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# CHANGING CONCEPTS OF CABOTAGE: A CHALLENGE TO THE STATUS OF UNITED STATES CARRIERS IN INTERNATIONAL CIVIL AVIATION?

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## I. UNITED STATES POLICY GUIDING NEGOTIATIONS FOR INTERNATIONAL ROUTES AND CAPACITIES

FOR MANY years international air carriers of the United States have enjoyed the relatively large profits and economic security flowing from a lion's share of the international passenger and cargo market. Substantial Government subsidization<sup>1</sup> of airlines, good business management, an almost inflexible adherence by United States negotiators to the Bermuda Agreement<sup>2</sup> principles, and a large resource of United States citizens pursuing international business activities and the normal tourist trade<sup>3</sup> abroad, have all contributed in providing the United States with a strong upper hand in securing an extremely sizeable chunk of the international air transportation market, that is, until recently. The decrease in the share of

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<sup>1</sup> Substantial subsidization of United States international carriers initially by the Federal Government had dwindled to nothing at the end of 30 Sept. 1967. At that time, carriers were receiving mail revenue, but no direct subsidy: C.A.B., Costs and Statistics Division, Bureau of Accounts and Statistics, AIR CARRIER AND FINANCIAL STATISTICS, VOL. XV-3, Quarter Ended 30 Sept. 1967.

<sup>2</sup> Air Services Agreement between the United States and the United Kingdom, and the Final Act of the Civil Aviation Conference, signed and entered into force at Bermuda, 11 Feb. 1946; [1946] 17 U.S.T. 683, 60 Stat. 1499. It should be noted that the benefits of the Bermuda principles to the United States are highly questionable among some authoritative quarters. In 1960, Colonel Harold A. Jones, former U.S. Representative to the ICAO Council and member of the Civil Aeronautics Board, wrote an article, *The Equation of Aviation Policy*, 27 J. AIR L. & COM. 221 (1960), in which he stated, in part, at 234, that "The sacred 'Bermuda principles' are beginning to cost the United States a lot of money. They were fine in 1946 when we generated about 70% of the transatlantic and transpacific traffic, and carried about 80% of it. Now, these same 'principles,'—'fifth freedom,' plus 'reciprocity of routes,' 'reciprocity of traffic centers' and 'dog leg routes'—exposed the great United States traffic market to dozens of international airlines of other nations, many of which generated little traffic, operating chiefly for reasons of politics and pride, and dependent upon the American tourist dollar. Our own airlines were carrying about 40% of the transatlantic traffic, although the United States generated about 71% of it. Were we trading transatlantic dollars for Paris and Rome 'fifth freedom' nickels?"

<sup>3</sup> See *id.*, wherein the amount of U.S. generated transatlantic market in 1946 is discussed. The following breakdown of passengers carried by air between Europe and the United States in 1967 indicates that despite the increasing number of foreign carriers entering the transatlantic market since 1946, U.S. carriers still carry a sizeable portion of it:

*Arrival from Europe*

Total—2,746,703  
Aliens—1,074,395  
U.S. Citizens—1,672,308  
Number carried by U.S. Airlines—1,233,225

*Departure to Europe*

Total—2,574,013  
Aliens—941,566  
U.S. Citizens—1,632,447  
Number carried by U.S. Airlines—1,120,801  
Statistics available from the U.S. Department of  
Justice, Immigration and Naturalization Service.

the North Atlantic, indeed the entire transatlantic, market enjoyed by United States carriers became a matter of public concern officially when President John F. Kennedy appointed a Steering Committee in 1961 to make a detailed study of United States participation in international air transportation, to isolate problem areas, and to formulate corrective measures and appropriate policies. In 1963, the Steering Committee concluded its study and submitted its findings and policy recommendations in a report<sup>4</sup> which was approved by President Kennedy.

One of the most interesting facets of the report dealt with the discussion by the Steering Committee of bilateral agreements, vis-à-vis present and future United States negotiation policies. In a policy statement, a discussion of United States philosophy guiding bilateral air transport negotiations appeared in part as follows:

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

In part, justification for this conclusion was that the philosophy behind bilateral agreements

rejects the concept that agreements should divide the market or allocate to the carrier of a particular country a certain share of the traffic. The latter concept would surely restrict the growth of international aviation and would result in endless bickering among nations as to their proper share of traffic. It is totally foreign to our basic trade policies and would clearly harm the long-range interest of United States carriers as well as those of the traveller and shipper.<sup>5</sup>

It is apparent that the reasoning in the policy statement was substantially influenced by what the Steering Committee thought the international aviation economic structure *should* be, and specifically by one of the terms of reference of the Committee: "to determine the effect of this diminution [in transatlantic traffic carried by United States carriers] on the United States balance of payments."<sup>6</sup> What apparently was not given due consideration was reasoned anticipation of what other countries might accomplish by cooperating to present an effective economic blocking action that would dilute United States superiority in the area of bilateral route

<sup>4</sup> The Steering Committee was composed of N.E. Halaby, then Administrator of the Federal Aviation Agency, as chairman; Kenneth R. Hansen, Bureau of the Budget, as Executive Secretary; and members Alan S. Boyd, then with the Civil Aeronautics Board; Hallis B. Chenery of the Agency for International Development; Griffith Johnson of the Department of State; C. Daniel Martin of the Department of Commerce; and Frank K. Sloan of the Department of Defense. The subsequent report of the Committee was released by the Office of the White House Press Secretary on 24 April 1963, and is referred to as the "Statement on United States International Air Transport Policy."

<sup>5</sup> 30 J. AIR L. & COM. 76, 78 (1960). The text of the Policy Statement was reprinted in Volume 30 of the Journal of Air Law and Commerce, beginning at 76. For facility of reference, this source for the Statement will be cited hereinafter.

<sup>6</sup> See Sackrey, *Overcapacity in the United States International Air Transport Industry*, 32 J. AIR L. & COM. 24, 48 (1966), wherein the purposes of the Steering Committee's investigation are discussed.

and capacity negotiations. With a little imagination and reasoned projection, it is not difficult to envision comparatively recent events as composing the initial steps in the creation of what could be a very important politico-economic move to minimize United States effectiveness in bilateral negotiations, *i.e.*, alteration of the traditional concept of a cabotage area and what constitutes domestic traffic.

## II. THE ROLE OF ARTICLE 77 OF THE CHICAGO CONVENTION

To follow the evolution of indicative events, it is necessary to refer to the history of the protracted dispute on Article 77 of the Chicago Convention.<sup>7</sup> In 1956, the Twelfth Session of the ICAO Assembly convened and, among other things, resolved:

That the Council shall . . . formulate and circulate to Contracting States its views on the legal, economic and administrative problems involved in determining the manner in which the provisions of the Convention relating to the nationality of aircraft shall apply to aircraft operated by international operating agencies.<sup>8</sup>

On 15 November 1956, the Air Transport Committee, which had been directed by the Council to study Article 77 within the framework of the entire Convention and pursuant to the Assembly resolution, submitted its findings to the Council.<sup>9</sup> Essentially, the Committee concluded that the responsibilities under the Convention of a Contracting State could not be assumed by an international operating agency; specifically, such an agency could not authoritatively register its own aircraft. Such action was not encompassed by the meaning of the "nationality of aircraft" provisions in that Convention.

The Air Transport Committee report remained dormant until December 1959, when the League of Arab States requested the Council to make a determination, regarding Article 77, as to the obligations under the Convention of constituent States of the proposed Pan-Arab Airline when Pan-Arab aircraft were operating into territories of other States.<sup>10</sup> The request was referred by the Council to a panel of experts for study. On 25 August 1960 the panel submitted its findings<sup>11</sup> which, like the Air Transport Committee report, were mostly negative. The principal conclusions of the panel were that an international operating agency, or an international organization, could not lawfully register an aircraft; it further concluded that recording of aircraft on a register jointly established by Contracting States of an international agency legally would not satisfy the requirements of the Convention.

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<sup>7</sup> Convention on International Civil Aviation (Chicago Convention), 7 Dec. 1944, art. 77, 61 Stat. 1180, 1202, T.I.A.S. 1591 (effective 4 April 1947) [hereinafter Chicago Convention].

<sup>8</sup> ICAO Assembly Resolution A2-13.

<sup>9</sup> Report of the Air Transport Committee on Problems of Nationality and Registration, ICAO Doc. C-WP/2284 (15 Nov. 1956).

<sup>10</sup> See generally, the paper of the ICAO Secretariat concerning the request of the League of Arab States, ICAO Doc. C-WP/3091 (24 Feb. 1960).

<sup>11</sup> Report of the Panel of Experts on Article 77, ICAO Doc. PE-77/Report (30 June 1960) attached to C-WP/3186 (25 Aug. 1960). For background work by the Panel of Experts, see generally, ICAO Doc. PE-77 Working Draft Nos. 2-18.

For the proponents of a loose interpretation of Article 77, which would accommodate the plans and needs of nations less developed than others in international civil aviation, the two negative reports appear effectively to block their pursuit of the Article 77 approach. Apparently, this was not to be the case. With what one expects involved the patient, but determined, solicitation of behind-the-scenes support from various Contracting States, the issue again was opened in 1964, principally at the insistence of Member State of Air Afrique.<sup>12</sup> From 15 July to 24 July 1965, a Subcommittee of the ICAO Legal Committee convened to consider the issue of Article 77 once more. In the report issued by the Subcommittee,<sup>13</sup> two unanimous decisions taken at the meeting were set forth:<sup>14</sup>

- (1) the decision taken by the Council pursuant to Article 77 of the Chicago Convention will be binding on all Contracting States if it is made within the scope of the authority given to the Council by that Article.
- (2) these provisions [of the Convention relating to nationality of aircraft] . . . include not only Articles 17 to 21 . . . but generally all articles of the Convention which either expressly refer to nationality of aircraft or imply it.

With these unanimous decisions, the door to an accommodating interpretation of Article 77 had been set ajar substantially, principally by the efforts of the States comprising Air Afrique. Further, by majority votes of 10 to 4<sup>15</sup> and 10 to 3<sup>16</sup> the Subcommittee concluded, respectively,

- (1) That the provisions of the Chicago Convention—without it being necessary to amend them—are not an obstacle to the principle of joint international registration;
- (2) That the determination made by the Council under Article 77 has sufficient effect for the international registration in question to be recognized by the other Contracting States and for the aircraft so registered to have the benefit of rights and privileges equivalent to those granted by national registration.<sup>17</sup>

From this point on, every step toward the accommodation of Air Afrique in the initial stages of its desire for legitimizing international registration of aircraft was downhill. It is obvious that years of struggling with an interpretation of Article 77, and the related unsatisfactory findings, had created a climate in which most of the Contracting States were willing to compromise the need for a strict legal interpretation (and, perhaps, a protracted agony of undertaking to seek clarifying amendments to the Convention) and settle for a political solution. The First Session of the Legal Subcommittee had reached conclusions specifically with Air Afrique in mind. The Second Session of the Subcommittee was to be devoted

<sup>12</sup> Requests of L'Union Africaine et Malgache de Coopération Economique and the United Arab Republic, ICAO Doc. C-WP/4115 (1 Dec. 1964) and Corrigendum.

<sup>13</sup> ICAO Doc. LC/SC-Article 77 Report 24/7/65.

<sup>14</sup> *Id.*, at 3.

<sup>15</sup> The United States delegation cast a negative vote on the first conclusion on the premise that there had not been sufficient legal study of Article 77 to justify a Legal Subcommittee reversal of the 1960 Panel of Experts.

<sup>16</sup> The United States delegation abstained in voting on the second conclusion of the Legal Subcommittee.

<sup>17</sup> *Supra* note 13, Annex B, at 13.

almost entirely to developing a procedural and substantive structure whereby Air Afrique could satisfy the political requirements attributed to Article 77 by the Subcommittee.

Much haggling and compromising obviously must have footnoted the entire proceedings of the Second Session of the Subcommittee, which convened in Montreal in 1967. For purposes of the present discussion, one significant event occurred which may have been the first patent indication that an effective institution to undermine United States bilateral negotiating superiority was beginning to evolve. During the First Session of the Subcommittee it was agreed<sup>18</sup>

that, whether for joint registration<sup>19</sup> or for international registration, the following criteria must be met:

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- (b) the operation of the aircraft must not give rise to any discrimination against aircraft of other Contracting States.

In connection with criterion (b), certain articles of the Chicago Convention were examined for applicability during the Second Session of the Subcommittee. Among these was Article 7, the cabotage provision, regarding which the Subcommittee reached the following agreement:

It was agreed that *the mere fact* of joint or international registration under Article 77 would not operate to constitute the geographical area of the multi-national group as a cabotage area<sup>20</sup> [Emphasis added.].

The heated debate surrounding the exact wording of this statement was extremely significant. In the words of the United States delegation to the Second Session of the Subcommittee,<sup>21</sup> "[r]aising this issue (regarding cabotage) provoked one of the warmest debates of the entire meeting."<sup>22</sup> According to its report, the United States delegation

informally discussed and then formally proposed that the cabotage issue be raised specifically so as to preclude any notion that by simply establishing a joint or international system of registration, the participating member states could treat as cabotage the carriage of traffic between their territories.<sup>23</sup>

The delegation report continues by observing that the United States

<sup>18</sup> *Supra* note 13, at para. 5.

<sup>19</sup> *Id.* at para. 8. In this paragraph of the 1965 Report of the Subcommittee, a distinction finally was made between a *joint air transport operating organization* and an *international operating agency*. Although Article 77 specifically states that the "Council shall determine in what manner the provisions of this Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies," the Subcommittee concluded that the provisions also cover joint air transport operating organizations; that any other conclusion would render Article 77 and related provisions ambiguous and confusing. This is precisely the issue which should have been resolved by legal analysis, and amendatory clarification if necessary, but which was settled by patchwork compromises and cumbersome proposals of criteria to be followed by the Council in making an appropriate determination pursuant to the last sentence of Article 77.

<sup>20</sup> ICAO Doc. LC/SC—Article 77—Report 7/2/67, para. 9.2 at 4.

<sup>21</sup> *Report of the United States Delegation to the Second Meeting of the Legal Subcommittee of the International Civil Aviation Organization on Problems of Nationality and Registration of Aircraft operated by International Agencies*, submitted to the Secretary of State 6 July 1967, by A. I. Mendelsohn, Chairman of the U.S. delegation. The Second Session of the Subcommittee was held in Montreal from January 4 - January 13, 1967. The U.S. delegation Report is referred to, hereinafter, simply as the Delegation Report.

<sup>22</sup> *Id.* at 20.

<sup>23</sup> *Id.* at 19.

"initiative on this point was enthusiastically and openly supported by the delegations of all the major aviation states." As the African delegations and those of other less developed countries increased the intensity of their opposition to definitive discussion of the cabotage issue, the stronger aviation countries increased their support of a definitive statement specifically precluding, within the framework of joint or international aircraft registration, any alteration of the existing concept of cabotage. The original United States proposal was to include, in the subsequent report of the Subcommittee, a statement regarding cabotage as follows:

It was agreed that joint or international registration under Article 77 would not operate to constitute the geographical area of the multi-national group as a cabotage area.<sup>24</sup>

Apparently, immediately before the noon recess, the Chairman of the Subcommittee<sup>25</sup> was preparing to call for a vote on the issue. At this point, it is helpful to quote the report of the United States delegation at some length since the subsequent revealing events took place during the recess and are not a matter of ICAO record. Mr. F. X. Ollassa<sup>26</sup> called for an adjournment before a vote could be taken,<sup>27</sup> and the Subcommittee agreed to adjourn for lunch. The following is an account, according to the United States delegation report, of what immediately transpired:

During the ensuing recess, Messrs. Braure<sup>28</sup> and Ollassa indicated that, although reluctantly, they could accept the proposal as submitted if the phrase "the mere fact" were added. The proposal would thus read: "It was agreed that the mere fact of joint or international registration under Article 77 would not operate to constitute the geographical area of the multi-national group as a cabotage area."<sup>29</sup>

The delegation report indicates that those countries supporting the original United States proposal examined the amended proposal and concluded it "had the very same meaning" as the original. The reasoning cited by the report which attempted to justify acceptance of the amended proposal was that there could be no objection

to the creation of a cabotage area between the states participating in the international or joint system of registration if those states took the far more significant step of establishing a federal union similar to that of the United States.<sup>30</sup>

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<sup>24</sup> *Supra* note 22.

<sup>25</sup> Mr. A. Garnault of France, elected as Chairman at the First Session of the Subcommittee, continued as Chairman of the Second Session.

<sup>26</sup> Mr. Ollassa was the delegate from Congo (Brazzaville) and one of the chief spokesmen for interested African States throughout the history of the Article 77 issue.

<sup>27</sup> The Delegation Report states at 20 that "Just prior to the noon recess, it appeared that the Chairman would call for a vote on this issue [U.S. proposal]—which would have been the first vote of the entire session." The Report continues by observing that Chairman Garnault, "who himself supported the United States proposal, had counted the delegates who were present and had ascertained that the proposal would pass." Obviously, Mr. Ollassa also recognized the probability of the proposal being adopted and was pressed to call for the noon recess which would allow him time to work out a compromising counterproposal with the United States delegation.

<sup>28</sup> Mr. E. J. L. Braure was one of the delegates representing Senegal at the Second Session of the Subcommittee.

<sup>29</sup> *Supra* note 22.

<sup>30</sup> *Id.* at 21.

When the Subcommittee reconvened after the noon recess, the United States proposal, as amended, was adopted unanimously and included in the Subcommittee report.

In reflecting upon the positions taken by the African delegations regarding Article 77, the strong opposition to a definitive agreement flatly precluding geographic boundaries of more than one State as a cabotage area, and the reluctant acceptance by certain African delegates of the amendatory addition to the United States proposal of the phrase "the mere fact," all indicate that at least Air Afrique has future plans beyond the simple resolution of the registration problem under Article 77. It is very difficult to believe that such future plans envisaged only the possibility that the Air Afrique Member States might wish to take the "significant steps of establishing a federal union similar to that of the United States." If that were true, an accommodating interpretation of Article 77 would not be necessary; indeed, Article 77 and the related "nationality" provisions of the Convention could be applied with relative ease much in the same manner as they are applied to aircraft of the United States at the present moment. One logical alternative conclusion regarding the approach pursued by members of the African delegations is that even if the "mere fact of joint or international registration" did not constitute a cabotage area of the participating countries, something less than a federalism similar to the United States, but more than joint or international registration, could. For example, it is difficult to conceive of newly independent African nations relinquishing respective sovereignties in the foreseeable future sufficient to establish a federalism similar to that of the United States. However, it is quite within the realm of possibility that the component States of Air Afrique could establish economic and administrative integration on aviation matters to the extent that, for civil aviation purposes, all sovereignty over these matters had been relinquished to an international and/or joint operating agency sufficient to claim economic and administrative "federalism" existed among the Air Afrique States. It is recognized that the term "federalism," as used within the conceptual context of transnational economic and administrative integration, distorts the classic international law definitions of a federal structure. On the other hand, it is very arguable that although the "mere fact," alone, of joint or international registration does not constitute a cabotage area of the member States, that fact *plus* total or significant economic and administrative integration of civil aviation matters will be sufficient to establish an international cabotage area, *i.e.*, an area which includes the boundaries of several different countries. In any event, the door to this possibility, or perhaps *probability*, has been opened—at least academically.

In September of 1967, the Sixteenth Session of the ICAO Legal Committee convened with the reports of the two sessions of the Subcommittee on Article 77 taking up most of the time of the delegates. The full Committee disposed of the procedural problem (principally as regards the embryonic plan of Air Afrique) attendant to the political solutions reached at the two Subcommittee sessions. It is not necessary, for the



purpose of the present discussion, to review the actions of the Council on the Legal Committee report<sup>31</sup> dealing with Article 77, except to the extent of noting that no adverse action was taken by the Council on that facet of the report dealing with the cabotage issue. Presumably, it is now up to the Air Afrique countries to formulate a joint air transport operating organization and/or an international operating agency which will satisfy the criteria ultimately adopted by the Council. However, even at this point, the evolving pattern of an international cabotage area has not come to rest. As seen in the discussion below, of the Swedish request for an interpretation of Article 7,<sup>32</sup> the pattern comes into even sharper focus.

### III. THE REQUEST BY SWEDEN FOR AN INTERPRETATION OF ARTICLE 7 OF THE CHICAGO CONVENTION

In the event that a criterion permitting legitimate argumentation for an international cabotage area within a politico-economic framework less than a "federal union similar to the United States" does not provide a totally stable foundation for effective presentation of such an argument, Sweden indirectly has supplied the means for strengthening it. A proposal by the Representative of Sweden that the "Council agree to express a certain opinion on the interpretation of Article 7"<sup>33</sup> was given initial consideration by the Council on 20 June 1966. Although not much importance was attached to this request, in terms of substance as well as priority, by most Member States of ICAO, a significant amount of material relating specifically to the Swedish problem has been developed.<sup>34</sup> Although, for purposes of the principal discussion, it is not necessary to pursue a detailed examination of the cabotage issue within the structure of the Chicago Convention, it is important to glance at the issues being raised with respect to Article 7 in order to develop a feeling for the related attitudes of ICAO States prior to its formal consideration at the Sixteenth Session of the ICAO Assembly, held in Argentina during September 1968.<sup>35</sup>

Article 7 of the Convention reads as follows:

Each Contracting State shall have the right to refuse permission to the aircraft of other Contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point

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<sup>31</sup> The Sixteenth Session of the Legal Committee submitted to the Council a report, which included its advice to the Council on the issue of Article 77; see Report of the Legal Committee, 16th Session, Doc. 8704, LC/155, Annex C. For the subsequent resolution adopted by the Council, in partial reliance upon the advice and recommendations of the Legal Committee, see ICAO Doc. 8722-C/976 (20 Feb. 1968), *Resolution Adopted by the Council on Nationality and Registration of Aircraft Operated by International Operating Agencies*.

<sup>32</sup> Sweden first requested an interpretation of Article 7 by the Council. As seen in note 35, *infra*, Sweden then requested that the item be included for discussion by the Executive Committee at the Sixteenth Session of the ICAO Assembly.

<sup>33</sup> The Swedish proposal, or request, is set forth in an Information Paper (12 June 1966) to ICAO Doc. C-WP/4406 (26 May 1966).

<sup>34</sup> For a fairly complete discussion of the history and related facts of the *Interpretation of Article 7 of the Convention*, presented by the Secretary General, see ICAO Doc. C-WP/4460 (24 Oct. 1966), including Appendices A-B.

<sup>35</sup> Sweden proposed that an additional item, entitled "Amendment to Article 7 of the Convention on International Civil Aviation," be included in the provisional agenda for the Executive Committee of the Sixteenth Assembly; ICAO Doc. A16-WP/7, EX/1 (11 March 1968).

within its territory. Each Contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State.<sup>36</sup>

It is generally conceded that the first sentence of Article 7 simply reiterates the principle of absolute sovereignty of a State over its territory and superjacent airspace; only in this Article it is specifically with respect to cabotage rights. It is the second sentence of Article 7 which is alleged to create ambiguities and doubt. Sweden is of the opinion that the second sentence could be legitimately subject to two different interpretations:

- (a) Cabotage right must be granted on a non-exclusive basis, *i.e.*, if one State is granted cabotage rights, any other State may require to be granted the same privilege.
- (b) States may grant cabotage rights to another State exclusively, provided this is not done "specifically," *i.e.*, if it is not specified that these are exclusive.<sup>37</sup>

The historical veracity or legal efficacy regarding these two interpretations are not at issue here. Explanations and views run from assertions that Article 7 is a superfluous residue of an aborted attempt "to exchange traffic rights for scheduled international air services on a multilateral basis,"<sup>38</sup> to the argument that a

deletion of the second sentence would clarify and simplify the situation . . . [since] States would still retain their right to refuse cabotage rights to other States and become free to grant such rights in accordance with their proper interests.<sup>39</sup>

The recommendation of Sweden is important to the present discussion from the point of view that a deletion of the second sentence of Article 7 would nullify the purpose of the cabotage provision, regardless of the original reasons behind it. It is not difficult to envision the principal reason as being protective of the domestic aviation rights not only of small States whose economies and very political existences were dependent upon large States immediately after World War II, but also as being an inarticulated agreement to protect the potential domestic markets for all States by permitting the grant of cabotage rights *solely* to one country, but *not exclusively*. The following explanation of the United States proposal on the cabotage issue at the Chicago Conference indicates the general view of most States participating in the Conference:

It is the view of the United States that each country should, as far as possible, come to control and direct its own international airlines. . . . This . . . suggests recognition of the principle that the people of each country must have the dominant voice in their own transport systems. *If air transport is not to become an instrument of attempted domination, recognition of this principle seems to be essential*<sup>40</sup> [Emphasis added.].

<sup>36</sup> Chicago Convention, art. 7, 61 Stat. 1182.

<sup>37</sup> *Supra* note 35, at 1.

<sup>38</sup> *Id.* at 2.

<sup>39</sup> *Id.* It should be noted that this essentially is the view stated by Sweden.

<sup>40</sup> *Supra* note 34, Appendix A, para. 2.1, at 13.

The delegate of the United States went on to say that for the above reason, "this country reserves, and believes that every country will insist on the right to reserve to itself, the internal traffic known as cabotage. . . ." If the purpose of the cabotage provision was meant to have more effect than simply a mutual agreement for mutual restraint against outside political and economic domination of aviation in less developed countries, specific exceptions to the sovereignty recognized in the first sentence of Article 7 could have been included in the Convention so that alleged violations would fall within the arbitration provisions of Articles 84-87,<sup>41</sup> and be subject to the penalty imposing jurisdiction of the Assembly pursuant to Article 88.<sup>42</sup> In any event, the burden placed upon a complainant State, of proving that certain cabotage rights were given on the basis of "exclusivity," would in most, if not all, instances be insuperable. However, such exceptions were not so included and one effect of Article 7 is an implied recognition that certain countries, which were not economically and politically independent in 1944, might well develop into economically viable nations to the extent that external domination of domestic aviation interests no longer would be a threat. It effectively is a recognition, by a mutual or "gentleman's" agreement, that the pertinent problems of cabotage may be altered or dissipated as international civil aviation develops. It is the opinion of this writer that the protection of small States intended by Article 7 is not now, nor will be in the 1970's, necessary for many of them due to changing circumstances and the innovation of new concepts in joint international airline efforts, *e.g.*, the Air Afrique plan and the tentative resolution of the Article 77 issue. If, as Sweden proposes, the second sentence of Article 7 is deleted, it virtually would be up to each State to determine its domestic aviation needs without any protection from an agreement of mutual restraint.

The United States delegation to the Chicago Convention foresaw the "undesirable" possibility of individual States joining together in the future to form a type of "international cabotage area." In further explanation of the United States cabotage proposal, the United States delegate stated that

Clearly, the right of reserved cabotage can be exercised by one country only; for if a number of countries were to pool their cabotage as between each other, the result would be merely to exclude nations not parties to the pool.<sup>43</sup>

The United States delegate assumed the attitude that such pooling of cabotage would be premised only on discriminatory or exclusive agreements. This, of course, is not necessarily true. There need be no exclusive agreements regarding the pooled cabotage area, and there need be no agreements effecting discrimination, according to nationality, against

<sup>41</sup> Chicago Convention, arts. 84-87, 61 Stat. 1204-05. Article 84 deals with settlement of disputes, article 85 with arbitration procedures, article 86 with appeals procedures, and article 87 with penalty for nonconformity of arbitration decisions by airlines.

<sup>42</sup> *Id.* at art. 88. Article 88 deals with the penalty for non-conformity by States with arbitral decisions and provides that "The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter."

<sup>43</sup> *Supra* note 40.

States not members of a cabotage pooling agreement. What could be effected, and quite legitimately, is the raising of the bargaining price which non-Member States would have to pay for operating in such an international cabotage area. It obviously is this very possibility which the United States wished to avoid, preferring to protect the concept of bilateral cabotage negotiations with individual States—unencumbered with having to consider the political and economic demands of other countries while negotiating such individual bilaterals. In an event, we have in Article 7 a history replete with non-definitive agreements of mutual restraint, precatory language, and unilateral expressions of opinions as to just what constituted cabotage in 1944, and what it hopefully would constitute in the future. These are hardly sufficient grounds upon which to build a convincing argument that the concept of cabotage, as provided in Article 7, is definitive, inflexible, and not sensitive to changing conditions. If States, such as those comprising Air Afrique, wish to pool their sovereign rights as to internal domestic aviation interests, and let the dictation of those interest rest with a mutually established international organization and/or joint operating agency, it could hardly derogate that justifying facet of Article 7 which was intended to protect those States from attempted outside domination. If it is argued that Article 7 was intended, at least in part, to ensure that all States have a fair and equal opportunity to share in any potential cabotage market, one need only refer again to the first sentence of that Article which recognizes, unequivocally, that "Each Contracting State shall have the right to refuse permission to the aircraft of other Contracting States to . . ." participate within its own cabotage area. Again, Article 1 of the Convention recognizes the long-standing principle of customary international law "that every State has the complete and exclusive sovereignty over the airspace above its territory."<sup>44</sup> It is submitted that a pooling of cabotage areas to form one international or collective cabotage area, pursuant to the recognition of the principle of "absolute and complete sovereignty," would not necessarily contravene the spirit and intent of the Chicago Convention, especially in view of the changing political and economic circumstances surrounding the aviation interests of many Contracting States, and especially if the Swedish proposal to delete the second sentence of Article 7,<sup>45</sup> or the Secretary General's proposal to amend Article 7,<sup>46</sup> is ultimately successful.

The Secretary General of ICAO proposed an amendment to Article 7 of the Convention for consideration by the Council during its continuing study of the Swedish request. The proposed amendment would delete the second sentence of Article 7 and reshape the first sentence to provide that

Carriage by air of passengers, mail or cargo picked up at one point in the ter-

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<sup>44</sup> Chicago Convention, art. 1, 61 Stat. 1180.

<sup>45</sup> ICAO Doc. SA 16/1-68/25 (1968), wherein the Secretary General announced inclusion of a new item for consideration by the Executive Committee, pursuant to the request of Sweden, at the Sixteenth Session of the Assembly; set forth as Addendum No. 1 of the Provisional Agenda, A16-WP/1, P/4 (22 Dec. 1967), Addendum No. 1 (11 Mar. 1968). See also, note 35, *supra*.

<sup>46</sup> ICAO Doc. C-WP/4738, ¶ 5 (3 Jan. 1968), Addendum dated 13 Feb. 1968.

ritory of a State and to be set down at another point in that territory is subject to the laws and regulations of that State.<sup>47</sup>

Quite generally, the amendment arises from an attempt to accommodate the deletion recommendation of Sweden and to redraft the first sentence in order to correct one or two inherent ambiguities<sup>48</sup> while still retaining the basic recognition of a State's sovereign rights over its domestic aviation interests. The proposed amendatory language is not a panacea since it raises new questions which would have to be resolved.<sup>49</sup> The amendment is thought to be necessary in order to make sense of the reference to Article 7 in Article 5 of the Convention.<sup>50</sup>

An alternative, to clarifying Article 7 through amendment procedures, is amendment by deleting the whole of Article 7. This alternative would make sense to the extent that if the second sentence of the Article is deleted, pursuant to the Swedish proposal, the first sentence effectively would remain only as a superfluous reiteration of a recognized principle of international law. However, there may be an effect of more subtle import by simply amending the Article in the manner, or similar variation, of that proposed by the Secretary General. If Article 7, or simply the second sentence thereof, is deleted, there would always be room for argument that "general practice in the aviation business" has permitted development of an accepted principle that cabotage areas cannot be pooled so as to exclude any particular carrier from participating in what presently is considered international traffic, *i.e.*, cabotage has always related only to points within the boundaries of any one individual State. However, by specifically recognizing in the Convention that cabotage activities are "subject to the laws and regulations of that State," it is very arguable that such laws could be established, within the intent of the amendatory language, that would manifest the economic necessity of formally integrating domestic aviation interests with cabotage interests of one or more other States, *e.g.*, an international operating agency which could be established by a group of nations such as those comprising Air Afrique. Both the political and economic environment of many African and Latin American countries, not to mention those which would participate in the Pan-Arab Airlines, makes economic and attendant administrative integration in these areas not only a possibility, but perhaps a necessity.

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<sup>47</sup> *Id.* at ¶ 3.

<sup>48</sup> One ambiguity which is alleged to exist is the use of the word "destined" in the first sentence of Article 7. It is believed "destined" could include stopping points in a foreign country while cargo or passengers ostensibly are being transported by the same aircraft or carrier from one point in a particular State and destined for another point in the same State. Geographically, this may be plausible for situations involving contiguous States.

<sup>49</sup> One question that immediately comes to mind is whether a State is *obliged* to establish appropriate laws and regulations, and what the consequences will be (in terms of rights or duties of other States) if such laws and regulations are not established.

<sup>50</sup> Chicago Convention, art. 5, 61 Stat. 1181. Article 5 provides, in pertinent part, that with respect to the right of non-scheduled flight "such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire . . . shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable."

## IV. CONCLUSION

It is recognized that legitimate differences of opinion exist regarding the issues raised, and the projections set forth, in this discussion. On the other hand, it also should be recognized that the implications arising from the Swedish request and proposal are far from having been analyzed definitively, both legally and from a policy point of view. It is submitted that at this time the Swedish proposal to clarify the alleged ambiguities in Article 7 unexpectedly may succeed in clearing the path to an effective institution for minimizing the strength of the United States when negotiating bilateral air transport agreements, in the future, with politico-economic regional groupings. Further, it will not be sufficient to rely solely on an accurate legal analysis of the cabotage issues in combating a move to expand the geographic parameters of a cabotage area. It can be seen from the tentative resolution of the Article 77 issue that political solutions to legal problems may prevail, especially when supported by the evolving trend of bloc voting within the Legal and other Committees of ICAO.

Finally, it is an understood phenomenon that aeronautical matters such as routes, capacity, aircraft type, beyond points, to name a few, are not the only items considered negotiable within the framework of bilateral air transport agreements. Unrelated economic resources and even non-aviation political alignments are fair game as well. In view of this, the effectiveness of a cabotage pooling arrangement, or international cabotage area, may be successfully countered and nullified by the well-developed aviation countries. On the other hand, depending upon what is available for negotiation, the effectiveness of such a pooling agreement could be strengthened substantially.

In any event, it will be interesting to observe the extent to which future joint international operating agencies, or international air transport organizations, will attempt to alter cabotage areas and the concept of internal domestic traffic in order to minimize the negotiating strength of advanced aviation countries, such as the United States, at the bargaining table.