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IATA: ITS LEGAL STRUCTURE — A CRITICAL REVIEW†

BY WARREN W. KOFFLER††

I. INTRODUCTION

AIR COMMERCE between nations is subject to economic regulation by the International Air Transport Association.¹ IATA is an international trade association which is cartel-like in a number of its operations.² It is no more, or less, cartel-like by reason of the fact that it enjoys protective immunity from the municipal law of the several nations that have sanctioned its existence and operation.³ There are divergent views as to whether or not the accomplishments of this organization justify the continuation of its privileged status under the domestic law of the United States.⁴

II. IATA AS AN INSTITUTION

The success of IATA was born out of the failure of the Chicago Conference on International Aviation to arrive at a multilateral agreement

† The title of this article clearly states its nature. Professor John Cobb Cooper, a former Editor and Editorial Advisor of the *Journal* (and former Legal Counsel of IATA) has expressed disagreement with a number of the author's statements. The *Journal* neither advocates nor necessarily agrees with the author's position. However, the *Journal* feels that the article is a useful, thought-provoking work. Certain officials of IATA were offered the opportunity to publish a simultaneous reply but declined because of conflicting schedules.

The opinions expressed in this article do not necessarily represent the viewpoint of the *Journal's* Editors, Editorial Advisors, or Publisher.

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¹ "Most international fares and rates are generally arrived at by agreement among the carrier members of the International Air Transport Association. . . ." 1964 CAB ANN. REP. 22.

² "It is said to be a monopoly when one person alone buys up the whole of one kind of commodity, fixing a price at his own pleasure," Case of Monopolies, 11 Coke 86 (1602). An association of persons in the same business, who join together on an international basis to fix prices and methods of operation, is a cartel. WEBSTER NEW WORLD DICTIONARY (College ed. 1959). IATA is an international monopoly, or cartel, by either classic or modern definition. While its stated purpose is to create economic air transport, its actual operation has set prices at a level sufficient to support the least efficient of its carrier members. It is simple to demonstrate, by example, that international air fares would be lower, were they not subject to control by a cartel: The route between Miami and Bogota provides a convenient example of an IATA rate, subsequent IATA v. non-IATA competition, and a lower IATA rate. In 1962, only IATA carriers flew the route between Miami and Bogota. At that time, Avianca, one of the IATA carriers flying the route, offered the IATA prop excursion fare of \$162 round trip. Official Airline Guide (World Wide Edition), Nov. 1962, p. C-518. Subsequently, a foreign air carrier permit for this route was granted to Aerocondor (Aerovias Condor de Columbia, Ltda.), a non-IATA carrier; Aerocondor offered the route at a prop round trip excursion fare of \$130. Official Airline Guide, Feb. 1965, p. C-497. IATA, faced with meaningful competition, reduced its fare, as reflected by Avianca, to the same amount. Official Airline Guide, Feb. 1965, p. 497. There is no reason to believe that IATA would have reduced its fare, but for the non-IATA competition; there is good reason to believe that, but for IATA, international air fares would be substantially lower. See Comment, *CAB Regulation of International Transportation*, 75 HARV. L. REV. 575, 579 (1962).

³ IATA Traffic Conference Resolution, 6 C.A.B. 639 (1946); See 40 OPS. ATT'Y GEN. 112, 115 (1947); *Cf.*, Brief for the Dep't of Justice, IATA Agency Resolutions Proceeding, 12 C.A.B. 493 (1951).

⁴ *McManus v. CAB*, 286 F.2d 414 (2d Cir.), *cert. denied*, 366 U.S. 928 (1961). IATA has impliedly acknowledged the need for structural revision. Parrish, *New Look For IATA: A Cultured Swede*, *American Aviation*, May 1965, pp. 18-19.

concerning the economic regulation of international air commerce.⁵ This conference, called by President Roosevelt in November 1944, was an attempt to assure the orderly development of international aviation at the conclusion of the hostilities.⁶ While fifty-four nations convened at Chicago,⁷ two were clearly dominant: the United States with a great aviation war machine ready for conversion to civilian operation, and Great Britain with her vast chain of colonies. Two radically different plans were offered:⁸

(1) The United States Plan—a United Nations type of organization to control technical matter with no delegation of authority to any international organization to fix rates, routes, frequencies, or capacity.

(2) The United Kingdom Plan—an international air authority to determine and distribute frequencies and capacity and with authority to fix rates; routes were to be agreed upon bilaterally.

It became clear at the outset of the meeting that a stalemate as to the economic aspects of international air commerce was in the offing. In the hope of establishing a basic format for future discussions, the airline representatives, who were attending the conference as technical advisors to the several official representatives, formed a committee to draft articles of association for a new trade association of international air carriers.⁹

At its conclusion, the Chicago Conference had achieved two lasting accomplishments:

(1) conclusion of the Chicago Convention establishing ICAO¹⁰ for standardization of international flight data;¹¹ and

(2) agreement upon two elements of reciprocal privilege in international air commerce;¹² *i.e.*, innocent passage above a sovereignty, and landing privileges for non-traffic purposes.

These two elements formed part of the "Five Freedoms"¹³ of international

⁵ *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 22, pt. 1 (Airlines) at 1072 [hereinafter cited as *Antitrust Hearings*]; ALEXANDROWICZ, *WORLD ECONOMIC AGENCIES LAW AND PRACTICE* 153 (1962).

⁶ *Ibid.*

⁷ Jones, *The Equation of Aviation Policy*, 27 J. AIR L. & COM. 227 (1960); See generally U.S. DEP'T OF STATE, *PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE* (1946).

⁸ *Ibid.*

⁹ *Antitrust Hearings* 1072.

¹⁰ SCHENKMAN, *INTERNATIONAL CIVIL AVIATION ORGANIZATION passim* (1955); H. SMITH, *AIRWAYS ABROAD* 182-85 (1950).

¹¹ Convention on International Civil Aviation, 7 Dec. 1944, pt. II, ch. VII, art. 43, 61 Stat. 1192 (1946).

¹² International Air Services Transit Agreement, 7 Dec. 1944, art. 1, sec. 1, 59 Stat. 1693 (1945).

¹³ The Five Freedoms are:

(1) First Freedom:

Innocent passage above a sovereign state;

(2) Second Freedom:

Freedom to land for non-traffic purposes;

(3) Third Freedom:

Freedom of State A's airline to discharge citizens and property of State A in State B;

(4) Fourth Freedom:

Freedom of State A's airline to pick up passengers and property in State B, destined for State A;

(5) Fifth Freedom:

Freedom of State A's airline to pick up passengers and property, on a reasonably through route, from State A to State B, destined for States C or D, and to discharge citizens and property from State C or D in States A or B.

air commerce upon which agreement was sought. The failure of the United States and Great Britain to agree upon three of these five points led to the Bermuda Air Conference of 1946.¹⁴

IATA was conceived at Chicago, nurtured at Havana,¹⁵ born at Montreal,¹⁶ and emancipated at Bermuda. It was at Bermuda that IATA received the rate-making authority which it continues to exercise today.¹⁷

III. IATA AS A MECHANISM

IATA is a membership association of the world's major commercial air carriers.¹⁸ Membership is open to all airlines that have been authorized by their respective governments to operate international services, and which in fact operate such services.¹⁹ The authority of the Association is vested in the General Meeting, which elects an Executive Committee to exercise management and policy functions.²⁰ This Committee, in turn, selects the Director General, who with his Secretariat, makes the wheels of IATA turn. The Secretariat performs services for the Association's five standing committees,²¹ the IATA Clearing House,²² and the IATA Traffic Conferences.²³

The traffic conference technique was established at the First General Meeting of the Association at Montreal in December 1945. At that time,

¹⁴ For a detailed analysis of factors leading up to the Bermuda Conference, see Jones, *supra* note 7, at 230; see Cooper, *Air Transport and World Organization*, 55 YALE L.J. 1191 (1946); See generally, Waldo, *Sequels to the Chicago Aviation Conference*, 11 LAW & CONTEMP. PROB. 609 (1946).

¹⁵ The Articles which the airline committee drew in Chicago, were adopted at an April 1945 meeting of international air operators at Havana, Cuba. *Antitrust Hearings* at 1072.

¹⁶ IATA is incorporated in Canada by a Special Act of Parliament, 9-10 George 6, c. 51, (Royal Assent 18 Dec. 1945).

¹⁷ Agreement with the United Kingdom Relating to Air Services, concluded 11 Feb. 1946, 60 Stat. 1499, T.I.A.S. No. 1507 [hereinafter cited as the Bermuda Agreement]; the ratemaking machinery provisions are set forth in Annex II of the Bermuda Agreement.

¹⁸ For a current membership list, see Official Airline Guide, June 1965, pp. A5-A10.

¹⁹ *Antitrust Hearings* 1073.

²⁰ *Ibid.*

²¹ IATA's five standing committees are:

- (1) Financial,
- (2) Legal,
- (3) Technical,
- (4) Medical, and
- (5) Traffic Advisory Committee and the Facilitation Advisory Group.

See *Antitrust Hearings* 1073-74; See also Mankiewicz (ed.), 1956 ANNUAIRE FRANCAISE DE DROIT INTERNATIONAL 670 (1957).

²² The IATA Clearing House is located in London, but has so close a working relationship with the Airlines Clearing House, Inc. in New York, that they are viewed analytically as a single unit. See Quinn-Harkin, *IATA*, Financial Times of London, 2 Sept. 1957. The Clearinghouses function to settle interline accounts among the carriers. *I.e.*, A desires to fly from New York to London, via Bermuda, and wishes to fly Eastern Airlines to Bermuda and BOAC from Bermuda to London; Eastern will write the through ticket to London and collect the full fare, as it is the "originating carrier." The Clearinghouse will debit and credit each carrier with its appropriate portion of A's fare; no account need be settled as to any single transaction. Debtor members receive a monthly statement upon which they must make telegraphic settlement of sterling to London or dollars to New York within seven days. Monthly clearances are frequently settled by set-off; In twenty-nine instances the set-off ratio has exceeded ninety-nine per cent. ALEXANDROWICZ, *op. cit. supra* note 5, at 155; See also *International Review*, 27 J. AIR L. & COM. 312 (1960); *Antitrust Hearings* 1075.

²³ The Traffic Conference machinery is the rate determining mechanism approved in the Bermuda Agreement; See note 17 *supra*. It has subsequently been included in the majority of the fifty bilateral agreements to which the United States is currently a party. 1964 CAB ANN. REP. 36.

a resolution was adopted²⁴ which established three semi-autonomous regional traffic conferences and provided a detailed procedure for their operation.²⁵ The government of each carrier member has approved this resolution.²⁶ The traffic conferences are established on a regional or geographic basis as follows:²⁷

- (1) Traffic Conference No. One—The Western Hemisphere.
 - (2) Traffic Conference No. Two—Europe, Africa, and that part of the Middle East lying west of and including Iran, Iceland, and the Azores.
 - (3) Traffic Conference No. Three—Asia, the balance of the Middle East, Australia, New Zealand, and the Pacific Isles except Hawaii.
- Each IATA member is a member of each Conference in which it operates a service.

The Traffic Conferences perform two important functions:

- (1) The setting of international airline rates for passenger and cargo services;
- (2) The standardization of the vast number of details involved in interline facilitation.²⁸

Although the first function is subject to far greater publicity, the latter is of at least equal importance. Standardization techniques have made interline commercial flight possible. They have removed the barriers of language and currency from international air travel. As the result of one standardization agreement, it is possible to travel around the world on the services of in excess of 119 individual airlines on a single standard ticket form.²⁹

What is good for the passenger, however, has proved equally enticing to the airlines. The airlines have not refrained from utilizing the standardization technique for their own purposes. Thus, the carriers have often made use of the miniature print of the Uniform Conditions of Carriage³⁰ (found on the reverse side of the Standard International Airline Ticket) for limitation³¹ or elimination³² of carrier liability in cases of injury or death resulting from carrier negligence.

IV. THE TRAFFIC CONFERENCE: A "PARA-LEGISLATIVE BODY"

The primary function of each traffic conference is to establish rates for

²⁴ Resolution as to the Provisions for the Regulation and Conduct of the Traffic Conferences was drafted and adopted pursuant to Article VIII, para. 5, of the IATA Articles of Association; See Sheehan, *The IATA Traffic Conferences*, 7 Sw. L.J. 135, 139 (1953); *Antitrust Hearings* 1073-74. See also Bebchick, *The International Air Transport Association and the Civil Aeronautics Board*, 25 J. AIR L. & COM. 8 (1958).

²⁵ *Ibid.*

²⁶ For details of United States approval, see note 38, *infra*.

²⁷ *Antitrust Hearings* 1076.

²⁸ "Crisis in the Conferences," Address by S. Ralph Cohen to the Centro per lo Sviluppo dei Trasporti Aerei, Rome, 29 April 1960, reprinted in 27 J. AIR L. & COM. 150 (1960) [hereinafter cited as Rome Address].

²⁹ The Interline Traffic Agreement has been accepted by sixty-nine IATA members and by fifty non-IATA members. See *Antitrust Hearings* 1078.

³⁰ Uniform Conditions of Carriage is a project of IATA's Legal Committee. *Antitrust Hearings* 1074. The Uniform Conditions of Carriage are reprinted at 21 J. AIR L. & COM. 340 (1954).

³¹ IATA Traffic Conference Resolutions, 10 C.A.B. 783 (1949).

³² See *Antitrust Hearings* 1060-62.

its geographic region. Each carrier receives at least thirty days' notice of a forthcoming meeting. This notice is accompanied by a fixed agenda which outlines the matters to be dealt with at the meeting. Every member of the Conference is entitled to have matters placed on the agenda. Since unanimous consent of all members is required for the adoption of each resolution, negotiation and compromise are the working tools of every traffic conference meeting.³³

Each traffic conference has three standing committees, comprised of personnel from each Conference member. Each Conference has a Secretary who is a full-time working executive in the employ of the Conference and with whom the committee chairmen coordinate inter-Conference meetings of their respective committees. These meetings may be set at New York, Paris, or Singapore (the regional headquarters of the several Conferences), or at other agreed upon locations.³⁴ Each Conference has three standing committees:³⁵

- (1) Analysis of Costs (Costs);
- (2) Fees, Rates, Charges, and Schedules (FRCS); and
- (3) Agency.

The Costs and FRCS Committees exist to coordinate the collection of data required for the next meeting of the traffic conference. Their authority is limited to making recommendations in their respective fields of operation.³⁶ To the contrary, the Agency Committee of each Conference is a strong economic force in the business of international aviation.³⁷ The Agency Committees meet bi-annually to consider and act upon:³⁸

- (1) Applications for travel agency appointment,
- (2) Suspension or cancellation of the appointments of agents found to be violating the terms of their agency sales contracts, and
- (3) Revisions of local criteria for agency appointments.

Since each Conference's Agency Committee acts with respect to all of the nations within its geographic region, it generally requires the help of an Agency Investigation Board (AIB) in each country. The AIB, which advises the Committee of its views concerning the eligibility for appointment of new applicants, was created to localize the appointment procedure

³³ *Antitrust Hearings* 1076-77; See Sheehan, *supra* note 24, at 139.

³⁴ *Id.* at 141.

³⁵ *Ibid.*; *Antitrust Hearings* 1077.

³⁶ *Ibid.*

³⁷ Sheehan, *supra* note 24, at 176. See also Mankiewicz (ed.), 1956 ANNUAIRE FRANCAISE DE DROIT INTERNATIONAL 671; See generally (as to operation of IATA Traffic Conferences and their Committees), 1957 Annual Report of ICAO (Montreal, 1958).

³⁸ A travel agent is a commission salesman who cannot earn a living at that business without an agency agreement from one or more airlines. IATA, by resolution, has forbidden any member from appointing or commissioning any travel agent who is not on the "IATA Approved List of Agents." In so doing, they have created a licensing, or appointment, procedure, operated by each Conference's licensing board—its Agency Committee. Sheehan, *supra* note 24, at 176; *Antitrust Hearings* 1055-57. See IATA Agency Resolutions Hearing, 12 C.A.B. 493 (1951). See also McManus v. CAB, 286 F.2d 414 (2d Cir.), *cert. denied*, 366 U.S. 928 (1961). This position is well stated in *Antitrust Hearings* 1308 (testimony of James P. McManus). See also Apgar Travel Agency v. International Air Transp. Ass'n, 107 F. Supp. 706 (S.D.N.Y. 1962). Brief for the Dep't of Justice, IATA Agency Resolutions Proceedings, CAB Docket No. 3350, submitted 22 Sept. 1950; IATA Resolutions No. 810, 810a, 810b, 810d, 810e, and 812. *But see Antitrust Hearings* 2284-2300 (testimony of Thomas J. Donovan).

by placing it in the hands of knowledgeable nationals of the applicant's own country. While this concept may be valid when applied to Monaco, its validity is questionable when directed at the United States or Brazil.³⁹

Prior to 1952, every member of IATA was required to execute a separate agency agreement with every agent that represented it. Under this procedure, a single agent could end up with fifty or more separate agency contracts. The carriers found this system burdensome and inefficient. In order to remedy this situation, the Conferences met in Buenos Aires in May 1952 to adopt the Standard Form Agency Agreement and a new procedure for carrier appointment of agents.⁴⁰ Under the method adopted, each agent accepted by the Agency Committee for listing is sent two copies of the standard form in blank. The agent signs and returns one copy to the Conference Secretary and retains the other for his files. The Conference then informs its members of the agent's availability for appointment. Those carriers wishing to appoint the agent send him a Certificate of Appointment.⁴¹ That this procedure is manifestly pregnant with legal problems was obvious to the Legal Committee, who were most restrained in their support for a document they had created.⁴² Mr. Sheehan, then IATA's Legal Drafting Officer, pointed out the following factors concerning the Standard Agreement which remain potential legal problems:

(1) Is forwarding a blank form of agreement to an agent an offer, subject to a condition precedent that a member forward an appointing certificate to that agent? or

(2) Is it merely an inquiry, which the agent may adopt as his offer to the carrier and which the carrier may accept by forwarding the appointment certificate to the agent? IATA clearly favors the second rationale, as it makes the member's headquarters the applicable situs under the situs or *lex loci contractus* theory.

(3) Since the Conference forwards the blank agreement to the agent and retains the inscribed contract for its members, what, if any, validity will be given to the Conference Resolutions and the member's power of attorney to the Agency Committee of the Conference, which provide that neither IATA, the Conference, the Committee, nor the employees of any of them, shall be personally liable for acts committed on behalf of its members?

(4) What effect will various judicial tribunals give to the terms of the agreement, to its form, and to its method and mode of execution? To date, the agreement remains unblemished.⁴³

V. IATA AND THE GOVERNMENTS

International air commerce is a source of national pride, power, and

³⁹ Sheehan, *supra* note 24, at 176; *Antitrust Hearings* 1079.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*; For an example of the systems operations, see *Antitrust Hearings* 2382-89.

⁴² Sheehan, *supra* note 24, at 178.

⁴³ Including the United States. See *McManus v. CAB*, 286 F.2d 414 (2d Cir.), *cert. denied*, 366 U.S. 928 (1961).

prestige.⁴⁴ As such, international airlines have become favorite tools of national image makers throughout the world. The profit motive is frequently secondary, if indeed in some circumstances it is considered at all.⁴⁵ Since the vast majority of international airlines are owned by their respective national governments in one form or another,⁴⁶ and are almost without exception the "chosen instruments"⁴⁷ of each government, it is not surprising that these same governments are frequently disturbed by what they consider to be both the philosophic and pragmatic immaturity of the United States in the sphere of international aviation policy.⁴⁸ Given this frame of reference, it is somewhat less difficult to comprehend the inability of the Chicago Conference of 1944 to arrive at a reasonable compromise between the plans presented,⁴⁹ and the subsequent birth at Bermuda of so strange a creature as is IATA.

It is quite possible that IATA would never have come to fruition had Congress given the CAB the same ratemaking authority over foreign air commerce as it did over domestic air commerce.⁵⁰ Notwithstanding the express manifestation of congressional intent to the contrary, it is clear that one of the prime objectives of the CAB at the Bermuda Conference was to obtain a greater measure of control over ratemaking in international aviation.⁵¹ Although the Bermuda Agreement, like all of the subsequent bilateral executive agreements concerning the exchange of civil aviation operating privileges, was negotiated by the State Department, the CAB provided technical assistance and counsel to the United States diplomatic team of negotiators; they were present and vocal throughout the meeting.⁵² In fact, the record clearly reflects that the Chairman of the CAB was personally present at the negotiating table almost constantly through-

⁴⁴ CAB, *The Role of Competition in Commercial Air Transportation*, 82d Cong., 2d Sess. (1952) (a Report to the Subcommittee on Monopoly of the Senate Select Committee on Small Business), pt. V, "International and Territorial Services," *passim*. See Cooper, *supra* note 14; THOMAS, *ECONOMIC REGULATION OF SCHEDULED AIR TRANSPORT* 188-89 (1951). See also *Logic of the Air*, Fortune, April 1943, p. 72. *But cf.* Address of Hon. Welch Pogue, Former Chairman of the CAB, before the National Aeronautics Association at Minneapolis, Minn., as quoted in Burke, *Influences Affecting International Aviation Policy*, 11 LAW & CONTEMP. PROB. 602 (1946).

⁴⁵ International air carriers, such as Thai International Airlines and Ethiopian International Airlines, do much for their country's national pride but little for its national economy; they frequently draw upon needed hard currency reserves.

⁴⁶ *Antitrust Hearings* 1047, 2449.

⁴⁷ See FREDERICK, *COMMERCIAL AIR TRANSPORTATION* 273 (5th ed. 1961). See also LISSITZYN, *INTERNATIONAL AIR TRANSPORTATION AND NATIONAL POLICY* 137-99 (1942).

⁴⁸ The carryover of United States domestic economic and legal principles, such as the inherent good of the "free enterprise system" and the reflection of that philosophy in our antitrust laws, are quite unacceptable to Euro-Afro-Asian governments. See Jones, *supra* note 7, at 224-25.

⁴⁹ Although prior to World War II Britain had generally been quite liberal, particularly as to her long-haul cabotage routes to the Commonwealth, in contrast to the restrictive concepts of the continental States, the British adopted a restrictive policy at Chicago. Hesse, *Some Questions on Aviation Cabotage*, 1 MCGILL L.J. 129 (1952); See *Economics of Air Transportation in Europe*, League of Nations Pub. No. C. 97, M. 44, 135 VIII (1935); Jones, *supra* note 7, at 228.

⁵⁰ Compare the authority delegated in each area at § 1102(d) of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 (1964), (which is identical with the Civil Aeronautics Act of 1938, 52 Stat. 973, as to their economic regulatory provisions), which gives the Civil Aeronautics Board the power to fix rates for domestic air commerce, but only the authority to fix maximum and/or minimum rates for overseas air commerce by United States flag carriers; See Hale and Hale, *Competition or Control IV: Air Carriers*, 109 U. PA. L. REV. 311 (1961).

⁵¹ See van der Tuuk Adriani, *The "Bermuda" Capacity Clauses*, 22 J. AIR L. & COM. 406 (1955).

⁵² *Antitrust Hearings* 2453; 1964 CAB ANN. REP. 36.

out the meeting.⁵³ This influence was remarkably documented in the text of the agreement, wherein it provides for alternative ratemaking procedures should Congress see fit to grant the CAB the authority it sought over international ratemaking;⁵⁴ it continues to seek identical authority twenty years later.⁵⁵

Given the limited direct legislative authority it has in this area, the CAB was somewhat pressed to come forth with a practical plan that would give it a measure of control and authority.⁵⁶ This it accomplished by utilizing Sections 412⁵⁷ and 414⁵⁸ of the Civil Aeronautics Act of 1938.⁵⁹ In combination, this provided a method by which the CAB could require United States international air carriers to file any proposed fare,⁶⁰ which the CAB could then, in effect, approve or disapprove.⁶¹ By giving its blessing to IATA, of which the United States international carriers were members, and by virtue of its ratemaking machinery,⁶² the CAB was acting to insure and perpetuate its own control over international air fares.⁶³ It would clearly have been a violation of United States antitrust legislation⁶⁴ for United States carriers, with or without combination with any foreign carrier,⁶⁵ to have met and agreed upon rates.⁶⁶ Unless the CAB executed its legislative authority to grant antitrust immunity⁶⁷ as to both the meeting and the rates,⁶⁸ the carriers would be obliged to submit all rates to the CAB for its approval. To bring this point home, a requirement was placed in the Bermuda Agreement that IATA rate agreements involving or affecting the United States or United States carriers be subject to the approval of the CAB;⁶⁹ it has reappeared in all subsequent bilaterals to which the United States is a party. Britain did not require the inclusion of an approval clause upon her behalf in the Bermuda Agreement.⁷⁰ It was quite unnecessary for her to do so, as the Ministry had international

⁵³ *Antitrust Hearings* 1028.

⁵⁴ See authorities cited at note 17 *supra*.

⁵⁵ 1964 CAB ANN. REP. 69; See S. 1540 and H.R. 6400, 88th Cong. 2d Sess. (1964).

⁵⁶ The CAB so states in its reasons for approving the IATA machinery; See IATA Traffic Conference Resolution, 6 C.A.B. 639, 642 (1946).

⁵⁷ Civil Aeronautics Act of 1938, § 412, 52 Stat. 1003 (now Federal Aviation Act of 1958, § 412, 72 Stat. 770, 49 U.S.C. § 1382 (1964)).

⁵⁸ Civil Aeronautics Act of 1938, § 414, 52 Stat. 1004 (now Federal Aviation Act of 1958, § 414, 72 Stat. 770, 49 U.S.C. § 1384 (1964)).

⁵⁹ Now Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 (1964). See note 50 *supra*.

⁶⁰ Section 412(a) requires that every carrier file any agreement with any other carrier, including fare agreements.

⁶¹ Section 412(b) authorizes the Civil Aeronautics Board to approve agreements filed under § 412(a) which are "not adverse to the public interest."

⁶² See note 56 *supra*.

⁶³ IATA, WORLD AIR TRANSPORT BACKGROUND, Montreal, 17 May 1956.

⁶⁴ See Clayton Act § 1, 38 Stat. 730 (1914), as amended, 15 U.S.C. § 12 (1964).

⁶⁵ Section 412(a) requires filing of any agreement by a United States carrier, whether with another United States carrier or a foreign carrier, or both; an agreement to fix rates would fall within the prohibitions of § 2(a) of the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. § 13 (1964).

⁶⁶ *Ibid.*

⁶⁷ Section 414 of the act provides that persons affected by agreements approved by the Civil Aeronautics Board under § 412(b) are "relieved from the operations of the 'antitrust laws.'"

⁶⁸ Two potential antitrust violations exist: (1) meeting to fix prices, and (2) agreeing at such a meeting upon the prices fixed. Both activities constitute violations of the Clayton Act.

⁶⁹ See Bermuda Agreement, annex II, para. (b).

⁷⁰ See *International Review*, 27 J. AIR L. & COM. 312 (1960).

ratemaking authority,⁷¹ although it was not the so called "double punch"⁷² that was already enjoyed by most of the governments on the Continent. Shortly thereafter, Britain joined the latter group upon its nationalization of BOAC.⁷³

Almost twenty-one years after Bermuda, the United States regulatory scheme seems quite quaint, if no longer odd, to other nations. Thus, an IATA executive, in a recent speech to a meeting of aviation experts, was brought to say:

[T]he peculiar attitude of United States law toward public utilities requires that agreements between airlines . . . must be subjected to the closest scrutiny and must be specifically approved before they can become effective. Other nations feel that they cannot exercise a lesser degree of sovereignty.⁷⁴

VI. THE MECHANISM OF IATA

The *modus operandi* of the IATA Traffic Conferences is quite simple upon its face. All of the members of all of the Conferences meet, in secret.⁷⁵ After the technicians of each carrier have swapped and bargained, certain basic fare structures are proposed in the form of Conference Resolutions. These are put to a vote before the assembled executive representatives of the members. Under the Conference voting scheme each carrier has one vote,⁷⁶ but that is all that is needed. Like the Security Council of the United Nations, IATA has a veto system. A single nay and the Resolution is defeated.⁷⁷ While this may appear to be somewhat odd for an international trade association, it seems even more so when examined in the light of IATA's graduated dues structure⁷⁸ which is not unlike the United States income tax. IATA has never asserted a claim to democratic principles of organization.⁷⁹ Considering the composition of the membership of the Association, the veto method of voting is not entirely lacking in merit. In essence, the members' governments have sent their technical experts to a meeting to negotiate the price of a commodity. These men, in the employ of their governments directly or indirectly, have been fully instructed before their departure.⁸⁰ This does not necessarily mean that they are bound to any given rate for a particular route. Rather, they are most

⁷¹ *Ibid.*

⁷² Since the airlines are owned by the government, the government has two opportunities to agree upon prospective international fares: (1) Initially, in their negotiation or origination stage, at the IATA Traffic Conference meeting; and (2) subsequently, when the approved resolution is submitted to the subject government for its approval. Since the carrier is merely the shadow of the government, the latter is said to have a "double punch."

⁷³ Air Corporations Act of 1949, 12, 13 & 14 Geo. 6, c. 91.

⁷⁴ Rome Address 152.

⁷⁵ The three traffic conferences meet together because many of the carriers operate in more than one conference area. In addition, rates determined often have an inter-conference impact.

⁷⁶ See *International Review*, 27 J. AIR L. & COM. 312 (1960).

⁷⁷ *Ibid.*

⁷⁸ Sheehan, *supra* note 24, at 143.

⁷⁹ Statement of Sir William Hildred, Director General of IATA, setting forth the merits of the Association, *Antitrust Hearings* 1048-49.

⁸⁰ Testimony of Juan Trippe where he stated: "The British Government owns the entire company [BOAC], so that its policy is coordinated and directly tied in with government policy in every regard." *Antitrust Hearings* 2455. (Mr. Trippe testified as the then President of IATA, as well as President and Chairman of the Board of Pan American World Airways.)

decidedly limited within a specific range of negotiability. After they have negotiated, if the resulting resolution is beyond that operative range, they may simply exercise the veto. In reality, this is a time-saving system, for their government would be quite prone to do the same thing; were an identical majority-approved tariff resolution presented to it for its approval; however, it might be less likely to disapprove such a resolution for other reasons.⁸¹ While the CAB, in its lobbying efforts before Congress for an increase in its international fare-making authority, has taken the position that government-owned carriers do not generally represent their government's policies, IATA has developed a more straightforward position in this regard. An Association executive has recently stated:

[E]ach of them [the members] must . . . negotiate within the framework of what it knows its government wants, will permit, or may hopefully be persuaded to allow.⁸²

That the government airline members of IATA do in fact represent their governments is quite clear from a cursory examination of the pertinent facts. A number of the governments represented by national carriers (*e.g.*, the Netherlands represented by KLM) accept the IATA fare structure resolution as proposed without further investigation.⁸³ Other governments, similarly situated, may make a pro forma examination of the tariffs filed, but make a practice of accepting the IATA tariff.⁸⁴ It is only appropriate that these governments should act in this manner, for they have already consented to that which is proposed.

IATA has been called an exercise in "professional para-legislation."⁸⁵ What governments have been unable or unwilling to agree upon directly, they have quite frequently been able to agree upon through the machinery of IATA. This is clearly an exercise in delegated national authority. It would be quite simple for most nations to freely accept this rationale. It is impossible for the United States to do so, for the CAB does not have any international rate-making power to delegate. While the authority of the air ministries of most nations to set international air fares is either inherent,⁸⁶

⁸¹ Some governments are said to fear the alleged chaos of an "open rate," although the experience has never proved to be chaotic. See Rome Address 154-55. *But see Antitrust Hearings* 2563 (statement of the CAB).

⁸² Rome Address 153.

⁸³ *Antitrust Hearings* 1064.

⁸⁴ *Antitrust Hearings* 2565-68 (statement of the CAB).

⁸⁵ Mankiewicz, *supra* note 37, at 671.

⁸⁶ As in Great Britain, where authority is derived from two sources: (1) as to BOAC, from § 5 of the Air Corporations Act of 1949, 12, 13 & 14 Geo. 6, c. 91; (2) as to foreign carriers, through inherent authority of the Aviation Ministry, Ministry of Aviation Order 1959 (S.I. 1959 No. 1768), arts. 2(1), (3). The Ministry does not acquire such authority directly as a result of international agreements entered into by the Crown, as the same do not become applicable municipal law unless so incorporated by domestic legislation. *Cf. Republic of Italy v. Hambros Bank, Ltd.*, [1950] 1 All E.R. 430 (Ch.). *But cf. Antitrust Hearings* 2566 (supplementary statement of the CAB). The nature of the inherent authority of the Ministry was fully described to this author in an interview with the Hon. N. W. Walker, Civil Air Attache, Embassy of Great Britain, Washington, D.C., on 7 April 1965.

As in Brazil, where § 151 of the Constitution of the United States of Brazil establishes the principle of "fair and just remuneration," upon which the executive has asserted its claim to inherent regulatory authority.

express,⁸⁷ or implied,⁸⁸ the Congress of the United States has expressly limited the authority of the Civil Aeronautics Board in this regard.⁸⁹ It seems quite possible, that had there been legislative silence, the CAB might well have asserted a claim to implied authority in this area.⁹⁰ The continuing historical position of the CAB, as a stepchild among its peers, has led it to dramatic action with little in the way of concrete results. Concurrently, the air carrier lobby has annually reiterated its seemingly logical but highly over-simplified arguments in favor of retention of the status quo; they have been successful.⁹¹ In its efforts to retain some margin of control over international air fares, the CAB has increasingly tended to cooperate with IATA.⁹² There is a growing body of informed opinion that feels that the CAB has grown so accomodating that it is becoming increasingly difficult to tell the regulator from the regulatee; that it no longer carries forth its legislative mandate to protect the public interest with sufficient vigor.⁹³

VII. THE FUTURE OF INTERNATIONAL RATEMAKING

Rapid changes in international air commerce are an accepted way of life.⁹⁴ In the past, these changes have been essentially technological⁹⁵ rather than structural in nature.⁹⁶ Henceforth, projected technical advances,⁹⁷ combined with previously unequaled per capita economic growth in the United States,⁹⁸ should catalyze the commencement of needed structural changes in international air commerce. Primary among these envisioned developments will be a revised approach to ratemaking, reflecting an increased

⁸⁷ As in France, where rates must be submitted for the approval of the Minister of Civil and Commercial Aviation; CODE OF CIVIL AND COMMERCIAL AVIATION (30 Nov. 1955), book III, ch. III, tit. II, art. 129; based upon Decree No. 55-1590 of 30 Nov. 1955, which was codified pursuant to Law No. 53-515 of 28 May 1958, [1958] Journal Officiel 4842 (Fr.) and [1955] Journal Officiel 11815 (Fr.). In addition, Air France must also submit its rates to the Minister of Finance & Economic Affairs, pursuant to ch. I, tit. III, art. 142 of the Code, above. If either Ministry fails to act within two months, the proposed rates are deemed approved.

As in West Germany, pursuant to Law of 21 Aug. 1936, Verordnung Ulber Luftverkehr 42 (Ger.).

As in Japan, pursuant to Civil Aeronautics Law No. 23, 15 July 1962, §§ 105 and 129 (2); Civil Aeronautics Regulations (Japan), arts. 217 and 233 (21), prescribing the contents of applications for rate approval.

As in the Netherlands, Aviation Act of 30 July 1926, art. 11.

⁸⁸ As in Argentina, pursuant to AVIATION CODE OF ARGENTINA, 15 July 1954, (promulgated 4 Aug. 1954), Law No. 14,307, tit. VIII, ch. I, art. 98, [1954] Boletín Oficial. See also LOJOUANE EDITORES, CODIGO AERONAUTICO DE LA NACION ARGENTINA (1954), for relation of the Code, above, to other Argentine law concerning aviation.

⁸⁹ Federal Aviation Act of 1958, § 1002(d), 72 Stat. 788, 49 U.S.C. § 1482 (1964).

⁹⁰ See *Antitrust Hearings* 2560-65 (supplementary statement of the CAB).

⁹¹ *Air Travel*, Sept. 1962, p. 56.

⁹² *Justice Demands Curbs on IATA*, *The Travel Agent*, 10 May 1965, p. 1.

⁹³ *Ibid.* See *Antitrust Hearings* 2356 (Testimony of R. W. Joyce). See also, Parish, *A Personal View*, *American Aviation*, Feb. 1964, p. 33, discussing CAB Chairman Boyd's efforts on behalf of IATA, in forcing El Al, Irish Int'l, and Canadian Pacific Airlines to come to terms on a proposed rate resolution upon which they had been holding out; *Interview with Dr. Walter Berchtold, President of Swissair*, *American Aviation*, Feb. 1964, p. 34.

⁹⁴ See generally FREDERICK, *op. cit. supra*, note 46, at ch. 10.

⁹⁵ In twenty years, international airlines have evolved from the DC4 to the fan-jet engine of the latest intercontinental versions of the B707 and the DC8; See, Henzey, *Airlines In Midst of Largest Equipment Program*, *American Aviation*, May 1965, p. 16.

⁹⁶ The operative structure of the IATA Traffic Conference has remained virtually unchanged during the past 19 years. See *Antitrust Hearings* 1076.

⁹⁷ Within the next ten years, commercial airlines will be operating between 150 and 200 supersonic aircraft, at a gross equipment cost of from between \$5 billion and \$8 billion. Henzey, *supra* note 95.

⁹⁸ It is estimated that by 1972, average annual per family income in the United States will be \$9,500. *How U.S. is to Change*, U.S. News & World Report, 17 May 1965, p. 56.

voice of the passenger.⁹⁹ How will IATA fare in the midst of these changes? It seems clear that IATA, as an institution, will continue and will grow¹⁰⁰ but not without basic changes in its methods of operation.¹⁰¹ IATA executives have propagandized to the effect that the Association is a necessary evil.¹⁰² The framework extended by them in support of these allegations, however, belie their contentions. All argument to this end commences from a single premise that price competition in international air commerce does not constitute an available alternative.¹⁰³ While the majority of informed opinion shares this view,¹⁰⁴ a candid examination of the price reductions resultant from IATA v. non-IATA carrier competition over the same routes causes one to question the type of information upon which such opinions are based. A significant minority continues to support a mixed approach of regulated and competitive rates as a healthier approach which is more conducive to carrier cogitation than total regulation.¹⁰⁵ Nevertheless, assuming arguendo the validity of the majority position above, there remain several reasonable alternatives to IATA. Essentially, each of these alternatives involves intergovernmental negotiation on either a bilateral or a multilateral basis.¹⁰⁶ While this method of approach is operatively practical, it is politically infeasible. The inescapable result of direct government action was demonstrated at the Honolulu meeting of the IATA in the fall of 1958.¹⁰⁷ Midway through that meeting, the air minister of one State, in addressing his national parliament, stated that either a particular proposed resolution then pending before the meeting be approved, or his government would order its national carrier to withdraw from the Association.¹⁰⁸ This attempt at unilateral policy determination boomeranged;¹⁰⁹ the minister involved was forced into eventual resignation. The instant effect of the statement at the IATA meeting was to make rewording, revision, or "backdooring" of the proposed resolution impossible. Since most international fares are closely related with each other, negotiation bogged down, and IATA's ratemaking machinery ground to a halt. The Traffic Conference ended without adopting a fare resolution. A single public statement had caused the meeting to end in a stalemate.¹¹⁰ The

⁹⁹ The United States has long provided a far larger number of airline passengers than any other country in the world. In fiscal 1964, this number increased to an estimated total of 6.6 million persons, for an increase of 10.1% over fiscal 1963. See generally 1964 CAB ANN. REP. 35. Consider the statement of IATA's Director General-designate, Knut Hammarskjold, that: "[I] will represent the passenger . . . for the passenger is the ultimate aim of the carriers." Parrish, *New Look for IATA: A Cultured Swede*, American Aviation, May 1965, pp. 18-19.

¹⁰⁰ There are few practical alternatives to IATA, but many practical changes that can be made within IATA. Consider the statement of Chairman Celler of the House Judiciary Committee: "[I] can readily see why an organization like [IATA] . . . is quite essential. However, it is not perfect." *Antitrust Hearings* 1071.

¹⁰¹ See Parrish, *New Look for IATA: A Cultured Swede*, American Aviation, May 1965, pp. 18-19.

¹⁰² Rome Address.

¹⁰³ *Antitrust Hearings* 1052 (testimony of Sir William Hildred, Director General of IATA).

¹⁰⁴ See generally authorities cited at notes 44 & 47 *supra*.

¹⁰⁵ *Ibid.*

¹⁰⁶ See Rome Address for a discussion of the possible alternatives to IATA.

¹⁰⁷ Rome Address.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

resulting crisis was resolved when a new minister, not bound by his predecessor's pledge, assumed office.¹¹¹ This incident established the validity of two important concepts:

(1) that a publicly proclaimed inflexible position by one party, as to a single proposed resolution, can totally wreck a traffic conference meeting, not only as to the resolution in question but as to every other item on the agenda as well;

(2) that the lack of an agreement at the end of a given traffic conference meeting does not necessarily produce the havoc and industrial anarchy that some had predicated would result from such a situation.¹¹²

The inability of the traffic conference to agree upon a new rate structure results in a so called "open rate" period. In this instance, the "open rate" extended over a period of some six months. In contrast to the dire predictions which were made during the Conference meeting, the "open rate" went unnoticed by the public at large. The blood and fire of manifold air crashes, resulting from over-economies necessitated by cut-throat rate wars, never came to pass. Instead, everything remained as it had been prior to the meeting. During the open rate all carriers refrained from filing new or revised rate tariffs. In practical effect, they acted as if they were bound by the expired IATA rate resolution. Had the carriers met in an attempt to arrive at a new set of rates outside the IATA framework and without the prior approval of the CAB, the meeting would have constituted an obvious violation of United States antitrust laws.¹¹³ As a result, it has been contended that the aftermath of this incident was unique, and that it therefore proves nothing. While it certainly does not provide a long term alternative to IATA, it does establish that short term gaps between rate tariffs will be met by carrier apathy, rather than competitive anarchy.

It is frequently suggested that international air fares be determined directly by intergovernmental negotiation.¹¹⁴ There is very little merit to the proposal, for its success requires two difficult prerequisites:¹¹⁵

(1) absolute secrecy before, during, and after the commencement of negotiations; and

(2) an honest desire to arrive at a viable commercial agreement without regard to national pride or political implications.

The problems inherent in producing these precedent conditions obviate the impracticality of the proposal.

¹¹¹ *Ibid.*

¹¹² See *Hearings On Civil Air Policy, Subcommittee of the House Committee on Interstate and Foreign Commerce* 498, 84th Cong., 1st & 2d Sess. (1956).

¹¹³ See authority cited at note 64 *supra*. However, the CAB would be required to convince the Department of Justice as to the necessity of prosecution. If the CAB were successful, Justice would have to establish that the meeting and resulting rates constituted a conspiracy, rather than a trade conference resulting in independent parallel action normal in the airline industry. See *Milgram v. Loews, Inc.*, 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).

¹¹⁴ See Jones, *supra* note 7.

¹¹⁵ See generally authorities cited at note 14 *supra*.

VIII. CONCLUSION

Do the accomplishments of IATA justify its privileged status under United States antitrust laws? Many think that they do not. What, then, is the alternative to IATA? One realistic answer would clearly seem to be a restructured IATA. Most of the institution's harshest critics would be softened, if not silenced, if one or more of the following suggested reforms were adopted.

(1) In those instances in which a sovereign State has authorized more than one carrier to engage in international air commerce, such carriers shall meet with their government prior to any meeting of IATA and shall adopt a uniform position upon each proposed agenda item. Such uniform position shall be represented at the IATA meeting by a single joint representative of those carriers who shall not be in the direct employ of any of these carriers nor of their government.¹¹⁶

(2) Traffic conferences shall be held on an annual basis. Six months prior to the commencement of such annual conference, each national carrier or their joint national representative, as the case may be, shall serve upon each other any changes which they intend to propose at the forthcoming session together with appropriate supporting documents. Three months prior to the commencement of such annual session, each party upon whom such service was made shall offer a reply, wherein they shall indicate generally their position upon the proposed change together with appropriate supporting documents.

(3) An international management corps shall be established to provide long term continuity to the programs of the Association.

(4) Meetings generally shall be open to the public, but executive sessions may be held where secrecy is required by the nature of the agenda item under consideration.

(5) Each member of IATA freely acknowledges that it enjoys a unique privilege as an international air carrier. It fully agrees that regardless of its particular form of business organization it is ultimately responsible to the public at large. It expressly recalls and reaffirms the basic principles of IATA as stated in its Articles of Association: to promote safe, regular, and economic air transportation.

¹¹⁶ In the United States, this representation should be conducted by an independent, quasi-governmental negotiating team, which while directly representing the carriers is indirectly representing the ultimate consumer. Clearly, this representation should not be directly related, in the public sense, with the government or any agency thereof. To the contrary, it should bear immediate relation to the several carriers involved. In essence, it need only represent the government, and the public, to the extent that the carrier representatives of BOAC, Air France, etc., act upon behalf of their governments.