

1982

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Stanley B. Rosenfield

Recommended Citation

Stanley B. Rosenfield, *International Aviation: A United States Government-Industry Partnership*, 16 INT'L L. 473 (1982)

<https://scholar.smu.edu/til/vol16/iss3/5>

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International Aviation: A United States Government-Industry Partnership

I. Introduction

In the last half of the 1970s, following the lead of deregulation legislation of domestic aviation,¹ United States international aviation policy was liberalized to provide more competition and less regulation.² The result of this policy has been an expanded number of U.S. airlines competing on international routes.³ It has also enlarged the number of U.S. international gateways and thus provided more points within the United States to and from which to carry traffic.⁴

The U.S. has worked for bilateral agreements with foreign aviation partners which would provide more opportunity for all scheduled carriers, both U.S. and foreign, to expand routes and provide greater freedom to set fares and adjust capacity, based on the marketplace.

The pro-competitive liberal policy advocated by the United States is based on the theory that competition will provide the lowest possible fares for the consumer, and that in open competition the U.S. carriers will not only survive, but also prosper.

The policy has attracted criticism on the basis that implementation of the liberal policy has actually resulted in placing U.S. carriers in a less competitive position. Foreign airlines, the majority of which are government-owned, are instruments of foreign policy, which are not allowed to fail,

*Mr. Rosenfield is a faculty Fellow with the U.S. Department of Transportation. The views expressed herein are those of the author and not necessarily those of the Department of Transportation.

¹Pub. L. No. 95-504, 92 Stat. 1705, October 24, 1978.

²U.S. Policy for the Conduct of International Air Transportation Negotiations, August 21, 1978; 88 Stat. 2102, January 3, 1975; Pub. L. No. 96-192, 94 Stat. 35, February 15, 1980.

³New carriers would include Air Florida, World, Capitol and Transamerica. Established carriers who have been provided the opportunity to expand into new international markets would include Delta and Northwest.

⁴New international gateways would include Dallas, Atlanta, Denver, St. Louis and Tampa.

regardless of losses. No U.S. carrier, no matter how efficient, can compete against such foreign airlines, because such carrier is actually competing with a foreign government, a battle no commercial airline can win. While this thesis has been supported by some airlines, such airlines are those which prior to the liberal U.S. policy were instruments of United States foreign policy, and were themselves protected from competition.⁵

Attacks on this policy have not been limited to airlines. One of the strongest attacks was by a respected news magazine in a cover story which suggested the probable result of the U.S. liberal policy could be the demise of the U.S. international air carriers.⁶

While the liberal policy was supported by the Carter Administration, one might expect an even more pro-competitive policy from the new Reagan Administration. At the same time, the new Administration is considered more "business-oriented" and should, therefore, be more concerned by any ill-effects on the air carriers. A change in administration, of itself, generates impetus for change from policies of the previous administration, and so the controversy may be expected to continue into the future.

It is the premise of this paper that the liberal aviation policy will work to the benefit of U.S. carriers, and that such policy need not sabotage U.S. international airlines. While the policy is sound, implementation of the policy requires recognition of the limitations U.S. carriers face in international markets.

This paper will examine the development of the U.S. liberal aviation policy, the results of this policy to date, and problems currently faced by U.S. international carriers. Finally, it will provide suggestions to permit U.S. carriers to compete internationally, based on competition in the marketplace; the legislative goals for the benefit of both U.S. carriers and consumers. The basic suggestion is a partnership between the U.S. government and its international aviation carriers.

II. Development of the Present U.S. International Aviation Policy

The 1970s saw a greater shift in policy relating to commercial aviation than in the previous history of civil aviation regulation. Consumerism reached its zenith in all areas in which government was concerned. Commercial aviation was no exception. The emphasis switched from the industry itself, to the public, and providing the traveling public with the lowest possible fares.

This was a radical change in commercial aviation because in this industry the original push for federal regulation, in the 1930s, came from inside the

⁵This would include Pan American, Trans World Airways, and Northwest, each a traditional international carrier of longstanding.

⁶*Is the U.S. Sabotaging Its International Airlines?*, BUSINESS WEEK 74, January 21, 1981.

industry, from the carriers themselves.⁷ This is contrary to other regulation of industry, particularly by the Interstate Commerce Commission, the forerunner and pattern for the Civil Aeronautics Act,⁸ in which regulation was instituted to protect the public from the abuses of the railroad industry.⁹

From the inception of the first economic regulation of commercial aviation, the Civil Aeronautics Act of 1938,¹⁰ until the Deregulation Act of 1978,¹¹ a period of forty years, no substantive changes were made in the Declaration of Policy, to guide the Civil Aeronautics Board (hereafter referred to as CAB or Board) in setting its priorities. Items considered to be in the public interest included, *inter alia*:

- encouragement and development of an air transport system;
- regulation to preserve the inherent advantages of air transport;
- improvement of relations between, and coordination of, transport by air carriers;
- competition to extent necessary to assure sound development of an air transport system;
- promotion and development of civil aeronautics.¹²

The primary concern of governmental regulation was the building and maintaining of commercial aviation and the protection of the industry. All of the goals were dedicated to this end. The only competition called for was that required to insure the development and expansion of aviation. While this emphasis for regulation was not surprising in 1938, when commercial aviation was in its infancy, it is less clear why this policy should remain intact for the next forty years, into the explosion of commercial aviation following World War II, the era of the jets, and finally into today's era of widebodied, jet aircraft.

President Nixon, in ordering a full review of international air transport policy, recognized the currents for change. This policy statement noted:

The present review of United States international air transportation policy is an effort to take account of current conditions, and the prospective circumstances of the 1970s . . . to serve our fundamental interests in international air transportation.¹³

⁷Rosenfield, *A Case for the Legality of Youth Standby and Young Adult Airline Fares*, 36 J. AIR L. & COM. 615, 644 (1970). Financing of the airline industry was dependent on a showing of stability, which the industry felt was best shown through federal regulation. Jones, *Anti-Trust and Specific Economic Regulation: An Introduction to Comparative Analysis*, 19 ANTI-TRUST § 261 (1961). In addition, this period was highlighted by seven major air crashes with the loss of fifty lives in 1936 and 1937. S. REP. NO. 687, 75th Cong., 1st Sess. (1937); Westwood and Bennett, *A Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterwards*, 42 NOTRE DAME L. REV. 309, 313 (1967).

⁸Ch. 104, 24 Stat. 379, Feb. 4, 1887.

⁹Atchinson, *The Evolution of the Interstate Commerce Act; 1887-1937*, 5 GEO. WASH. L. REV. 289 (1937).

¹⁰Ch. 601, 52 Stat. 973, June 23, 1938.

¹¹Pub. L. No. 95-504, 92 Stat. 1705, Oct. 24, 1978.

¹²72 Stat. 740, 49 U.S.C. § 1302.

¹³International Air Transportation Policy of the United States at 2, June 22, 1970.

In his personal statement accompanying this policy, President Nixon declared:

The policy is carefully framed to conserve opportunities of all our carriers for continued growth. It is directed realistically at making a new variety of service available to passengers and shippers.¹⁴

This statement, by President Nixon, is the first recognition of consumerism that was to become the dominant force of the 1970s.

By 1976, several bills relating to reduced regulation and greater consumer benefits had been introduced into Congress.¹⁵ The debate for deregulation, or at least reduced regulation, in domestic aviation was well underway. A new international aviation policy statement was issued by President Ford, indicating that the liberal approach to aviation regulation was to apply to international as well as domestic aviation.

The United States seeks an international economic environment and air transportation structure conducive to healthy competition among all our carriers. We shall rely upon competitive market forces to the greatest extent feasible, . . .¹⁶

Principal objectives to guide U.S. international air transportation policy for the future should include, *inter alia*:

- reliance on competitive market forces to the greatest extent feasible;
- provision for transportation whenever a substantial need exists;
- support of a private United States air transportation industry that is economically viable and efficient.¹⁷

In pursuing these objectives, the United States is concerned with the public interest in both low-cost, readily available air transportation and a financially viable international aviation system.¹⁸

This shift in policy from the industry to the consumer was completed by the statement of President Carter issued in 1978:

United States international air transportation policy is designed to provide the greatest possible benefit to travelers and shippers. Our primary aim is furthering the maintenance and continued development of affordable, safe, convenient, efficient and environmentally acceptable air service.

Maximum consumer benefits are best achieved through the reservation and extension of competition between airlines in a fair marketplace. Reliance on

¹⁴*Id.* Cover statement of the president.

¹⁵H.R. 12061, introduced by Representatives Anderson and Stuckey, October 21, 1975; identical bill S. 2551, introduced by Senators Magnuson and Pearson, Oct. 22, 1975. S. 3364, introduced by Senators Kennedy, Buckley, Hart and Scott, May 3, 1976; identical bill H.R. 13762, introduced by Representatives Roncalio and Stuckey, May 12, 1976. S. 3536, introduced by Senators Cannon and Pearson, June 8, 1976; identical bill H.R. 14330, introduced by Representatives Jones, Anderson and Stuckey, June 11, 1976. H.R. 14606, introduced by Representatives Anderson and Snyder, June 29, 1976. S. 3830, introduced by Senator Cannon, Sept. 20, 1976.

¹⁶International Air Transportation Policy of the United States, covering letter of President Ford, Sept. 8, 1976.

¹⁷*Id.* 3.

¹⁸*Id.*

competitive market forces to the greatest extent possible in our international air transportation agreements will allow the public to receive improved service at low costs that reflect economically efficient operations.¹⁹

This shift from emphasis on development of the air transport industry to "provide the greatest possible benefits to travelers and shippers,"²⁰ was given legislative sanction in the Deregulation Act of 1978, for domestic aviation, which added to the policy section, consideration in the public interest of the availability of adequate, economic, efficient and *low-priced* services (emphasis added);²¹ maximum reliance on competitive market forces and on actual and potential competition;²² and, the encouragement of entry by new air carriers.²³ These were added to the policy for foreign air transportation by the International Air Transportation Competition Act of 1979.²⁴

In the regulatory area, this policy shift to the consumer was evidenced by the IATA Show Cause Order issued by the Civil Aeronautics Board raising the question whether the Board should continue to grant antitrust immunity to the International Air Transport Association (IATA) ratemaking conferences whose purpose was to establish the price and conditions of service for international air transport through consultation and agreement of the airlines flying a particular route.²⁵ This proceeding was subsequently narrowed so that it applied only to fares²⁶ and to air transportation to or from the United States.²⁷ A tentative order was filed approving the traffic conference for a two-year period, but providing that U.S. carriers could not participate in the North Atlantic Rate Conference during this period.²⁸ A final order was entered on May 6, 1981, affirming the tentative order.²⁹ In deference to a request of the Department of Transportation (DOT) the effectiveness of this final order was stayed until September 15, 1981.³⁰ All governments reserve the right to approve international air fares. Fares between the U.S. and other states are currently based upon bilateral negotiation with individual foreign governments.

¹⁹U.S. Policy for the Conduct of International Air Transportation Negotiations, at 1, Aug. 21, 1978.

²⁰*Id.*

²¹49 U.S.C. § 1302(a)(3).

²²49 U.S.C. § 1302(a)(4).

²³49 U.S.C. § 1302(a)(10).

²⁴Pub. L. No. 96-192, 94 Stat. 35, Feb. 15, 1980.

²⁵CAB Docket 32851, Order 78-6-78, June 9, 1978. IATA was organized in 1946 as an organization of world airlines flying international routes whose primary function was to establish international air fares, which were subject to approval by individual governments involved. This organization grew out of the failure of the Chicago Convention (Convention on International Civil Aviation, 61 Stat. 1180, Dec. 7, 1944) to agree on a fare setting mechanism by governments for post-World War II commercial traffic.

²⁶CAB Order 79-5-113, May 14, 1979.

²⁷CAB Order 79-8-194, August 30, 1979.

²⁸CAB Order 80-4-118, April 15, 1980.

²⁹CAB Order 81-5-27, May 6, 1981.

³⁰See Letter from Marvin S. Cohen, Chairman, CAB to Drew L. Lewis, Secretary, DOT, May 6, 1981.

The United States policy has been further implemented through bilateral aviation agreements, which are negotiated for the United States by a team composed of representatives of the State Department, Civil Aeronautics Board and the Department of Transportation. The "liberal" provisions sought by the U.S. negotiators encourage more competition and grant greater flexibility to the individual carrier to exercise its discretion and its business judgment in its operations. The "liberal" bilateral contains one or more of the following six terms:

1. *Fares*. The basic principle is that each carrier should have freedom to establish its own fares, rather than having fares set by either involved government. No government, including the United States, is willing to give up its right or obligation to disapprove fares considered inappropriate, whether such fare is too high or too low.

There are two liberal fare provisions, each designed to grant carrier discretion to fares established. The most liberal provision is "mutual disapproval" pricing. Fares are established by each carrier, and must be accepted as effective unless *both* states involved disapprove the fare. Disapproval by one state is not sufficient to defeat such fare, unless such disapproval is concurred in by the other state.³¹

The second liberal provision is called country-of-origin pricing. A fare may be unilaterally disapproved, but only by the state from whose territory the traffic originates. Thus, State A could disapprove a fare from State A to State B, but only State B could object to a fare from State B to State A.³²

2. *Capacity*. This refers to restrictions which limit the number of passengers carried. Included would be restrictions on the number of flights, as well as the frequency of such flights. Also involved are restrictions on the type of aircraft and the number of seats on a particular craft. Included would be any restriction which limits the passengers carried. The most liberal provision would be without restriction in this area. The right to fly any number of seats and any number of frequencies would be determined by the carrier, based solely on market conditions.³³

3. *Multiple carrier designation*. This provision involves the right of a state to approve more than one carrier to provide the agreed service between states.³⁴ This has been of greater concern to the U.S. because of multiple American carriers, in a world in which most states have only one

³¹U.S. Model Air Transport Agreement, Art. 12, Aug. 1, 1980; *e.g.*, Air Transport Agreement between the U.S. and Belgium, T.I.A.S. 9207, art. 6, Dec. 12 & 14, 1978.

³²U.S. Model Air Transport Agreement, art. 12, at 26, Jan. 1, 1979; *e.g.*, Air Transport Agreement between the U.S. and the Netherlands, T.I.A.S. 8998, art. 12, March 31, 1978.

³³U.S. Model Air Transport Agreement, annex I, sec. 2, Rev. Aug. 1, 1980; *e.g.*, Air Transport Agreement between the U.S. and Israel, T.I.A.S. 9002, Aug. 16, 1978.

³⁴U.S. Model Air Transport Agreement, art. 3, Rev. Aug. 1, 1980; *e.g.*, Air Transport Agreement between the U.S. and Belgium, T.I.A.S. 9207, art. 3, Dec. 12 & 14, 1978.

international carrier. In at least some other countries this is beginning to change.³⁵

4. *Routes*. This provision involves a reduction in restrictions on the routes a carrier may fly. For the United States this involves the right of its carriers to make stops between the U.S. and this partner state, and to continue on to other states beyond. The U.S. has used additional gateways in the United States as an exchange for such route rights.³⁶

5. *Country-of-origin charters*. This provision relates to charter flights only, whether such charter involves passengers or cargo. It provides that any charter flight, whether one way or round trip, will be governed by the laws and regulations of the state from whose territory the flight originates. The laws and regulations of each state avoid the necessity of a compromise between the laws of each state, before an agreement can be reached relating to charter flights.³⁷

6. *Fair competitive practices*. Each party shall allow a fair and equal opportunity for each designated airline to compete. Each state shall eliminate forms of discrimination or unfair practices which adversely affect the competitive position of an airline of the other state. This is interpreted to mean that each airline has a right to competitively procure products and services necessary to provide air transport at fair, just, reasonable and non-discriminatory prices in the territory of the other contracting party. This applies to such things, among others, as user charges, fuel prices, fuel allocation and ground handling services.³⁸

The U.S. liberal policy for international aviation can be described as a combination of approaches, including legislation, CAB orders and the above liberal bilateral provisions. The start of this liberal policy can be dated from 1977, and traced to the push for domestic deregulation;³⁹ Bermuda II, the new bilateral agreement with the United Kingdom;⁴⁰ and, authority to operate Laker Skytrain service to the United States.⁴¹ The start of bilateral agreements with the "liberal provisions" dates to 1978. Since then, more than a dozen bilateral agreements, with nations in every area of the world have been signed which encompass liberal bilateral provisions. Not all liberal provisions are included in each bilateral. In addition,

³⁵*E.g.*, United Kingdom with British Airways, British Caledonia and Laker; France with Air France and U.T.A.; and, Canada with Air Canada, and C.P. Air.

³⁶U.S. Model Air Transport Agreement, Annex I, Rev. Aug. 1, 1980; *e.g.*, Air Transport Agreement between the U.S. and Singapore, T.I.A.S. 9001, art. 3, March 31, 1978.

³⁷U.S. Model Air Transport Agreement, Annex II, Rev. Aug. 1, 1980; *e.g.*, Air Transport Agreement between the U.S. and Korea, T.I.A.S. 9427, art. 2, March 22, 1979.

³⁸U.S. Model Air Transport Agreement, arts. 10, 11, Rev. Aug. 1, 1980; *e.g.*, Air Transport Agreement between the U.S. and Jamaica, T.I.A.S. 9613, art. 5, April 4, 1979.

³⁹*Supra*, note 15.

⁴⁰Air Services Agreement between the government of the United States of America and the government of the United Kingdom of Great Britain and Northern Ireland, July 23, 1977, T.I.A.S. 8641, 28 U.S.T. 5367.

⁴¹Skytrain service represented low cost non-reservation service. CAB Docket 25427, Orders 77-8-94, 77-9-91.

there are degrees of liberality between agreements.⁴² Liberal bilaterals still represent only a small portion of the bilateral aviation agreements to which the United States is a party.⁴³

III. Results of U.S. Policy

The pro-competitive policy advocated by U.S. regulation is based on the theory that competition will provide the lowest possible fares for the consumer, and that in open competition the U.S. carrier will survive and prosper. Fares for consumers have been reduced, in spite of the fare increase required by the increased cost of fuel. Fares set by agreement of the carriers would undoubtedly have been higher. However, the recent past has not been a period of economic prosperity for U.S. international carriers, which has led to the complaints against the liberal U.S. aviation policy.

Based on their profit and loss statements, 1980 was a disaster for U.S. international carriers. The twelve U.S. international carriers combined for a total operating loss of \$248 million in their international operations.⁴⁴ The only carriers to show a net operating profit were American, operating only in Latin America, and Trans World, operating only in the Atlantic.⁴⁵ In addition, Flying Tiger had an operating profit on its Pacific routes and Pan American had an operating profit on its Latin American routes, but in each case, the total international traffic resulted in a net loss.⁴⁶

Tempering these international losses, at least in reference to blaming liberal bilaterals, is the fact that the U.S. domestic carriers' experience was no better. 1980 was simply a financial disaster for both domestic and international aviation. Only three major carriers in the United States showed an operating profit in 1980.⁴⁷ The remaining major U.S. carriers showed an operating loss totaling \$391.9 million.⁴⁸

⁴²Some examples of liberal bilaterals would include: the Netherlands, T.I.A.S. 8998, March 31, 1978; Singapore, T.I.A.S. 9001, March 31, 1978; Belgium, T.I.A.S. 9207, December 12 & 14, 1978; and Jamaica, T.I.A.S. 9613, April 4, 1979.

⁴³The U.S. has in excess of 70 bilateral aviation agreements. *See* Treaties in Force, Jan. 1, 1980.

⁴⁴The twelve carriers reported include American Airlines, Braniff Airways, Continental Airlines, Delta Airlines, Eastern Airlines, Flying Tiger Line, Northwest Airlines, Pan American, Airlift International, Trans World Airlines, Western Airlines and Seaboard World Airways, AAIMS II, CAB Form 41, Year 1980, April 22, 1981.

⁴⁵*Id.*

⁴⁶

Flying Tiger	-33 million (Atlantic)
	7 million (Pacific)
Total loss	-26 million
Pan American	-52 million (Atlantic)
	-17 million (Pacific)
	+25 million (Latin America)
Total loss	-44 million, <i>id.</i>

⁴⁷Delta, Eastern and U.S. Airlines, AVIATION WEEK, 30-31, Feb. 23, 1981. Delta's top carrier profit of 164 million was in spite of its operating loss of \$7 million on its international routes. Eastern's operating profit of \$1.9 million included its operating losses of \$12 million on its international routes. *See also* AAIMS II, CAB Form 41, Year 1980, April 22, 1981.

⁴⁸Operating losses ranged from Trans World's loss of \$18.4 million, in spite of its \$5.5 mil-

One bright spot is the growth in European liberal markets vis-à-vis the non-liberal bilateral European countries.⁴⁹ Between 1977 and 1980, scheduled traffic increased 99.4 percent in the liberal markets as against only 41.1 percent in European countries with non-liberal bilateral agreements.⁵⁰ The conclusion from this figure is that liberal bilaterals have at least been helpful in expanding markets.

These financial figures on international aviation are not encouraging. The question, however, is whether these figures are attributable to the U.S. liberal policy, and if so, to what extent. There are several reasons why it would be unreasonable, if not impossible, to attribute the above results to the U.S. liberal policy.

The period during which such policy has been in force with any particular aviation partner is relatively short.⁵¹ In addition, it has been a period of economic downturn in the United States, with inflation hitting all time double digit highs, while the dollar deteriorated on many world markets. Added to these factors is the cost of airplane fuel, which represents more than 25 percent of airline operating costs. It has risen so rapidly that it threatens to put the price of travel, even with sharp price competition, out of reach of substantial numbers of potential passengers.

At least two other factors also need to be considered. At the end of World War II, the United States was dominant in international commercial aviation. In fact the United States was the only nation with a viable airline industry. Thirty-seven years have elapsed since World War II, and this is no longer true. Particularly among the industrialized countries of Europe and Japan, rebuilding of the commercial aviation fleet has been completed. These states have established their own markets, as well as becoming competitors on U.S. routes. The U.S. market share, regardless of the strength of its own international commercial fleet, will necessarily be reduced as foreign carriers increasingly exploit their natural markets.⁵²

lion profit on its international routes, to Pan American's operating loss of \$129.6 million, including its loss of \$44 million. The twelve major U.S. carriers include American with an operating loss of \$86.3 million, in spite of an international profit of \$177,000, Continental Airlines, Delta Airlines, Eastern Airlines, Northwest Airlines, Pan American Airlines, Republic Airlines, Trans World Airlines, United Airlines, U.S. Airlines and Western Airlines. *AV. WEEK & SPACE TECH.* at 30-31, Feb. 23, 1981.

⁴⁹The European countries with liberal bilaterals include Belgium, the Netherlands and West Germany. In addition, the United Kingdom is included because the interpretation and amendments to the U.S.-UK bilateral put it in the liberal group.

⁵⁰Analysis of North Atlantic Traffic and Financial Data, U.S. DOT, Feb. 17, 1981.

⁵¹The first so-called liberal bilateral was signed with the Netherlands, and became effective March 31, 1978, T.I.A.S. 8998.

⁵²Traditionally, U.S. carriers have carried a smaller percentage of U.S. traffic than foreign airlines carry of their own citizens, e.g., the percentage of U.S. citizens flying U.S. carriers decreased from 58.6 percent in 1972, to 55.3 percent in 1979, while 40.6 percent of foreign citizens flew U.S. carriers in 1972 and in 1979 this had increased only slightly to 41.9 percent. Between the United States and Europe the statistics are worse. In 1972, U.S. carriers transported 48.4 percent of U.S. citizens and this figure dropped to 46.7 percent in 1979. However,

Directly related to the above factor is the change in nationality of the flying public. In 1980, the U.S. citizen share of the international market dropped to 48 percent, and in January 1981, this percentage dropped to 46 percent.⁵³ These represent the first period during which passenger traffic between the U.S. and the world included more foreign citizens than U.S. citizens. This has not been an abrupt change, but a shift that started well before liberal bilaterals, one of progression during the 1970s.⁵⁴ This trend is likely to continue for some time in the future. This is related to the growing affluence of foreign citizens, combined with the depreciation of the U.S. dollar. In 1980, for the first time, the U.S. offered a bargain in travel to foreign citizens, particularly from such countries as the Federal Republic of Germany, Switzerland or Japan, and other countries with currencies more stable than the dollar.

Statistics of 1970 trends suggest that the U.S. liberal policy has been advantageous to U.S. carriers. While the percentage of U.S. citizens flying U.S. flags was lower in 1979 (55.5 percent) than in 1972 (58.6 percent), the low part of the decade was 1976 (53.1 percent), but the following years have shown a gradual increase.⁵⁵ The percentage of foreign citizens flying U.S. carriers has actually increased between 1972 (40.6 percent) and 1979 (41.9 percent).⁵⁶

There are other possible factors as well. One might be the maturity of the U.S. market, based on which the relative number of travelers has peaked, vis-à-vis foreign countries in which new found affluence is allowing foreign travel for the first time, and in which the potential market has not yet been reached. In addition, as in the case of most economic factors, and has proven true of commercial aviation in the past, the market is subject to cyclical changes.⁵⁷

It is clear that there are problems in the U.S. international aviation industry. Less clear is the cause of these problems. The conclusion that can be drawn at this time is that any problems in international aviation could be caused by many factors, other than U.S. liberal bilateral agreements.

in regard to foreign passengers, U.S. carriers transported only 29.7 percent in 1972 and 35.7 percent in 1979. I&N Service, *Reports of Passenger Travel between the United States and Foreign Countries*, 1970-1974, DOT, U.S. International Air Travel Statistics, 1975-1979.

⁵³DOT Transportation Systems Center, I&N Service Form 1-92 flight reports, April, 1981.

⁵⁴In 1972, U.S. citizens represented 61.2 percent of the international market, and has gradually dropped until the U.S. citizens were only 50.4 percent in 1979. I&N Service, *Reports of Passenger Travel Between the United States and Foreign Countries*, 1970-1974; DOT, U.S. International Air Travel Statistics, 1979-1980.

⁵⁵I&S Service, *Reports of Passenger Travel Between the United States and Foreign Countries*, 1970-1974, DOT, U.S. International Air Travel Statistics, 1975-1979.

⁵⁶*Id.*

⁵⁷This cycle could be starting an upswing with the 5.2 percent increase in U.S. international air travel during January 1981, compared to January 1980, though it is premature to predict such based on statistics for one month. See, U.S. DOT News, at 1, April 6, 1981.

IV. Current Problems

Decreased regulation should encourage increased carrier independence. New and original decisions should be based on the marketplace. This has been true in domestic aviation, where the results of deregulation are already evident, even before deregulation is complete.⁵⁸ New airlines are operating under new concepts.⁵⁹ Old airlines are expanding and changing goals.⁶⁰ All additions and changes are in direct competition with established carriers, and in many cases, challenging accepted principles and practices of established carriers. This is competition.

Is this same effect evident on the international scene? While decreased regulation should encourage greater airline independence based on the marketplace, and greater carrier competition, it does not necessarily do so. Some states have declined to accept any part of U.S. proposals for more liberal practices and greater competition. In some areas carriers are competing in the marketplace, but in other areas they are falling back on protection by subtle and not-so-subtle means. In domestic U.S. competition, all carriers are privately owned and subject to the same ground rules. Internationally, the ground rules are not uniform, and this is attributable, at least in part, to the difference in ownership of foreign airlines.

IATA statistics are revealing regarding ownership of international airlines. Of eighty-five active members of IATA, sixty-nine airlines, representing 81 percent of the members, were government owned in varying degrees. Forty-two carriers (61 percent) were 100 percent government owned, and twenty-one carriers (30 percent) were more than 50 percent government owned. The remaining six (9 percent) had government ownership, but less than 50 percent. There were sixteen privately owned carriers operating internationally which were members of IATA (19 percent) of which seven were U.S. carriers and at least two were all cargo carriers. Of the remainder, the largest were CP Air (Canadian), UTA (French) and British Caledonian (U.K.). Thus, of the nine foreign privately owned carriers, none was among the larger international carriers, nor in any case did it represent the only carrier of the state.⁶¹ However, not all major international carriers are 100 percent government owned. Some, such as KLM (The Netherlands) and Lufthansa (West Germany) are more than 50 percent government owned, while others such as Japan Airlines and Swissair have government ownership of less than 50 percent.⁶²

⁵⁸Under the domestic legislation different functions are phased out gradually over a period starting Dec. 31, 1981, and ending Jan. 1, 1985, 49 USC § 1601(a)(b).

⁵⁹Examples would include Southwest Airlines, New York Air, Midway Airlines, and Peoples Express, which just started operation in May 1981.

⁶⁰U.S. Airlines (formerly Allegheny) is probably the best example.

⁶¹In the United Kingdom there is 100 percent government-owned British Airways; in Canada 100 percent government-owned Air Canada; in France there is Air France, more than 50 percent government owned.

⁶²CAB Docket 32851, Ex. IATA-400, Aug. 20, 1970. These figures were assembled before the withdrawal of U.S. airlines from IATA. Therefore, the number of 100 percent privately

Eighty-one percent of the IATA airlines engaged in international competition have some government ownership. With the exception of the U.S. carriers, practically all major international carriers have some government ownership.

One result of this government ownership is a business philosophy different from that in the United States. This philosophy is based on cooperative control of the market. This philosophy is not limited to commercial aviation, but is common in other government controlled industries. In the U.S., the emphasis is placed on competition. In the U.S. the public interest involves both the airlines *and* the consumer. While the view in some states is changing and coming closer to the U.S. view, the number of these changing states is small, and the changes are very slow.⁶³ Another result of government ownership is a different set of rules geared to protection of the state carrier. Such is based on the financial interest of keeping its airline operating; the interest of most states in an international presence, the sign of membership and prestige in the international community; and finally, the interest of most as a means of promoting tourism. Based on its income, tourism is an end in itself which may justify strong state interest.

States with an international air carrier support controlled, non-competitive fares and conditions of service as an aid to insuring the continuing financial viability of such airline, regardless of its ability to compete.⁶⁴ In addition, states provide protection to their carrier by a wide range of practices which are intended to provide advantage to the local carrier over all foreign carriers, or over the carrier of a specific country. These practices are of particular concern to U.S. carriers, because regardless of competitive ability or resourcefulness, carriers cannot combat state practices by individual action.

While most states favor IATA as a means of controlling competition, sole reliance is not placed here. A common form of cooperative agreement in all parts of the world is pooling. While pooling may involve different types of arrangements, it is basically an agreed split of a particular market between carriers who are pool partners, with a penalty assessed any partner taking in excess of its share, or at least not reaping the profit from the

owned airlines would now be less.

⁶³*Supra*, Ch. III, at 708 *et seq.*

⁶⁴All states encourage the flag carrier to pay its own way. In the case of less-developed or developing states, such is based on the practical limitation on funds. Even in developed states there will be pressure on the airline to support itself. *E.g.*, an emergency meeting was called for June 1981, by IATA to reverse IATA carrier losses of \$2.1 billion in 1980. (Wall Street Journal, at 28, col. 1, May 28, 1981.) However, subsidies are provided where it is considered in the state interest. One of the most extreme examples is the Concorde, jointly built by the British and French, and flown by British Airways and Air France. The development cost of \$4.5 billion has been capitalized, and in addition, both governments subsidize annual operating losses in order to provide the world's only supersonic commercial transport.

excess. A pool partner has no incentive to take traffic from its pool partners, because all partners share according to their agreement, regardless of the actual quantity of traffic carried. However, pool partners cooperate to the exclusion of non-pool operators. It is to the advantage of the pool to increase its market share at the expense of non-pool members. The result of such an agreement is a grouping of pool partners against all non-pool carriers. This is particularly disadvantageous to U.S. airlines who are forbidden by antitrust laws from engaging in pooling agreements.⁶⁵

Protection of the home market is provided in many instances on a direct or indirect basis by the local government, the local airline, or both. Following are examples of the types of barriers erected against American airlines. This is not intended as a definitive listing, either of practices or countries involved. This is merely a representative sampling of both.

A common problem, particularly in Eastern bloc countries is the limitation on the right of American carriers to sell transportation directly for local currency.⁶⁶ Sales are limited to foreign exchange, which of course limits the market severely. Local citizens are effectively prevented from flying U.S. airlines, because they usually have no access to dollars, and in some cases it is illegal for them to have foreign exchange. Another requirement is that tickets must be sold on the local carrier's stock, allowing the local carrier access to how many tickets are being sold on the foreign carrier and how many on the local carrier.⁶⁷ Through control of domestic tickets the local carrier can require agents to book required percentages on the local carrier or lose the right to sell domestic tickets.⁶⁸

An even more frustrating problem can be lack of right to freely convert local currency into dollars.⁶⁹ This may occur in spite of an agreed right, as part of the bilateral agreement, providing for such remittance. This is particularly difficult to prevent because the government agency in charge of foreign exchange will be different from the aviation agency. Even when allowed, there are many instances of onerous requirements and restrictive procedures, which at the very least may cause long delays in use of funds earned in a foreign country, and at the most can require funds to remain in a country where the airline has no use for them.

⁶⁵Pooling is forbidden by the Sherman Anti-Trust Act, 26 Stat. 209, as amended, 15 U.S.C. § 1. The CAB has the power to grant antitrust immunity to pooling agreements, but it doesn't do so. 49 U.S.C. § 1384. It has, however, permitted agreement controlling capacity, *see, e.g.*, amendment to Air Transport Agreement with Venezuela, 27 U.S.T. 4111; T.I.A.S. 8443, September 22, 1976. Another example of an agreement within a narrow range is the new bilateral signed with the People's Republic of China entered into September 8, 1980, *see* Annex V(2) and exchange of letters dated September 8, 1981, between Boyd Hight, Chairman, U.S. Delegation and Len Zheng, Leader, PRC Delegation, stating that traffic would not be reasonably balanced, as required in art. 12(2), if the traffic of either designated carrier exceeded 56.25 percent of the total traffic. However, no specific penalty is provided for such excess, other than consultation between the parties.

⁶⁶Poland, Yugoslavia.

⁶⁷Yugoslavia, Italy.

⁶⁸Italy.

⁶⁹Soviet Union, Ghana, Argentina, Taiwan.

A more subtle problem is the limitation on use of a computerized ticketing system, so that travel agents using the computer would have access only to the local carrier schedules. While schedules of foreign carriers could be found, it would take effort outside the computer.⁷⁰ This is a particularly difficult problem because foreign use of computers is well behind use in the U.S. Many of the systems being installed do not have the capacity or range of abilities of U.S. computers. Thus, a further question is added. What is lack of capacity (which could be the system or intentional) and what is intentional discrimination? The local computer can be depended on to at least be large enough for the local carrier and its pool partners.

There are requirements of local crews for passenger and baggage handling which give preference to local carriers and which switch traffic to local carriers whenever possible.⁷¹ Another example would include even more subtle methods such as control of gate location (requiring most inconvenient gate locations to foreign carriers) and requiring use of inconvenient times for flights, a problem which can be particularly troublesome on long international flights where times of both arrival and departure can be critical.

A final example is the charge made by individual airports, user charges. The most prominent example today is Heathrow Airport in London, the airport with the world's highest landing fees. This problem is already the subject of lawsuits⁷² and received considerable discussion at the International Civil Aviation Organization meeting in Montreal, in May 1981. Heathrow is only one example, however, as this is a problem in many countries.⁷³ All airports make charges for landing and for services provided at the airport. Such charges are required to be uniform and nondiscriminatory. Charges are to be related to the costs of providing services.⁷⁴ The question is whether charges are related to costs and services, or whether international traffic is being asked to subsidize other less used facilities, domestic service or domestic airports.⁷⁵

Not all acts of discrimination may even be intentional. In at least some instances, practices are instituted for the benefit of the local carrier and it develops that such actually puts all foreign carriers at a disadvantage, not merely specific American carriers. In most instances, retaliation in the U.S. is impossible because all carriers must be treated equally, whether domestic or foreign.⁷⁶

⁷⁰This has become a frequent problem with examples in Scandinavia, West Germany and Italy.

⁷¹The Netherlands, Italy.

⁷²This problem is not limited to U.S. carriers. Pan Am, TWA, as well as a large number of foreign carriers have filed suit in England.

⁷³*E.g.*, *inter alia*, Chile, Australia, India, Italy.

⁷⁴Convention on International Civil Aviation, art. 15, 61 Stat. 1180 (1948).

⁷⁵There may also be a problem of discrimination between international traffic. For example, distinction at Heathrow is made between type of aircraft, for which it is presently claimed, there is no reasonable basis in cost, but which may differentiate between international traffic coming from different originating points.

⁷⁶49 U.S.C. § 404(a)(2); § 1102.

In addition, because of competition in the United States, a foreign carrier has a choice of carriers with whom to deal. Concessions not available from one carrier may be available from another who is interested in increasing its business. Thus, the competition in the United States works as a disadvantage to U.S. carriers. For example, TWA flying to Frankfurt is limited to dealing with Lufthansa, the sole German carrier, but Lufthansa in dealing in the U.S. is not limited to TWA. It can deal with any U.S. carrier willing and able to deal. If TWA refused to make a deal whereby Lufthansa schedules would be listed on its computer, it would not prevent Lufthansa from being listed on one or more other U.S. airline computers. The only computer system in Germany, however, is the "START" system, owned by Lufthansa and German travel agents. To date, Lufthansa has refused access to the system by U.S. carriers, although one U.S. carrier is presently negotiating for such rights.⁷⁷

Discriminatory practices may be defined as any actions by a foreign government or airline which unfairly inhibit U.S. carriers' ability to compete against such foreign airline. While the previous pages have given some examples, such are not all inclusive, but merely representative.⁷⁸

V. Current Remedies

What mechanism is currently available for the settlement of the types of disputes encountered? At the first level, some may be settled by negotiation between the airlines, or between the U.S. airline and the foreign government.⁷⁹ Direct negotiation between airlines was more easily done when airlines reached fare agreements through consultation and bargaining, because the airlines were negotiating directly with each other, and if the subject of negotiation was not on the specific dispute, nevertheless it was subject to being considered in the overall solution. While it may no longer be as easy to reach a solution because of the lack of a general fare negotiation, nevertheless direct negotiation is not ruled out.

If the airline is unsuccessful, it may turn to the government to enter into the negotiation, and while the process will take longer, it may be possible to reach a solution through negotiation involving both governments and airlines.

The U.S. government has recognized that not all problems can be settled through negotiation. The CAB first adopted regulations to protect U.S. carriers in 1961. Its original purpose was to control capacity of foreign carriers

⁷⁷Pan American Airways.

⁷⁸All cases reported to the government are reported in CAB, Report to Congress, FY 1976, at 102-111; FY 1977, at 105-116; FY 1978, at 87-98.

⁷⁹CAB, Report to Congress, FY 1978, at 97.

where a foreign state controlled capacity of a U.S. carrier.⁸⁰ Subsequently restrictions were added to control foreign charters,⁸¹ under the Federal Aviation Act provision requiring filing of agreements;⁸² and, the CAB was given authority to investigate and suspend or reject fares in foreign air transportation.⁸³

Finally, two pieces of legislation, specifically designed to aid U.S. carriers against foreign discriminatory practices have been enacted. The first legislation was the International Air Transportation Fair Competitive Practices Act of 1974.⁸⁴ This Act recognized discriminatory and unfair competitive practices to which U.S. airlines are subjected by foreign airlines and foreign governments. It calls upon the Departments of State, Treasury, Transportation and the CAB to keep such practices under review and to take "all appropriate actions within its jurisdiction to eliminate such"⁸⁵ It does not provide a remedy except in the specific case of excess user charges at foreign airports.⁸⁶

An example of action under this Act was a dispute in which France objected to a Pan American change of gauge in Paris (change in size of aircraft on a continuing flight). France refused to allow Pan American to disembark passengers on May 1, 1978, the first day of the objected to service. The CAB ruled on May 9, 1978, that France was in violation of the U.S.-France bilateral agreement,⁸⁷ action which could have resulted in suspension of French service from Paris to Los Angeles under CAB regulation.⁸⁸ Such suspension would have taken effect on July 12, but on July 11, arbitration was agreed to, and the U.S. position was supported by the arbitration award on December 9, 1978.⁸⁹

A second legislative effort was the International Air Transportation Competition Act of 1979,⁹⁰ which expanded the ability of the government to protect U.S. carriers against foreign discriminatory practices. Under this Act, the Board may act to protect U.S. carriers whenever a foreign carriers or government has "impaired, limited or denied the operating rights of U.S. air carriers."⁹¹

⁸⁰ 14 C.F.R., Part 213. Since 1961, this section has been expanded to cover a broader range of problems. See Damrosch, *Retaliation or Arbitration or Both? The 1978 United States—France Aviation Dispute*, 74 ASIL 785, 787 n.8 (1980).

⁸¹ 14 C.F.R., Part 212.

⁸² 49 U.S.C. § 1382.

⁸³ 49 U.S.C. § 1482.

⁸⁴ 88 Stat. 2102, 49 U.S.C. § 1159, Jan. 3, 1975.

⁸⁵ *Id.* § 1159b.

⁸⁶ *Id.* If foreign charges unreasonably exceed comparable costs in the U.S., compensatory charges may be levied against the air carriers of the foreign country involved.

⁸⁷ 61 Stat. 3445, T.I.A.S. 1679, as amended.

⁸⁸ 14 C.F.R., Part 213.

⁸⁹ Case Concerning the Air Services Agreement of 27 March 1978, Arbitral Award of 9 December, 1978, 54 I.L.R. 304 (1979); See Damrosch, *Retaliation or Arbitration—or Both? The 1978 United States—France Aviation Dispute*, 74 ASIL 785, 785-789 (1980).

⁹⁰ Pub. L. No. 96-192, 94 Stat. 35, Feb. 15, 1980.

⁹¹ 49 U.S.C. § 1372(f)(2).

The Board may summarily suspend a foreign carriers permit or alter, modify, amend, condition or limit operations under such permit,⁹² or upon its own initiative or outside complaint determine that a foreign government or carrier either engaged in unjustifiable or unreasonably discriminatory, predatory or anti-competitive practice against a U.S. carrier, or imposed unjustifiable or unreasonable restrictions on access of a U.S. carrier to foreign markets. The Board may take action to eliminate such practices or restrictions.⁹³

One of the first complaints under this legislation was filed by Air Micronesia alleging unfair treatment by the Japanese Civil Aeronautics Board by refusing new and additional frequencies to Air Micronesia, while authorizing the same to Japan Airlines, the Japanese national carrier.⁹⁴ While the matter was pending in the CAB, the problem was at least partially resolved through governmental negotiation in September 1980.

Another example is the current TWA fare dispute with Lufthansa, the West German national flag carrier, in which the Federal Republic of Germany (hereafter FRG) refused to allow TWA to match Lufthansa fares from internal German points to the U.S. TWA filed a complaint against Lufthansa and the FRG before the CAB, alleging that such refusal was a discrimination against TWA in violation of the U.S.-German bilateral agreement.⁹⁵ On February 13, 1981, the Board entered an order finding TWA entitled to relief. The Board found, in part, that the German government:

unjustly discriminated against TWA in favor of Lufthansa by unreasonably and unjustifiably denying TWA the right to match Lufthansa's fares in the U.S.-Germany market; has unjustifiably and unreasonably restricted TWA's access to the U.S.-FRG market; and has violated the Protocol to the U.S.-Federal Republic of Germany Air Transport Services Agreement.⁹⁶

The Board deferred the question of sanctions on the basis that consultations were to take place between the U.S. and Germany on this issue in the near future, but indicated that sanctions would be imposed if the problem were not otherwise satisfactorily resolved.⁹⁷ Additional consultation in March 1981, produced no solution to the problem, but to date the Board has taken no further action.

U.S. carriers start international service with a disadvantage built into the system. The right and obligation to compete in the international marketplace has resulted in competition, but with different sets of rules, rather than the single standard under which all carriers operate in domestic competition. Not only do U.S. carriers start international competition with a

⁹²*Id.*

⁹³49 U.S.C. § 1159(b)(2).

⁹⁴CAB Docket 38449, July 9, 1980.

⁹⁵CAB Docket 39072, Dec. 17, 1980.

⁹⁶CAB Order 81-2-68, at 3, Feb. 13, 1981.

⁹⁷*Id.* at 6.

disadvantage built into the system, but in addition, dealing is done with airlines with government backing. Hardly a fair match even for the most efficient U.S. carrier! Yet, the situation is created by the U.S. governmental desire to turn international aviation into a competition to be determined in the marketplace.

Does this suggest that the U.S. policy is wrong? Does this suggest that U.S. airlines were better off under IATA and regulated rates and fares? This is the conclusion suggested by those opposed to competition, but unquestionably it is not better for the traveling public—both of the U.S. and other countries—who paid high fares for lower and less service for the “stability” of IATA. It certainly is not better for the U.S. purposes of “the promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry”⁹⁸ and “the strengthening of the competitive position of United States air carriers to at least assure equity with foreign air carriers. . . .”⁹⁹

In addition, the evidence is conclusive that such problems did not begin with the liberal bilateral agreements. While there may have been less emphasis on such problems, it does not follow that the problems did not exist. The fact that regulation by the CAB to protect U.S. carriers was first originated in 1961¹⁰⁰ indicates the problem long antedated liberal bilateral agreements. Also, the first legislation specifically designed to combat foreign discriminatory practices was enacted in 1974, at least three years before liberal bilaterals.¹⁰¹

It may be that increased competition has exacerbated some problems. It might also encourage some foreign governments and airlines to seek alternative methods of insuring survival on the best possible terms. It is not likely, however, that a change in U.S. policy from liberal bilaterals will cure such problems for U.S. airlines. Implementation of the U.S. policy, however, much include a program to insure the opportunity for U.S. carriers to succeed. The theory behind deregulation is that those who can successfully compete will do so. It does not, and should not, guarantee the success of all U.S. entrants. This was the problem of regulation; the accepted carriers were protected regardless of their ability or willingness to provide the best available aviation service for the consumer. At the same time, it would be ludicrous to view international competition as being subject to the same rules as domestic competition. The rules of domestic competition and international competition are entirely different. What is required is rules which provide U.S. international carriers the opportunity to compete, and which allow their failure only based on the inability to compete under the same rules all others are using.

⁹⁸49 U.S.C. § 102(a)(11).

⁹⁹49 U.S.C. § 102(a)(12).

¹⁰⁰14 C.F.R., Part 213.

¹⁰¹The International Air Transportation Fair Competitive Practices Act of 1974, 88 Stat. 2102, 49 U.S.C. § 1159, Jan. 3, 1975.

VI. A U.S. Government-U.S. International Airlines Partnership

U.S. carriers often, if not always, register complaints with the United States government as a last resort. American carriers often do not want the CAB to impose retaliatory sanctions; the airlines may prefer to incur relatively small cost, *in order not to risk a more harmful sanction*—altering or eliminating the carrier's service to that country. (Emphasis added.)¹⁰²

What is required is a new relationship between the U.S. government and its international carriers. Such relationship must recognize and understand the rules by which foreign international carriers are operating, and what will be necessary to insure that the U.S. carriers are effective competitors.

Under the IATA rate conference, no relationship was desirable or possible between the U.S. government and its international carriers. Their roles were regulator and regulated. At the other extreme, some states have treated aviation as a token of state maturity; to carry the flag at whatever expense to the government; to remain visible. Neither would be acceptable under the U.S. policy which calls for promotion of a "[P]rivately-owned United States air transport industry."¹⁰³

Recognition of the mutual interests of the U.S. government and its airlines could be achieved through a relationship unique, at least in the United States, a partnership. A partnership between the government and its international carriers under which each partner would have specific obligations for the benefit of the U.S. international aviation industry.

This partnership could insure U.S. carriers the opportunity to compete internationally, subject only to market conditions, while at the same time recognizing the realities and limitations currently placed on international competition by foreign governments. The basic purpose of this partnership would be the conduct of international commercial aviation in accordance with the standards established by Congress. The airlines represent the operating partner. The conduct of the business must be in the hands of the operating partner. Routes actually served, capacity, type of equipment, fares, types of services offered, etc., those decisions of a private business enterprise would be made, to the greatest extent feasible under international regulation, by such operating partner. All business expertise rests with the operating partner, and the ultimate financial success of each carrier should rest on its ability to compete, not on protection from the government.

Recognizing the realities of commercial international aviation also recognizes that a private airline cannot compete or negotiate with states or state interests. It is necessary to have the government as a partner, with two basic duties. The first is rulemaking, setting the agreement through bilateral negotiation with a foreign state, under which the airlines of both states will operate. The second duty of the governmental partner is rule enforc-

¹⁰²CAB, Report to Congress, FY 1978, at 97.

¹⁰³49 U.S.C. § 102(a)(11).

ing. This obligation would be the duty to insure that the agreement negotiated is followed by the foreign state and its carriers so that U.S. carriers are not discriminated against or disadvantaged, and that the results of international competition are truly determined in the marketplace.

Rulemaking

Rulemaking represents negotiation of the basic agreement of the states between which the air service is to be provided. Negotiation of agreement with foreign states is a basic governmental function which could not be performed by an air carrier because the rights and duties of an air carrier in a foreign state is not a matter of mere business arrangement, but rather of international state agreement. This requirement of government involvement is true in all states, including the United States.¹⁰⁴ While the agreement is between states, its basic purpose is commercial. It is in the interest of the traveling public and the airlines, rather than a matter of basic state relations such as state recognition, peace, war, etc. As such, the commercial partner, the airlines, has a strong interest in the content of such agreement.

Today, international airlines are consulted on bilateral negotiations through meetings at which the general public is free to express its views prior to actual negotiation. Such views are not, of course, binding on the negotiating team. In addition, the Air Transport Association (ATA) sits as an observer at all negotiations and is available during negotiations to present the airline view.¹⁰⁵

If the airlines and government are to work together as a team, airlines need a greater input into the negotiating session. While representatives of airlines are frequently members of foreign negotiating teams, such is not the case in U.S. delegations. Representation of U.S. airlines has been limited to the ATA. There are at least two reasons for this result. First, the members would be overwhelming in numbers because in some instances, there could be as many as seven or eight or more carriers involved in a particular market. The second reason is the feared requirement of other interests on the negotiating team to "balance" the airline bias, which could lead to an expanded negotiating team, possibly of overwhelming size, representing a variety of views.¹⁰⁶

Neither reason is convincing. Numbers of carriers would present no problem as a maximum number could be set (possibly 3). Where more carriers had an interest it would be upon the carriers to agree on a representative group of the appropriate size, or to accept the ATA as their representative, as they saw fit.

It is also recognized that the positions of all carriers will not always be

¹⁰⁴49 U.S.C. § 1372(a).

¹⁰⁵The ATA is a private organization representing U.S. airlines, both domestic and international.

¹⁰⁶These might include one or more groups claiming to represent aspects of the public interest, or special interest groups, such as a particular service or carrier.

compatible.¹⁰⁷ Compatibility is not essential. Mutually exclusive situations are no different than those problems faced by the CAB in selecting between carriers.¹⁰⁸ What would be important would be to insure that conflicting sides were appropriately represented, and that conflicts were resolved in advance of the negotiation.¹⁰⁹ The ultimate solution will be determined by the responsible agency based on congressional intent as expressed in the Federal Aviation Act itself.¹¹⁰

Neither would the argument requiring balance of airline bias be a viable argument. The airlines have a direct and continuing interest in such aviation negotiation. The government has an interest in the airlines' involvement, because any governmental agreement is of little value if no carrier is interested in providing the service. The U.S. government cannot require a carrier to fly a specific route, it merely gives approval or disapproval after a specific carrier requests permission to offer such service. If no carrier is willing to provide the service, the agreement of the government is of little value. In the same manner, a carrier may discontinue service, if it is dissatisfied with the terms under which it must do business. Such may be the result if the government has no understanding of the carriers problems.

The industry offers the government the expertise gained from years of prior operation. Expertise that only the industry can provide to its governmental partner. This expertise is necessary, not only to advance the U.S. airline industry, but also to further the other areas of the congressional mandate which combine to make the public interest. These would include "maintenance of an air transportation system relying on competition *to provide efficient and low priced service.*" (emphasis added)¹¹¹ In addition is the statement declaring that the U.S. international air transport policy is to provide the greatest possible benefit to travelers and shippers, the flying public.¹¹² But even the flying public does not represent the balance of U.S. interests in aviation. The Federal Aviation Act also speaks of domestic and foreign commerce, the Postal Service and the national defense.¹¹³ Thus, the aviation industry is only one aspect of different areas which go to make

¹⁰⁷For example, in recent talks with the Japanese, United Airlines, wanting to start international service with a route to Tokyo, had a position contrary to that of Pan American, long in the field and understandably, not desirous of additional competition.

¹⁰⁸49 U.S.C. § 1372. In many instances the bilateral agreement may limit the number of U.S. carriers and the Board will have to determine which of several applicants will receive the route award. *E.g.*, Air Services Agreement between the United States of America and the government of the United Kingdom of Great Britain and Northern Ireland, art. 3, 28 U.S.T. 5367; T.I.A.S. 8641, July 23, 1977, as amended.

¹⁰⁹In the actual negotiation, only the chairman of the delegation ordinarily speaks, although he may ask a member of his delegation to clarify a point during negotiation. The negotiating position is determined by private meeting of the negotiating team where all divergent views may be considered.

¹¹⁰49 U.S.C. § 1302(a).

¹¹¹49 U.S.C. § 1302(a)(9).

¹¹²U.S. Policy for the Conduct of International Air Transportation Negotiations, at 1, August 21, 1978.

¹¹³49 U.S.C. § 1302(a)(5).

up the public interest in international aviation. It is the obligation of government to insure that all aspects are considered.

In addition, there is the matter of necessity. Negotiations are not academic exercises. They represent rights and obligations between governments. They also represent rights and obligations of the industry and specific carriers, as well as the rights of the traveling public. The negotiating partner must have all possible information for the benefit of its mandated interests.

Finally, a partnership implies a working relationship between the partners. This is provided by a cooperative effort between those most familiar with the problems, and those responsible for the results of negotiations, the government partner.

Rule Enforcing

Enforcement involves assurance that the agreement negotiated will be implemented as the parties intended. This also requires dealing at the state level which would be impossible for the airline partner. It would, however, again involve a close working relationship between government and the airline carrier.

The relationship between airlines and government must be at such level that government would be aware of the problems of the aviation partner with a foreign state as such problems arose. Such problems could then be given consideration as they developed and prior to a carrier suffering actual damage.

U.S. airlines have a greater fear of further foreign detrimental action than they have confidence of any prompt and effective action on the part of their own government!¹¹⁴ That carriers from the world's most important commercial aviation nation should have such an attitude is difficult to comprehend. The result, however, is predictable. Many problems are merely ignored or endured, because of the lack of confidence of affirmative results. Problems may be taken to the government, but only after an airline has been unable to obtain satisfaction by itself, and the problem is of such proportion that something must be done.¹¹⁵

The proposed partnership would do away with airline fears and hesitancy to work together. Under such partnership, the governmental partner would be specifically acquainted with the needs of the U.S. international carriers.

Basic requisites of rule enforcing would include:

1. A close working relationship with the rulemaking and rule enforcing needs of U.S. carriers. This would require knowledge and cooperation between the partners similar to that required by the rulemaking function.

¹¹⁴*Supra* note 102 at 719.

¹¹⁵This was the unanimous view expressed by officers of major U.S. airlines in personal interviews. Not surprisingly, such officers prefer anonymity in this matter.

Envisioned would be an acquaintance and knowledge of all problem areas.¹¹⁶

The close working relationship would not be sufficient in itself. It would have to be combined with the requirements that the governmental partner:

2. Be able to protect the legitimate U.S. carrier interests, and
3. When required by such interests, the ability and willingness of the governmental partner to act promptly.

The ability to protect legitimate U.S. interests has been provided through various means.¹¹⁷ The greatest difficulty is the ability and willingness to act promptly; to provide aid before substantial loss occurs.

Return to the TWA-Lufthansa fare dispute.¹¹⁸ The CAB determined that TWA was entitled to relief, but deferred imposing sanctions pending negotiation between the U.S. government and the FRG which took place during the week of March 16, 1981. Such talks were concluded without agreement. After four months, TWA still had no solution to its problem. The special holiday fare, which was for the Christmas holiday season had become moot, but TWA was foreclosed from this service for the 1980-81 Christmas season. While TWA was prevented from competing by the German government, Lufthansa was able to offer a special holiday fare between Germany and the U.S., without competition! The loss to TWA was not only the seats which might have been sold, but also the larger market presence, a definite advantage to Lufthansa in terms of future business.

In the Pan American change-of-gauge matter,¹¹⁹ the new Pan American service was delayed from May 1, 1978, the beginning of the summer season, until December 1978, when the matter was finally determined, after a total elapsed time of eight months. Even more importantly, the whole summer season, the most important season of the year, was lost by Pan Am. Air France, the French national carrier, was the beneficiary of Pan Am's inability to compete.

Each of these illustrations shows the cooperation between a foreign government and a foreign airline, working together to the detriment of the U.S. carriers, without penalty to the foreign carrier, even though eventually the U.S. position has legally been found correct.

Action was taken by the government in each case, and such action by government standards was relatively prompt. Nevertheless, the measure must be private industry standards, not government standards because it is private industry, not government, which must bear the losses.¹²⁰ In each

¹¹⁶This is not to suggest that such partnership requires 100 percent agreement. In some instances, the partners might eventually agree that the U.S. carrier was in error. Another conclusion might be that, though not in error, the matter might not be worth pursuing on the part of the governmental partner.

¹¹⁷*Supra*, page 487 *et seq.*

¹¹⁸*Supra*, page 489.

¹¹⁹*Supra*, page 488.

¹²⁰Negotiation with a foreign state involves the CAB as well as the Departments of State and Transportation. Each may have a different view, and it will be necessary to expend the time to

case, though the foreign carrier and/or government was found to be in error, it was the U.S. carrier who suffered. In each instance the foreign carrier received an advantage. The ability to aid in a solution is not helpful unless it includes the willingness to aid in a prompt solution. Failure to provide such is not only detrimental to the airlines involved, but in addition, is detrimental to the U.S. government policy of strengthening the competitive position of U.S. carriers vis-à-vis foreign carriers.¹²¹

Is it necessary to "write off" airline short term profits because of governmental involvement? It does not seem reasonable to penalize U.S. carriers, while foreign carriers do not encounter the same problem. Foreign governments have no hesitancy about imposing rules which are detrimental to U.S. carriers.

One can speculate that based on past experience, there is little fear by foreign governments of U.S. retaliation. This well may be so. However, the power to retaliate against foreign carriers even before a matter is adjudicated is provided by the International Air Transportation Competition Act of 1979. While the U.S. has the power to act summarily,¹²² it has never exercised such power. In fact, it has never exercised its authority to impose sanctions after a determination of the matter. If sanctions are imposed on the Federal Republic of Germany in the TWA matter, it will be the first.

The use of sanctions is considered abhorrent because it suggests counter measures which might lead to a war of sanctions. If used indiscriminately, undoubtedly such could occur. Nevertheless, alternatives must be considered. What is the alternative when it can only be to the foreign carrier's advantage, whatever the delay? Why is it necessary that only U.S. carriers should suffer until full adjudication of an issue?

Once a determination has been made that the right of U.S. carriers to compete has been adversely affected by discriminatory or restrictive practices of foreign governments or carriers, U.S. action should be prompt. There is normally no basis for allowing a foreign carrier the advantage until agreement is reached. It would be more conducive to prompt settlement of such disputes if both sides were similarly disadvantaged, so that in effect the *status quo* was maintained. Use of such power, or merely the possibility of such use, would require foreign governments and airlines to rethink practices which are disadvantageous or discriminatory to U.S. airlines, in view of their own potential loss in the U.S. market, while such program was being adjudicated. Use of such power, or the possibility of such use, would also give U.S. carriers the confidence to work with the governmental partner to prevent such practices which are to the detriment of the U.S. aviation policy.

reach a unified negotiating position. In addition, potential financial losses are of direct concern to private industry, but will not have the same urgency in governmental dealings.

¹²¹49 U.S.C. § 102(a)(12).

¹²²49 U.S.C. § 1372(f)(2).

Difficulty in imposing sanctions, in addition to the above reason, can be attributed to the required present procedures. These include the input of the involved carrier, the Department of State, the Department of Transportation and the Civil Aeronautics Board. This is a slow and cumbersome process before action can be taken.¹²³

Serious consideration should be given to the amendment of the Act to require mandatory sanctions *automatically* upon the finding of an unfair, discriminatory or restrictive practice, or where the rights of a U.S. carrier have been impaired, limited or denied. The purpose of such a provision would not be to punish a foreign carrier. The purpose of such should be to insure the status quo until the matter could be worked out by appropriate governmental authority. Using the TWA-Lufthansa example once again, such sanction should not be to put Lufthansa in a worse position. Rather, the sanction should have denied the right of Lufthansa to use the discount fare refused to TWA. The airlines would be put on an equal basis, and kept in such position until final settlement. This would provide notice that no foreign carrier will be allowed a temporary advantage through such action, while at the same time not giving a marketplace advantage to either the U.S. or the foreign carrier.

Such modified legislation should clearly specify that the automatic sanctions under this amendment would only insure the status quo on both sides, without advantage to either, until a final determination of the rights had been adjudicated.

It may be argued that such legislation would merely lead to retaliation by foreign states. This is possible, but merely argues that it is necessary to allow the advantage to foreign states. It must be remembered that there must be a finding, in fact, of a prohibited act. If no such finding is justified, the U.S. carrier is not entitled to relief. The purpose of such change would not be to change the advantage to U.S. carriers, but to insure the status quo, to insure no advantage to either side.¹²⁴

The ultimate result would not guarantee superiority for U.S. carriers. There is no intention to even guarantee survival of all U.S. carriers. The only guarantee by the governmental partner is that the U.S. carriers, as well as foreign carriers, should have the same right to determine survival and prosperity where it belongs, in the marketplace.

¹²³Sec. 9, 49 U.S.C. § 1372(f)(1), can be acted upon by the CAB, with the approval of the president of the United States. In practice, in addition, the Department of State and Department of Transportation are also consulted under section 9, although the statute requires it only under section 23, 49 U.S.C. § 1159(b)(2).

¹²⁴Such legislation would also be of value to foreign carriers where claims are made of unfair practices against U.S. carriers. This is not unheard of. There is no more reason to allow unfair practices by U.S. carriers than by foreign carriers.

The Partnership and the Public Interest

A final consideration is the relationship between the proposed partnership and the public interest. Prior to the deregulation legislation and the liberal international policy, criticism was leveled at the government, and particularly the CAB, for protecting the aviation industry to the detriment of the flying public. Will implementation of the partnership produce the same claim of protection for the industry to the detriment of the public? Will the government regulator be in the position of being accused of favoring one interest, the commercial airlines, over another interest, the flying public?

Commercial aviation has changed dramatically since 1938, when economic regulation was first legislated. The declaration of policy, together with the areas to be considered in the public interest were first established in 1938. While there have been several major changes in this legislation,¹²⁵ except minor wording changes, the purpose clause and the objectives of the Act remained unchanged prior to the Deregulation Act of 1978. The language of the Act had remained constant, while the industry expanded and assumed the role as the major mode of common carrier passenger traffic.

The original Civil Aeronautics Act of 1938¹²⁶ and the Federal Aviation Act was originally enacted in 1958,¹²⁷ called for regulation to recognize and preserve the advantages of and to foster sound economic development in air transport,¹²⁸ and competition—but only to the extent necessary to assure sound development of air transportation. Emphasis was on development and protection of the industry.¹²⁹ By the early 1970s, the public perception of the relationship between government regulation, commercial aviation and the general public had changed. 1938 standards no longer remained appropriate. The public needs and desires had changed. The public interest, as determined by statute, is, however, determined only by the policy laid down by Congress.¹³⁰ What is included within the public interest will also be determined only by the basic policy laid down by Congress.¹³¹

The public perception changed, and Congress has now acted to change the public interest. The provisions of public interest set out in the paragraph above are no longer part of the Act. Under the Deregulation Act of 1978,¹³² they have been replaced by requirements for efficient and lower priced service,¹³³ and emphasis on competitive market forces in at least

¹²⁵ Reorganization Plan of 1940; Federal Aviation Act of 1958, 72 Stat. 731, (1958, as amended); Department of Transportation Act, 80 Stat. 931 (1966, as amended).

¹²⁶ 52 Stat. 973.

¹²⁷ 72 Stat. 731.

¹²⁸ 49 U.S.C. § 102(c)(2).

¹²⁹ 49 U.S.C. § 102(c)(4).

¹³⁰ *United States v. Lowden*, 308 U.S. 225 (1939).

¹³¹ *American Airlines v. North American Airlines*, 351 U.S. 79 (1956); *Ratner v. United States*, 162 F. Supp. 518 (S.D. Ill. 1957), *aff'd*, 356 U.S. 368 (1958).

¹³² 92 Stat. 1705.

¹³³ 49 U.S.C. § 102(a)(3), (7).

three sections of the policy statement.¹³⁴ The public interest has been changed from emphasis on protecting the aviation industry to building a competitive industry for the benefit of the public. In accordance with this new emphasis, a new requirement is the strengthening of the competitive position of U.S. carriers vis-à-vis foreign air carriers to insure at least equality, as well as the opportunity to maintain and increase profitability.¹³⁵ It has already been shown¹³⁶ that it is difficult or impossible for U.S. carriers to compete with foreign carriers through unaided competition. The partnership here recommended is essential if the revised congressional mandate is to be carried out.

In addition to the competitive position of U.S. carriers, other aspects of the current public interest require consideration, including, the: (1) public (2) domestic and foreign commerce of the U.S. (3) postal service and (4) national defense.¹³⁷ All of these depend on a strong U.S. international aviation capacity. A cursory glance might suggest that the public could be served by foreign carriers as well as American carriers. However, this is only superficially true. Without U.S. competition, the public would be subject to such service and such fares as foreign carriers were willing to provide. It would not be sufficient that service was available by foreign carriers. While the competition of foreign carriers will provide better service and more competitive fares, the commerce, postal service and national defense can only be satisfied by the presence of a viable U.S. international aviation capacity. Only a U.S. aviation industry, with competition by foreign carriers, can provide the U.S. public the best possible service at the lowest possible prices.

The mandate of government today has changed from the mandate to the CAB under the original 1938 Act. Today, its obligation is to provide the atmosphere under which U.S. carriers can compete, but not to insure success. Success of the individual carriers is to be provided by the marketplace, and it is the obligation of government to insure that the competition of the marketplace is the only determinant of the success or failure of an individual carrier.

Can the proposed partnership protect the aviation industry to the detriment of the public? Does it favor one interest—the international airlines, over other interests—the flying public? The answer is clearly no. On the contrary, the protection of the flying public, as well as the domestic and foreign commerce, postal service and the national defense of the United States, the basic aspects of the revised public interest, require the proposed partnership to insure the required U.S. international aviation capacity.

¹³⁴ 49 U.S.C. § 102(a)(4), (9), (10).

¹³⁵ 49 U.S.C. § 102(a)(12).

¹³⁶ *Supra*, ch. IV.

¹³⁷ 49 U.S.C. § 102(a)(5).

VII. Conclusion

The Deregulation Act of 1978 provides for the sunset of the Civil Aeronautics Board on January 1, 1985.¹³⁸ The authority of the CAB with respect to foreign air transportation is transferred to the Department of Transportation,¹³⁹ and the Department of Transportation becomes the natural governmental partner under the proposed partnership.

The timing of this change is fortuitous, but appropriate. A new administration is in place which has stressed its empathy with business and its desire to expand business freedom. Combined with this new administration is the congressionally mandated change of the DOT as successor to the sunsetted CAB. The result is a new regulator of international aviation, with the challenge and opportunity of looking to the future without being fettered by past practices, procedures or policies. CAB sunset provides the perfect opportunity for the proposed partnership. This legislation moves the United States in a new direction, toward the greatest possible freedom to operate in the marketplace, while being divorced from the manner, purposes and goals of the first forty years of economic regulation of aviation. The combination is the ideal opportunity to initiate a bold new approach to international aviation policy.

In setting up new practices, DOT will have an advantage the CAB did not enjoy. That will be a need for less departmental consultation and joint departmental action. The potential departments are reduced, as the interest in international aviation will be limited to the Departments of State and Transportation. CAB was required to consult with both departments, State and Transportation before acting under both the 1974 International Air Transportation Fair Competitive Practices Act¹⁴⁰ and the 1979 International Air Transportation Competition Act,¹⁴¹ and departmental negotiation of a unified position was required before negotiating with a foreign government.¹⁴² The CAB, where it has final authority, is not bound to follow the advice of either department, however.¹⁴³

¹³⁸49 U.S.C. § 1551. It is likely that the CAB will terminate even earlier. Congressman Levitas (D.-Ga.) has introduced legislation moving the date up to 1983, H.R. 902, 97th Cong., 1st Sess. The CAB has split, a minority favoring October 1982 as the sunset date, while the majority recommend 1983. October 1982 is the date recommended by the Department of Transportation. For a discussion on some reasoning behind early sunset, see, Judith T. Connor, Asst. Secretary for Policy and International Affairs, U.S. Department of Transportation, Remarks before the International Aviation Club. April 21, 1981.

¹³⁹49 U.S.C. § 1551(b)(1)(B).

¹⁴⁰88 Stat. 2102, §§ 2 and 3 (Jan. 3, 1975).

¹⁴¹94 Stat. 35, § 23 (Feb. 15, 1980).

¹⁴²*Supra*, note 120.

¹⁴³The CAB has not always followed the advice received, however, *E.g.*, on May 6, 1981, the Board issued a final order in the IATA Show Cause Proceeding (Docket #32851), in spite of a request by both the Departments of State and Transportation that no further action be taken in this matter at this time. See letter dated May 6, 1981, from Drew Lewis, Secretary of Transportation to Marvin Cohen, Chairman of the CAB, and response of the chairman of the CAB of the same date.

Under sunset all responsibility for international aviation is in DOT, subject only to a duty to exercise its authority "in consultation with the Department of State."¹⁴⁴ Precisely what this clause means has not been determined. This could be interpreted to mean consultation on all aviation matters, which would be a continuation of past practice, or consultation only on matters which affect foreign policy. This latter interpretation would be a major change limiting governmental involvement and responsibility in ordinary aviation problems to a single department, the DOT.

In the past all international negotiations of aviation agreements have been chaired by the Department of State, and this could change under this language.¹⁴⁵ While it has been customary for the Department of State to chair aviation negotiations, the State Department does not chair all international negotiations in all fields, particularly in the area of commercial negotiations.¹⁴⁶ In supporting passage of the recent Foreign Sovereign Immunities Act, the State Department acknowledged these were circumstances when it was advantageous to the Department of State not to be involved in routine commercial matters, limiting its activity to those matters necessitated by the constraints of foreign policy.¹⁴⁷

The final approach accepted by the Departments of State and Transportation will have to await future development. However, at the most, two departments will be involved, conceivably only one. Either is an advantage over the three departments involved prior to sunset, and should be an aid to expedited governmental action.

The changes in international aviation from a completely regulated industry to one in which carriers are expected to compete in the marketplace is a radical change of direction. It offers not only challenges but also opportunities of great magnitude both to the airlines and to the government. Sunset will provide the opportunity for the DOT to set up the governmental partnership suggested. This partnership can and will insure that United States international air carriers can operate, compete and survive in the world marketplace.

¹⁴⁴49 U.S.C. § 1601(b)(1)(B).

¹⁴⁵Negotiation with the Japanese in April 1981, was for the first time chaired by a member of the DOT, Frank Willis, Deputy Assistant Secretary of Transportation, rather than by a member of the State Department. The reason given was the failure of the administration to have a sufficiently high level State Department negotiator in place. Whether this will have any future significance remains to be seen. It could also be significant that Mr. Willis came to the DOT from the State Department where he had previously been involved in aviation negotiations. *Avi. Daily*, at 202, April 6, 1981.

¹⁴⁶*E.g.*, the recent talks with Japan regarding reducing export of automobiles to the United States was chaired by Bill Brock, Special Trade Representative. *N.Y. Times*, sec. D1, p. 2, col. 4, March 27, 1981.

¹⁴⁷Pub. L. No. 94-350, 90 Stat. 2891, July 12, 1976.

