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# CHARTERS, THE NEW MODE: SETTING A NEW COURSE FOR INTERNATIONAL AIR TRANSPORTATION

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“Public opinion’s always in advance of the Law.”

John Galsworthy, *Windows*,  
Act 1

*In the final issue of Volume 38 of this JOURNAL, Mr. Robert M. Lichtman presented an argument for the regularization of the legal status of international air charter services through the use of a system of bilateral agreements. In this article, the authors argue that a multilateral approach is the most direct and efficient method of establishing the international rights of non-scheduled air transportation. Despite the difference in approaches to the problem, the authors join Mr. Lichtman in emphasizing the need for an international system comprised of both non-scheduled and scheduled services. The authors believe that the present de jure regime that relies almost exclusively on scheduled services has not satisfied the needs of the public. They urge instead that all nations should work for “freedom of the skies” by the elimination of unnecessary restrictions on charter services; there should be a de jure recognition of the new system of “barter” for international charter air transportation.*

INTERNATIONAL air transportation is not unlike any other international exchange of commercial rights. It is a method of barter employing a currency that is based on political, social and

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economic imperatives. The final product of the barter is the rationalization of these political and economic imperatives at the international level, which in turn, creates a *de jure* regime for international air transportation. At the present time, this regime is almost the exclusive province of scheduled air services established, for the most part, on a bilateral basis. One of the purposes of this article is to explore how this course was set, particularly as it relates to the new phenomenon of international charter services.

In contrast to scheduled services, charter or nonscheduled services are almost entirely a *de facto* creation of the last decade. Despite their recent birth and limited *de jure* status, charter services have become an increasingly important force in international aviation and are at the center of one of the greatest controversies in the history of international commerce. The mere existence of these services is an indication that the old method of barter is incomplete and that there are additional imperatives to be considered.

#### I. THE PRESENT COURSE: IS INTERNATIONAL AIR TRANSPORTATION REALLY GOING ANYWHERE?

It would not be unfair to describe the present *de jure* regime of international air transportation as essentially a pattern of scheduled services with generous political overtones. In this context, "scheduled" services are those services with certain basic characteristics such as point-to-point routes and an emphasis on a maximum number of frequent flights in regular, repetitive series. Although the *de jure* regime is only twenty-five years old, the political overtones and route-regularity-frequency concepts are older. Looking back at this history, one cannot help but wonder whether the passage of time instills respect or merely dulls the mind, for it is obvious that the policy considerations that may have been valid sixty, forty-five or even twenty-five years ago are totally irrelevant today. In other words, the present course was established to avoid obstacles that no longer exist.

##### A. *The Legacy of the Early Years*

If quantum leaps in technology are accurate milestones for commercial air transportation, there have been two: December 13, 1903, with a 284 yard flight across a North Carolina sand dune;<sup>1</sup>

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<sup>1</sup> First Flight, by the Wright Brothers at Kitty Hawk, North Carolina.

and May 2, 1952, with a 5,638 mile flight from London to Johannesburg.<sup>2</sup> The intervening years of technological maturation and political and economic development, however, tell the real story of international air transportation. For example, one distinguished commentator viewed this period as follows:

The structure of world civil aviation has been fashioned by many forces amongst which economic logic has played only a modest part. There has rarely been a time in the short history of air transport when governments have not taken a hand, for better or worse, in determining the way in which air services should be developed. The reasons for this interest of governments in the airlines have included considerations of airspace sovereignty; the desire to maintain a strategic reserve of aircraft which can be mobilized in time of war; the fact that transport everywhere involves major political, economic and social implications; and the necessity of enforcing standards of air safety in the interests of the traveling public.<sup>3</sup>

### 1. *Air transportation as a political pawn*

Prior to the First World War, air transportation was at best a curiosity and at worst a potential instrument of war. At the theoretical level, it was also a novel challenge to the traditional concepts of land-bound national sovereignty. The concern over national sovereignty led to a series of conferences culminating in the doctrine that the sovereign rights of national entities extend to the airspace over their territories.<sup>4</sup> The military potential of aviation was the predicate for what was probably the first bilateral agreement on air transportation—an agreement between France and Germany in 1913 providing for the admission of civil aircraft from either country, but giving each country the right to refuse admission to the other's military aircraft.<sup>5</sup>

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<sup>2</sup> First pure-jet commercial flight, by a BOAC de Havilland Comet.

<sup>3</sup> BRITISH AIR TRANSPORT IN THE SEVENTIES: REPORT OF THE COMMITTEE OF INQUIRY INTO CIVIL AIR TRANSPORT. Chairman, Professor Sir Ronald Edwards 1 (1969) [hereinafter cited as "Edwards Report"].

<sup>4</sup> 1910 Paris Conference On Aerial Navigation; 1911 Institute of International Law at Madrid; 1916 meeting of the Pan American Aeronautic Federation at Santiago, Chile.

<sup>5</sup> The first actual bilateral exchange of commercial air transport rights probably occurred in an agreement between France and Germany in September 1920. Rinck, *The International Factors In German Air Transport*, 33 J. AIR L. & COM., 102, 110 (1967). See generally R. FIXEL, *LAW OF AVIATION* 27-37 (4th Ed. 1967). Professor Fixel suggests that war was the basis for all international regulation of aviation.

Immediately after the war there was little qualitative improvement in aviation technology, but there was a remarkable quantitative increase.<sup>6</sup> This increase combined with the strange phenomenon of strong nationalism coexisting with increasing internationalism and led to the Paris Conference on Aerial Navigation in October 1919. This conference produced the first multilateral agreement on air transportation institutionalizing the principle of national sovereignty over territorial airspace, the Convention For The Regulation of Aerial Navigation.<sup>7</sup> But again political considerations predominated since no one believed that there were "enough potential commercial markets among the nineteen states of Western Europe to justify civil aviation as a profitable business enterprise."<sup>8</sup> Thus, the keystone of our present system—the right of any nation unilaterally to control entry into its airspace—was simply the product of politics. Unfortunately, this same thinking still permeates the system.

## 2. *Routes, regularity and frequency—chasing the trains and carrying the mail*

Although they seem second nature now, the route-regularity-frequency concepts that characterize scheduled services are not a product of efficient logic. For example, if a transportation system was going to be created *ab initio*, it would be difficult to devise concepts as complex or unique. As the Edwards Report correctly noted, these concepts are not the product of logic, economic or otherwise, but instead are the product of some mundane circumstances. The two most important of these circumstances, and the ones most often overlooked today, were the necessity to meet surface competition—chasing the trains—and to carry the mail.

Because of limited capacity and low speeds, commercial air transportation was merely an airborne shadow of the traditional

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<sup>6</sup> The United States, alone, spent over one billion dollars on new aircraft during the war training over 10,000 pilots to fly these aircraft. CAB, HANDBOOK OF AIRLINE STATISTICS 425 (1969 ed.).

<sup>7</sup> 3 *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers* 3768. The Paris Convention was signed and ratified by the governments of Belgium, France, Bolivia, the British Empire, Greece, Japan, Portugal, the Serb-Croat-Slovene States and Siam. The United States signed, but failed to ratify.

<sup>8</sup> Jones, *The Equation of Aviation Policy*, 27 J. AIR L. & COM. 221, 225 (1960).

surface modes until around 1930. Other than the airline's novelty, it could offer little more than a railroad; this was especially true in Europe.<sup>9</sup>

Speed has always cost money. Up to about 1928-30 several of the most influential people in British aeronautical circles thought in terms of making civil aviation self-supporting through the development of 100 m.p.h. aircraft which would provide a just sufficient advantage in speed to make the airline an effective competitor with the railroads.<sup>10</sup>

Thus, the airlines matched the railroads by offering a regular pattern of service between two points—only at a greater speed.

In the United States, the development of commercial air transportation after the First World War was attributable to the carriage of mail. The airplane offered the ability to conquer the two major foes of surface mail, time and terrain, but ran the risk of another obstacle, weather. For almost twenty years the primary role of the United States airlines was to provide a system of communication rather than a system of transportation. Consequently, non-mail revenues of the United States airlines did not exceed their mail revenues until 1935.<sup>11</sup> The mail carriage obligation complimented the desire to meet surface competition since both required a regular pattern of point-to-point service.

Although these circumstances were present within the United States and Europe, arguably they were not present in the longer

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<sup>9</sup> European companies dominated civil aviation after the First World War. On February 8, 1919, a private French carrier instituted passenger service between Paris and London, the first recognized international commercial flight. On May 17, 1920, KLM inaugurated Amsterdam-London service making it the oldest scheduled carrier still in existence today. In addition, most of the major European scheduled carriers were formed in this period. *WORLD AIRLINE RECORD* 125 (5th ed. 1955).

<sup>10</sup> Higham, *Estimates and Actuality: Comparative Costs of British Cross-Channel Airlines, 1918-1924*, 28 *J. AIR L. & COM.* 137, 152 (1961-62).

<sup>11</sup> The United States Post Office Department began airmail service in 1918 and gradually expanded it until, by 1924, transcontinental service was possible with navigational assistance provided by bonfires and railroad tracks. The Kelly Act of 1925 (43 Stat. 805) turned over the carriage of domestic airmail to private carriers, providing the impetus for their development. The McNary-Watres Act of 1930 (46 Stat. 259) provided for mail payments solely on a space and mileage basis, which thereby indirectly subsidized passenger services. To this day, subsidization of United States carriers (local service carriers only) is accomplished through the mail pay provision of section 406 of the Federal Aviation Act of 1958, 49 U.S.C. § 1376 (1970). See CAB, *HANDBOOK OF AIRLINE STATISTICS* 425-427 (1969 ed.)

haul, international markets. This argument fails, however, when the history of the premier international airline, Pan American World Airways, is examined. Pan American began service on October 28, 1927, with an airmail contract between Key West, Florida and Havana, Cuba. Within two years it had expanded its airmail system to 11,500 unduplicated route miles throughout Latin America. All of Pan American's subsequent pioneering of international routes was based on the carriage of mail:

(i) In November 1935, a Pan American China Clipper inaugurated transpacific mail service between San Francisco and Manila, but passenger service did not follow until a year later.

(ii) The mid-Atlantic route (New York-Lisbon-Marseilles) was opened on May 20, 1939, with a Pan American Yankee Clipper, but passenger service again did not follow until later.

(iii) The last major route, the North Atlantic (New York-Southampton), was inaugurated with airmail service, on June 24, 1939.<sup>12</sup>

In short, every major international airline service established before the Second World War was established either to match a surface competitor, to provide mail service or both.

### 3. *The Civil Aeronautics Act of 1938—a fitting summary*

Since the state of public international aviation law had progressed beyond the accomplishments of the Paris Convention of 1919,<sup>13</sup> the best summary of, and the most fitting conclusion to, this period was a landmark piece of national aviation legislation: the United States Civil Aeronautics Act of 1938.<sup>14</sup> This Act was, and probably still is, the single most important expression of national control over air transportation. In the opening paragraphs of the Act, the Congress was careful to articulate its views on the appropriate goals for United States air transportation:

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<sup>12</sup> CAB, HANDBOOK OF AIRLINE STATISTICS 431 (1969 ed.). Actually, the first commercial passenger flight across the Atlantic was made by the German dirigible, the Graf Zeppelin, in October 1928. *Id.* at 428.

<sup>13</sup> The most important public international aviation agreements in this period were the Madrid Convention of 1926 and the Havana Convention of 1928, both of which were similar to the Paris Convention. For a discussion of these, and a discussion of the considerable developments in private international aviation law during this period see FIXEL, *supra*, note 5, at 33-43.

<sup>14</sup> 52 Stat. 973. The Civil Aeronautics Act of 1938 was re-enacted as the Federal Aviation Act of 1958, 49 U.S.C. 1301, *et seq.* (1970).

. . . an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense.<sup>15</sup>

This familiar theme had been developing for over thirty years, but the passage of thirty years would raise serious questions concerning its continued validity. For example, only three years before Congress passed the Act and while it had similar legislation under consideration, airmail revenues still represented approximately one-half of the total United States airlines' earnings; by 1971, however, the airmail revenues of all United States airlines were less than three per cent of their total operating revenues.<sup>16</sup> To the extent that the national defense mandate is still valid today, it is served almost exclusively by the United States Air Force's commercial augmentation airlift program, a program that ironically relies on charter transportation performed by scheduled and supplemental carriers. This is not to criticize the United States legislation, which is still a remarkable achievement, but instead to illustrate that the scheduled service mystique is nothing more than a response to outdated facts that has been gifted with perpetual motion.

#### B. *The De Jure Development of International Air Transportation Reflects this Legacy*

The development of international air transportation since the Second World War has been on a *de jure* basis. It has also been concentrated almost exclusively in the area of scheduled services. The right to operate scheduled services between nations, which is highly prized and therefore equally well guarded, has usually been embodied in one or more bilateral or multilateral regimes. Nevertheless, the rationalization of these rights has not changed the basic currency of exchange inherited from the earlier years. If anything, as each succeeding step toward rationalization was taken, and as the underlying compromises became imbedded in the system, this currency became self-sustaining, as if it represented an end rather than a means.

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<sup>15</sup> Section 2(a) & (d) of the Civil Aeronautics Act of 1938; Section 102(a) & (d) of the Federal Aviation Act of 1958, 49 U.S.C. § 1302(a) & (d) (1970) (*emphasis added*).

<sup>16</sup> CAB, QUARTERLY AIRLINE INDUSTRY ECONOMIC REPORT (December 1971).



### 1. *The North Atlantic Route Case and a lost opportunity*

International commercial air transportation was suspended during the Second World War, but the basic technology continued to advance. The technological position of the United States vis-a-vis Europe was reversed, with the United Kingdom concentrating on the development of smaller aircraft and the United States developing the larger bomber and transport category aircraft.<sup>17</sup> But most important, at the close of the war, the United States had the upper hand in determining the future of the international air transportation system.

Even during the war, the North Atlantic was recognized as the primary international air transportation market, both because of the close ties between the United States and Europe and the history of passenger liner traffic in this market. Thus, when the Civil Aeronautics Board instituted the *North Atlantic Route Case* in 1944, it began its most important task. L. Welch Pogue, then Chairman of the Board, had publicly stated that it was time to "stop chewing on the fringe of present travel and make a bold stroke to serve air transportation to the common man."<sup>18</sup> The President of Pan American World Airways had an idea how this could be accomplished:

We propose to move boldly ahead in the post-war period, however, and to provide mass transportation for the businessman and tourist at low rates unique in air transportation.

We are confident that both trade and travel will come if we provide comprehensive air service within the reach of every business, both large and small, and within the means of the average man and woman.

...

[We have] the objective, among others, of setting rates so low as to make it possible for the average man with a two week vacation to spend it in Europe.<sup>19</sup>

Thus, the world's first "bulk" air transportation proposal was born. This idea materialized during the *North Atlantic Route Case*, into a proposal for a low-cost (three and one-half to five

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<sup>17</sup> See text accompanying note 24 *infra* for a discussion of the effect of this technological imbalance on the positions at Chicago in 1944.

<sup>18</sup> Quoted in Brief of Pan American World Airways to the Examiner at 5, *Additional Service to Latin America*, CAB Dockets 525, *et al.*

<sup>19</sup> Exhibit PA-12, at 2, *North Atlantic Route Case*, CAB Dockets 855, *et al.*

cents per revenue passenger mile, for a 296 dollar roundtrip fare between New York and London) service between the major gateways in the United States and Europe. But this service had a price—the acceptance of Pan American as the “chosen instrument” of United States international aviation.

Although the CAB refused to pay Pan American’s price,<sup>20</sup> it still retained a remarkable opportunity to create a transportation system. The CAB recognized that “[a] most important influence upon the anticipated development of transatlantic air transportation concerns the adaptability of air transportation to the purposes of travel.”<sup>21</sup> Thus, for the first time in the forty years of aviation, a governmental body considered the desires of the traveling public, but unfortunately it erroneously measured these purposes:

It seems reasonable to anticipate that the *speed, frequency, regularity*, and year-round comfort of air service will encourage substantial growth in nearly all of the foregoing categories of overseas travel.

...  
*It is the nonrecreational travel categories, however, which are most generally regarded as offering the greatest promise for expansion.* Purpose-of-travel surveys conducted by domestic carriers prior to the war indicate that nonrecreational air travel ranges from 75 to 85 per cent of total travel. The ultimate effect of the development of transatlantic overseas air transportation upon nonrecreational travel categories can only be conjectured. However, it seems probable that growth in these categories will be great compared to the growth of recreational travel, and that this travel will be well balanced both seasonally and directionally.<sup>22</sup>

Since at least three-fourths of the transatlantic air traffic is currently composed of recreational or pleasure travel, this error was substantial.<sup>23</sup> This error in judgment was based upon the unfortunate analogy to domestic air transportation before World War II

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<sup>20</sup> American Export Airlines and Transcontinental & Western Air also received transatlantic routes. *Northwest Airlines, Inc., North Atlantic Route Case*, 6 CAB 319 (1945).

<sup>21</sup> *Id.* at 330.

<sup>22</sup> *Id.* at 331 [emphasis added].

<sup>23</sup> The Port of New York Authority survey of 1968-69 indicates that only 20% of the United States citizens flying to Europe have “business” as their motivation, which is reasonable since only 18% indicated that their trip was paid for by their employer. ITA, *Motivations of the Transatlantic Air Passengers On Flights from New York*, ITA Bulletin No. 5, at 95 (Feb. 1, 1971).

—short haul, domestic markets will always contain more nonrecreational or business travel than the long-haul, international markets. This was particularly true in the late 1930's when the domestic airlines were beginning the passenger business and when flying required a considerable economic and philosophic commitment on the part of the passenger. The error is significant because it gave a new respectability to the old concepts and restraints by implying that the old concepts met public demand. A nonrecreational or business travel market can fit into the rigid structure imposed by the route-regularity-frequency triumvirate; a recreational or pleasure travel market cannot.

Whether the system would have evolved differently if the CAB had correctly judged the nature of the transatlantic market is conjectural because there never had been another system. And despite contrary assertions, the CAB's conclusion was, at least in this sense, result-oriented. In any event, the United States could have changed the course by its leadership in aviation. Not only was that opportunity wasted, but another similar opportunity would not appear for over twenty years.

## 2. *Chicago and Bermuda Compound the Error*

The International Civil Aviation Conference, convened by the United States at Chicago in 1944, and its principal product, the Convention On International Civil Aviation,<sup>24</sup> are the Runnymede and Magna Carta of international air transportation. Contrary to popular belief, neither the airplane nor international law were initially conceived at Chicago. The commentators have even tended to view the entire affair with something less than blind enthusiasm:

The Chicago Conference is a classical demonstration of the postulate that nations, no matter how enlightened, are not capable of understanding and comprehending anything beyond their own national interest.<sup>25</sup>

This skepticism is justified by the Conference's attempt to settle the dispute between the United States and the United Kingdom over "freedom of the skies." Basically, the United States wanted freedom of the skies and the United Kingdom did not. This is not

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<sup>24</sup> 61 Stat. 1180 (hereinafter cited as "Chicago Convention").

<sup>25</sup> Jones, *The Equation of Aviation Policy*, 27 J. AIR L. & COM. 221, 227 (1960).

the stuff from which great law is made, and the convergence of these irreconcilable positions in the Chicago Convention was more circumlocution than compromise. Moreover, apart from the creation of the International Civil Aviation Organization, which was indeed a distinguished and remarkable achievement, most of the important problems were simply postponed. For example, capacity and rates were not considered until the Bermuda Conference in 1946, and "nonscheduled" services, or all those potential methods of providing air transportation other than the traditional scheduled route services, would hopefully never be considered.

By the time the United States and the United Kingdom began bilateral negotiations at Bermuda in 1946, it was apparent that international air transportation had dropped the last vestiges of a commercial enterprise and had become a creature of political policy. In addition to the traditional political concept of maintaining national sovereignty, a new political element was also added—equating participation in international air transportation with international prestige. Although other political considerations were involved in the formation of flag airlines, looking back it is obvious that the primary consideration in the development of these carriers was that flag carriers became status symbols. Moreover, the realization that there was insufficient traffic in this system to support all of the newly whetted flag carrier appetites further complicated the problem.

But the real significance of the Bermuda negotiations is the lack of activity since. The Bilateral Air Transport Agreement finally signed by the United States and the United Kingdom<sup>26</sup> established the practice of bilateral rather than multilateral regimes; balanced the scheduled system on the thin thread of compromise; and finally, set forth the political currency to be used in these exchanges. A quarter of a century later, Bermuda is re-enacted daily as nations constantly exchange aviation rights, but the questions concerning the basic nature of the system still go unanswered or worse, unasked.

### 3. *ICAO and the Paris Agreement—With Friends Like These, Who Needs Enemies?*

The *de jure* regime of international air transportation is not limited to scheduled services. Although there is a more limited

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<sup>26</sup> 60 Stat. 1499; TIAS 1507.

regime for charter or nonscheduled services, it is inaccurate to refer to the "development" of these services as *de jure* because this regime is intended to achieve the opposite effect. For example, in every instance from Chicago to Paris the role of nonscheduled carriers was defined by those who had already decided that the system should rely entirely on scheduled services.

The starting point is article 5 of the Chicago Convention, not because it played any positive role, but because it still casts what has become a rather ominous shadow over the development of charters. The first paragraph of article 5 grants non-traffic rights for "aircraft not engaged in scheduled international air service." The second paragraph, however, is less generous on the question of traffic rights for these services:

Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire *on other than scheduled international air services*, 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 [s]tate where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.*<sup>27</sup>

Two important legal questions are raised by this provision. First, what is the distinction between scheduled and nonscheduled international air services since neither term is defined in the Convention?<sup>28</sup> Second, does article 5 give states the authority to prohibit or severely restrict nonscheduled services at will? Unfortunately, both questions were quickly resolved by ICAO in a manner inhospitable to the development of charters. Thus, a definition of scheduled services was devised that encompassed any service open to use by the public and operated pursuant to a published timetable or in a regularly systematic service; conversely, nonscheduled service was service that did not possess any one of these characteristics.<sup>29</sup> In

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<sup>27</sup> Chicago Convention, *supra*, note 24, article 5, paragraph 2 (*emphasis added*).

<sup>28</sup> Article 96 defines "air service" as "any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo," but it does not define "scheduled."

<sup>29</sup> International Civil Aviation Organization, *Definition of A Scheduled International Air Service*, ICAO Doc. 7278, C/841 at 3-6 (1952). See generally BIN CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* (1962). Although the United States has not accepted this definition, the Civil Aeronautics Board does occasionally employ it in granting "nonscheduled" authority to foreign air carriers for certain limited operations. In each case, however, the Board enters a

addition, it was held that the states were entitled to require prior permission for nonscheduled services provided that this right was not "exercised in such a way as to render the operation of this important form of air transport impossible or non-effective."<sup>30</sup> This right of prior permission obviously gives the states broad discretion in the administration of their prior permission "right" since theoretically a misuse of this discretion could only be challenged under the Disputes and Default procedures of articles 84, 85 and 86 of the Convention, which, to the authors' knowledge, has never been done. In practical terms then, this approaches absolute discretion.<sup>31</sup>

In all fairness, the ICAO's interpretations of the Chicago Convention merely reflected the climate prevailing in international air transportation at that time:

Up to the Second World War the air services normally referred to as 'scheduled services' formed a class that was so distinct as to need little definition. Any air transport company that wished to attract a substantial amount of business had not merely to run to a schedule, but had to advertise that schedule as widely as possible. Companies running charter or taxi services found little demand and were able to operate with relatively small aircraft at a passenger-mileage charge considerably above the scheduled air service rate.<sup>32</sup>

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caveat to the effect that their action "should not be construed as an expression of opinion by the Board as to the proper interpretation to be placed on the scope of article 5 and 6 of the Chicago Convention." *Aerotransportes Entre Rios S.R.L., Foreign Air Carrier, permit and CAB Order 72-4-84, at 2, n.1 (1972)*; *Aerolineas Carreras Transportes Aereos, Foreign Air Carrier permit, 41 C.A.B. 562, 563 (1964)*.

<sup>30</sup> IACO Doc. 7278, C/841 at 12 (1952). This reversed an earlier ruling by the ICAO Secretariat that the states were not entitled to require prior permission for nonscheduled services. *See* ICAO Doc. 6894, AT/694 (1949).

<sup>31</sup> Even the United States has leaned toward this view. In interpreting its authority under section 1108(b) of the Federal Aviation Act of 1958, 49 U.S.C. 1508(b) (1970) to authorize occasional commercial transport operations by non-United States air carriers, authority that is "designed, among other purposes, to carry out the international undertakings of the United States in the Chicago Convention, in particular article 5 thereof," the Civil Aeronautics Board has stated that any permit authorizing such operations "may be withheld, revoked, amended, modified, restricted, suspended, withdrawn, or cancelled by the Board in the interest of the public of the United States, without notice or hearing and without the right in the holder to challenge the Board's discretion." 14 CFR 375.42(b) (1970); 24 FED. REG. 124 (1938); 25 FED. REG. 2790 (1960); 29 FED. REG. 8002 (1964).

<sup>32</sup> International Civil Aviation Organization, *Distinction Between Scheduled and Nonscheduled Operations in International Civil Air Transport*, ICAO Doc. 4522, A/EC/74, at 15 (1947).

This excuse is not available, however, to the European Civil Aviation Conference and its attempts to reach a multilateral accord on charters.<sup>33</sup> When ECAC was established at the 1954 Strasbourg Conference "[t]here was . . . general agreement that nonscheduled commercial air services should be allowed freedom of operation within Europe without prior permission from governments if such services did not compete with established scheduled services."<sup>34</sup> The ECAC began drafting a model multilateral agreement on nonscheduled services and in April 1956 this draft was presented to the member countries at Paris for their signature. Unfortunately, the Paris Agreement<sup>35</sup> followed the course established earlier by ICAO and IATA<sup>36</sup> of restricting charter services to the fullest possible extent. Under article 2 of the Paris Agreement, prior approval pursuant to article 5 of the Chicago Convention is not required for nonscheduled services if: (i) they are humanitarian or emergency in nature; (ii) if they carry six or fewer passengers on an occasional basis; (iii) there will not be more than one flight per month between a pair of points; or (iv) they are "between regions which

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In this early period there were at least two bilateral agreements governing nonscheduled services between the United Kingdom, on the one hand, and France and Switzerland on the other. These agreements generally permitted nonscheduled flights without prior permission, but only when they carried four or fewer passengers, were not operated over scheduled routes, or were single flights over scheduled routes. Cmd. No. 8157 (1951); Cmd. No. 8794 (1953); see BIN CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* (1962).

<sup>34</sup> In March 1953, the Committee of Ministers of the Council of Europe adopted a resolution calling for close cooperation between European airlines and their governments. ICAO then convened a Conference On the Coordination of Air Transport in Europe at Strasbourg, France, in April and May of 1954. It was at that Strasbourg Conference that ECAC was created and this resolution adopted. ICAO Doc. 7575, CATE/1 at 11 (1954).

<sup>35</sup> Multilateral Agreement on Commercial Rights of Nonscheduled Air Services in Europe, adopted April 30, 1956; effective July 23, 1957.

<sup>36</sup> Although technically a private body, IATA has had an inordinate amount of influence on the development of charter policies. IATA began work on charters as early as 1947 and the adoption of Resolution 045 served as a model for both ICAO as well as attempts by the individual states to define nonscheduled services. See ITA, *Trans Ocean Inclusive Tours—Some Recent Legal and Policy Developments*, 1968/1-E at 20-21 (1968); Goldklang, *Transatlantic Charter Policy—A Study in Airline Regulation*, 28 J. AIR L. & COM. 99, 105 (1961-62). Resolution 045 has survived over twenty years, but the United States Civil Aeronautics Board, "convinced that the time ha[d] come to recognize new concepts of charter air transportation, and that charter regulations should be framed in a manner which will promote rather than inhibit the public demand for bulk air transportation," recently issued an order disapproving Resolution 045 as it applies to air transportation into and out of the United States. CAB Order 72-6-91, at 4 (1972).

have no reasonably direct connection by scheduled air services.”<sup>37</sup> Article 3 of the Paris Agreement reaffirms the prior approval right over all other nonscheduled flights, subject to certain minimal notification requirements. The fairest evaluation of the Paris Agreement was that given by the Assistant Secretary General of ICAO shortly after it was signed: “It does not, to be sure, constitute in itself an epoch-making step forward in the liberalization of commercial rights in international aviation.”<sup>38</sup>

There have been no significant bilateral or multilateral agreements governing nonscheduled services since the Paris Agreement, even though a “number of recently concluded bilateral agreements include provisions concerning nonscheduled flights, either with reference to the European multilateral agreement (countries in Europe and the Mediterranean Basin up to the Middle East, in particular), or with a statement of appropriate principles and procedures.”<sup>39</sup> The entire sum and substance of the *de jure* recognition of these services at the international level, therefore, remains the agreements described above, agreements that for the most part confirm the right of nations to regulate these services at their discretion.

### C. Development on A De Facto Basis

Despite the existence of this inhospitable framework, international charter or nonscheduled services have become a *de facto* reality. Charter services do exist and have become a significant force in the international movement of passengers. In the North Atlantic and Western Europe, the two major markets where most of this development occurred, the pattern was the same; charter services met a demand that was not met by existing scheduled services.

#### 1. The North Atlantic Market Receives a Second Chance

In 1944 there was a neglected opportunity to re-structure the North Atlantic along different lines. Fortunately, there was a second opportunity to restructure the market in the form of charter

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<sup>37</sup> In addition, single entity or own-use flights and cargo flights were exempted from prior approval.

<sup>38</sup> Weld, *Some Notes on the Multilateral Agreement on Commercial Rights of Nonscheduled Air Services in Europe*, 23 J. AIR L. & COM. 180, 187 (1956).

<sup>39</sup> ITA, *Some Prospects Opened up by Competition Between Scheduled and Nonscheduled Transport*, ITA Bulletin No. 27 at 26,638 (July 6, 1970).



services. Charter services in the North Atlantic can be traced to 1948 when the "large irregular air carriers," the predecessors of today's supplementals, began operating a small number of flights. In the summer of 1949, the Civil Aeronautics Board granted exemptions to many of these carriers permitting them to carry approximately 2,500 students to Europe at an average round trip fare of 350 dollars. The following summer, exemptions were again granted and approximately 5,000 students were flown to Europe, but financial defaults by several of the agents and organizers resulted in strandings and aroused public opposition.<sup>40</sup> As a result, the Civil Aeronautics Board did not permit the supplementals to re-enter the transatlantic market until 1955 when it adopted guidelines that formed the basis for the present United States charter regulations.<sup>41</sup> The tremendous growth in North Atlantic charter traffic, however, which accounted for approximately 2.5 million passengers in 1971 or over twenty-seven per cent of the total North Atlantic traffic,<sup>42</sup> has been a product of the explosive era of the late 1960's. Charter services in this market are now offered by nineteen IATA carriers<sup>43</sup> and at least two dozen charter carriers, only six of which operate under the American flag.<sup>44</sup> In addition, Pan American World Airways is one of the three largest charter carriers in the market and in 1971 it carried 263,000 charter passengers between the United States and Europe. In 1950, on the other hand, the total transatlantic scheduled and charter traffic was only slightly larger!<sup>45</sup> Yet through all of this period there was not one agreement between the United States and a European nation on charters.

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<sup>40</sup> See Goldklang, *supra* note 34, at 100-04.

<sup>41</sup> *The 1955 Transatlantic Charter Policy*, 20 C.A.B. 782 (1955).

<sup>42</sup> CAB, *THE MAGNITUDE OF THE SUPPLEMENTAL AIR CARRIER OPERATIONS* at 54 (Sept. 1972).

<sup>43</sup> Historically, the Civil Aeronautics Board has included charter authority in foreign air carrier permits authorizing scheduled service. In two recent cases, however, the Board refused to include charter authority in such permits and indicated that it was considering the institution of proceedings to review the charter authority granted to foreign air carriers. *Trans-Mediterranean Airways, S.A.L., Foreign Air Carrier Permit*, CAB Order 72-12-91, at 3 (1972); *Polские Linie Lotnicze, Foreign Air Carrier Permit*, CAB Order 72-12-56, at 2 (1972).

<sup>44</sup> In 1971, the United States and non-United States charter carriers handled 67% of the North Atlantic charter traffic, with 33% being handled by IATA carriers. CAB, *THE MAGNITUDE OF THE SUPPLEMENTAL AIR CARRIER OPERATIONS* at 54-56 (1972).

<sup>45</sup> CAB Forms 41.

## 2. Charters within Europe Surpass All Expectations

Within the European community the development of charters has primarily consisted of the growth of one stop inclusive tours from Northern Europe to the Mediterranean region. In 1969 there were approximately 11.2 million charter passengers carried within Europe and ten million participated in inclusive tours.<sup>46</sup> This market originated in 1950 when approximately seventy privately-owned nonscheduled carriers were registered in the United Kingdom. By 1951 they were carrying 200,000 passengers annually.<sup>47</sup> This development under British regulation roughly paralleled the development in the United States, but as the traffic increased and the patterns developed, it became apparent that inclusive tour charters were to be encouraged.

Similar to their transatlantic counterparts, intra-European charters have developed in spite of the *de jure* regime. In analyzing the relationship of inclusive tour charters to its own definition of scheduled service, ICAO concluded that inclusive tour charters should be presently treated as nonscheduled and therefore, subject to article 5 of the Chicago Convention.<sup>48</sup> Consequently, this brings most inclusive tours within article 3 of the Paris Agreement and the prior approval of the states. The liberal application of article 3 to inclusive tour charters in the last ten years is partly the result of a recommendation made by ECAC in 1961.<sup>49</sup> Although it is

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<sup>46</sup> It has been estimated that non-scheduled traffic will overtake scheduled traffic in Europe by September 1974 and that by 1980 intra-European charters will be at a level of sixty-three million passengers annually. McDonnell Douglas, *The European Charter Airlines*, Market Research Report No. CI-804-1873 at 13, 44 (Nov. 1970).

<sup>47</sup> *Id.* at 3. Although there were some additional registrations, the process of attrition has reduced the number of British "Independents" engaged in inclusive tour services to approximately one dozen. Edwards Report, *supra* note 3, at 33.

<sup>48</sup> ICAO Doc. 8244-AT-717 (1962). The distinction is a difficult one to draw. If the ICAO definition of a scheduled service as one open to the public and operated with systematic regularity is applied, inclusive tours could easily be treated as scheduled services. The problems this would create under the Chicago Convention and the bilateral system would be virtually insurmountable. See ITA Study 1968/1-E, *supra* note 34, at 17-19.

<sup>49</sup> Recommendation No. 6 of the Fourth Session of ECAC, Strasbourg, France (July 1961):

### Inclusive Tour Flights

Whereas inclusive tours in Europe make a contribution to the economy of the countries to which they are operated and have a social value in enabling people, who might not otherwise be able to travel, to see and become acquainted with foreign countries; and

startling that a mere "recommendation" of a quasi-governmental international body could have this impact, when important commercial enterprises such as charters exist in an international vacuum the balance can be swung by such quasi-legal devices. Unfortunately, the effect could be substantial restrictionism as well as liberalizations.

#### D. *The Honeymoon for Charter Services Ends*

Since scheduled services are recognized at the international level and charter services are surviving solely as a matter of grace, what is wrong with an approach that enables charter services to grow to their present size? This argument equates limited prosperity with a waiver of rights. The public has a right to international air transportation, but it is vested in neither the carriers nor the states—it is the right of the potential passenger to the best possible transportation at the lowest reasonable cost. Moreover, transportation should have the certainty of *de jure* recognition regardless of the form the transportation takes. The uncertainty surrounding the future of charter services means that the present level of service could disappear in a matter of years; or even worse that the real potential of charters, which have seen most of their growth only in the last five years, will never be reached.

The problem is far from academic. Within the European community, there has been a conscious and concerted effort in the last few years to limit the growth of charters through the imposition of

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Whereas many persons traveling on inclusive tours in chartered aircraft at prevailing low prices might not otherwise travel by air; and

Whereas inclusive tour charters are not therefore necessarily detrimental to the scheduled carriers and have, on the contrary, in some cases at least, been the forerunner of new scheduled services, thus generating new traffic for the scheduled carriers;

The Conference Recommends

1) that the Study Group established by COCOLI to consider Non-scheduled Services and Inclusive Tours should now consider the principles that should govern the operation of inclusive tour charters, with the object of establishing the maximum possible liberalization of this type of traffic;

2) that, in the meantime, Member States, having regard to their policies of coordination for air services, should continue to adopt a liberal attitude toward flights exclusively reserved for inclusive tours.

A similar liberal recommendation regarding student charters was made in 1967. Recommendation No. 6 of the Second Intermediate Session of ECAC, Paris (July 1967).

unilateral restrictions. Many European nations, through the ECAC, have imposed capacity or price restrictions on charters thereby inhibiting future development. In the Pacific, Japan imposes a quota on charters, while Australia and New Zealand have recently made overtures that would open up the South Pacific charter market to nonscheduled carriers for the first time. Additionally, many nations apply the charter definitions contained in IATA Resolution 045, which are more restrictive than the United States charter regulations, to nonscheduled carriers who are not members of IATA.<sup>50</sup> In short, the emphasis is on containment rather than development and restrictionism rather than rationalization.

The critical time is now. Charter services could rapidly disappear from the international air transportation system; a brushfire of consumer demand would be extinguished because of insensitivity at the international level. Although mere survival is not enough, neither is continued uncertainty.

## II. THE NEW COURSE: PERMITTING INTERNATIONAL AIR TRANSPORTATION TO SEEK ITS OWN LEVEL

At the present time, there are many proposals circulating concerning how to best rationalize charter services at the international level. Within Europe, ECAC is again pressing for a further multilateral "response" to charters, but this reaction is probably a euphemism for further restrictions. The United States, following a mandate contained in its Statement of International Air Transportation Policy, is urging a bilateral approach with four basic clauses: (i) routes would be governed "by formulae similar to those used in our bilateral agreements on scheduled services"; (ii) no control on capacity, but (iii) "bilateral machinery" to prevent "substantial impairment" of scheduled services; and (iv) a definitional agreement.<sup>51</sup> While the consideration of these proposals represents progress, at most they would be interim or transitional measures primarily designed to preserve the status quo and only incidentally to encourage future development. Without minimizing the importance

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<sup>50</sup> See generally ITA Bulletin No. 8, at 171-72, 177 (Feb. 28, 1972). See also Lichtman, *Regularization of the Legal Status of International Air Charter Services*, 38 J. AIR L. & COM. 441 (1972).

<sup>51</sup> Remarks by Secor D. Browne, Chairman, Civil Aeronautics Board, before the Royal Aeronautical Society, London, Mimeograph at 10-13 (Mar. 13, 1972).

of these "interim" measures, they could extend over several years; these measures are essential to the success of international air transportation. Absent a long-term objective, however, these measures could easily propagate the faults of the present system.

It would be ideal, of course, if a simple formula could be derived that would solve this problem, *i.e.*, a *deus ex machina* that would end the disputes and satisfy all parties. Unfortunately, however, there is not a simple solution and the prospects of developing one in the future are slight. The present system of scheduled services has become embedded in the pattern of international commerce and it cannot be discarded overnight. Despite their large volume, charter services are a recent phenomenon. Thus, a new policy is needed instead of a formula. To accomplish this new policy, however, the old inhibitions must be discarded in favor of basics.

#### A. *The New Currency of International Aviation Exchange*

In the bargaining process that characterizes any attempt at establishing international rights, the medium of exchange is a mixture of needs and politics. Thus, if international charter services are to receive status similar to international scheduled services, some additional barter must be placed on the bargaining table. The two most important of these are the needs of the consumer and the economic impact of tourism.

##### 1. *The Needs of the Consumer*

In the international air transportation system, available seats on an aircraft are a product and the consumer of that product is the passenger. To demonstrate that the needs of the consumer have become diffused in the intricacies of the scheduled system, scheduled international airlines produce approximately twice as many passenger seats than passengers demand and then pass the price of this overproduction on to the passengers. Rarely have the international airlines asked the consumer what he wants—more often they have *told* him what he wants. The Edwards Report was perhaps the first national undertaking to face this problem directly:

[T]he primary long-term objective of a national policy towards commercial flying should be to see that each customer . . . gets what he wants. Romantic, exciting and important though the air-

line business may be, it is, in the last analysis, there to . . . provide services for money.<sup>52</sup>

Charter services demonstrate that air transportation can be mass transportation if the price barriers are removed. They are both a response to, and a product of, consumer demand; in this sense charter services are unlike any other form of air service.

## 2. *The Economic Impact of Tourism*

The economic equation in scheduled international services has generally centered around the revenues derived directly from the transportation and how these revenues could be equitably divided. Occasionally, this equation is lightly seasoned with balance of payments considerations, but the primary aim of any negotiator has always been to maximize his carrier's share of the passenger market and thereby the passenger dollar. With the advent of charter services, there has been an awakening to the importance of passenger expenditures at the point of destination instead of on air transportation. This is also true with respect to scheduled services.<sup>53</sup>

Income from international tourism is the equivalent of export income and the possibility of using air transportation to generate massive amounts of this income has become likely. It is estimated that the world's total international tourism receipts in 1971 approached twenty billion dollars, an eleven per cent increase over 1970.<sup>54</sup> International tourism as exemplified by Spain has become a major industry. For example, in 1969 Spain's receipts from international tourism exceeded seventy-five per cent of its total receipts from merchandise exports.<sup>55</sup> Charters were the key to this development since seventy per cent of the airline passengers traveling to Spain from the rest of Europe in 1969 arrived on charters.<sup>56</sup> Thus,

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<sup>52</sup> Edwards Report, *supra* note 3, at 9.

<sup>53</sup> In a thorough balance of payments study conducted several years ago, the Civil Aeronautics Board estimated that fares accounted for only one-third of international travel expenditures with direct spending accounting for the balance. CAB, *The Impact on the Balance of Payments of the Air Transport and Aircraft Industries* (1965).

<sup>54</sup> IUOTO, *The Development of International Tourism in 1971(II)*, (1972).

<sup>55</sup> OECD, *Tourism in Member Countries* (1970); IMF, *International Financial Statistics* (Jan. 1971).

<sup>56</sup> ITA, *Tourist Migrations and Population*, ITA Bulletin No. 6, at 121 (Feb. 14, 1972).

the potential is staggering and the only absolute limitation is population since tourism generates tourism:

For the time being, these major migrations are on the whole more or less unilateral. It is mostly a case of holiday-makers going to a receiving country from a generating country. But when tourist arrivals assume such proportions that they bring with them a real improvement in economic prosperity, the receiving countries gradually tend to become tourist generating countries. This is what is happening particularly in Spain. . . . Such trends should take place in all parts of the world and this progressive transformation of unilateral migrations into reciprocal tourist flows will make it increasingly difficult to identify the real flows and the prevailing direction.<sup>57</sup>

"Population exchange" is a rather dramatic concept, but the jet-age had made it technologically possible. The only barrier is cost; chartered air transportation helps break that barrier for a significant segment of the population.

*B. The Traditional Areas of Disagreement—Are They Relevant in View of the New Currency?*

Throughout the development of international scheduled services certain areas of disagreement constantly reappear. The present pattern of bilaterals reflects the controversies over capacity, rate control, designation and route description. Moreover, these same areas of disagreement are also assumed to characterize charter services. Upon analysis, however, this assumption would appear to be erroneous because the appearance of the new currency of international aviation exchange has witnessed the disappearance of the old problems.

*1. Capacity and Rate Controls*

The Bermuda compromise on capacity and rate control was a necessary predicate to any agreement at that time. The international scheduled service market was too small to be divided into various segments. Today this market is larger and there are more divisible segments, thus the controls might have relevance to scheduled services. But charters are a different situation since charters are solely a function of consumer demand. It is this demand that determines the level of capacity. It is this demand that should de-

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<sup>57</sup> *Id.* at 121.

termine the rates. For these reasons, therefore, the practice of scheduling solely to attract a larger share of the market, known as incremental or saturation scheduling, may plague international scheduled services, but it is unknown in planeload charter operations. Moreover, there is never the fear that rates will be too high with respect to charter services, a serious and recurring problem with the IATA carriers. In short, consumer demand is a constant that provides the necessary intentional control over charter capacity and rates.<sup>58</sup>

## 2. *The Problem of "Optics"*

The other area of disagreement has traditionally been one of "optics"—how the controversy looks from the respective sides of the argument. The designation of carriers and the description of routes often receive an emphasis that goes beyond economic reality and focuses instead on international politics. Charter services, on the other hand, have not been embraced by these same chauvinistic impulses and while this has been an obstacle to the growth of charters, they are removed from the political arena where form triumphs over substance.

To the extent that these areas of disagreement reflect actual economic considerations, *i.e.*, to the extent that they have an impact on market share, different considerations predominate in charter services. The new currency, the needs of the consumer and the tremendous financial impact of tourism, tends to obscure petty concerns over division of charter passenger revenues. Moreover, unlike scheduled services, there are no artificial controls on the potential of the charter market, thereby creating a situation in which competition can thrive.

## 3. *The Real Area of Disagreement—The Relationship Between Scheduled and Charter Services*

When the smoke clears in the scheduled-charter controversy, the argument will still be centered around the relationship between the services the scheduled and charter airlines perform. There appear to be only two sides to this argument with the scheduled airlines

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<sup>58</sup> Unilateral national controls, such as those given the Civil Aeronautics Board by section 1002(j) of the Federal Aviation Act, 49 U.S.C. § 1482(j) (1970) remain necessary to enforce governmental policies disfavoring discriminatory or unreasonable rates.



arguing that charter services seriously injure scheduled services and therefore must be contained, while charter airlines argue to the contrary. Although most of the evidence seems to favor the contentions of the charter airlines, neither side will concede anything. In addition, the Edwards Report noted that there is not enough knowledge concerning the nature of the market served by scheduled services, much less the charter market, to be determinative of the controversy.

Although this lack of knowledge does not eliminate the problem, it does suggest another approach. Instead of establishing absolute definitions and distinctions, the objective should be to learn from experience and to experiment as much as possible. In the course of the experiment, the benefit of the doubt in the initial stages should always be given to charter services since they are an expression of consumer demand. In a sense this is what already has occurred, but on a *de facto* rather than a *de jure* basis. This system has been successful with both scheduled and charter services sharing remarkable growth. Thus, the goal of any interim *de jure* approach should be to continue this experiment along these lines.

### C. *A Recommendation for a New Course*

Although there is no easy or readily available solution, there is a possibility for a change in direction. Also, more is needed than a simple recognition of the irrelevance of much of the scheduled system and the emergence of charters. The following is a suggested course:

(i) A five year experimental period during which international charter services would be given *de jure* recognition through a series of bilateral regimes. Each regime would be based on the traffic flows, both scheduled and charter, between the signatory parties, but the emphasis would always be on expanding the charter concept, while attempting to reach a reasonable distinction between scheduled and charter services. Each pair of bilateral partners would meet annually to analyze the results of the experiment and to agree on further expansion of the concept if justified.

(ii) At the conclusion of the experiment, all of the bilateral partners would enter into a multilateral negotiation aiming towards an agreement defining the distinction between scheduled and charter services and granting commercially unrestricted rights, or "free-

dom of the skies," to all charter services operated between the parties. A possible vehicle for this multilateral agreement would be the Chicago Convention, amended to include a definition of "scheduled air service" in article 96 and with the second paragraph of article 5 amended to read as follows:

Such aircraft, if engaged in the carriage of passengers, cargo or mail for remuneration or hire or other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo or mail without restriction.

Admittedly, this proposal borders on aviation heresy, for two reasons: first, it is common knowledge that freedom of the skies died at Bermuda; and second, it is also common knowledge that multilateral agreements inevitably represent the lowest common denominator. While there is a germ of truth in these contentions, this proposal is realistic when placed in the context of charter services. Freedom of the skies might be incompatible with a scheduled system, but it is not necessarily inconsistent with a system of charters. Although freedom of the skies does not mean a flood of uneconomic competition, it does mean the elimination of unnecessary restrictions on charter air transportation. Similarly, the multilateral approach may have been discredited by ECAC's less than honest use of it, but it still remains the most direct and efficient way of establishing international rights. The possibility of amending the Chicago Convention, however, is slight, but it does illustrate that only a few words presently stand between the consumer and mass air transportation.

The recommendation in a nutshell is *de jure* recognition with maximum flexibility. Flexibility is perhaps the most important component of this recommendation, for it would really permit charter air transportation to seek its own level, to set its own course. What will be the final course? Only the passage of time and consumer demand will tell, but this, after all, is what will assure its success.

### III. EPILOGUE

This article was initially conceived as a paper presented to the First World Congress on Air Transportation and Tourism, con-

vened in Madrid in April 1972.<sup>59</sup> The events that have transpired in the intervening months have been totally unprecedented in the long history of international air transportation.<sup>60</sup> The predicate for the chain of events was the Order of the Civil Aeronautics Board, effective July 1, 1972, which disapproved IATA Resolution 045 governing passenger charters. The Board found that the IATA charter resolution impeded carriers from meeting the increasing demand for low cost mass air transportation and was, therefore, inconsistent with the development of a sound overall air transportation system.<sup>60a</sup>

At the national level, the traditional definitions of charter services have been rapidly changing. The most widely publicized of these changes was the adoption by the Civil Aeronautics Board of the Travel Group Charter (TGC) regulations for a three-year experimental period.<sup>61</sup> A TGC is basically a charter open to anyone willing to pay a twenty-five per cent deposit at least three months in advance of the flight, subject also to certain other restrictions.<sup>62</sup> Less publicized was the adoption by the United Kingdom of Advance Booking Charter (ABC) rules, similar to TGC's but with

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<sup>59</sup> The Congress subsequently adopted a recommendation: (i) that the nations should immediately commence negotiations towards the adoption of bilateral agreements that would provide an assured legal status for international charter air services; (ii) that the bilateral agreements should be designed to maximize development of charter air services without restrictions hampering the availability of those services to the world traveling public, such as restrictions requiring prior approval of individual charter flights, limiting capacity, controlling rates or discriminating between geographical areas; and (iii) that once experience has been gained under these bilateral agreements, the nations should meet in an International Conference for the purpose of entering into a multilateral agreement guaranteeing "freedom of the skies" for international charter services.

<sup>60</sup> See generally Lichtman, *Regulatization of the Legal Status of International Air Charter Services*, 38 J. AIR L. & COM. 441 (1972).

<sup>60a</sup> CAB Order 72-6-91 (1972).

<sup>61</sup> Regulation SPR-61, adopted Sept. 27, 1972; 14 C.F.R. Part 372a (1970); 37 FED. REG. 20674 (Oct. 3, 1972). The regulation is presently being litigated in the United States Court of Appeals for the District of Columbia Circuit.

<sup>62</sup> For example, a minimum stay of seven days in North America and ten days in all other markets is required; all TGC's must be on a roundtrip basis; all of the seats contracted for by the TGC organizer, in minimum blocks of forty, must be reserved three months in advance; the price must be pro rated among the actual participants, and if more than twenty per cent of those making deposits fail to make full payment no later than forty-five days prior to departure, the flight must be canceled; detailed filing requirements are imposed on both the carrier and the organizer; and the carrier may not market TGC's directly to the public, but instead, must market through TGC organizers who are treated as indirect air carriers and must meet stringent financial security requirements.

less burdensome restrictions.<sup>63</sup> A third development has been the proposed extension of Inclusive Tour Charter rights, heretofore reserved to charter carriers, to scheduled carriers as well.<sup>64</sup> The fourth and final development at the national level has been the proposed elimination of affinity charters during the TGC experiment.<sup>65</sup>

The most startling developments, however, have been at the international level. Over the past few years, one of the most intransigent European nations on the question of charters has been Belgium, even to the extent that it imposed an outright ban on charters originating in the Northeastern United States. This was suddenly and dramatically reversed in early October 1972 when delegations from the United States and Belgium signed a Memorandum of Understanding that does grant unrestricted charter rights to the properly designated carriers of each country even though it specifically stops short of becoming a bilateral charter agreement. A few weeks later, the United States, Canada and the ECAC member nations met at Ottawa and entered into a Declaration of Agreed Principles (the Ottawa Accord) that purported to regularize rights for TGC's and ABC's in the North Atlantic. While recent bilateral charter negotiations have demonstrated that there is less than total unanimity with regard to the meaning of the Ottawa Accord, it is nevertheless an important first step toward a multilateral solution.

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<sup>63</sup> The United Kingdom's Civil Aviation Authority released the proposed ABC rules on July 12, 1972. They are more liberal than TGC's to the extent that they permit direct marketing by the carriers at a fixed rate, but in other essential respects they are similar. In a related development, on September 26, 1972, the Civil Aviation Authority granted Laker Airways Ltd., one of the remaining Independents, authority to conduct "Skytrain" operations, essentially a low cost, non-reservation scheduled service, between London and New York subject to frequency and airport restrictions. The implementation of this authority is contingent upon approval by the United States Civil Aeronautics Board.

<sup>64</sup> EDR-240, SPDR-31; 38 FED. REG. 1396 (Jan. 2, 1973). In the preamble to EDR-240, the Civil Aeronautics Board announced that it is "prepared to grant waivers from our own ITC regulations to the extent necessary to sanction the performance of an inbound ITC, so long as it is operated in accordance with the originating country's ITC rules. . . ." EDR-240, *supra*, at 14-15; 38 FED. REG. 1396 (Jan. 2, 1973). This raises the distinct possibility that all carriers will be able to operate one-stop ITC's similar to the European experience provided the flights originate outside the United States. Petitions for Rulemaking are also pending that would eliminate the present three-stop requirement in all markets.

<sup>65</sup> EDR-237; 37 FED. REG. 24193 (Nov. 15, 1972). Several European nations, notably the United Kingdom and West Germany, have announced that they intend to phase out affinity charters by the end of 1973.

It is not possible to prognosticate the status of the system a year from now, but it is safe to say, as the Civil Aeronautics Board did in promulgating the TGC regulations, that there is a "current momentum in the international community of civil aviation toward devising new charter concepts."<sup>66</sup> Even while this momentum continues to build, however, new questions arise. As the new concepts replace older distinctions between scheduled and charter services, the distinctions between the classes of carriers performing these services are also disappearing. Chairman Browne of the Civil Aeronautics Board commented on this phenomenon in a recent speech:

For many years the existence and growth of the charter carriers has provided a valuable competitive spur to the scheduled carriers. However, the scheduled carriers will expand their capability for providing for the new market, and develop an economic investment in that capability. . . . This is not to say that the scheduled carriers should swallow the charter carriers, or that the charter carriers should devour the scheduled carriers. Rather, it means that ultimately the two classes will necessarily blend into one.<sup>67</sup>

This phenomenon is not only evidenced by the large scale entry of scheduled carriers into planeload charters, including TGC's, but it is also reflected in the numerous and varied discount fare proposals that led to the current open rate situation in the North Atlantic. Unfortunately, many of the suggested rates would be counterproductive—depressing the yields of the scheduled carriers to levels far below costs while diverting revenues from charter services.

The final answers to these questions will depend on the results of litigation at the national level and negotiations at the international level. If the concrete results of the United States-Belgium Memorandum of Understanding and the less precise results of the Ottawa Accord are any indication, however, the system has embarked on a course roughly parallel to that recommended at Madrid. If nothing else, international commercial air transportation has entered the most exciting period in its history.

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<sup>66</sup> SPR-61, *supra* note 61, at 30.

<sup>67</sup> Speech by Secor D. Browne, Chairman, Civil Aeronautics Board, before the Royal Aeronautical Society, 61st Wright Memorial Lecture, Mimeograph, at 7-8 (London Dec. 7, 1972).