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Recommended Citation
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THE ROLE OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION ON Deregulation, Discrimination, AND DISPUTE RESOLUTION

PAUL STEPHEN DEMPSEY*

The Convention of International Civil Aviation was the product of a multilateral effort by 52 nations which met in Chicago in 1944. Although the drafters had hoped to reach agreement on both economic regulation (i.e., routes, rates, frequencies and capacity) and safety, they were clearly successful only as to the latter. The

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2 The Chicago Conference on International Civil Aviation of 1944 resulted from consultation among the United States, Canada and Great Britain during World War II. Fifty-four nations were represented. See U.S. Department of State, Proceedings of the International Civil Aviation Conference 1-7 (1948). The discussions focused on the nature and scope of authority for a world aviation management body. Thirty days after Chicago, the ICAO came into being on April 14, 1947, following ratification by 26 states required by the convention. Y. KIHL, Conflict Issues and International Civil Aviation Decisions: Three Cases 2 (1971) [hereinafter Y. KIHL]. Subsequent growth in the organization has been in membership (a marked increase followed the gaining of political independence by several Afro-Asian countries in the late 1950s and early 1960s) but not in task expansion.

3 The Chicago Convention was unable to reach agreement on either of the two major economic issues facing international civil aviation — routes or rates. The economic regulatory environment was left for nations to define on an ad hoc basis. Routes, frequencies, and capacity were ordinarily prescribed in bilateral air transport agreements. Until the late 1970s, the United States utilized the Bermuda Air Transport Agreement as a model for the establishment of specific price floors and service ceilings upon air carriers. Beginning with the Carter Adminis-
Chicago Convention, which entered into force in 1947, established a governing body, the International Civil Aviation Organization,4 as an arm of the United Nations to oversee and regulate the development of international aviation.5

4 The International Civil Aviation Organization (ICAO) is a specialized agency of the United Nations. It is a technical body charged with promoting intergovernmental cooperation in the field of civil aviation, and the culmination of efforts to create a technical framework for managing the political rivalry and commercial competition among nations engaged in international civil aviation. Y.KIH, supra note 2, at 1. The focus of the initial organizing efforts (i.e., technical and commercial regulation), was curbed by the irreconcilable positions assumed by participant states on the issue of the freedom of the air. For example, at the ICAO Conference in Chicago, in December 1944, the United States, anticipating a postwar growth in commercial airline activity, favored freedom of the air and open competition. The British, on the other hand, opted for a protectionist position favoring orderly, restricted development. Id. at 2. The discrepancy in positions on this key issue resulted in a non-regulatory but technical body, primarily concerned with standardizing international air navigation.

Thus, the bulk of ICAO's concern is technical, while the commercial aspects of international civil aviation are handled through a preferred system of bilateral and regional agreements. This system provides for such matters as specific routing and, in some regions, pooling arrangements between or among airlines. TOURTELLOT, Membership Criteria for the ICAO Council: A Proposal for Reform, 11 DEN. J. INT'L L. & POL'Y 51, 52 (1981) [hereinafter TOURTELLOT].

5 See generally B. CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT 31-105 (1962). Article 65 of the Chicago Convention allows the ICAO, through the Council, to enter into agreements with other international bodies for the maintenance of common services and for common arrangements concerning personnel and, with the approval of the Assembly, may enter into such other arrangements as may facilitate the work of the organization. See id. at 38.

Article 57 of the Charter of the United Nations provides for bringing the specialized agencies, established by multigovernmental agreement, with wide international responsibilities, as defined in their basic instruments in economic, social, cultural, educational, health and related fields, into relationships with the United Nations. See id. at 59.

Article 64 of the Chicago Convention on International Civil Aviation provides that the ICAO may, with respect to air matters within its competence directly affecting world security, by vote of the Assembly, enter into appropriate arrange-
The Convention superseded all the existing multilateral treaties on civil aviation (i.e., the Paris Convention of 1919 and the Havana Convention of 1928). It conferred upon the ICAO general jurisdiction to encourage "the safe and orderly growth of international civil aviation", including the responsibility to promote development, design and operation of appropriate aircraft, airport and air navigation facilities.

The Agreement provides, inter alia,

(1) that any applications submitted to the ICAO by States other than provided for in Articles 91 and 92(a) of the Convention to become parties to the Convention be immediately transmitted by the Secretary of the Organization to the U.N. General Assembly, which may recommend the rejection of such application, and any such recommendation shall be accepted by the Organization (Art. 2);

(2) for Reciprocal Representation, without vote, a specified meeting of the U.N. and meetings (general and special) of various bodies of the organization (Art. 3).

The aims and objectives of the ICAO are:

"to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

(a) Insure the safe and orderly growth of international civil aviation throughout the world;

(b) Encourage the arts of aircraft design and operation of peaceful purposes;

(c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;

(d) Meet the needs of the peoples of the world for safe, regular, efficient, and economical air transport;

(e) Prevent economic waste caused by unreasonable competition;

(f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;

(g) Avoid discrimination between contracting States;

(h) Promote safety of flight in international air navigation;

(i) Promote generally the development of all aspects of international civil aeronautics."
Today the ICAO is one of the largest specialized organizations of the United Nations. Like the United Nations, the ICAO is comprised of an Assembly of general membership and a quasi-executive Council of more limited membership. Because virtually all nations of the world are parties to the Chicago Convention, the Assembly has 150 member states. Like the United Nations, each member of the ICAO has an equal vote. Membership in the Council is based on three considerations: 1) nations "of chief importance in air transport"; 2) nations "which make the largest contribution to the provision of facilities for international civil air navigation"; and 3) other states

* Id. at Art. 44.

Note that the Preamble to the Chicago Convention emphasizes that international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world. Yet its abuse can become a threat to the general security.

* * * Id. at Art. 45. The ICAO coordinates the activities of member states toward achieving the goals of the 1944 Chicago Convention. The Convention defines the rights and obligations of the contracting States in international civil aviation and cooperation. T. Buergenthal, Law-Making in the International Civil Aviation Organization 4 (1969) [hereinafter T. Buergenthal]. The components include the Assembly, the Council, the Air Navigation Commission, the Air Transport Committee, the ICAO Legal Committee, the Committee on Joint Support of Air Navigation Services and the Finance Committee. *Id.* at 9.

The ICAO Council Assembly is the universal body corresponding to the United Nations General Assembly within ICAO structure. Each contracting State has a vote in this body which meets triennially to review and guide the work of the organization. Y. Kihl, supra note 2.

* * * Id. The ICAO Council is composed of thirty-three states, is elected by the Assembly for three-year terms, and is in permanent session. See Tourtellot, supra note 4, at 55. The most powerful body of the ICAO, the Council has been likened to the structural equivalent of the U.N. Security Council. It is in charge of the Air Transport Committee and the Air Navigation Committee. *Id.* As a continuously operating Council, this body has assumed both routine and extraordinary functions on behalf of the ICAO and stands somewhat above corresponding bodies in other international organizations. *Id.*

As the dominant organ of the ICAO, membership in the Council is prestigious and states follow and participate in its activities. The Council President is the executive officer of the ICAO and represents the Organization externally. A major duty of the Council is to adopt international standards and recommend practices and incorporate these as Annexes to the Convention on International Civil Aviation. The Council has 14 mandatory and 5 permissive functions outlined in Articles 54 and 55 of the Chicago Convention, respectively.

* * * Tourtellot, supra note 4, at 55.

* * * Chicago Convention, supra note 1, at Art. 48(b).
whose membership on the Council will ensure some measure of geographic parity.\textsuperscript{12} Unlike the United Nations Security Council, none of the thirty-three members of ICAO Council enjoys a veto.

The ICAO Council enjoys comprehensive legislative power. Thus, it holds authority to promulgate "International Standards and Recommended Practices" as Annexes to the Chicago Convention upon approval by two-thirds of the Council members. An Annex ordinarily becomes effective within three months, unless a majority of Assembly members officially object.\textsuperscript{13}

A. Extraterritorial Application of Competitive Laws

Traditionally, ICAO has focused on technical and navi-

\textsuperscript{12} Id. at Art. 50(b). The 17th(A) (Extraordinary) Session of the ICAO Assembly on March 12, 1971, adopted an amendment of Art. 50(a) of the Convention increasing the membership of the Council from 27 to 30 contracting states. See Osieke, Unconstitutional Acts in International Organizations: The Law and Practice of the ICAO, 28 Int'l & Comp. L.Q. 1, 18 (1979).

\textsuperscript{13} Chicago Convention, supra note 1, at Arts. 37, 54(1), 54(m), 90. Hence, parties to the Chicago Convention can only veto an Annex promulgated by the ICAO Council (and even then, only on a short time fuse); they need not formally ratify the multilateral obligations imposed upon them by the Council. See B. Cheng, supra note 5, at 64-65. The Annexes which have been adopted have dealt with a wide variety of issues:

- Annex 1: Personnel Licensing
- Annex 2: Rules of the Air
- Annex 3: Meteorology
- Annex 4: Aeronautical Charts
- Annex 5: Units of Measurement to be used in Air-Ground Communications
- Annex 7: Aircraft Nationality and Registration Marks
- Annex 8: Airworthiness of Aircraft
- Annex 9: Facilitation of International Air Transport
- Annex 10: Aeronautical Telecommunications
- Annex 11: Air Traffic Services
- Annex 12: Search and Rescue
- Annex 13: Aircraft Accident Inquiry
- Annex 14: Aerodomes
- Annex 15: Aeronautical Information Services
- Annex 16: Environmental Protection
- Annex 17: Security
- Annex 18: Safe Transport of Dangerous Goods by Air

As can be seen, a comprehensive variety of subjects have been addressed by the Chicago Convention and its numerous Annexes, and a wide variety of obligations have been imposed upon member states.
gation issues rather than economic aspects of international aviation. With the emergence of United States initiated deregulation, however, a growing number of nations have utilized the multilateral forum of the organization as an area in which to register their disapproval with the disruptive effects of unilateral efforts of the United States to impose its will upon the international aviation community.\(^\text{14}\) Formal protests to United States unilateral initiatives, particularly in the fields of antitrust and ratemaking, have been adopted by ICAO on several occasions since the "open skies" regime began.\(^\text{15}\)

\(^{14}\) The ICAO Secretariat elegantly expressed the difficulties which had been created by U.S. policy initiatives, as follows:

Under the sovereignty principle in Article 1 of the Chicago Convention each state determines its own regulatory policy and sets administrative, operational and legal requirements for international air transport operations to and from its territory. International airlines may therefore be subjected, in the States to which they fly, to a wide variety of actions which are not usually coordinated with other States. However, the concerns of the 24th Session of the Assembly, as expressed in Resolution A24-14, were with \(\ldots\) unilateral measures which \(\ldots\) could endanger the orderly and harmonious development of international air transport services on the basis of equality of opportunity and mutual respect of the rights of States. \(\ldots\)

In recent years a number of States have re-examined their fundamental approaches to the regulation of international air services, especially regarding competition, and the increased level of general concern about such unilateral measures may be attributed in some degree to the resultant changes in the regulatory framework. While many States have reaffirmed strictly regulated bilateral arrangements and multilateral tariff mechanisms, others, in various degrees, have adopted new economic criteria and competition standards for their air services, negotiated for more competition in bilateral arrangements and redefined the role and sometimes the ownership of their national airlines. These developments have moved many States into an increasingly open and competitive regulatory environment, producing a greater level of uncertainty and conflict between regulatory approaches. Thus, in the broad context, the concern over unilateral measures in the air transport field may be seen against the background of an increasingly diversified and fluid spectrum of regulatory approaches which not infrequently places some stress on air transport relations, both bilateral and multilateral.

ICAO Doc. AT-Conf/3-WP/3 ¶¶ 3-4 (April 9, 1985).

\(^{15}\) Similarly, IATA has been active in protesting U.S. unilateral initiatives in this field. At its 41st Annual General Meeting in Hamburg in October of 1985, it adopted a resolution welcoming "[l]egislative proposals in the US designed to ensure that the interests of foreign governments are fully taken into account." It
Diplomatic resistance to the extraterritorial application of United States antitrust laws has been robust. In 1978, the CAB issued a Show Cause Order which proposed to eliminate IATA’s antitrust immunity — a threat which received a thundering storm of protests from the world community, and was ultimately withdrawn.\textsuperscript{16} The extraterritorial reach of civil and criminal United States antitrust laws in the Laker bankruptcy case led to fierce opposition by the British government, causing a capitulation of the United States Justice Department’s Grand Jury investigation.\textsuperscript{17} When the ICAO Secretariat questioned its members regarding unilateral measures which adversely affect international air transport, it found that:

Although international air transport traditionally has been exempted from application of national laws aimed at ensuring free competition, with the adoption in recent years of air transport policies emphasizing competition, the application of such laws to this field has created a significant issue . . . . [S]everal States referred to recent United States’ actions under its competition laws and policies and their alleged destabilizing effects on the whole international air transport system.\textsuperscript{18}

\textsuperscript{16} "More recently, the removal of exemptions for airline travel agency programs in the United States has exposed international carriers to domestic antitrust laws, resulting in considerable disruption to an internationally recognized [sic] and valued system." ICAO Doc. AT-Conf/3-WP/14 §2 (July 15, 1985).


\textsuperscript{18} ICAO Doc. AT-Conf/3-WP/3 ¶6 (April 9, 1985).

With the adoption by the United States in recent years of a pro-competitive international air transport policy, its authorities questioned whether international airline activities, and in particular certain IATA tariff coordination and agency arrangements, should continue to be exempted from anti-trust prosecution. Such exemptions had previously been given rather routinely. This review was opposed by many States which want IATA cooperative arrangements to remain outside the application of any anti-trust laws. Several States also remain very disturbed about private law actions under the United States antitrust laws. The basic concerns of all
More recently, the threat of competition laws has proliferated. The Trade Practices Commission of Australia attempted to withdraw antitrust immunity from domestic and international airlines. The Commission of the European Economic Community has threatened to apply Articles 85 and 86 of the Rome Treaty to activities of international carriers. The growing burdens imposed by the actual or threatened extraterritorial application of competition laws has been described as follows:

[T]he requirement to mount legal or political actions to respond to such initiatives is time-consuming and costly. Individuals can be subject to subpoena in criminal and civil proceedings for activities recognized as normal under the prevailing aviation regime. There is also potential for time-consuming, costly and possibly commercially damaging discovery of documents. . . . Existing airline cooperative activities ranging from tariff coordination to product distribution to timetable scheduling are at risk. . . . Furthermore, the development of new programmes is hindered by uncertainty.

In response to the growing threat posed by a proliferation of potential antitrust liability, many nations have promulgated "blocking legislation" designed to circumscribe local implementation of evidentiary requests or to prevent local enforcement of judgments rendered abroad. Most nations have had limited success in their attempts to redress antitrust disputes through means of bilateral consultation; none have utilized arbitration to resolve competition conflicts. Some states have negoti-
ated bilateral agreements regarding competition laws, providing for notice and consultation prior to the extra-territorial application of one state's competition laws against the other. The Organization for Economic Co-operation and Development (OECD) has advocated multilateral efforts at conflict prevention. In a 1979 Recommendation concerning the implementation of competition legislation between member states, the OECD urged notification, exchange of information, coordination, consultation, and conciliation on such issues.

Certain regional organizations have also been active in this field. For example, the Sixth Assembly of the Latin American Civil Aviation Commission (LACAC) adopted Resolution A6-4 urging states not to take unilateral antitrust measures which affect international air transport. Similarly, the African Civil Aviation Conference (AFAFC) adopted Resolutions S6-4 and S7-1 which expressed concerns about unilateral actions taken by a state under its competition laws; the European Civil Aviation Conference (ECAC) has voiced similar objections.

unilateral measures. There is a general reluctance to use arbitration. Although one responding State believed that the possibility of arbitration could have a restraining effect, most saw it as of little practical value or useful only as a last resort.

Id.

Id. at ¶ 11. The United Kingdom forcefully urged cooperative bilateral mechanisms for implementation of antitrust principles:

Recent developments both within Europe and on the North Atlantic (the celebrated Laker case) suggest the need for a reappraisal of the appropriate means for ensuring conditions of free competitions within the framework of air services agreements. . . . [N]ew provisions for the control of anti-competitive behaviour cannot properly rely on the unilateral application of national laws, which often reflect different approaches to competition policy and may not be appropriate to the special conditions of international air transport.

Any provisions for the regulation of anti-competitive behaviour in international air services — like all other conditions governing competition in the provision of such services — must rest on arrangements agreed bilaterally between the two states concerned.

ICAO Doc. AT-Conf/3-WP/44 ¶¶ 1,4,5, (October 28, 1985).

Id.

Id. at ¶ 12 (April 9, 1985).

Id.

ICAO Doc. AT-Conf/3-WP/26 ¶ 5 (October 16, 1985).

ICAO Doc. AT-Conf/3-WP/3 ¶ 14 (April 9, 1985).
The ICAO has grown increasingly active in this area. As "open skies" began in 1977, the ICAO convened what has been described as "the most important gathering since Chicago,"<sup>29</sup> a Special Air Transport Conference in Montreal which adopted Recommendation 11 advising that "unilateral action by governments which may have a negative effect on carriers' efforts toward reaching agreement should be avoided as far as possible."<sup>30</sup> When the United States Civil Aeronautics Board issued its International Air Transport Association (IATA) Show Cause Order in 1978 threatening revocation of the antitrust shield for consensual ratemaking activities, the ICAO Council adopted a Resolution requesting Contracting States "to refrain from any unilateral action which would endanger multilateral fares and rate setting systems."<sup>31</sup> The IATA system was supported at Montreal by more than 100 governments, leaving the United States almost isolated.<sup>32</sup>

In 1980, the ICAO convened its Second Air Transport Conference. Most delegates deplored the United States' efforts in the extraterritorial application of its antitrust laws.<sup>33</sup> They argued that "unilateral actions which disrupted multilateral tariff negotiations were contrary to the spirit of the Chicago Convention, placed international cooperation in peril and, through their destabilizing influence, threatened the economic performance of the international aviation system as a whole."<sup>34</sup> The Conference issued a strong series of recommendations condemning the unilateral United States assault on the tariff

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<sup>31</sup> ICAO Doc. 9297, AT-Conf/2, at 34 (February, 1980). Similar concerns were expressed at the time by African Civil Aviation Commission, the Arab Civil Aviation Council, the European Civil Aviation Conference and the Latin American Civil Aviation Commission. <i>Id.</i>

<sup>32</sup> A. SAMPSON, supra note 29, at 144.

<sup>33</sup> ICAO Doc. 9297, AT-Conf/2, at 35 (February, 1980).

<sup>34</sup> <i>Id.</i>
integrity of IATA.\(^{35}\)

An official of the United States Department of Transportation condemned ICAO's action in Congressional testimony delivered in 1981:

ICAO is basically responsible for safety and facilitation of international air transportation. Recently, efforts have been made to expand ICAO's jurisdiction to economic matters including detailed traffic and financial reporting. This must be resisted. ICAO should have no rule in these matters.\(^{36}\)

By 1982, the ICAO Assembly had also become embroiled in the issue of the extraterritorial application of national legislation in the field of competition as it affects international aviation. It adopted Resolution A24-14 which urged member states "to avoid adopting unilateral measures which may affect the orderly and harmonious development of international air transport and to ensure that domestic policies and legislation are not applied to international air transport without taking due account of its special characteristics."\(^{37}\)

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\(^{35}\) Id. Recommendation 9

THE CONFERENCE

1. RECOMMENDS that the examination of any system for the multilateral establishment of international tariffs should involve the participation of the entire international aviation community;

2. RECOMMENDS that unilateral action by governments which may have a negative effect on carriers' efforts towards reaching agreement should be avoided;

3. RECOMMENDS that international tariffs should be established multilaterally, and when established at regional level the worldwide multilateral system should be taken into consideration; and

4. RECOMMENDS that the worldwide multilateral machinery of the AITA Traffic Conferences shall, wherever applicable, be adopted as a first choice when establishing international fares and rates to be submitted for the approval of the States concerned, and that carriers should not be discouraged from participation in the machinery.

Id. at 36.

\(^{36}\) Majiel, Impact of Current U.S. Policy On International Civil Aviation, 32 ZEITSCHRIFT FUR LUFT-UND WELTRAUMRECHT 295, 315 (1983)[hereinafter Impact of Current U.S. Policy]. Actually, the preamble and Article 44 of the Chicago Convention suggest that ICAO does have jurisdiction over economic matters in international air transportation. Id. at 315-16.

In late 1985, ICAO convened the Third Air Transport Conference in Montreal. Attended by 400 officials representing 93 Contracting States, as well as observers from non-Contracting States and international and regional organizations, the world community once again condemned the unilateral application of domestic competition legislation to international aviation. The Conference adopted Recommendation 3/1, which is about as strongly worded as any in this field. It asked the ICAO Council to develop, "as a matter of high priority," guidance material for conflict avoidance or resolution on matters involving the application of national competition laws to international air transport. Further, it urged Contracting States to avoid the unilateral extraterritorial application of their domestic competition legislation, and instead to engage in consensual bilateral consultations and negotiations with other affected governments.

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ICAO Doc. AT-Conf/3-WP/71, at 3-11 (1985). Recommendation 3/1 provides, *inter alia*, that in implementing ICAO Assembly Resolution A24-14, member States shall:

a) cooperate with each other so as to discourage unilateral measures and ensure the creation and maintenance of services between States so that fair and equal opportunities exist for the sharing of benefits by each State and its air carriers;

b) ensure that their national competition laws are not applied to international air transport in such a way that there is conflict with their obligations under their air services agreements and/or under the Chicago Convention, nor in such a way that they have extra-territorial application which has not been agreed between the States concerned;

c) consult with other Contracting States whose air carriers may be affected before taking any action likely to be construed as encompassed by Assembly Resolution A24-14; and

d) endeavour to agree bilaterally, in advance of any problems, about methods to ensure harmonious air transport relations between Contracting States whose competition policies are at significant variance with each other.

Id. The United States Government issued the following response to Recommendation 3/1:

**RECOMMENDATION 3/1**

The United States Delegation does not agree in any way with the recommendations made by Committee A with respect to the need for ICAO action — particularly precipitous action — to ameliorate
B. Tariff Setting, Approval and Enforcement

With the United States antitrust assault on IATA, and the consequential disintegration of the integrity of the international ratemaking structure, ICAO has found itself increasingly involved in regulatory issues. Among those perceived problems in the application of national competition laws to international aviation.

We believe, Mr. Chairman, that ICAO should avoid any suggestion that it is attempting to direct states to alter their basic economic policies. States have a right to apply their economic policies under Article 6 of the Chicago Convention as conditions attached to their grant of permission for the operation of air services to their territory. Furthermore, the wording of the proposed recommendations suggests either a misunderstanding of the term "extraterritoriality" or a misuse of that term solely to attack national legislation as applied to activities appropriately subject to a country's jurisdiction.

In dealing with competition laws, we believe the Committee's recommendations would take ICAO beyond its appropriate role. This is a matter where ICAO's inherent institutional competence to make recommendations to States is in question. As was said at the outset, this delegation cannot, therefore, support or accept the proposed recommendations.

To this, the Government of the United Kingdom responded as follows:
1. The United Kingdom believes that unilateral measures which amount to serious and persistent breaches of air services agreements threaten the framework within which international scheduled air services operate.
2. The single most destructive measure is the unilateral application of domestic competition laws to scheduled services, where such laws have not been designed to deal with the particular characteristics and needs of international civil aviation, and where their application has not been agreed by the other States concerned.
3. However, the United Kingdom recognizes that as governments relax their regulatory controls for the parties to air services agreements to conclude arrangements to deal with anti-competitive behaviour by airlines.
4. The United Kingdom stands ready to engage in bilateral discussions about such arrangements and, where necessary, will initiate such discussions.
5. We hope that the projected study within ICAO, which will be directed to the development of guidance material for the avoidance or resolution of conflicts between States over the application of national competition laws to international air services, will include both the identification of the anti-competitive behaviour by air carriers which needs to be controlled; and the means which States could adopt on a bilateral basis for controlling and penalizing such anti-competitive behaviour.
receiving serious attention is the role of governments in establishing and enforcing international air carrier tariffs. Traditionally, the regulatory structure for scheduled international air transport has rested upon the foundations of the numerous bilateral air transport agreements between nations which provide, *inter alia*, for the establishment of tariffs. Usually, carriers themselves have the initial responsibility for the setting of rates through intrairline negotiations usually under IATA or regional organization auspices, which are then submitted to both affected governments for their approval.\(^{40}\)

Although bilateral arrangements for tariff regulation continue to dominate international aviation, certain multilateral rate mechanisms have also been established. In 1963, eleven nations in eastern Europe and Asia consummated the Unified Air Passenger and Air Cargo Tariff Agreements. Four years later, ECAC promulgated the International Agreement on the Procedure for the Establishment of Tariffs for scheduled services, which calls for tariff negotiations by airlines and multilateral regulation thereof by fifteen Western European nations. In 1978, the eighteen member governments of the Latin American Civil Aviation Commission ratified the Commission's Resolution A3-Z.\(^{41}\) Members of the Organization of African Unity considered a 1980 Convention to establish an African Air Tariff Conference. In 1982 the United States consummated a Memorandum of Understanding on passenger fares with several members of ECAC, which delegated initial tariff negotiation and designation to the air carriers and provided for automatic governmental approval of rates falling within specified tariff ranges.\(^{42}\)

Almost all nations have legislation or other regulatory mechanisms which provide for governmental approval of

\(^{40}\) ICAO Doc. AT-Conf/3-WP/5 ¶ 1 (July 30, 1985). Nonscheduled operations have been subjected to unilateral regulation by states, although a few of the recently consummated bilaterals include tariff regulatory provisions affecting them, principally in order to protect scheduled operations.

\(^{41}\) Id. at ¶ 2.

\(^{42}\) Id. at ¶ 3.
rates for international scheduled air transportation. Many provide authority to suspend, modify, and/or establish tariffs. Generally, governments regulate rates in order to foster public interest values which balance the competing interests of airlines, consumers, and other national policies. Among the criteria utilized to assess the extent to which an appropriate balance has been achieved are the following:

the relationship between tariffs and costs; the relationship of tariffs to characteristics of service; the relationship of the proposed tariffs to those of other air carriers; the availability of tariffs to meet the degree of discrimination between users of different tariffs; and the ease of understanding and of enforcement of the tariffs. In recent years there has also been increasing emphasis on avoidance of tariffs which are predatory, which are an abuse of a dominant position or of monopoly power, or which are artificially low because of government subsidy.

Because the regulation of the tariffs of international airlines is inherently a bilateral task, nations must often compromise their differing procedures governing tariffs, which has created conflict with the multilateral negotiating mechanism. In an effort to encourage enhanced uniformity in government procedures, ICAO published a Standard Bilateral Tariff Clause in 1978. This Clause called for dual approval of the tariffs by both governments. Nevertheless, with the introduction of the United States "open skies" initiatives, a number of bilaterals subsequently consummated have called for a

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43 Id. at ¶ 7. Governments have considerably less jurisdiction over the rates of non-scheduled air carriers. Id. Although almost all nations have developed a regulatory structure with authority to approve scheduled tariffs, only about half routinely approve all aspects of international rates. ICAO Doc. AT Conf/3-WP/70 ¶ 6.5 (Nov. 6, 1985). Most have jurisdiction to enforce the tariffs they approve. Id. at ¶ 6:6.
44 ICAO Doc. AT-Conf/3-WP/5 ¶ 8 (July 30, 1985).
45 Id.
46 Id. at ¶ 9.
48 Id. at 100.
"country of origin" approach (i.e., approval or disapproval only by the nation in which the traffic originates), or a "dual disapproval" method (i.e., the tariff becomes effective unless both governments disapprove it). Some bilaterals, including the United States-ECAC Memorandum of Understanding, provide for a zone of pricing flexibility within whose perimeters the carrier-initiated rate may not be disapproved.49

The IATA became heavily involved in the consensual ratemaking process after World War II. In order to maintain the integrity of the uniform tariff scheme, IATA inaugurated a system of enforcement in 1951 which provided for detection of infractions and the actual or threatened imposition of sanctions, such as fines.50 The enforcement mechanism functioned relatively smoothly for two decades. In the early 1970's, however, it began to fall apart due to the over capacity engendered by airline purchases of large numbers of wide-bodied aircraft (purchases which were based on overly optimistic traffic projections) and the enhanced competition among IATA carriers and between non-IATA carriers and non-scheduled operators.51 Increasingly, carriers departed from IATA-designated rates. In 1971, the ICAO Assembly passed Resolution A18-18, which urged IATA to strengthen and intensify its enforcement efforts.52 Nevertheless, the rate structure was becoming unraveled.53

In 1978, IATA abandoned its "punitive" compliance program.54 In 1981, IATA replaced the punitive program

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49 ICAO Doc. AT-Conf/3-WP/2 ¶ 10 (July 30, 1985).
51 ICAO Doc. AT-Conf/3-WP/12 ¶ 5 (July 15, 1985).
53 Id.
54 ICAO Doc. AT-Conf/3-WP/2 ¶ 15 (March 26, 1985).
with a "preventive" approach by adopting the Fair Deal Monitoring Programme. In many areas carriers have consummated agreements promising not to offer discount rates lower than a specified amount below the "official" IATA tariffs. By early 1985, local market reform programs by carriers existed in more than 40 nations.

Some governments, particularly those in Africa and Latin America, would prefer a return to the pre-1978 IATA disciplinary regime of sanctions (including suspensions from IATA activities, an approach which has been applied regionally by the Orient Airlines Association). This approach, however, has been rejected on a worldwide basis because it would be "costly, ineffective, counter-productive from a public relations standpoint, and unenforceable."

Nevertheless, the ICAO's Third Air Transport Confer-

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This resulted from increased numbers of non-IATA scheduled and charter operators, large numbers of new widebody capacity during a time of weak traffic demand, plus the overriding consideration that the IATA machinery should not penalize members for competing with non-members.

ICAO Doc. AT-Conf/3-WP/12 ¶ 5 (July 15, 1986).

55 Id. at ¶ 6.

This programme directed efforts towards the development of national or regional market reform programmes tailored to specific market and regulatory conditions. As a result, local carrier groups were established in many countries throughout the world and self policing programmes instituted.

Id. See ICAO Doc. AT-Conf/3-WP/70 ¶ 6:4 (Nov. 6, 1985).


57 Id. at ¶ 16. The underlying causes of tariff malpractice have been described as follows:

[T]he incidence of malpractice [tends] to vary inversely with the financial health of the industry and to be most prevalent when demand did not meet expectations and capacity was excessive. There were a number of additional reasons why carriers might resort to tariff malpractice rather than seeking revised approved tariffs through the established machinery. Amongst these was the desire to influence demand through tariff measures more quickly than airline tariff negotiation and government approval procedures permit, to seek a competitive advantage, or to seek preferential access to particular sources of traffic such as large business enterprises for which there were no special discounts approved. The increasing multiplicity and complexity of tariff rules and conditions contributed both to unwitting as well as deliberate malpractice.
ence in 1985 was active on the subject of ratemaking and tariff enforcement. It adopted Recommendation 6/1, which urges States to encourage their air carriers to comply with established tariffs and to support local tariff integrity programs. It also implores the ICAO Council to encourage member States to enforce tariff violations of carrier agents, and implement relevant ICAO Assembly and Conference Resolutions and Recommendations. In addition, Resolution 6/2 calls upon the Council to develop the guidelines for tariff enforcement requested by Assembly Resolution A24-13.

Another issue addressed by the 1985 Conference was the widespread use of various promotional techniques for encouraging ticket purchases since the development of the deregulation philosophy in international aviation. Such techniques include “frequent flyer” programs, free

ICAO Doc. AT-Conf/3-WP/70 ¶ 6:2 (Nov. 6, 1985). Other problems of tariff enforcement were described in these terms:

International tariffs, including IATA agreements and rules, are often insufficiently precise from a legal standpoint to ensure successful prosecution for a breach. Also, the growing complexity of fares, the large number of tariff filings, a lack of adequate justification of proposals and of a universal formula for evaluating fares made the approval process so difficult that government approval often could not encompass all elements of the tariffs.

Id. at ¶ 6:7.

ICAO Doc. AT-Conf/3-WP/70 ¶ 6:14 (Nov. 6, 1985). Specifically, Recommendation 6/1 recommends the following:

1. that States cooperate with each other to encourage their designated airlines to comply with tariffs approved by the relevant aeronautical authority in accordance with applicable air service agreements;

2. that States, in addition to their tariff enforcement measures, support the local tariff integrity programmes of air carriers to the extent consistent with national policy and legislation;

3. that the Council encourage States to take the necessary measures to ensure that each airline be fully responsible for the violations by its agents of approved tariffs, except for those areas which fall under the exclusive responsibility of agents; and

4. that the Council, in addition to adopting whatever other decision it deems necessary, urge States to implement the Assembly Resolutions and the Recommendations of the Air Transport Conferences relating to the enforcement of international tariffs.

Id.

Id. at ¶ 6:20.
hotel accommodations, and joint programs with other commercial enterprises (e.g., which offer purchases of cameras, car rentals, or hotel accommodations coupons which may be redeemed for discounts on international air fares). The Conference adopted Recommendation 4/5, which urges that such incentives be regarded as a part of the international rate and filed with the appropriate governmental authorities for their approval.

C. Bias in Airline Computer Reservations Systems

During the Third Air Transport Conference in 1985, the smaller countries of western Europe (i.e., Austria, Belgium, Luxembourg, the Netherlands, and Switzerland) urged adoption of a recommendation that the ICAO Council review all aspects of computer reservations systems and formulate recommendations to protect the public against abuse and maintain fair competition between air carriers. These countries pointed out that outside the United States there is usually only one airline computer reservations system due to high investment costs. The existence of only one computer reservations system leads to the possibility of monopoly abuse such as display bias, unfair or unreasonable limitations on carrier access, incorrect information, and abuse of information.

The Conference noted that there may be a need to reg-

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60 ICAO Doc. AT-Conf/3-WP/5 ¶ 29:30 (July 30, 1985); ICAO Doc. AT-Conf/3-WP/51 ¶ 4:19 (Oct. 31, 1985).
62 ICAO Doc. AT-Conf/3-WP/91 ¶ 5 (July 2, 1985).
63 Id. at ¶ 11.
64 Id. at ¶ 5. "[R]efusal to accept a foreign airline as subscriber or biasing heavily against a foreign airline can seriously affect the marketing opportunities of such an airline." Id. at ¶ 11. The Conference recognized the existence of the following:

- a number of actual or potential abuses in the systems including display bias, restrictions on carrier participation, misinformation or improper use of information concerning individual carriers' services, and inequity in the schedule of fees. These risks were particularly high where the systems were owned by individual airlines and in those countries where only one system was available.

ICAO Doc. AT Conf/3-WP/59 ¶ 5:17 (Nov. 4, 1985).
ulate computer reservations systems in a manner similar to U.S. domestic regulation. As a result, it adopted Recommendation 5/4, which urged "that the Council study all relevant aspects of Computer Reservations Systems and formulate recommendations whose purpose would be to avoid abusive use of these systems at the international level, in order to enhance fair competition between airlines and protect the travelling public."

D. Discrimination in Airport Navigation and User Fees

Among the general objectives established by the Chicago Convention is the obligation of the ICAO to "develop the principles and techniques of air navigation and to foster the planning and development of international air transport so as to... [a]void discrimination between contracting States. . . ". In addition to this broad policy directive to assist in achieving an international aviation environment free of discrimination, the specific provisions of Article 15 of the Convention require ICAO's members to give foreign carriers non-discriminatory treatment in the use of their airports and air navigation facilities, and to assess airport and user fees at a level no

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65 ICAO Doc. AT-Conf/3-WP/59 ¶ 5:19 (Nov. 4, 1985). Prior to its sunset in 1985, the U.S. Civil Aeronautics Board promulgated regulations in this field, the most salient provisions of which are:

[W]ith respect to display of information a system owner must adopt criteria which prevent bias. [I]t is not allowed to use carrier identity as a selection criterion. CRS owners are not allowed to discriminate among participating carriers in the setting of fees. This does not mean that equal prices have to be charged of all users, but the price differences must be based on cost differences.

In the event that a system owner offers a service enhancement to any participating carrier, it has to offer it to all participating carriers on a non-discriminatory basis. [T]he System owner has to make available to all participating carriers on a non-discriminatory basis, all marketing, booking and sales data that it elects to generate from its system. [T]hese rules do not apply to a foreign airline that operates a CRS and does not display the flights of all United States carriers equally with its own flights. In other words, bias against such airline is not prohibited.


67 Chicago Convention, supra note 1, at art. 44(g).
higher than those charged local aircraft in the performance of like or similar services.\(^68\)

In 1973, the ICAO convened a Conference on the Economics of Route Air Navigation Facilities and Airports. The Conference issued a series of recommendations dealing with various aspects of airport and user charges, which were adopted by the Council.\(^69\) These recommendations were reviewed, refined, and expanded at a Conference on Airport and Route Facility Economics held in Montreal during May and June of 1981.\(^70\) Ultimately, the ICAO Council issued a document summarizing its policies on charges for airports and route air navigation facilities.\(^71\) Although not binding upon member states in the strict legal sense as a treaty or an Annex to the Chicago Convention, these policies nevertheless constitute the ICAO's highest authoritative interpretation of the obligations imposed upon nations under Article 15.

As to airport charges imposed where an airport is provided for international use, the Council expressed a general principle favoring the assessment of fees in a manner in which "users shall ultimately bear their full and fair share of the cost of providing the airport."\(^72\) In determining the fees to be assessed, airlines are not charged for nonutilized facilities and services.\(^73\) The principle of non-discrimination in assessing such fees is clearly imposed:

\(^{68}\) Id. at art. 15.
\(^{70}\) ICAO Doc. 9343-CARFE (1981). The Conference was attended by fifty-nine nations and seven international organizations. Id. at 37-43.
\(^{71}\) Statements by the Council to Contracting States on Charges for Airports and Route Air Navigation Facilities, ICAO Doc. 9082/2 (1981). The Statements supersede the 1973 draft. Id.
\(^{72}\) Id. at § 11.
\(^{73}\) Id. at § 12(ii). This is redundantly stated in three different ways:

In determining the cost basis for airport charges, the following principles should be applied: (ii) In general aircraft operators and other airport users should not be charged for facilities and services they do not use. . . (iii) Only the cost of those facilities in general use by international air services should be included. . . (v) The proportion of costs allocable to various categories of users, including State aircraft, should be determined on an equitable basis so that no users
"The charges must be non-discriminatory both between foreign users and those having the nationality of the State of the airport and engaged in similar international operations, and between two or more foreign users." 74 Certain fees, if reasonably imposed and conducted with the airline's prior consultation,75 are deemed appropriate, including passenger-service charges,76 security charges,77 and noise-related charges.78

Many of the same principles apply to fees imposed for route air navigation facilities. Where route air navigation facilities are provided for international use, providers may assess foreign airlines their fair share of the related costs, but they should not be asked to shoulder more than the

shall be burdened with costs not properly allocable to them according to sound accounting principles.

Id. at ¶ 12.

74 Id. at ¶ 13(iii). "Where any preferential charges, special rebates, or other kinds of reduction in the charges normally payable in respect of airport facilities are extended to particular categories of users, governments should ensure, so far as practicable, that any resultant under-recovery of costs properly allocable to the users concerned is not shouldered on to other users." Id. at ¶ 13 (iv). Fees charged are to be based on the weight of the aircraft rather than the length of the flight. Id. at ¶¶ 14(i),(iv). This too, eliminates another possible means of discriminating against foreign carriers.

75 Id. at ¶ 18. "The Council recognizes the desirability of consultation with airport users before significant changes in charging systems or levels of charges are introduced, it being understood that the purpose of consultation is to ensure that the provider gives consideration to the views of the users and the effect the charges will have on them. . . ." Id. at ¶ 18.

76 Id. at ¶ 15. Although the Council stated that passenger-service charges are not objectionable in principle, there are practical objections to their direct collection from the passenger. Id.

77 Id. at ¶ 16(ii). Airport authorities "may recover the costs of security measures at airports from the users in a fair and equitable manner. . . ." Id.

78 Id. at ¶ 17. Although noise alleviation or prevention measures are approved of in principle, the Council insists on the following limitations:

(i) Noise-related charges should be levied only at airports experiencing noise problems and should be designed to recover no more than the costs applied to their alleviation or prevention.

(ii) Any noise-related charges should be associated with the landing fee, possibly by means of surcharges or rebates. . . .

(iii) Noise-related charges should be non-discriminatory between users and not be established at such levels as to be prohibitively high for the operation of certain aircraft.

Id. at ¶ 17.
costs properly allocable to international civil aviation.\textsuperscript{79} The council reemphasizes the principle of non-discrimination in imposing such fees.\textsuperscript{80} The provider of the facilities is to assess the charges on the basis of distance flown and aircraft weight.\textsuperscript{81}

E. Other Areas of Air Carrier Discrimination by Governments

Even though no action was taken, the ICAO's Third Air Transport Conference in 1985 considered two major areas of discrimination — airline marketing and selling, and currency remittance difficulties. Unilateral restrictions in airline marketing and selling may impede market access by carriers or increase their costs, whether they are imposed in order to protect the local-flag carrier or are based on other policy considerations. Many states view such practices as violating the "fair and equal opportunity" provisions of the Chicago Convention, the Assembly

\textsuperscript{79} Id. at ¶ 26. See also id. at paras. 28, 30.

\textsuperscript{80} Id. at ¶ 32(iii).

States should ensure that systems used for charging for route air navigation facilities and services and any new or revised changes are established in accordance with the following principles:

(i) Any charging system should, so far as possible, be simple, equitable and suitable for general application at least on a regional basis.

(iii) The system of charges must be non-discriminatory both between foreign users and those having the nationality of the State or States providing the route air navigation facilities and services and engaged in similar international operations, and between two or more foreign users,

(iv) Where any preferential charges, special rebates, or other kinds of reduction in charges normally payable in respect of route facilities and services are extended to particular categories of users, Contracting States should ensure, so far as practicable, that any resultant under-recovery of costs properly allocable to the users concerned is not shouldered on to other users,

(v) Any charging system should take into account the cost of providing route air navigation facilities and services and the effectiveness of the services rendered.

Resolution, and most bilateral air transport agreements. Among the specific types of airline marketing and selling restrictions identified at the Third Air Transport Conference are those:

- requiring certain users, such as governmental authorities and travel agents, to favour [sic] national flag airlines;
- introducing carrier-limited point-to-point fares designed to restrict fifth freedom access;
- prohibiting issuance by foreign airlines of their own travel documentation, thus delaying and reducing airline revenues;
- requiring that ticket sales to non-residents be made in foreign currencies, thus usually increasing the cost of travel;
- conditioning visa issuances so as to direct traffic to a national airline; and
- restricting the establishment and staffing of offices by foreign airlines.

Air carriers which suffer such forms of discrimination initially seek redress directly from the involved government. If these efforts fail, they are ordinarily followed by government-to-government consultations which may lead to amending the bilateral air transport agreement by providing for carrier freedom in such areas as establishment of offices or local currency sales. The first Special Air Transport Conference in 1977 adopted Recommendation 17 which provides that "in adopting tariff agreements, each airline operating on a route or parts thereof should be given equal opportunity to participate in the carriage of the traffic. . . ." This is the only ICAO action in this area.

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82 ICAO Doc. AT-Conf/3-WP/71 ¶ 3:24 (Nov. 11, 1985).
83 ICAO Doc. AT-Conf/3-WP/3 ¶ 15 (Apr. 9, 1985). Another complaint was raised by the ECAC: "... excessive use of a monopoly for station services and levying of surcharges that cannot be justified by services provided. . . ." ICAO Doc. AT-Conf/3-WP/24 ¶ 4 (Oct. 21, 1985).
84 ICAO Doc. AT-Conf/3-WP/3 ¶ 16 (Apr. 9, 1985).
85 Id.
86 Id. at ¶ 17.
87 See ICAO Doc. AT-Conf/3-WP/71 ¶ 3:24 (Nov. 6, 1985).
Another area of concern for the international air transport industry is the problem of restrictions on the transfer of airline revenues. In 1979, $350 million was tied up in foreign countries; by mid-1984, that figure had grown to $850 million.\(^8\) The periods of delay have ranged from four months to four years.\(^9\)

Several reasons cause such delays. Developing nations have finite reserves of foreign currency, competing demands, and other priorities. The government may consider the needs of foreign commercial enterprises, such as the airline industry, not to have high priority.\(^9\) Nevertheless, these blockages of revenues earned in a foreign country not only have an adverse effect on international carriers’ cash flow, but these revenues are also subjected to inflation or devaluation while inside the bureaucratic labyrinth. As a result, these burdens have sometimes prompted a reduction or termination of services.\(^9\) For example, a large African nation lost service from six major foreign air carriers because it failed to make currency remittances for a number of years.\(^9\)

The affected airline or the IATA usually resolves these difficulties with the involved government directly. Occasionally, government-to-government consultations occur, and sometimes lead to an amendment of the bilateral air transport agreement providing for the unimpeded transfer of airline revenue.\(^9\) The 1985 Third Air Transport Conference recognized the difficulties of currency remittances. One delegate identified their existence as follows:

\[\text{T}r\text{ansfer delays by such States were not deliberate or discriminatory but stemmed from a serious shortage of hard currency. . . . [N]ew guidelines or measures proposed at the multilateral level could resolve the problem. Many bilateral air services agreements already contain}\]

\(^8\) ICAO Doc. AT-Conf/3-WP/13 ¶ 1 (July 15, 1985).
\(^9\) Id.
\(^9\) ICAO Doc. AT-Conf/3-WP/3 ¶ 18 (Apr. 9, 1985).
\(^9\) Id.
\(^9\) ICAO Doc. AT-Conf/3-WP/19 ¶ 11 (Sept. 27, 1985).
\(^9\) ICAO Doc. AT-Conf/3-WP/3 ¶ 20 (Apr. 9, 1985).
provisions dealing with airline currency transfers, but this has not ended the problem. He advocated dialogue between affected airlines and currency officials to pursue realistic compromise solutions such as negotiation of temporary rescheduling arrangements.94

The ICAO has never adopted a formal resolution addressing this problem.95

F. Reciprocal Elimination of Foreign Taxation

In the area of taxation, ICAO efforts have gone beyond attempting to secure nondiscriminatory treatment. The ICAO has encouraged removal of all taxes on foreign airlines on a reciprocal basis, so that the only nation which will impose significant taxes will be the state in which the carrier maintains the headquarters of its commercial operations.

Items in the field of international aviation historically targeted for taxation by governments include: (a) fuel, lubricants and other consumables, and (b) the freight and passenger income derived from operating equipment. The types of taxes imposed have included income, import, export, excise, sales, and consumption taxes.

The Chicago Convention did not attempt to deal comprehensively with tax questions. However, Article 24 of the Convention insists that fuel and lubricating oils on board the aircraft on arrival and retained on board upon departure shall be exempt from customs duty, inspection fees, and similar national or local duties and charges.96 Article 24 also provides for temporary duty free admittance of aircraft traveling to, from, or through the aircraft of a Contracting State,97 and for an exemption from customs and similar duties on spare parts, equipment, and aircraft stores.98

94 ICAO Doc. AT-Conf/3-WP/71 ¶ 3:26 (Nov. 6, 1985).
95 Id. See also ICAO Doc. AT-Conf/3-WP/3 ¶ 20 (Apr. 9, 1985).
96 Chicago Convention, supra note 1, art. 24(a), at 1186.
97 Id.
98 Id. This exemption from duty is, however, subject to the customs regulations of the contracting state. Id.
The London Conference of 1939 adopted the Convention Concerning Exemption and Taxation for Liquid Fuel and Lubricants Used in Air Traffic. Representatives of 38 states signed the Convention. However, it was never entered into force, because many of the nations entered war shortly after its adoption. Article 2(1)(a) thereof would have exempted fuel and lubricants contained in the tanks of aircraft from customs and other duties.

In 1951, the ICAO Council adopted two resolutions and one recommendation on the taxation of fuel, income, aircraft, and the sale or use of international air transportation. Its purpose was to reduce the problem of multiple taxation and limit the imposition of taxes to the nation in which effective management of the airline is maintained. The recommendation and resolutions were essentially reaffirmed and expanded into three Council resolutions and one recommendation in 1966.

The first resolution goes beyond Article 24(a) of the

\[\text{ICAO's Tax Policies on Taxation in the Field of International Air Transport, ICAO Doc. 8632-c/968 at 1 (1966) [hereinafter ICAO Tax Policies].}\]

\[\text{Id. at 5.}\]

\[\text{Council Resolution on Taxation of Fuel, Lubricants, and Other Consumable Technical Supplies: (Essentially Reaffirmed by Council Resolution of 14 Nov. 1966) Sec. 1}\]

\[1.\text{ When an aircraft registered in one State arrives in the territory of another State, the fuel, lubricants, and other consumable technical supplies contained in the . . . aircraft shall be exempt customs of other duties;}\]

\[2.\text{ When an aircraft . . . departs . . . the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight should be furnished exempt from all customs or other duties. . . .}\]

\[\text{Council Resolution on Taxation of the Income and Flight Equipment of International Air Transport Enterprises:}\]

\[1.\text{ Each Contracting State should . . . grant reciprocally to air transport enterprises of other Contracting States}\]

\[a.\text{ exemption from taxation on the income and gross receipts derived in that State from the operation of aircraft in international air transport; and}\]

\[b.\text{ exemption from property taxes, capital levies, increment of wealth or other similar taxes on aircraft engaged in international air transport. . . .}\]

\[\text{ICAO Doc. 7145 C/824 (1951).}\]

\[\text{ICAFO Tax Policies, supra note 99, at 1-2.}\]
Chicago Convention by not only calling for the tax exempt treatment of fuel and lubricating oils on board an aircraft, but also including consumable technical supplies such as deicing fluid, hydraulic fluid, and cooling fluid. The rationale for expanding the scope of Article 24(a) was that these commodities perform an analogous function for aircraft. If they remain onboard, they should be free of customs and other duties on a basis of bilateral reciprocity with other nations. The second resolution calls for an exemption for taxation of income earned and of aircraft operated in international air transport operations. Each nation is to negotiate bilateral tax treaties designed to eliminate double taxation generally or to include exemption provisions in their bilateral air transport agreements or domestic legislation. The third resolution

103 Id. 3-5. This resolution has largely been implemented by the United States Government. In order to qualify for the tax exemption, the airline must file Form 637 with the U.S. Department of Internal Revenue. ICAO's Policies on Taxation in the Field of International Air Transport, Supp. (Amendment 5) at 1, ICAO Doc. 8632-c/968 (1985) [hereinafter Amendment No. 5].

Forty-nine countries provide full reciprocal [exemptions to the United States]: Austria, Bahamas, Belgium, Benin, Bermuda, Brazil, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Dominican Republic, El Salvador, Ecuador, Finland, Greece, Guyana, Honduras, Iceland, India, Islamic Republic of Iran, Ireland, Israel, Ivory Coast, Jamaica, Jordan, Lebanon, Mexico, Morocco, Kingdom of the Netherlands (also Netherlands Antilles), Nicaragua, Norway, Pakistan, Panama, Peru, Poland, Philippines, Republic of Korea, Romania, Senegal, Spain, Sweden, Switzerland, Trinidad and Tobago, Union of Soviet Socialist Republics, Venezuela, Yugoslavia.

Id. at 2. Seventeen countries provide limited reciprocal exemptions:

Argentina, Australia, Cuba, Egypt, France, Federal Republic of Germany, Italy, Japan (full reciprocity being negotiated), Kenya, New Zealand, Portugal, Saudi Arabia (full reciprocity being negotiated), South Africa, Tanzania, Thailand, Uganda, United Kingdom. Limited reciprocal exemptions are also provided by Taiwan.

Id.


(1) Each Contracting State shall, to the fullest possible extent grant reciprocally

(a) exemption from taxation on the income of air transport enterprises of other Contracting States derived in that State from the operation of aircraft in international air transport; and

(b) exemption from property taxes, and capital levies or other similar taxes, on aircraft of other Contracting States engaged in international air transport;
calls for the elimination of sale or use taxes, including taxes on gross receipts of aircraft operators and taxes levied directly on passengers and shippers (including taxes on cargo air waybills, tickets, head taxes, and embarkation and disembarkation taxes). Finally, the Council issued a recommendation that fuel, lubricants, and other consumable technical supplies aboard an aircraft be exempted from taxation when the aircraft makes successive stops at two or more international airports in a single customs territory.

(2) Each Contracting State shall endeavor to give effect to paragraph (1) above, by the bilateral negotiation of agreements relating to double taxation generally, or by such other methods as the inclusion of appropriate provisions in bilateral agreements for the exchange of commercial air transport rights, or by legislation granting such exemption to any other State that provides reciprocity.

Id. The net result of this resolution would be to limit taxation upon the earnings and fleet of international airlines to the nation in which effective management of the enterprise is located. Id. The U.S. has long granted such exemptions in its bilateral agreements and has entered into such agreements with the following nations:

- Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Bermuda, Canada, Chile, China, Colombia*, Denmark, Egypt, Finland, France, Federal Republic of Germany, Greece, Hungary, Iceland, India, Islamic Republic of Iran*, Ireland, Italy, Japan, Jordan, Kuwait, Lebanon*, Liberia, Luxembourg, Malta, Mexico, Morocco, Kingdom of the Netherlands, (and Netherlands Antilles), New Zealand, Nigeria, Norway, Pakistan, Republic of Korea, Poland, Portugal*, Romania, South Africa, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, Union of Soviet Socialist Republics.

* Exemptions are granted upon a review of the country tax laws by the U.S. Internal Revenue Service. Continued exemption subject to a review of any changes in laws.

Amendment No. 5, supra note 103, at 2-3.


(1) Each Contracting State shall. . . eliminate as soon as its economic conditions permit all forms of taxation on the sale or use of international transport by air, including taxes on gross receipts of operators and taxes levied directly on passengers or shippers.

Id. The United States ordinarily imposes a $3.00 tax on international air travel beginning in its territory, pursuant to sections 4261 and 4171 of the Internal Revenue Code. Where travel is limited to 225 miles of the U.S. border in Mexico or Canada, the tax is 8% rather than $3.00. Amendment No. 5, supra note 103, at 3.

106 ICAO's Tax Policies, supra note 99, at 7. The United States grants such exemptions to international flights on the basis of reciprocity. Amendment No. 5, supra note 103, at 2.
G. Dispute Resolution Mechanisms and Sanctions

Chapter XVIII of the Chicago Convention establishes a mechanism for dispute resolution of disagreements arising between member states on issues of interpretation of the Convention or its Annexes.\(^{107}\) If negotiations between the governments fail to resolve the dispute, they may submit it to the Council for decision.\(^{108}\) No council member may vote on any dispute in which it is a party.\(^{109}\) Appeals of the Council's decision may be made to the Permanent Court of International Justice or an ad hoc arbitral tribunal,\(^{110}\) whose decision shall be final and binding.\(^{111}\)

Chapter XVIII also includes some rather stringent sanctions for noncompliance with decisions rendered under its provisions. Where the Council concludes that an airline is not conforming to a final decision, member states shall not allow the carrier to pass through their airspace.\(^{112}\) Also, any state found in default of the Chapter's provisions may have its voting powers in the Assembly suspended.\(^{113}\)

\(^{107}\) Chicago Convention, supra note 1, at arts. 84-88. The Chicago Convention was preceded by the Interim Agreement on International Civil Aviation, which established the interim Council on the Provisional International Civil Aviation Organizations [PICAO], and gave it a broad jurisdiction over the settlement of aviation disputes. Article III, section 6(8) thereof gave the interim Council power to "act as an arbitral body on any differences arising among member States relating to international civil aviation matters which may be submitted to it", and Article VIII, section 9 gave the Council authority to review airport use charges and "report and make recommendations thereon..." Fitzgerald, The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council, 1974 CAN. Y.B. INT'L L. 153, 154-55 [hereinafter ICAO Jurisdiction].

\(^{108}\) Chicago Convention, supra note 1, art 84. "[B]efore any request is filed with the ICAO Council for its decision, it is necessary for the aggrieved Contracting States to try to settle the matter by negotiation." Hingorani, Dispute Settlement in International Civil Aviation, 14 ARB. J. 14, 16 (1959) [hereinafter Hingorani]. See also B. CHENG, supra note 5, at 479-84 for a discussion of the suspension of air services agreements.

\(^{109}\) Chicago Convention, supra note 1, at art. 84.

\(^{110}\) Id. at art. 85.

\(^{111}\) Id. at art. 86.

\(^{112}\) Id. at art. 87.

\(^{113}\) Id. at art. 88.

The specialized agencies, exercising as they do higher degrees of
The Chicago Conference also produced two additional multilateral agreements providing for the exchange of traffic rights — the Transit Agreement and the Transport Agreement. They employ identical language regarding the settlement of disputes. When a nation suffers injury under the agreements, it may request the Council to examine the problem. The Council then calls the parties into consultation. Should consultations fail to resolve the controversy, the Council "may make appropriate findings and recommendations. . . ." The Agreements also ad-

supervision over specific patterns of transnational interaction, are in a proportionately better position to contribute to an enforcement program [than is the United Nations]. Since they are closer to specific value flows, they are more capable of precipitating immediate indugences and deprivations upon enforcement targets. . . . The ICAO may announce termination of landing and overflight rights and may restrict or cancel other privileges.


The Transport Agreement provides for the privileges of: (1) flying across each contracting state's territory and landing for nontraffic purposes; (2) taking on passengers, mail, and cargo destined for the territory of the State whose nationality the aircraft possesses; and (3) taking on passengers, mail, and cargo destined for the territory of any other contracting State, and delivering passengers, mail, and cargo coming from any such territory. Transport Agreement, supra this note, at art. I., § 1.

Acceptance of the Transport Agreement has been rather limited and slow. See generally W. Wagner, International Air Transportation as Affected by State Sovereignty 140-46 (1970). By 1984, ninety-six nations had accepted the Transit Agreement, while only eleven remained parties to the Transport Agreement. M. Bowman and D. Harris, Multilateral Treaties Index and Current Status 111-12 (1984).

115 Transit Agreement, supra note 114, at art. II, § 1; Transport Agreement, supra note 114, at art. III, § 2.

A contracting State which deems that action by another contracting State under this Agreement is causing injustice or hardship to it, may request the Council to examine the situation. The council shall thereupon inquire into the matter, and shall call the States concerned into consultation. Should such consultation fail to resolve the difficulty, the Council may make appropriate findings and recommendations to the contracting States concerned. . . .

Transit Agreement, supra note 114, at art. II, § 1; Transport Agreement, supra note 114, at art. IV, § 2.
dress disputes as to their interpretation or application; should negotiations between the states fail to resolve such disputes, the conflict resolution provisions of Chapter XVIII of the Chicago Convention may be employed.116

Many of the early bilateral air transport agreements designated the ICAO as the dispute resolution arbitral or adjudicatory forum.117 The newer agreements have largely abandoned reference to the ICAO in this capacity, although some give authority to the President of the ICAO Council to assist in designating arbitrators. No conflict has ever been submitted to the ICAO for arbitration under the terms of the Chicago Convention, although the ICAO has been active on occasion in helping to designate arbitral panels.118

In 1957, the Council promulgated Rules for the Settlement of Differences, which establish adjudicatory procedures for disputes submitted to it under Chapter XVIII.119 Significantly, Article 14 thereof allows the Council to ask the parties to engage in direct negotiations at any time.120 During such negotiations, the formal complaint mechanism of Article 84 of the Chicago Convention is suspended, although the Council may impose specific time limits on the negotiations.121 The Council may render

116 Id.
If any disagreement between two or more contracting States relating to the interpretation or application of this Agreement cannot be settled by negotiation, the provisions of Chapter XVIII... shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the [Chicago Convention].
Transit Agreement, supra note 114, at art. II, § 2; Transport Agreement, supra note 114, at art. IV, § 3.

117 Milde, Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO), in SETTLEMENT OF SPACE DISPUTES 87, 88 (1980) [hereinafter ICAO Dispute Settlement].

118 Id. at 88, 94.


120 Rules, supra note 119, at art. 14(1).

121 Id.
any assistance which is likely to facilitate successful conclusion of the negotiations, including the designation of a conciliator.\textsuperscript{122} Article 14 departs from the adjudicatory focus of most of the Rules, emphasizing mediation or conciliation and the good offices of the Council as a means of dispute resolution.\textsuperscript{123} As Professor Buergenthal has noted, "This provision indicates that the Council considers that its main task under Article 84 of the Convention is to assist in settling rather than in adjudicating disputes."\textsuperscript{124}

H. Adjudications Before the ICAO Council

In four decades since the promulgation of Chapter XVIII, only three disputes have been submitted to the Council for formal judicial resolution. In none of the cases did the Council issue a decision on the merits of the case,\textsuperscript{125} and none of the cases involved issues of economic discrimination or anticompetitive conduct.

\textsuperscript{122} Id.

\textsuperscript{123} ICAO Dispute Settlement, supra note 117, at 89; Gariepy & Botsford, The Effectiveness of the International Civil Aviation Organization's Adjudicatory Machinery, 42 J. Air L. & Com. 351, 358-59 (1976) [hereinafter Gariepy & Botsford].

The India-Pakistan dispute of 1952 prompted the ICAO Council to adopt rules emphasizing the use of negotiation as a means of dispute resolution. Professor Fitzgerald has noted that "[a]pparently, the Council was even at the time aware of its possible inadequacy as a judicial body, and was reluctant to discharge the judicial functions conferred on it by the Chicago Convention." ICAO Jurisdiction, supra note 107, at 157.

\textsuperscript{124} T. BUERGENTHAL, supra note 8, at 136. The ICAO has been more successful in assisting the consensual resolution of disputes than have most of the other organs of the U.N. Garrett Hardin described the cause of the impotence of the United Nations succinctly thus: "The United Nations is a toothless tiger, because the signatories of its charter wanted it that way." Hardin, Living On a Lifeboat, 24 Bioscience 561 (1974). And, former U.N. Ambassador Jeanne Kirkpatrick expressed the failures of the agency in the arena of dispute resolution as follows:

A mediator has to be above the conflict, and the conflict resolution machinery at the United Nations is not above politics; it is a part of world politics. And it is not realistic to believe that any reform of the U.N. structure is possible to make it an effective instrument of conflict resolution.


\textsuperscript{125} ICAO Dispute Settlement, supra note 117, at 90.
1. *India v. Pakistan (1952)*

The first dispute involved a complaint by India against Pakistan, filed with the Council in April of 1952. India alleged that Pakistan's refusal to permit Indian aircraft to fly over its territory to and from Afghanistan constituted a breach of the Chicago Convention. Because no rules of procedure had then been promulgated, the Council appointed a Working Group of three Council representatives to assist in devising appropriate procedures. The Working Group suggested, *inter alia*, that the parties "enter into further direct negotiations as soon as possible with a view to limiting to the greatest possible extent the outstanding issues." By June of 1953, the parties had reached an amicable resolution of the controversy and so informed the Council.

2. *United Kingdom v. Spain (1969)*

The second complaint was filed by the United Kingdom against Spain, alleging Convention violations by the establishment of a prohibited zone near Gibraltar. All the pleadings were filed while bilateral discussions proceeded between the parties at the United Nations and privately. In November of 1969, the Council President reported that the parties had informed him that they wished the complaint deferred *sine die.* Consideration was thus deferred indefinitely.

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128 ICAO Doc. 7291 (C/845) 162-65 (1952).

129 Exchange of Notes, Apr. 22, 1953, India-Pakistan, 164 U.N.T.S. 3 (1953). See also ICAO Doc. 7361 (C/858) 15-26 (1953); ICAO Doc. 7367 (A7/P1) 74-76 (1953); *ICAO Jurisdiction, supra* note 107, at 156.

130 See Note, 14 B. U. Int'l L.J. 612 (1973); *ICAO Jurisdiction, supra* note 107, at 185.

3. Pakistan v. India (1971)

The most interesting of the three disputes was the third complaint, filed by Pakistan against India in February of 1971.132 This was triggered by India’s suspension of Pakistani flights over its territory after two Indian Nationals hijacked an Indian aircraft, flew it to Pakistan, and blew it up, allegedly with the complicity of the Pakistani government.133 The suspension of service effectively isolated East and West Pakistan from feasible air transportation. The hijacking itself was inspired by the Kashmir uprising of 1965.134

In August and September of 1965, an uprising in Kash-

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133 See generally Application Instituting Proceedings (India v. Pakistan), 1973 I.C.J. Pleadings (Appeal Relating to the Jurisdiction of the ICAO Council) 6-7 (Aug. 30, 1971) [hereinafter Application Instituting Proceedings]. ICAO Dispute Settlement, supra note 117, at 92. On January 30, 1971, two Indian nationals (allegedly members of the Kashmir National Liberation Front [KNLF] hijacked an Indian aircraft en route to Jammu, India and diverted it to Lahore, Pakistan. Upon landing, the 28 passengers and 4 crew were released, but the hijackers remained in possession of the aircraft and threatened to blow it up unless their demands were met. The hijackers sought asylum in Pakistan and the release of 36 KNLF prisoners held by India. While the pair retained control of the plane, Pakistan granted asylum and allowed them to visit the terminal to receive food and contact others. India refused to release any prisoners, however, and two days after the hijacking began, the hijackers blew up the plane as Pakistani authorities and the media looked on. The aircraft, its cargo, and the baggage of the passengers were destroyed. It took 49 hours for the passengers and crew to be returned after their release to the Indian border 36 miles from Lahore.

134 There has always been a great deal of tension in relations between India and Pakistan, especially in the volatile Kashmir and Jammu regions, which occupy the extreme northern portions of both countries. The border located in those regions is disputed by India, and despite agreements between the two countries to decide the future of the Kashmir and Jammu regions according to the wishes of the people living there, India never fulfilled its obligations under the agreements. As a result, India has had to deal with terrorist activities in Kashmir and Jammu which have been applauded, if not aided, by Pakistan.

The counter-memorial of Pakistan filed with the International Court of Justice discussed a bilateral agreement entered into by India and Pakistan to determine the future of Jammu and Kashmir through a fair and impartial plebiscite. Pakistan also accused India of preventing the plebiscite from ever taking place. Counter-Memorial of Pakistan (India v. Pakistan), 1973 I.C.J. Pleadings (Appeal Relating to the Jurisdiction of the ICAO Council) 373 (Feb. 29, 1972) [hereinafter Counter-Memorial of Pakistan].
mir had fueled tensions along the border, which led to armed conflict between the two countries. During the conflict, which lasted almost three weeks, each nation suspended air traffic within its boundaries of aircraft registered by the other. India's immense geographical size separated what was then East and West Pakistan which posed a particular hardship for Pakistan. The suspension was resolved by the signing of the Tashkent Declaration in early 1966. The Declaration was intended to help normalize relations between the two states. Under its general terms, overflights of each other's territories resumed, but landings were not permitted. The Declaration imposed status quo which continued until the 1971 hijacking.

India unilaterally suspended Pakistan's overflight privileges on February 4, 1971, five days after the hijacking. Both were parties to the Chicago Convention and the Transit Agreement, and Pakistan sought to invoke the dispute resolution mechanisms of the ICAO Council by filing a complaint with the Council. The complaint alleged violations of Article 5 of the Chicago Convention and Article 1 of the Transit Agreement, under which contracting parties are granted the privilege to overfly or make non-traffic stops in the territories of other contracting parties, whether the international air services are scheduled or unscheduled.

Early on, the proceedings before the Council encountered a roadblock. India filed a preliminary set of objections on May 28, 1971, challenging the jurisdiction of the Council. India argued that the two states had suspended

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155 When overflight privileges were unilaterally suspended by India in 1971, Pakistan was forced to route its flights through Colombo, Sri Lanka, doubling the distance to be traveled from approximately 1300 nautical miles to more than 2600. See Memorial of India (India v. Pakistan), 1973 I.C.J. Pleadings (Appeal Relating to the Jurisdiction of the ICAO Council) 91 (Dec. 22, 1971) [hereinafter Memorial of India].


157 See Chicago Convention, supra note 1, and Transit Agreement, supra note 108.
the Chicago Convention and the Transit Agreement in 1965: air traffic between them was governed instead by the Special Agreement under the Tashkent Declaration. Under both the Chicago Convention and Transit Agreement, however, the Council has jurisdiction over disagreements between contracting states relating to their interpretation or application. But India argued that there was no disagreement relating to the interpretation or application of either the Chicago Convention or the Transit Agreement. Further, it claimed the Council had no jurisdiction to resolve disputes concerning the Special Agreement under the Tashkent Declaration.

In response, Pakistan urged that any dispute between two contracting states relating to the suspension or termination of the Chicago Convention or the Transit Agreement should be regarded as a disagreement relating to their interpretation or application and the present dispute was, therefore, within the Council's jurisdiction. In any event, the Tashkent Declaration merely reinstated the Convention and Transit Agreement; it did not create any special regime.

On July 19, 1971, the Council affirmed that it had jurisdiction over the Pakistani complaint. India appealed to the International Court of Justice (ICJ), pursuant to Article 84 of the Chicago Convention. Proceedings before the Council were held in abeyance pending the outcome of the appeal.

The central issue before the ICJ was whether Pakistan's complaint disclosed the existence of a disagreement relating to the application of the Chicago Convention or the Transit Agreement. The Court characterized the issue in a liberal way, stating that the legal question was whether or not the dispute could be resolved without any interpre-

138 Chicago Convention, supra note 1, at art. 84. See also Transit Agreement, supra note 114, at art. II, § 2.
139 Id.
140 Memorial of India, supra note 135, at 48.
tation or application of the relevant treaties at all. If it could not, the Court concluded, then the ICAO Council must be competent to hear the case.

India took the position that absolutely no interpretation or application of the Chicago Convention or the Transit Agreement was necessary. The two treaties were allegedly irrelevant because: (1) they were not in force, or had been suspended, between the two parties, or (2) the phrase "interpretation or application" did not include the terms "suspension" or "termination." India asserted that the treaties were terminated or suspended either in 1965, during the outbreak of hostilities, and subsequently replaced by a Special Agreement under the Tashkent Declaration, or in 1971, when Pakistan materially breached its obligations under those treaties in its actions toward the hijackers.

The ICJ responded that even India's defenses required some degree of interpretation or application of the treaties. The Court voted 14-2 to uphold the jurisdiction of the ICAO Council to hear the case. India's contention that the Special Agreement replaced the treaties required interpretation or application of the Chicago Convention, Articles 82 and 83. Article 82 requires that contracting states not enter into obligations or understandings inconsistent with the treaty's terms. Article 83 requires that any new agreements (which are not inconsistent with the obligations imposed by the Chicago Convention) be registered with the Council.

As to India's argument that Pakistan breached its obligations under the treaties by its actions arising out of the 1971 hijacking, the Court answered that a finding of a material breach requires a conclusion that a violation of a provision essential to the accomplishment of the purpose of the treaty has occurred. Such an analysis inherently

141 I.C.J. Judgment, supra note 132, at 47.
142 Id.
143 Id.
involved an examination of the treaties concerned.\textsuperscript{144}

Finally, the ICJ considered India's argument that the treaties had been suspended or terminated, and that as a result the dispute could not involve interpretation or application of those treaties. Article 89 of the Chicago Convention allows a contracting state to disregard its obligations under the Convention in times of war or national emergency. Pakistan argued that under Article 89, India had a license to ignore obligations during those special circumstances. Therefore, after the emergency or war had ended, its obligations resumed automatically. India interpreted the provision differently. It believed the purpose of Article 89 was to emphasize that the Convention did not affect any rights in international law that the parties might hold under special circumstances. The ICJ concluded that the fact that the parties disagreed as to the provision's meaning proved the existence of a disagreement relating to the interpretation or application of the Convention. The Council, therefore, was vested with jurisdiction even if there was only one such provision.\textsuperscript{145} As one commentator noted, the decision makes it clear that "the unilateral denunciation of a treaty will not enable a party to escape the application of the clauses in the treaty pertaining to the settlement of disputes relating to the treaty."\textsuperscript{146}

The ICJ decision, issued August 18, 1972, cleared the way for consideration of the merits of the case by the ICAO Council. The conflict was essentially rendered moot when Bangladesh emerged as a new nation, replacing East Pakistan. In July of 1976, India and Pakistan issued a joint statement discontinuing the proceedings before the ICAO Council.\textsuperscript{147}

\textsuperscript{144} \textit{Id.}


\textsuperscript{146} See \textit{ICAO Jurisdiction}, \textit{supra} note 107, at 184.

\textsuperscript{147} \textit{ICAO Dispute Settlement}, \textit{supra} note 117, at 93.
I. Strengths and Weaknesses of the ICAO's Dispute Resolution Machinery

There are many reasons why so few disputes have been submitted to the ICAO Council for adjudication under Article XVIII. First and foremost is the nature of the Council itself — it is a political body comprised of governmental representatives appointed for their technical, administrative or diplomatic skills rather than their legal abilities. Hence, they do not possess that measure of independence and autonomy of an unbiased neutral decisionmaker that one normally expects of a judge. For example, during the second Pakistan v. Indian proceeding, several Council members requested postponement of a vote while they consulted their respective governments to obtain instructions.

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148 T. BUERGENTHAL, supra note 8, at 123-24.
149 As Dr. Michael Milde, Principal Legal Officer of ICAO, has noted: "The Council of ICAO cannot be considered as a suitable body for adjudication in the proper sense of the word — i.e., settlement of disputes by judges and solely on the basis of respect for law. The Council is composed of States (not independent individuals) and its decisions would always be based on policy and equity considerations rather than on purely legal grounds. . . . Truly legal disputes (recognized by States concerned as being purely legal) can be settled only by a true judicial body which can bring into the procedure full judicial detachment, independence and expertise. The under-employed ICJ is the most suitable body for such type [sic] of disputes.

ICAO Dispute Settlement, supra note 117, at 93, 95 (emphasis in original).
150 ICAO Dispute Settlement, supra note 117, at 90. As Professor Fitzgerald has eloquently noted:
In the case of the ICAO Council, the persons sitting on the bench are demonstrably the national representatives of the respective member states. They are not, for the purposes of considering disagreements or complaints, divested of their character as national representatives. Hence, there is at the outset a contradiction in the ICAO procedure for the settlement of disputes which provides that representatives of states sitting as such will be called upon to act in a judicial capacity. Indeed, a perusal of the minutes of the Council meetings of July 28-29, 1971, shows that some of the members wanted to defer decisions because they wished to await instructions from their governments. Other representatives had already apparently received their instructions. . . . In short, it is a contradiction in terms to say that a state can be a judge. It is also a contradiction to hold that a representative who
In the postwar euphoria in which the Chicago Convention was consummated, it was no doubt anticipated that the world community would cooperate on the basis of man's higher virtues and aspirations. But nations, being created by, and reflections of, man, reflect the full spectrum of his strengths and weaknesses. Hence, the assumptions upon which adjudicatory jurisdiction was conferred to the ICAO may have been specious.

Beyond the problem of the absence of an impartial decision maker is the potential cost of lengthy adjudicatory proceedings which consume parties' time and money. The sheer size of the ICAO Council (thirty-three members) would increase the likelihood of a lengthy evidentiary and decisional process. Further, it would be possible to have as many as sixteen separate dissenting opinions.

Moreover, the Council itself has not exhibited enthusiasm for deciding cases under Chapter XVIII. In each of the three cases filed, the delay in the proceedings has enabled the parties to resolve the controversy amicably and consensually. The 1957 Rules suggest a preference for consultations and negotiations rather than adjudication and sanctions. Hence, mediation, conciliation, and the prudent use of good offices are perhaps the more efficient and effective means of conflict resolution, and the one preferred by the ICAO itself. Of course, the exist-

receives instructions from a state as to how he should act with respect to a particular disagreement could be seen to act judicially.

ICAO Jurisdiction, supra note 107, at 169 [citations omitted].

151 T. BUERGENTHAL, supra note 8, at 124.
152 Id.
153 ICAO Dispute Settlement, supra note 117, at 90-93.
154 See id. at 94.
ence of Chapter XVIII's adjudicatory machinery may itself encourage nations to resolve their disputes amicably.\textsuperscript{156} It undoubtedly gives the Council additional leverage in its efforts at mediation and conciliation.\textsuperscript{157}

However, some commentators argue that ICAO's dispute resolution mechanism ought to be employed to deal with problems of economic discrimination in international aviation. Dr. Gertler has noted that despite the ICAO's shortcomings it is not quite understandable why states have not approached the ICAO concerning some discriminatory practices, such as complaints over landing fees, given the clear mandate of Article 15 of the Convention. By precedent-setting decisionmaking, the ICAO Council could achieve more significant progress towards an orderly flow of international air transport commerce than is possible in isolated bilateral contexts through unilateral national protective measures.\textsuperscript{158} Indeed, assuming that the ICAO Council is a body which can render only a political decision reflecting the position of member governments, there may be instances when the complaining party believes that it would win on such grounds as, for example, where landing fees at a popular international airport are exorbitant and discriminate against foreign carriers. The offended governments might be inclined to direct their Council representatives to vote that the fees violate Article 15 and the Council's 1981 Policies on Charges for Airports and Route Air Navigation Facilities. The potential sanctions under Articles 87 and 88 are among the most severe available to any multilateral organization. Their threat would likely compel the losing party to comply with the Council's determination expedi-

\textsuperscript{156} See ICAO Dispute Settlement, supra note 117, at 94. See also Gariepy & Botsford, supra note 123, at 359, 361-62.

\textsuperscript{157} Gariepy & Botsford, supra note 123, at 361-62. "[W]hen the Council invites the parties to enter into further negotiations, for example, it is rather difficult for them to decline such an invitation, for there is always the possibility real or imagined that this uncompromising stance might affect the Council's decision in the case." T. Buergenthal, supra note 8, at 195.

\textsuperscript{158} Gertler, supra note 81, at 803-04.
tiously. And if it believed the Council's conclusions to be legally unsound, it could appeal the decision to a more neutral tribunal (i.e., the ICJ or an ad hoc arbitration board) for legal review under Article 86.

J. Specific Cases Involving Methods of Dispute Resolution and Arbitration in International Aviation Disputes

1. United States v. France (1963)

While many bilateral air transport agreements contain clauses for compulsory arbitration of disputes upon the insistence of either party, prior to 1962 none had been invoked. Most international aviation conflicts had instead been resolved between the governments and/or airlines through consultation or negotiation. Hence, the arbitral decision involving a controversy which arose with France over United States flag rights beyond Paris in 1963 was a landmark in the history of dispute resolution.¹⁵⁹

The conflict arose over interpretation of the traffic rights conferred by the United States-France Air Transport Services Agreement of 1946.¹⁶⁰ Under it, Route One granted United States-flag carriers the opportunity to operate between the United States and Paris, thence to Switzerland, Italy, Greece, Egypt, "the Near East," India, Burma, and Siam (presently Thailand), to Hanoi and thence to China and beyond. Route Two allowed United States-flag service from the United States via Spain to Marseille, then via Milan and Budapest to Turkey and beyond.¹⁶¹ Trans World Airline was immediately certified to serve Route One; competitive service by Pan American between the United States and Paris, and thence on to Rome and Beirut, was inaugurated in 1950.¹⁶² When Pan American attempted to initiate service to Beirut, the

¹⁶¹ Id. at Schedule II.
¹⁶² Larsen, supra note 159, at 233.
French government argued that Beirut was not included in the term "Near East," but allowed service to begin nevertheless. In 1955, Pan American announced its intention to fly beyond Beirut to Tehran. France again objected on the same grounds, but acquiesced in the new service. However, the French government refused to allow flights by Pan American between Paris and Istanbul, although Pan American continued to serve the market without embarking passengers at Paris. Similar service was begun to Ankara, Turkey, shortly thereafter. In 1958, France formally announced its intention to terminate the bilateral agreement. Notice of renunciation was withdrawn just prior to its effective date, in return for an expansion of routes for the French flag-carriers, allowing them to serve Los Angeles and San Francisco. In 1960, the United States and France exchanged notes, giving France access to California via Montreal (but without "fifth-freedom" rights), and providing that "existing service" provided by Pan American to Paris and Istanbul would continue undisturbed. But, in 1962, the French government informed Pan American that all its traffic


Shortly before Pan American proposed service to Istanbul in 1955, it proposed to extend its Paris-Rome-Beirut service to Tehran, Iran. The Secretary General of Civil and Commercial Aviation told the United States air attaché that United States carriers did not have the right to serve Tehran via Paris under the Agreement, (a) because Tehran lay too much to the north to be included in a reasonably direct route to India; and (b) because Iran was part of the Middle East and not the Near East. The United States air attaché replied that those two terms were interchangeable. Several further exchanges followed between French and American officials and Pan American, but the service was in fact inaugurated, and maintained (with varying frequencies) until 1961.

rights between Paris and Tehran were suspended.\textsuperscript{168}

Negotiations between the two governments reached an impasse in 1962, prompting the United States to invoke the compulsory arbitration clause, Article X, of the Agreement.\textsuperscript{169} Professor Lowenfeld summarized the heart of the controversy:

The amount of money directly involved in the dispute — that is revenue from Paris-Turkey and Paris-Tehran passengers carried by Pan American — was estimated at about $400,000 per year. Most of these passengers would, presumably, go over to Air France if Pan American could not take them. If Tehran were to be prohibited entirely to planes stopping at Paris (as contrasted with continued blind sectors' rights) the loss to Pan American would be much greater — perhaps as much as $2,000,000 — because its entire route schedule would have to be rearranged. Beyond this, however, both sides saw the arbitration as a symbolic test. The United States felt that France had been harassing the American carriers with a view to once more renegotiating the Agreement; and France felt that the United States, not content with its undue advantage of 1946, had continued to reach out for more.\textsuperscript{170}

Two questions involving interpretation of the Agreement were submitted to the three-member arbitration panel: (1) may a United States carrier provide service between the United States and Turkey via Paris, and embark and disembark, in Paris, passengers destined for or originating in Turkey; and (2) may a United States carrier provide service between the United States and Iran via Paris, and embark and disembark in Paris passengers destined for, or originating in Iran?\textsuperscript{171}

The arbitration tribunal concluded that neither Turkey nor Iran was included in Route One of the 1946 bilateral

\textsuperscript{168} A. Lowenfeld, \textit{supra} note 3, at II-24.
\textsuperscript{169} Id. at II-24-25.
\textsuperscript{170} Id. at II-25 [citations omitted].
agreement, in the former case because a route to India via Turkey is specified in Route Two. Nevertheless, the Tribunal attached great weight to French consent in allowing such service to be inaugurated and continued for several years. It concluded that a United States carrier could continue to serve Turkey via Paris, not by virtue of the 1946 bilateral agreement, but as a result of French consent beginning with the inauguration of service in 1955, and confirmed by the 1960 exchange of notes. However, neither the 1946 Agreement nor the subsequent service gave Pan American the authority to provide "fifth-freedom" local service in the corridor. The Tribunal also found that a United States carrier had the right to serve Iran, not by virtue of the Agreement, but as a result of the informal French consent to the Paris-Rome-Tehran service inaugurated in 1955. The United States also had the right to continue "fifth-freedom" service in this market, again by virtue of French consent. Although the specific legal question of whether the service violated the explicit terms of the Agreement was resolved in France's favor, the United States won both an economic and equitable victory with the Tribunal's finding that Pan American should not be deprived of service begun with French consent, explicit or implicit, and sustained for a long period of time.

2. United States v. Italy (1965)

The second dispute in the history of international aviation submitted to arbitration was one between the United States and Italy involving all-cargo service to Rome.

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173 Larsen, supra note 159, at 242.
174 Id.
Trans World Airlines began passenger service to Italy in 1946 under a temporary air services agreement; the following year it added all-cargo flights to the market. In 1948, the two governments consummated a bilateral air transport agreement on the Bermuda I model, which became the focus of controversy. Pan American was given authority to enter the market in 1950. Trans World Airline's all-cargo service to Italy was interrupted that year by the war in Korea and did not resume until 1958. Once-a-week service was increased to four weekly TWA all-cargo flights the following year. Pan Am initiated all-cargo service to Italy in 1960, increasing frequency to two flights per week in 1963. Alitalia had begun all-cargo service in the market in 1961, increasing to three flights a week in 1963.

In 1963, both Pan Am's proposal to expand its all-cargo service to four weekly flights, and TWA's proposal to expand to six weekly flights were rejected by the Italian government. Alitalia was in no position to meet the enhanced competition because of equipment shortage. The United States formally objected to the action of the Italian government with a diplomatic note of September 19, 1963. The crisis came to a head as TWA announced in December of that year its intention to substitute jet aircraft in the market, which would more than double its capacity.

Consultations between the two governments were held in early 1964. Italy claimed that all-cargo service was not authorized by the 1948 bilateral, which explicitly author-

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176 See North Atlantic Route Case, 6 C.A.B. 319 (1945).
180 U.S. - Italy Arbitration, supra note 179, at 500.
ized carriers of the two nations to transport "passengers, cargo and mail." Italy read this phrase in the conjunctive, as a requirement for combined passenger and cargo service. It has been suggested that the delaying tactics of the Italian government were designed to allow Alitalia time in which to acquire jet cargo aircraft. When consultations failed to resolve the dispute, the arbitration clause of the Agreement was invoked by the United States in June of 1964, and a tripartite tribunal was commissioned to resolve the dispute. By a vote of two-to-one, the tribunal upheld the United States' position, resting its decision on the interpretation of identical language of Bermuda I (upon which the 1948 United States-Italy Bilateral had been based) and the practice of the airlines of both nations to provide all-cargo service in the market without objection until 1963.

The United States was slow to exercise its newly won rights to expand its all-cargo service in the market for fear that Italy might renounce the 1948 Agreement. The United States-Italy Agreement included other valuable passenger rights which neither the United States nor its airlines were eager to jeopardize. However, the United States Civil Aeronautics Board authorized a third carrier, Seaboard, to provide all-cargo service in the market in 1966. Upon the inauguration of such service, Italy de-

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182 U.S.-Italy 1948 Bilateral, supra note 177, Annex § III.
183 Id. at Annex § XII.
184 A. Lowenfeld, supra note 3, at II-62.
185 See Bradley, supra note 181.
186 U.S.-Italy Arbitration, supra note 179, at 508-09.
187 Transatlantic Route Renewal Case, 44 C.A.B. 9, 15 (1966). During this period, Italy also sought increased operating rights to Los Angeles, and beyond New York to Mexico City.

The United States maintained that there was insufficient demand for such services, that Italy was not offering sufficient value in return, and in particular that the Mexico City run would be all fifth-freedom; also the United States objected to Italy's refusal to permit service by United States carriers beyond Rome to Africa south of Cairo, and to Rome via Algiers as an intermediate point, both of which, it said, were within the bilateral agreement.

A. Lowenfeld, supra note 3, at II-82.
nounced the 1948 bilateral agreement, and started the one-year termination clock running.188 The negotiations during the ensuing twelve months failed to produce an agreement, and accordingly the U.S.-Italy Air Transport Agreement of 1948 was terminated May 30, 1967. Air transport service between the two nations nevertheless continued, but with the Italian government maintaining its all-cargo restrictions and threatening fifth-freedom restrictions.189 Finally, in 1970, after thirty-three rounds of talks between the two governments, negotiators consummated a new agreement. The Italians then objected to the landing of the new and larger freighter, the B-747, which they argued was not in existence when the new bilateral was signed.190


Perhaps the most interesting of the arbitrations in which the United States has been involved concerned a subsequent dispute between the United States and France over Pan American's "change of gauge" operations191 between London and Paris. In 1978, Pan Am proposed service between San Francisco and Paris via London, flying a B-747 from San Francisco to London, and off-loading the remaining passengers onto a smaller B-727 aircraft for the duration of the London-Paris journey. The French objected, arguing that such "change of gauge" operations were not permitted under the United States-France bilateral air transport agreement.192 The French Government

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188 U.S.-Italy 1948 Bilateral, supra note 177, at art. 9.
189 A. Lowenfeld, supra note 3, at II-82.
190 House Hearings on International Aviation, supra note 175, at 438 (testimony of Donald C. Comlish).
191 "Change of gauge" is a term borrowed from the early railroad industry. It involves substituting equipment of a different size along a through route, and transferring the passengers from the larger to the smaller aircraft. See Damrosch, Retaliation or Arbitration — Or Both? The 1978 United States-France Aviation Dispute, 74 AM. J. INT'L L. 785 (1980) [hereinafter Damrosch]. See generally Case and Comment, The U.S. French Air Services Arbitration 38 CAMBRIDGE L.J. 293 (1979).
banned the new service, insisting that the United States first enter into negotiations by which the French would be given a privilege of equal value. However, the United States took the position that Pan Am’s proposed operations were already permitted under the existing bilateral. Efforts to resolve the conflict by consultations and exchange of diplomatic notes between the two nations proved unsuccessful.193

Pan Am commenced the “change of gauge” operations on May 1, 1978. After twice issuing warnings to the carrier, on the third day of May the French gendarmes seized the B-727 at Paris Orly Airport, refused to allow the passengers to disembark and ordered it returned to London.194 Pan Am suspended the service and brought an action in French courts seeking reversal of the decision.195 On May 4, the United States Government requested expeditious arbitration of the dispute under Article X of the bilateral.196

Absent a satisfactory response on behalf of the French Government, the United States Civil Aeronautics Board issued a decision under Part 213 of its Economic Regulations suspending Air France’s service to Los Angeles via Montreal, effective July 12.197 The United States Government contended, and the CAB concluded, that the government of France had “taken action which, over the

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193 Damrosch, supra note 191, at 785-86.

194 House Hearings on International Aviation, supra note 175, at 438-39 (testimony of Donald Comlish).

195 Damrosch, supra note 191, at 786.

196 U.S.-France 1946 Bilateral, supra note 192, at art. X. Article X provided that: any dispute between the Contracting Parties relative to the interpretation or application of this agreement or its Annex which cannot be settled through consultation shall be referred for an advisory report to the Interim Council of the Provisional International Civil Aviation Organization.

197 See CAB Order 78-5-106 (1978); CAB Order 78-6-82 (1978); CAB Order 68-6-2-2 (1978).
objections of the United States Government, will impair, limit, terminate and deny operating rights and deny the fair and equal opportunity of United States carriers to exercise the operating rights provided for in the United States-France Air Transport Services Agreement. On the day before the suspension was to become effective (July 11) the United States and France entered into an Arbitral Compromis providing for an expeditious arbitration of the dispute and requiring that the CAB’s suspension order be vacated. On December 9, 1978, the arbitral tribunal rendered its decision concluding that France had wrongfully denied Pan Am’s “change of gauge” operations which were implicitly authorized by the bilateral, and that CAB’s threatened invocation of its Part 213 sanctions was lawful.

This controversy illustrates the effective use of unilateral sanctions under Part 213 as a means of facilitating expeditious implementation of a bilateral’s arbitration provisions. However, the Compromis tended to disfavor the interests of Pan Am, for although it established a relatively prompt date for the arbitration’s conclusion (December 10, 1978), it allowed Pan Am to continue its change of gauge operations for only one-half of the days since the dispute commenced on May 1. Since the Compromis was not consummated until mid-July, Pan Am had already lost the opportunity to participate in much of the Summer peak season. Hence, total maintenance of the status quo, from May 1 to July 14, and partial mainte-

200 Case Concerning the Air Services Agreement of 27 March 1946, Arbitral Award of 9 December 1978, 54 I.L.R. 304 (1979); Damrosch, supra note 191, at 788.
201 As one commentator noted:
One result of the U.S. action was that France had substantially more interest in a speedy resolution of the dispute than before the entry of the first part 213 order. Thus, the threat of retaliation served as a substitute for effective international judicial mechanisms to enforce a preexisting commitment to arbitrate.
Damrosch, supra note 191, at 799.
nance of it between July 14 and December 10, inured to the benefit of the French flag-carrier, Air France, and to the detriment of the United States flag-carrier, Pan American.202

One commentator has since pointed out that the real conflict between the two governments was not the legal issue of whether change of gauge rights beyond London and Paris was conferred by the bilateral. According to Professor Bilder, the French denial of Pan Am’s efforts was predicated upon its desire to force the United States to give it over-the-Pole operating rights to the west coast of the United States.203 The United States decision to submit the legal issue to arbitration, employing the CAB’s Part 213 as a coercive catalyst to get the French to the negotiating table, irritated the French and frustrated their real objective.204 Professor Bilder has noted that this example reflects one of the disadvantages of third-party dispute resolution: “A tribunal must necessarily focus narrowly on the immediate ‘legal’ issue before it, which may have little do with the true source of contention between the parties.” 205 The precise legal determinations rendered by the tribunal in the second United States-France Arbitration is beyond the scope of this article.


The most recent arbitrated international aviation conflict involved a dispute between Belgium and Ireland over the interpretation of the capacity clause in their bilateral air transport agreement. The original Bermuda model capacity clause had precluded any explicit predetermination of capacity, and instead limited it to the general provision that “air services are to provide capacity adequate to the traffic demands between the country of which such airline

202 Id. at 801-02.
203 Bilder, Some Limitations on Adjudication As an International Dispute Settlement Technique, 23 VA. J. INT’L L. 6 (1982).
204 Id.
205 Id. at 4.
is a national and the country of ultimate destination of traffic.”

Article VIII of the 1955 Belgium-Ireland bilateral agreement was even less precise:

(1) The transport capacity provided by the contracting parties’ airlines on the agreed services shall be adapted to traffic needs.

(2) On joint routes, the airlines designated by the contracting parties shall take into account their mutual interests so that their respective air services shall not be unduly affected.

Belgium argued that excessive capacity existed in the market, and that the eleven weekly flights of the two nations should be reduced to eight, to be divided equally between the carriers of both nations. The average load factors in the market during the preceding two years had ranged between thirty-six and forty-three percent. Ireland responded that the market had not reached over-capacity when such factors as revenues, costs and expanding traffic were considered, and that there was no universal rule on the subject of capacity divisions under bilateral air transport agreements. Further, Ireland maintained that equalizing capacity share would fail to take into account Aer Lingus’ role in developing the market, or prior capacity agreements consummated between the two

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207 Id. at 46-47.

208 Id. at 48.

Belgium maintained:

a) that excess capacity had been created;
b) that there was an imbalance in traffic carried;
c) that these two problems, contrary to the agreement, created a third problem for they unduly affected the services of the carrier designated by Belgium;
d) that these discrepancies should be corrected by reducing the total number of services to 8, to be shared equally by the two designated airlines: 4 for Sabena and 4 for Aer Lingus;
e) that such an equal distribution was stipulated by the agreement, and that equality was also set as an objective by the designated airlines.

Id.
governments.\textsuperscript{209}

For the sake of expediting resolution of the controversy, a single arbitrator was elected under Article X, Paragraph 3, of the bilateral agreement. The Arbitrator was Mr. H. Winberg, who had formerly served as Sweden’s Director of General Civil Aviation, and the ECAC’s President.\textsuperscript{210} As a matter of general principle, Mr. Winberg found the existence of excess capacity inimical to the development of a sound aviation industry:

Air transport is a collective transport mode, which is necessarily limited to certain days and times for the operation of services.

Any excess capacity is prohibited by the need to avoid operations that do not comply with sound airline service economics.

The airlines should take their mutual interests into account so that their respective services are not duly impaired. In particular, this means that an airline may not provide excessive capacity likely to endanger the viability of the other carrier’s operations on a given route or to limit, on that route, its role of operating the various categories of traffic on the most profitable basis.\textsuperscript{211}

\textsuperscript{209} Id. at 48.

\textit{Ireland maintained:}

\begin{itemize}
  \item a) that there was no overcapacity in this case, \textit{i.e.}, taking the route characteristics into account — level of revenues, costs and expanding traffic — as aviation agreements could not set a universal rule in this respect;
  \item b) that, on the contrary, prospects for traffic growth were favourable, particularly because the market had been insufficiently developed so far (in terms of tourism);
  \item c) that there were grounds for maintaining adequate frequency to ensure market development;
  \item d) that a reduction in frequency would be contrary to the public interest (particularly with the requirements for schedules associated with traffic to and from Brussels, the EEC headquarters);
  \item e) that an equal share in capacity would not take into account the effort made by Aer Lingus, which alone had created and developed the route over the years, or the capacity adjustments already accepted since the advent of Sabena and the market in 1979.
\end{itemize}

\textit{Id. at 48-49.}

\textsuperscript{210} Id. at 47-48.

\textsuperscript{211} Naveau, \textit{A New Arbitration Verdict Involving a Bilateral Agreement: Arbitration On the Belgium/Ireland Capacity Clause}, 38 ITA \textbf{WEEKLY BULL.} 975, 979 (1981).
But he also assessed the historic contribution of Aer Lingus to the market, pointing out that the Irish flag-carrier determined capacity exclusively prior to 1979, reducing its service as Sabena entered the market, and that 60% of the traffic originated in Ireland. Nevertheless, passenger load factors had been but 40% during the prior two years — "a very low figure compared with other European routes operated by the designated airlines and other European airlines." Mr. Winberg concluded "that overcapacity has existed on the Brussels-Dublin route for two years, that future growth is not likely to remedy this situation and that a reduction of capacity is needed as early as possible." He therefore ordered that the existing 10 roundtrips in the Sunday evening-Friday evening time period be reduced to six. But he did not feel that there should be an equal division of frequencies, suggesting that Sabena reduce its four roundtrips by one, and that Aer Lingus yield two of its six roundtrips. Because of the mathematical mistakes he thought these reductions would produce an average load factor of fifty percent in the market, and thereby increase the profitability of both carriers' operations.

212 The Arbitral Award in the dispute between the Belgium and the Irish Civil Aviation Authorities over services between Brussels and Dublin by Sabene and Aer Lingus was given at Dublin on 17 July 1981. Naveau, supra note 206, at 50, 54.
213 Id. at 56.
214 Id. at 57. See Naveau, supra note 206 at 50; Arbitration Verdict, supra note 211, at 981.