The Special Air Transport Conference of ICAO: April 1977: A New Basis for the Trade in Traffic Rights for International Air Services

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IN HIS comprehensive and amply-documented article "Bermuda revisited", Mr. Barry Diamond concludes, inter alia, that the Bermuda Agreement is immutably the best approach available to the United States, "if the bilateral partners of the United States operate according to the rule which the United States and the United Kingdom drafted at Bermuda." This is probably true and not only for the United States but for international civil aviation in general. Unfortunately, also for the United States, the original Bermuda principles are no longer applied in most bilateral air relationships. For the United States to complain, however, does not seem fully justified in all cases, as it is not always the other partner to the United States bilateral Bermuda-type agreements who departs from these principles: the United States itself does not uphold the original principles without respect of countries, but does deviate from them in cases other than in retaliation against restrictions imposed on United States carriers' operations in violation of the Bermuda principles.¹

Now, of course, the issue is not which principles for a regulatory

¹ Dr. Wassenbergh, a noted authority on international aviation law, has recently completed his third book "Public International Air Transportation Law in a New Era." He is associated with KLM Royal Dutch Airlines; but the views expressed herein are his own.


³ Id. at 491.

regime of international air carriers’ operation will be the most advantageous for the United States or any other particular State for that matter. The objective in trying to draft such principles, clearly, should be the sound development of the international air services system as a whole, as it is being built up by the air services of the air carriers of all states together. In my writings cited by Mr. Diamond, I have advocated a regulatory system based primarily upon economic considerations of fair competition, carrier efficiency and the acceptance by the public of the services offered. In other words, a regulatory system allowing for the forces of the market place to determine the quantity and quality of the services offered, while taking into account the peculiarities of the airline industry, is the desired result. This, in turn, calls for a certain amount of price regulation in the public interest to ensure honest competition in the international field. According to Mr. Diamond, however, my criticism of restrictions based upon the wish to protect one’s “own” air traffic market in order to reserve as much as possible the carriage of a state’s “own” traffic to its national air carrier(s), should be disregarded for the reason of “what might be called a conflict of interest, based on the self-interest of the Netherlands and KLM.”

Mr. Diamond argues that:

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.

The Netherlands happens to be a small country, although KLM may be a major airline. The Netherlands, traditionally, follows a liberal aviation policy and KLM has never felt at a competitive disadvantage in the absence of restrictions.

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4 The new International Air Transportation Policy of the United States, approved by President Ford on Sept. 8, 1976, is a well thought-out statement and contains a great number of commendable policy issues. On the whole, however, it is a “fighting document” to primarily advance the interests of the United States' international carriers.

5 Cf. the new United States Policy Statement: “However, fundamental restraints limit the operation of free competition in international air services.” (p.21).

6 Diamond, supra note 1, at 470.

7 Id. at 470.
upon foreign air carriers by the Netherland's authorities. Mr. Diamond's reproach of self-interest in my advocating a "liberal" system of economic international air transportation regulation, therefore, cannot be based on his arguments. His rebuke, however, could be based on my confidence that KLM and any other efficient national air carrier, under a liberal regime of honest competition will be able to remain competitive and thereby serve the public in the best possible way. If this does not result, it is simply too bad for KLM and the public. It would be a pity for international civil aviation if it is true that the existence in practically every state of national airlines operating international air services would make it understandable, as Mr. Diamond states, that "the constituency for my purely international approach is as small as it is." On the contrary, it should be clear to everyone that the very fact of the existence of the many national airlines makes an international approach a "must", if we want to avoid a permanent cold war in the air.

Mr. Diamond, however, apparently accepts both this cold war, as it, indeed, is presently being waged, and the possibility that it will further escalate. Should we accept that "internationalism" finds only lip-service and no real support? The answer is no, because it cannot be denied that the alternative, i.e., present-day "bilateralism" in the exchange of air traffic rights, promotes sectarianism and aggravates discord. For example, states with a large home market tend to adopt the view in bilateral air negotiations that their carriers' share of the international air traffic market, and every national air carrier's share for that matter, should correspond to the size of their "own" market, and direct their efforts to this end. States with more than one main international airport tend, in bilateral negotiations, to adopt the gateway system in granting routes. This posture is pursued to reserve the domestic sector of

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8 Other examples are Lebanon, Scandinavia, et. al.
9 Diamond, supra note 1, at 471.
10 Cf. the new United States Policy Statement: "We recognize that international transportation presents special challenges—the most obvious being the need to cooperate with other sovereign nations." (p.2).
11 E.g., the denunciation of the Bermuda agreement between the United States and the United Kingdom by the United Kingdom on June 22, 1976.
12 Cf. the "Fly-US-Flag" program.
the transportation of international traffic as much as possible to their own carriers and direct more traffic to the international services of their own carriers. On the other hand, states with carriers operating long-haul routes may defend the fifth freedom, but states with a less-developed airline industry will tend to be protectionist to minimize competition. States with a holiday market tend to promote charter traffic to their territory, as the cheap charter fares can bring more tourists. States which are centrally located defend the sixth freedom for everybody [the (fortunate) accident of geography]. States with mainly a terminal market or located at the periphery of the international air traffic market, i.e., with only end-to-end traffic, may turn to traffic- or tariff-discriminatory measures in order to channel the traffic to and from their country on third and fourth freedom carriers’ services. This cuts out fifth freedom carriers and transfer traffic, for example, via intermediate points other than the furthest points served by their own carrier(s). States not interested in serving, or not serving to the same extent, the country of the airline of the other party may turn to the levying of royalties or may restrict, or even flatly refuse to exchange, traffic rights if they cannot obtain satisfactory reciprocity. States wishing to strengthen their relations with any particular country for political, military or other reasons may depart from all principles in granting traffic rights to that particular country. It is, therefore, obvious that present-day “bilateralism” in the exchange of air traffic rights is destructive to effective international air transportation.

The absence of an agreed international approach to international civil aviation regulation leads states to an opportunistic use of power to serve their own particular aviation interests on short term. It has hopefully been predicted that bilateralism may further develop into regionalism when groups of states decide that they can serve their interests better collectively than individually. This, however, will only aggravate the problem under the present trends in air policy: the cold war will be waged between bigger entities.

13 The fifth freedom is the right to carry traffic between third countries en route.

14 The sixth freedom refers to the carriage of traffic between third countries via the homeland of the carrier carrying the traffic. As such it combines fourth freedom carriage (from a third country to the home country of the carrier) and third freedom carriage (from the home country of the carrier to a third country) without a break of journey in the home country of the carrier.
Practicing bilateralism in this way promotes an "everyone for himself" situation. Bilateralism or regionalism, which so far has been the only feasible mode to build an international air transportation system by the common effort of all states together on behalf of the travelling and shipping public at large, can very well be used to maintain and further develop an integrated world-wide regulatory framework for civil aviation. This will occur only if states are willing to move away from the gradually accepted principle of the "closed sky" by virtue of their national sovereignty, to an "open sky" in virtue of their common interest in establishing and participating in a world-wide international air services system. Such "open sky" should be closely defined by the basic requirements of such world-wide air services system.

To give a hypothetical example of one of these basic requirements: if the London-New York service of British Airways happens to be used by the public from countries other than the United States and the United Kingdom, travelling or shipping first to London or, as the case may be, New York, the traffic transferring there to the London-New York-London service, the United States government should not try to prevent such use under the United States-United Kingdom bilateral air agreement by imposing tariff, frequency or capacity restrictions on the services over that route. To do so would break up the system of world-wide air transportation facilities which can be made available to the public at large and which this public apparently chooses to make use of. 13 Equally, the United Kingdom, in our example, should not prevent the scheduling by PanAm of capacity required to carry traffic to the United Kingdom coming from, for example, Mexico or Canada and travelling or shipping via New York on PanAm's services to London. Nor should, in our example, Mexico indirectly prevent PanAm from carrying traffic originating in Mexico on its New York-London services.

It is true, however, that bilateralism does prevent PanAm from operating directly between Mexico City and London and may prevent PanAm from scheduling one-plane-through-services with a

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13 Cf. Recommendation on Government intervention in fares and rates on international scheduled services, ECAC/9, Triennial Session (1976): "2) should particularly avoid interventions that would cause a limitation of travel and shipping opportunities etc."
single flight number from Mexico City via New York to London, just as it does prevent British Airways from scheduling direct services between, for example, Rome and New York and maybe one-plane-through-services with one and the same flight number between Rome and New York via London. For bilateralism to create an integrated world-wide air services system in the interest of the public at large, it is, therefore, indispensable for the states to agree upon the multilateral significance of bilaterally exchanged routes and traffic rights so that the air policy of the states does not deprive the public in third country markets of bilaterally agreed transportation facilities.

The multilateral significance of international air services for the public at large is recognized in the IATA fares and rate setting machinery. Departure by individual governments from a multilateral system to establish tariffs, whether by government order setting unilateral tariffs or by bilateral agreement setting tariffs for use by their own carriers or even by the third and fourth freedom carriers only, leads to a segregation of part of the market from the overall air traffic market by anti-competitive and discriminatory means. This segregation places international civil aviation and the travelling and shipping public at the mercy of the power play between the states. States, therefore, in their air policy, should give as a first requirement, priority to the development of the entire international air transportation market over their own particular short-term national interests in promoting traffic in bilateral markets of their own carriers by artificial means.

There may be good reasons for a state to impose certain temporary restrictions on foreign air carrier operations. One example would be to establish its own carriers in the market. These, however, should not become the rule as is the case today. The breakdown of the international air transport regulatory framework which

16 See ECAC Recommendation, supra note 15: “1) should continue to promote the establishment of fares and rates for international scheduled air services by the airline industry itself, and should exercise caution when intervening in fares and rates so as not to undermine the multilateral structure of fares and rates.”

17 See CIVIL AERONAUTICS BOARD, REGULATORY REFORM: REPORT OF THE CAB SPECIAL STAFF, where it is stated that an undesirable effect of regulation is that “the user, as well as the overall economy, is (similarly) paying for inefficiencies . . . resulting from Government policies designed to . . . artificially determine the market share of particular airlines through protective regulation.”
resulted during the past decade has led the ICAO Assembly to convene a Special Air Transport Conference in April 1977. On the agenda of this Conference are the very problems of the regulation of capacity, the distinction between scheduled and non-scheduled services and the tariffs and their enforcement. For the United States, wishing to continue its leadership role in the development of civil aviation, it will be of the utmost importance what the majority of the states will decide in these matters. To accept the reality of the escalating cold war in the air under a system of "pure bilateralism" may mark the end of international rapprochement.

Pure bilateralism means the end of the public's freedom to ship and travel by air world-wide according to its own choice. Nevertheless, such bilateralism may be found by the developing states to be in their short term aviation interests as a protection against the big aviation powers which promote their "own traffic" doctrine: the developing states could hold down capacity to the level of their own operations to prevent their carriers from being swamped by foreign capacity. The Bermuda principles of 1946 were a compromise between two opposing philosophies and realities. A new compromise will have to be found. The realities and philosophies of today, thirty years after Bermuda, however, have drastically changed.

The legal concept of sovereignty formally has undergone little change, notwithstanding the great technological developments which have shrunk the world. But in practice, states increasingly assert their sovereignty and act as if they are islands in themselves, where they should recognize their growing interdependence. The rule of non-interference in the national affairs of another state is a rule of international law. Interference over the objections of the state concerned violates the latter's sovereignty, and can be legally opposed by that state with all reasonable means available. But, on the other hand, states by virtue of their power, can and increasingly do interfere in the course of things in the international sphere.

19 The new United States Policy Statement was issued without prior consultation with other interested nations, although President Ford, in his endorsement of the Statement, states that: "Historically, the United States has had a leadership role in the development of international air transportation and intends to continue that role." The implementation of the new policy statement will depend upon the cooperation of other sovereign nations.
Such interference can only be opposed by power. This means that basically a regime of nonfreedom exists in respect of the international activities of man.

To obtain freedom in the international sphere, bilateral or multilateral negotiations are necessary. The freedom which results is a freedom by contract, in our case, the bilateral or multilateral air agreement as far as the actual operation of international air services is concerned.¹⁹

Today, there are no binding international rules in respect of the contents of such bilateral or multilateral air agreements. By international custom the Bermuda principles used to constitute such rules for bilateral air agreements. They no longer apply as to new bilateral air agreements, and in practice not even in respect of existing bilateral air agreements if one party feels that its interests are no longer served by the agreement in the best possible way, and it has the power to impose its different views.²⁰

It will be the task of the Special ICAO Conference to try to formulate clear international rules in this field and reconfirm, or, as the case may be, amend the Bermuda principles. In the international field states have the choice to work together in the long-term interest of all concerned, or to try and defend their own particular short-term interests by making use of their near-absolute sovereignty or their power.

For international civil aviation the choice is to either subject every activity in the international field to the prior consent of the state(s) concerned, or to adopt clear international principles for the international air transportation system in the common interest of all states and the public at large.

As to the regulation of capacity and tariffs in international civil aviation, the time may have come to try to formally amend or even replace the Bermuda principles ("ex post facto" capacity review and adherence to multilaterally established tariffs as agreed upon


in IATA) by more "modern" principles. At the same time an answer will have to be found to the question of the "schedulized" charter competition which threatens the economic viability of the scheduled air services system. If there is no longer room for an idealistic approach, the starting points for a new pragmatic international regime will have to be:

A. the safeguarding of a share of the international air traffic market for each of the states;\(^1\) and

B. the maintainance of sufficient competition to protect the interests of the travelling and shipping public.\(^2\)

On the basis of these two prerequisites, a new regime for international air transportation might be agreed upon enabling both the scheduled and non-scheduled air carriers to maintain an economically sound world-wide network of international air transportation services, while offering the public the widest possible choice of service (quantity, variety, quality, price).

The situation in practice today is that the Bermuda principles have been abandoned to a point that the scheduled air traffic market has been carved up between states; the most protectionist states determining the level of services in bilateral air relationships, leaving hardly any room for free competition, except, up till now, on a number of routes between the United States and certain foreign countries (e.g., the North Atlantic route). Shares of the market have been indirectly apportioned to the respective national air carriers by means of route, frequency, capacity and traffic restrictions and also, with increasing frequency, by tariff restrictions.\(^3\) If a carrier feels that it does not obtain its "legitimate" share of the market or does not operate its authorized services, it may try to "sell" the unused part to the national carrier of the other country by requiring the conclusion of a pool agreement, the payment of royalties, the conclusion of an advantageous commercial agreement or otherwise.

This "balanced" situation leaves no room for competition, not

\(^1\) Having a national airline is felt to be part of the international identity of a State.

\(^2\) The alternative would be to regard and treat international civil aviation as an international public utility, abandoning the individual profit motive and having international air services operated and financed by the States together.

\(^3\) Moreover any anti-competitive practices could be mentioned, e.g., the monopolization of the distribution system (control of agents).
even price competition. Price competition would serve no purpose under restrictive conditions, since every other carrier, through capacity or other arrangements, obtains its “legitimate” share of the market and naturally wants to do so at the highest possible price. Under such conditions market growth cannot be optimal. In other words, such a system tends to promote undercapacity and high tariffs.

The charter revolution, however, introduced price competition and led to an oversupply of services, especially on the North Atlantic routes. The United States reacted by trying to even more strictly define and enforce its national air carriers’ entitlement to the international scheduled air traffic market on the basis of a state’s “own” traffic. To this end, a definition of “scheduled traffic” had to be found. To separate scheduled traffic from charter traffic, the distinction was sought by some in allocating individual business travel to scheduled services and group tourist travel to charter services. They agreed that scheduled services should be restricted to the capacity which would be essential to cater to the individual traveller. Such essential scheduled air services should be divided between the scheduled air carriers on the basis of the “own” traffic doctrine and be protected by the governments. Free competition could then be allowed as between scheduled and charter carriers for the group travel market. A few facts of air transportation life may show the fallacy of this United States-inspired scheme, as it would lead, apart from the adverse consequences for the entire interna-

24 Price competition between scheduled carriers has been avoided through multilateral price-fixing under IATA-rules to prevent cut-rate competition, given more liberal operating conditions. The charter competition has upset this machinery on the North Atlantic and the Europe-South East Asia routes.

25 This reasoning underlies the criticism of IATA being a cartel. IATA, as a multilateral carrier organization, serves a purpose under liberal operating conditions, but loses its “raison d’être” and thereby its credibility under a system of strict bilateral capacity regulation.

26 In the United States, the air carriers had to accept rate regulation in return for entry control by the CAB under the Civil Aeronautics Act of 1938.

27 The charter revolution had its main impact on the Europe-Far Eastern route, because of the “exempt” charter operated by BCAL to Singapore, and on the North Atlantic route.

28 The new United States Policy Statement makes a distinction between “departure time-sensitive” and “price-sensitive” international air passengers, the first category relying primarily upon scheduled air service available at short notice, while the second category will and is able to accept advance purchase requirements.
tional air transportation industry, to the virtual elimination of the participation of the smaller countries in scheduled international air transportation:

A. the scheduled air traffic market, in terms of individual business travellers of the smaller countries, is insufficient to support economically viable scheduled air carriers operations;

B. charter air carriers have a distinct (lower cost/lower fare) advantage over scheduled air carriers in the competition for the group travel market;\[^{29}\]

C. to obtain an equal share of the charter air transportation market is very difficult for a carrier whose home base is not in the country where the traffic originates (because of a bigger hold of the middlemen, for example).

In respect of international charter operations, the United States, moreover, invented the so-called three to four uplift ratio, requiring foreign charter carriers to operate three charter flights to the United States for every four charter flights allowed to be operated for the carriage of traffic originating in the United States. Also, the United States would bilaterally restrict the operating rights for charter services to traffic originating in or destined for the territory of the carrier's home land, including traffic making a stopover of not less than two nights in the home land of the carrier.\[^{30}\]

In the new United States International Air Transportation Policy Statement of September 8, 1976, it is true, these policies in respect of essential levels of scheduled service and the uplift ratio are not repeated in so many words. The statement, however, leaves ample room for much restrictive implementation. In that case, countries with a smaller volume of traffic originating therein will have to find an answer to these restrictive theories and practices leading to the silent capture of the international air traffic market by the bigger states. To this end, a certain minimum participation of every state

\[^{29}\] Charter-only carriers operate mainly on dense routes at high load factors. Moreover, as a rule, their overhead cost is lower than that of scheduled air carriers. A cost advantage of scheduled carriers may be their higher aircraft utilization and the possibility to use idle aircraft hours for charter operations. This, however, will not allow large scale charter operations in competition with charter-only carriers. The new United States Policy Statement, therefore, calls for part charters to be allowed (p. 12).

\[^{30}\] Agreement with the United Kingdom on Air Charter Services, April 28, 1976, ___ U.S.T. ___, T.I.A.S. No. ___.
in international air transportation should be guaranteed while
next to this an area of free competition, open to all air carriers
having a "natural access" to the traffic concerned, should be estab-
lished in the interest of the travelling and shipping public.31

I will outline a possible new system for the regulation of inter-
national air transportation to amend and thereby at least partly re-
vive the unfortunately deceased Bermuda principles. If we accept
a state's entitlement to the carriage by its national air carrier(s)
of a share of the international traffic, we shall have to define the
traffic to which a state is entitled. For this purpose and in view of
the above, it is suggested that this traffic should be defined by the
"natural access" which a carrier, in the absence of restrictions, has
to the traffic.32 This would be, in the first place, the traffic which
embarks or disembarks in the home country of the carrier, regard-
less of its origin or destination. Such traffic constitutes the justifica-
tion of the services of the carrier concerned and therefore should
be taken as a basis for regulatory purposes. It will provide an op-
portunity and an incentive for carriers to increase the volume of
traffic embarking or disembarking in its home country, without the
restraints of a predetermination of routes on a bilateral basis, point-
to-point tariff restrictions, tariff discriminatory measures or sixth
freedom traffic restrictions.33 Furthermore, on services being oper-
ated by a carrier for the traffic embarking and disembarking in its

31 Cf. S. WHEATCROFT AIR TRANSPORT POLICY 73-74 (1964) where he states
that "liberal" countries may accept a share of forty per cent of the traffic. He
concludes: "The difference between liberal and protectionist policies may (there-
fore) be thought of as a willingness, on the one hand to compete for 20% of the
total market, compared with an insistence upon a 50/50 division of traffic on the
other."

32 In the new United States Policy Statement a different criterion is mentioned:
"... to select routes that closely reflect natural traffic patterns and are eco-
nomically viable." (p. 2). It should be noted that a traffic pattern develops as a
result of services offered, and that, dependent on the acceptance of the public
of such services, the economic viability of the operations is determined.

33 A major inconsistency in the new United States Policy Statement is the
objective of "reliance on competitive market forces to the greatest extent feas-
able" (p. 8) next to the statement that where carriers rely excessively on sixth
freedom traffic this has "severely distorted traffic levels and distribution in certain
markets" (p. 20). Does the United States want to prescribe transportation on
United States carriers' services where the public chooses to make use of foreign
carriers' services in sixth freedom? To what extent can the public make use of
sixth freedom transportation possibilities before it becomes excessive for the
carrier to accommodate the public in this way?
home land, the carrier should be entitled to serve a number of foreign points on one and the same service if geography, economy and operational convenience permit. In such cases the carrier would obtain a natural access to the traffic moving between such foreign points and should obtain the right to embark and disembark traffic in fifth freedom in the intermediate point(s).

It may be seen that under this system there will always be at least two national carriers and, in the case of the fifth freedom, an undefined number of third country carriers which have a "natural access" to the same traffic. The question then arises who will be entitled to carry which percentage of that traffic at which frequency and with which capacity (type of aircraft) and along which route (on end-to-end services, or on services via intermediate points or on transit services to points beyond, or on connecting services). To answer this question I should like to, first of all, use four "imperatives" for governments to implement the "natural access" criterion: the operational, the geographic, the economic and the social imperative. The operational imperative is determined by the characteristics of the aircraft in the widest sense and the available airport and air navigational facilities. States should make it operationally possible for air carriers to serve the traffic centers which can support air services. The geographic imperative is determined by the location of the traffic centers as such and in relation to each other. States should allow reasonably direct routings to and from the homeland of a carrier, combination of services, transit services and services which connect with each other, if justified by geography, including passenger or shipper convenience. The economic imperative is determined by the requirements of an economically sound operation of international air services. States should allow sufficient frequencies and capacity, as well as sufficient traffic rights at reasonable tariffs, to enable the air carriers to mount an economic operation between traffic centers. It may be necessary to this end to restrict entry of too many carriers in some markets. Such restrictions would specify which routes or route sectors may not be served by a specific carrier or carriers. After taking these three imperatives into account, the fourth imperative should not be ig-

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34 So-called blind-sector rights (commingling rights, including co-terminal rights).
nored: the social imperative. States should ensure on the one hand that the public can be served according to its choice and on the other hand that measures are taken to protect the population and the environment against the nuisance, damage and hazards which may result from the operation of aircraft. Of course, such measures should not discriminate and should not work to the detriment of international civil aviation development.

The regulatory problem of allocating shares of the international air traffic market to the scheduled and non-scheduled (charter) carriers of the respective states should be approached on the basis and within the framework of these imperatives, while leaving part of the market open to free competition. Such allocation should therefore be limited to carriers having a natural access to the carriage of the traffic. Competition between such carriers should be subject to the rules of fair play only. As a first rule, no state should be allowed to protect or claim its share of the traffic to which its air carriers have a natural access if these carriers do not make an effort to carry that share in practice, or are unable or unfit to do so. The justification of the operation of routes and the provision of capacity for traffic to and from a carrier's homeland should be found, in the case of scheduled operations, in a minimum average loadfactor on each sector of the route of not lower than say fifty percent, achieved over a minimum period of one year.

In the case of non-scheduled operations the yardstick should be, next to a higher loadfactor requirement at specified minimum charter prices, the profitability of the individual flight or the programmed operation ("schedulized" charter flights). For the determination of the shares, one should not strictly divide, as has been unreflectingly suggested by some, only the scheduled operations as between states and leave charter services to compete freely among themselves and with scheduled air services. To do so would reduced the scheduled air services as far as they could then be eco-

30 Under such a system IATA could regain its indispensibility.
31 At each intermediate point a certain amount of fifth freedom should be granted as long as the transit traffic will be more, as an average, than the traffic embarking at the intermediate point concerned.
32 See also note 29 supra.
33 As has been argued, it is extremely difficult to find an adequate definition of "scheduled service" or "scheduled traffic."
nomically operated, to an unacceptable level, even if scheduled services' shares would be protected by the governments. The essential level of scheduled air services, and certainly the level of essential scheduled air services which would remain, if charter air services were allowed to compete freely for the traffic which is not bound to travel or be shipped on scheduled services and which could just as well make use of charter service (and will do so if the price is more advantageous), would in many cases be too low to be economically justified and would no longer be adequate to satisfy public demand for readily available scheduled service. On the North Atlantic route, for instance, often more than seventy percent of the traffic on scheduled services comes under this category.

The conclusion, therefore, must be that, if we want to determine shares of the traffic to which states will be entitled, no distinction must be made between programmed charter service and scheduled service or alternately that charter service should be bound to minimum tariffs to ensure honest competition with scheduled services. In the latter case the question would be asked what the use of charter service would be. On the other hand the question may be asked what the use of scheduled services is, if a great part of the traffic can be carried cheaper on charter services. I feel that once shares have been allocated, the question whether traffic should be carried on scheduled services, charter services or on both, should be left to the decision of the states concerned, on the understanding that in this case multilateral agreement exists in respect of charter-worthiness criteria to prevent diversion of traffic from one country to another. Traffic to which the carrier(s) of a state have a natural access may be carried on charter flights or on scheduled services or on both, depending on the decision of the states involved and on agreement between them, as long as their "legitimate" share of the traffic is safeguarded. How can this be achieved?

States with a large traffic-originating market are inclined to solve the charter problem by suggesting that the rules of the country of origin should prevail, so that the state of origin will be free to determine how "its" traffic is to be carried. In my opinion, however,

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39 Under such a system, the determination of the "legitimate share" would still be based on the origin of the traffic. It is not surprising, therefore, that the new United States Policy Statement of September 8, 1976, reaffirms that the United States will continue to advocate the "country of origin" concept (p. 13).
no such priority could be given to the state in which the greater part of the traffic between two points originated. After all, the state attracting the traffic may have a greater interest in the provision or at least the availability of adequate service to its territory. It is true that the state in which the greater part of the traffic originated grants more export opportunities than it receives when exchanging tariff rights, but this cannot be an argument to claim the greater part of the capacity to be provided, nor to apply its rules unilaterally. The opposite result could hold back the development of the traffic in case the state receiving the traffic wants more service (and is willing and able to provide it) than the state in which the traffic originated is prepared to allow. Application of the rules of the country of origin of the charter traffic, therefore, cannot guarantee an optimum development of the market nor provide a just basis for the ultimate determination of the “legitimate” shares of the states in the carriage of international air traffic.

We will have to approach the problem from a bilateral, or better still, multilateral or at least plurilateral standpoint. The traffic to which a state has a natural access can be divided into on-line traffic moving over routes to and from the homeland of its carriers and in fifth freedom en route, and non-scheduled (charter) traffic between any points where its carriers can offer a competitive product on a profitable basis. The share to which each state is entitled and which could receive protection, in respect of such on-line traffic could be established at forty percent as far as the traffic to and from the homeland of the carrier is concerned. This share can be obtained on both scheduled and charter services. As far as

40 The European countries, organized in the European Civil Aviation Conference, have consistently refused to formally accept the country of origin concept.

41 The United States may find that it has an interest in having a say in the European rules governing charter operations in order to attract more tourists from Europe to the United States on charter flights.

42 The new United States Policy Statement 'justifies' the application of country of origin rules by stating that it cannot be expected that complete international commonality can be achieved and each country should be enabled to adopt those requirements that meet its 'unique' needs. (p. 13). In my opinion each country's unique needs call for international multilateral agreement in respect of the regulation of international 'scheduled' charter operations.

43 On-line traffic is traffic moving between points chosen by the carrier to be served with scheduled air services, such carrier having a natural access to the traffic concerned.

44 Criteria for a definition of “scheduled air service” or “scheduled air trans-
on-line fifth freedom traffic en route and off-line traffic is concerned, the share should be determined in free competition in respect of traffic to which the carrier has a natural access. In the case of on-line fifth freedom traffic this could go up to twenty percent of the traffic on the sector concerned.

Off-line traffic by definition will be charter traffic, or at least non-scheduled traffic. This system would mean that a carrier having a natural access to the traffic on a route thus specified would have a protected on-line entitlement to forty percent of its homeland traffic (third, fourth and sixth freedom traffic), while it would have the possibility to obtain up to twenty percent of the traffic on fifth freedom sectors en route in free competition. To obtain this share, and even more in case other "natural-access-carriers" do not take up their share of the on-line traffic, the carrier should maintain a reasonable load factor or profitable charter service and quote agreed tariffs. The natural access criterion and the forty/forty/twenty percent determination of on-line shares will automatically limit entry of too many carriers into the same international market on the same route.

Any structure of international air services requires a tariff policy geared to the regulatory system in respect of route patterns and capacity. In my system non-discriminatory price competition could be allowed to a certain extent, if this would help to further develop the market on an economic basis. The transition to a more competitive market between carriers having a natural access to the traffic for which they would be allowed to compete would benefit

46 Off-line traffic is traffic between points or areas which are not being served by scheduled services of a carrier which has a natural access to the traffic concerned.

47 Cf. the CAB Regulatory Reform Bill presented to the U.S. Senate in early June, 1976, which, however, would involve a system of part regulation, de-regulating charter and all-cargo transportation only. S. 3536, 94th Cong., 2d Sess. (1976). See generally, 41 J. AIR L. & COM. 573-883 (1975).
the travelling and shipping public, provided rules of honest competition can be enforced. This task should be left to the airline industry with the possibility of assistance on the part of the aeronautical authorities if needed. The shares should be assessed bilaterally, plurilaterally or multilaterally after each of two one year scheduling periods, and adjustments in schedules and capacity could be agreed, if necessary, to enter into force as from the second scheduling period thereafter.

No predetermination of routes, schedules and capacity on the basis of traffic forecasts should be allowed as this would affect traffic development. Such artificial restraints affect carrier efficiency and reduce the flexibility required to respond to and stimulate traffic demand.

In a growing market the carrier, not having obtained its “legitimate” share of the market, should have first priority to increase its on-line capacity, including the inauguration of new scheduled routes. No reduction of capacity should be required if a carrier obtains a satisfactory loadfactor or operates profitable charter services. Such reduction would punish the carrier for its efficiency and victimize the public making use of these services. If a state, however, exceeds its share of the traffic by the operation of charter services, a reduction of the on-line charter operations could be envisaged, if required by a state to enable its carrier(s) to obtain its legitimate share.

The indiscriminate cries for ever stricter capacity regulation in international air transportation on the one hand, and deregulation within the United States on the other hand, should be replaced by constructive study of the many financial, economic, social and political aspects of the problem. It is hoped that the above comments may contribute to further deliberation of the matter and possibly some positive results of the coming Special ICAO-Conference.

Governments, in order to prevent predatory pricing, should disapprove fares and rates below the direct costs of providing the service in question, taking the fifty per cent load-factor standard as a basis to compute the direct costs per seat kilometer and ton kilometer. Revenue requirements (rate of return on investments) could then be left to measures to be taken by the carriers, designed to lead in practice to loadfactors, exceeding the standard loadfactor.