06.
370 See the subsection entitled “Some Structural Problems in International Civil Aviation Which Bear on the Bermuda Agreement” supra.
371 Nikita Khrushchev’s phrase “salami tactics” is apt in this regard.
The United States first threatened, and then actually did denounce the Warsaw Convention. While the squeeze in that case ended as a U.S. club over the heads of the world's non-U.S. international airlines, the tactic worked, primarily because the consequences for these airlines of operating outside the scope of any international convention limiting their liability was deemed by them to be far worse than the increased limit on their liability that the United States was proposing in the Montreal Agreement. The same technique can be applied to the negotiation of BATA's, provided that the United States can be sure from the outset that the consequences to its bilateral opposite numbers of operating in the absence of an agreement will be considered by them to be worse than the revisions in the BATA's that the United States is seeking. Essentially, if the United States seeks to impose a new or modified regime of bilateral agreements, it must first carefully assess the retaliatory measures available to its bilateral "adversaries," operating singly and in concert, and the likelihood that all or any of these will be employed in the face of the tough new stance by the United States negotiators.

The success of such a "hard line" U.S. policy may depend on how successful the United States negotiators are in leaving an escape valve, or face saving fall-back position, to the other parties in the bilateral negotiations. Adoption and pursuit of such a policy by the United States at the outset depends on the raising of airline economic criteria and balance of payments considerations to top priority status over the political and strategic factors which have until now ranked first in the order of United States international civil aviation priorities.

CONCLUSION

THE BERMUDA AGREEMENT AND BILATERAL AIR TRANSPORT AGREEMENTS IN THE FUTURE

It is still possible today to say that the institutions created by the Chicago Convention and the Bermuda Agreement have not changed.

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372 In that event, the United States denunciation was withdrawn just prior to the time when it was to have become effective. See A. Lowenfeld, Aviation Law, §§ 5.1-5.4 (1972).

373 Clearly in such negotiations the United States would be playing the now unfamiliar role of real party in interest, rather than that of intermediary or "honest broker" as it has in so many recent diplomatic endeavors.
significantly since 1946. But now it appears that events will force a modification of that statement. In what direction will the coming changes point the system of regulating international civil aviation?

It is helpful to examine an earlier attempt some ten years ago to provide an answer to that question. In an article published in July, 1965, Peter Jack, of BOAC, made the following observations:

Thus, as far as one can see, the existing Bermuda bilateral framework is likely to persist, although regional groupings, new governments, and possibly changes in the basis of negotiation, may modify "Bermuda" into something very near to the predetermination type of agreement. It would seem to me that restrictions are more likely to increase: the move could be towards predetermination rather than to a multilateral freedom. (emphasis added).

Mr. Jack proved to be a reasonably good prognosticator. International civil aviation today is demonstrably on the verge of the period of change and restructuring dimly forseen by Mr. Jack because the United States, the leading aviation power, has declared itself ready for change. Since the United States has not heretofore shifted its international aviation policy since 1946, that process of change may rightly be said to have begun.

It will be recalled that at the outset of this article four questions were posed and the time has now come to attempt to answer those questions.

The first question posed was whether the Bermuda Agreement is immutably the best approach available to the United States. The answer is yes, if the bilateral partners of the United States operate according to the rules which the United States and the United Kingdom drafted at Bermuda. The answer is no if they decide to formulate rules of their own in disregard of the Bermuda rules. Since more nations are choosing the latter course than ever before, it seems clear that Bermuda in fact, as opposed to Bermuda in theory, is not the best approach available to the United States.

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374 Thornton, supra note 10, at 43.
375 See the section entitled "The U.S. Attitude Toward the Bermuda Agreement" supra.
376 Jack, supra note 9, at 471-76.
377 BOAC is currently known as British Airways.
378 Jack, supra note 9, at 474-75
379 See note 375 supra.
The second question was, is there an approach to the exchange of international commercial air rights which might prove more advantageous to the United States than the Bermuda approach? Here, once again, fact and theory must be carefully distinguished. Presumably any number of theoretical constructs can be devised which will be advantageous to the United States. The United States' real problem is not in devising foolproof schemes for maintaining a competitive advantage; rather the problem is to obtain a competitive advantage, or at least the fair and equal opportunity to compete, on a negotiated bilateral basis with its allies. This second question really devolves into a consideration of possible United States negotiating strategies.\[360\]

The third question was whether the United States would be able to maintain the Bermuda approach to BATA's in the face of growing opposition from third countries, should it desire to do so. After examining the restrictions which have crept into the Bermuda type agreements "through the back door,"\[351\] this question too has devolved into another question. Namely, why should the United States wish to maintain the Bermuda approach, when in doing so it is "trading fifth freedom dollars for Paris and Rome nickels"?\[352\] Which nations oppose the U.S. maintenance of the Bermuda approach? There are none. So long as the nations are allowed to continue imposing restrictions, they have no reason to desire a change from the Bermuda plan to some other plan, presumably of the predetermination type. The flexibility of Bermuda gives them a cover for the imposition of restrictions, whereas the spelling out of terms in a predetermination agreement would mean that the United States would be bargaining for precise economic values rather than just for vague fair and equal opportunities. In such bargaining the United States would inevitably bargain harder, since airline competition would no longer be a factor, and the results obtained at the bargaining table would be drastically different from the existing situation.

The fourth question inquired whether the preservation or overthrow of Bermuda type agreements was any longer even a signifi-

\[359\] See note 347 supra.

\[351\] B. Cheng, supra note 7, at 234 and see the subsection entitled "Restrictions Applied Under Bermuda Type Agreements" supra.

\[352\] Jones, supra note 14, at 234, and see the section entitled "The United States Attitude Toward the Bermuda Agreement" supra.
In economic terms, the status of Bermuda agreements is a significant issue since the existing regulatory system determines the amount of revenues earned by the respective contracting parties. Although some state that a liberal system always benefits a large, efficient carrier this statement is not completely true since restrictions applied sub rosa under the Bermuda type of agreement can be just as restrictive and anti-competitive as predeterminist schemes or those of the Soviet bloc countries.

It is still not clear where international civil aviation is headed. One author who has a view of the future is Dr. Wassenbergh. He begins his sketch of the future by describing the evils of the present system which will vanish upon the establishment of the new order:

The *credo* of modern aviation policy, however, in the terms of the U.S. Government, is the bilateral allocation of routes and traffic rights, resulting in an “equitable overall exchange of economic benefits derived from the establishment of air services between every two countries, including equitable opportunity for the airlines of the two countries to serve the needs of the traveling and shipping public.

This is a primitive and anachronistic effort to solve a problem that is rapidly assuming supra-national dimensions. National and bilateral principles fall far short of coping with the situation. They stultify international air transportation and cripple air travel and shipping.385

Dr. Wassenbergh’s prescription for these evils is what he calls the “extra-national” approach to international traffic rights, meaning:

[T]he international traffic markets should technically be taken as a whole, as a composition of the innumerable number of bigger and smaller traffic streams, and not as a market made up of as many different independent markets as there are States. On the other hand, each airline should be considered according to its fitness, its willingness and its ability to provide services.386

383 *See supra* note 381.
384 *Edwards Report, supra* note 9, at 89.
385 *H. Wassenbergh, 1970, supra* note 9, at 12.
386 *Id.* at 6. Outside of the Netherlands this approach is known as “pie in the sky,” or, to paraphrase Charles Wilson’s famous remark, “What’s good for KLM is good for the world.” Perhaps as a sort of spontaneously generating self-fulfilling prophecy, Wassenbergh then predicts, “The operations of supersonic and wide-bodied jet aircraft in most cases will make it practically impossible to adapt the
Wassenbergh is not alone in favouring such an approach, although not all who share his view share his reasons for it. Some even profess to see signs that the glorious day of internationalized air travel will soon be upon us. Thus, Pourcelet has stated that nationalism in air transport will decline as an outmoded concept and internationalism will grow. While this statement seems to confuse what is in the world with what should be in the world, it seems clear that in the long run this view will gain universal acceptance. One important question is whether those states adversely affected by the present system can afford to wait for the long run. These states, now including the United States, are convinced that they cannot afford to wait.

A view of the future based on a long-run view is that of Gerald Fitzgerald, the Legal Advisor of ICAO who sees a more regional approach to operations through the growth of regional airlines and eventually interlocking global and even interplanetary transportation systems which would render meaningless the distinctions now drawn by the Chicago Convention and national laws between civil aviation and other forms of aviation. Interesting though such views may be, they offer no immediate guidance for the near term in international civil aviation.

Thornton has considered what lies ahead for international civil aviation in the near term and has concluded that major political, economic and technical change may take place, concentrated within a short period of time. Should this occur, Thornton believes, "The magnitude and intensity of change will severely test the ability of international air transport institutions to survive." The following are the four foreseeable changes Thornton has perceived:

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38 Pourcelet, supra note 26, at 75.
39 Fitzgerald, supra note 24, at 269-72.
390 Thornton, supra note 10, at 43-44.
391 Id.
(1) The EEC and the possibility of a merger of EEC airlines;
(2) The USSR as a possible international competitor, with SST’s;
(3) The greater possibility of big power solutions, with a consequently reduced importance of those countries which heretofore have been considered well situated for international air transport; and
(4) 747’s and airbuses creating divisive fare disputes in IATA between those wanting lower fares and more passengers and those wanting higher fares on account of the higher cost of operating their less up to date aircraft.\(^{392}\)

The conclusion to be drawn is that Bermuda is poised on the brink of either fundamental change or desuetude.\(^{393}\) The role of BATA’s in the near future was ably set forth by Rosevear when he stated:

> It is perfectly clear that the nations have not seen fit to open the air routes of the world freely and without reservations. This is the situation and we must make the best of it. I submit that the conclusion must be that Doctor Bin Cheng was right when he wrote that “each freedom contains a restriction which may only be removed at a price.” The system of bilateral air transport agreements with the checks and balances furnished by ICAO, IATA, the governments concerned in each case and their agencies works very well indeed. Thus far there has been sufficient good will to enable the nations and the air carriers to make use of the freedoms of the air. The bilateral air transport system of agreements is not perfect but it is the best we can expect for a long time to come.\(^{394}\)

In that judgement he is probably quite correct.

**APPENDIX**

**THE BERMUDA CAPACITY PRINCIPLES**

(4) That there shall be a fair and equal opportunity for the carriers of the two nations to operate on any route between their respective

\(^{392}\) Id. And see Comments of U.S. Department of Justice, *In the Matter of (Minimum) Charter Rates*, Docket 25875, February 26, 1975. The post-1973 fuel crisis, and the concomitant economic downturn of the major Western States, although unforeseen by Thornton, appear to be of more than sufficient magnitude and intensity to threaten the survival of the two major U.S. flag international air carriers, Pan Am and TWA. See note 335 supra.

\(^{393}\) Id.

\(^{394}\) *THE FREEDOM OF AIR*, supra note 9, at 136.
territories (as defined in the Agreement) covered by the Agreement and its Annex.

(5) That, in the operation by the air carriers of either Government of the trunk services described in the Annex to the Agreement, the interest of the air carriers of the other Government 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.

(6) That it is the understanding of both Governments that services provided by a designated carrier under the Agreement and its Annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier 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 point on the routes specified in the Annex to the Agreement shall be applied in accordance with the general principles of orderly development to which both Governments subscribe and shall be subject to the general principle that capacity should be related:

(a) to traffic requirements between the country of origin and the countries of destination;
(b) to the requirements of through airline operation; and
(c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.

(The preceding provisions are Sections 4-6 of the Final Act of the "Air Services Agreement Between the United Kingdom and the United States and Final Act of the Civil Aviation Conference," signed February 11, 1946, at Bermuda, which agreement is referred to in this paper as the Bermuda Agreement. The full text of this agreement can be found in Cmd. 6747, 60 Stat. 1499, and T.I.A.S. No. 1507.)