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INTERNATIONAL AIR CHARTER TRANSPORTATION

INTERNATIONAL AIR CHARTER TRANSPORTATION:

Its legal regulations and implications

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Master of Laws (LL.M.)

by

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SUMMARY

In spite of a restrictive de jure regime, international air charter transportation has developed as a mode of air transport of major economic importance, carrying 38% of the air traffic volume within Europe and close to 30% on the North Atlantic routes.

Charter air transportation has also a significant social function in that it allows a group of people which otherwise would not have been in a position to travel, to take advantage of such low-cost air transportation.

This thesis makes a study of the regulatory regime that has governed air charter transportation, since charter flights have been operated on a comercially successful basis: it analyzes the advantages and drawbacks of the different regulatory approaches to international air charter transportation, -unilateral, bilateral and multilateral-, and gives some needed suggestions for a balanced regulatory framework.

SOMMAIRE

Malgré les restrictions juridiques, les vols nolisés internationaux se sont développés comme un moyen de transport aérien economiquement important. En Europe les vols nolisés comptent pour 38% du volume de la circulation aérienne et proche de 30% sur les routes de l'Atlantique du Nord.

Le transport aérien nolisé a aussi une importante fonction sociale, en ce qu'il permet à un groupe de personnes qui ne s'aventurait pas autrement, de voyager à bon marché.

Cette thèse étudie le regime regulatoire du transport aérien nolisé depuis qu'il est en opération sur une base commerciale. Elle analyse les avantages et désavantages des systèmes de règlements,-unilateral, bilateral et multilateral-, qui régissent sur le plan international le transport aérien nolisé et elle fait quelques suggestions pour un cadre de règlements équilibré.

INTRODUCTION

Air charter transportation is that mode of air transport where the entire capacity of an aircraft is chartered. This results in full or near-full flights and thereby produces the lowest per passenger cost and the maximum utilization of the aircraft.

Scheduled service air transportation offers regular and dependably frequent services, providing extensive flexibility in length of stay, and maintains world-wide routes, including to areas of low traffic volume.

These two transport formulae are entirely different from the legal and economic point of view, in terms of what they have to offer as well as the economic consequences.

Regulations, governing charter operations, have, through the years, restricted the scope of this type of operation. Through these restrictions governments meant to prevent charter operations from impairing scheduled services by diverting traffic from them.

Chapter I of this thesis will deal with the charter concept in general and with the impairment question in particular.

Chapter II will deal with the regulatory framework, by which charter operations are governed.

An extensive evaluation will be given of article 5 of the Chicago Convention which governs non scheduled operations and the impact this article has had on the unilateral government regulations of the ICAO member states.

Paragraph 5 of the second chapter analyzes the definition of an international scheduled air service, as it was drafted by the ICAO Council in 1952, and

the further attempts that were made to improve this definition. Abortive as these attempts were, they were stopped altogether in 1955, to create an opportunity for further practical action and for liberalization of the existing charter regulations. The result was the conclusion of a regional multilateral agreement, governing charter operations within Europe. The agreement is usually referred to as the Paris Agreement. This chapter also tries to give an evaluation of the distinction between scheduled and charter services, which is mainly needed for regulatory purposes, and will suggest some criteria that represent a closer approximation to reality.

Where scheduled air service operations are governed by bilateral air transport agreements, charter services, to date, are mainly regulated by unilateral government regulations.

A few bilateral arrangements, governing charter operations, have recently been concluded between the United States and a number of European countries. The US is still in favor of a bilateral approach to the regulation of charters, while the European Civil Aviation Conference(ECAC) favors a multilateral approach.

Chapter III will pay attention to the origin of the unilateral regulatory structure, and describe the evolution towards a bilateral approach. It will attempt to give some solutions on a multilateral level.

Although the subject of charter air fares would be on its place in this chapter, the multitude of recent developments in this field warrants a separate chapter dedicated to this subject.Chapter V will give a survey of the most important events and will suggest a solution that will enhance the viability of the charter industry and prevent below cost operations.

Chapter IV will deal with the three most important forms of charter air transportation: Affinity Charters, Advance Booking Charters and Inclusive Tour Charters. Each of the three paragraphs of this chapter gives a historical background, both factual and regulatory, describes the importance of the three modes in specific markets, analyzes the existing regulations and gives suggestions and solutions where necessary.

In colloquial language, the term "non scheduled" has been replaced by the term "charter".

In regulatory language the term"non scheduled" is, however, still widely used. The difference between the two terms is mainly of a political nature.

The term charter is a private law term, which refers to the contract between the air carrier and the charterer.

The term non scheduled is a public law term, making a negative comparison with what is known as scheduled services.

Since the"non scheduledness" of charter operations has ceased to be a workable criterion for such operations, this thesis will use the term "non scheduled" only in reference to the time when charter operations were truly non scheduled.

Chapter I : CHARTERS.

Paragraph 1 : The Term "Charter".

The term "charter" appears in a large number of regulatory enactments, predominantly English and American.

---Its origin in American regulatory language is said to have been the mention made in the Air Commerce Regulations of 1934, that authority to perform "special charter trips" was an incidental right of such airlines as had secured an airline certificate for conducting scheduled operations of passenger air transportation. The term can now be found in the mandates of power given to the United States Civil Aeronautics Board (CAB) in the Federal Aviation Act of 1958 (1).

---Furthermore, it is found in a number of US regulations promulgated pursuant to this Act (2), as well as some European decrees bearing on licensing questions. Thus, "charter companies" were referred to in the former directives to the British Air Transport Advisory Council (3).

The term "charter service" was introduced as one of the notions of the

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1. Section 401.e: Any carrier may take charter trips....under regulations prescribed by the Board.

2. CFR 14 Part 207, 10 March 1951; CFR 14 Part 212, 12 Aug. 1958; CFR 14 Part 295, 26 May 1959; CFR 14 Part 372a, 27 Sept. 1972; CFR 14 Part 378 5 Jan. 1965; CFR 14 Part 373, 14 July 1974; CFR 14 Part 369, 18 June 1974.

3. Directive of 26 September 1950, Part II, 4...apllications by independent operators (charter companies); also in Part III,5.

British Civil Aviation (Licensing) Regulations of 1960.

The British Civil Aviation Act of 1971 gives a definition of a charter flight:

> "A charter flight means a flight in respect of which the following conditions are satisfied:
> (a) all the accomodation on the aircraft which is occupied by passengers or cargo has been sold to one or more charterers for resale-
> (b) in the case of a flight for the carriage of passengers the operator has made available not fewer than 10 seats to each charterer, provided that this shall not apply to a service for the carriage only of ships crews, including masters, their baggage and parts or equipment for ships (4).

---The Ordinances of the Western Allies for occupied Germany spoke about "Das Chartern von Luftfahrzeugen" (5).

---In the IATA resolutions the term "charter" is in ample evidence, one resolution, number 045, being exclusively devoted to charter matters (6).

---In most non-English speaking countries the term has found its way only into the spoken language, not into the regulatory language. Regulatory provisions in those countries usually use the equivalent of the obsolete term "non scheduled".

Air charter transportation is that mode of air transport where the entire capacity of an aircraft is chartered. This results in full or near full flights, and thereby produces the lowest per-passenger cost and the maxi-

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4. Civil Aviation Authority Official Record. Air Transport Licensing Notices Schedule 1, published by the Authority on 25 October 1973.
5. Art. 6 of Durchfuhrungsverordnung Nr 12 (Luftfahrt) zu dem Gesetz Nr 24 der Alliierten Hohen Kommission von 30. Marz 1950, promulgated 31 August 1950 and art. 5 of its Neufassung of 23 Jan. 1951.
6. IATA resolution 045 will be dealt with extensively in chapter IV, paragraph 1.

mum utilization of the aircraft. Generally, a charter passenger pays one half of that which his counterpart pays on a scheduled flight.

Scheduled services offer regular and dependably frequent services, provide extensive flexibility in length of stay and maintain world wide routes including routes to areas of low traffic volume. Scheduled service is provided to small cities as well as large, in season and out of season, when traffic demand is low as well as when it is high, and over economically viable as well as "loss" routes.

Charter service is provided only where and when there is demand.
The charter operators cater to that segment of the public that wants the lowest-possible-cost air transport service, to those people who are willing to forego the luxury of scheduled air transport and accept the more restrictive type operation of charter transport, in that they are required either to be a member of a club or association or to book and pay their transportation in advance.

In the case of scheduled services, the loadfactor achieved is the ultimate arbiter of the carrier's cost of operating and ultimately of its yield. In charter service, by its nature, this cost variable is substantially eliminated and as a result the potential efficiency of an aircraft can reliably be passed on to the consumer.

Charter services are viewed upon both in a positive and in a negative manner.
Its positive function becomes clear when one considers its specific performances. Charter flights perform a number of specialist types of jobs

which could not be satisfactorily or could not be performed at all by any existing scheduled service.

ICAO's Air Transport Committee, in a report to the Council in 1953, formulated it as follows:

> The main function of non scheduled transport services is in fact supplemental to, rather than competitive with the work of the scheduled air services. In the transport field, non scheduled services perform an important experimental function as with new types of load (for example carrying motor cars), or new types of operation (for example "all-inclusive" tours), or new types of aircraft (for example helicopters used to transport equipment and personnel in inaccessable development projects)..... Non scheduled air transport services also give an opportunity to make new aviation firms to start in the air transport field. The following is an illustrative list of special transport tasks performed by non scheduled services:
>
> 1) Off-route, door-to-door transportation;
> 2) Satisfying very infrequent or seasonal transportation demands;
> 3) Carrying special kinds of loads too large or inconvenient or troublesome for scheduled services;
> 4) Transportation in which the aircraft stays with its passengers throughout the itinerary for greater speed or convenience;
> 5) Transportation for emergencies;
> 6) Transportation where extra services are given by the operator (e.g. the services of a guide for sporting trips);
> 7) Special luxury transportation;
> 8) The carriage of a group of people who wish to travel together and could not do so on a scheduled service;
> 9) The delivery of aircraft by air (which may alternatively be considered as "airwork");
> 10) The carriage of special groups (e.g. teams, ship's crews) between places served only indirectly and with many changes by scheduled air services;
> 11) Cheap transportation of special types of passengers who are prepared to fly when space is available, thus producing high loadfactors (e.g. emigrants).(7)
>
> It may be noted also that non scheduled flights generally bring substantial advantages of some kind to the countries they serve. Tourists, special types of trade, industrial experts, spare parts for important machines, seasonal supply of labor, immigrants, are typical of loads brought to countries by non scheduled air services to the advantage of those countries.

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7. Draft report to the ICAO Council by the chairman of the Air Transport Committee: Prospects of and methods of further international agreement on commercial rights in international air transportation---Non Scheduled Air Transport Operations. AT/WP 311 at 9 of 23 ebruary 1953.

A negative attitude towards the charter phenomenon has been assumed chiefly by the scheduled airlines. The scheduled operators have blamed charter operators for "creaming off" the market, for picking the most lucrative routes. This allegation is backed by the following data: in 1968, the US charter carriers concentrated 97% of their international operations in the North Atlantic and Carribean areas. In fact, 65% of their pro rata operations internationally was on the North Atlantic. 78% of their transatlantic flights during the first 9 months of 1969 was concentrated at New York, Los Angeles and San Francisco. Over 70% of their transatlantic flights during that same period was bound for a terminal in one of four European countries: Germany, the United Kingdom, the Netherlands or Italy. This geographic concentration was linked with a peak season concentration: the performance of the US charter airlines ranged from an allocation of 18% of their international capacity on the North Atlantic in the first quarter of 1968 to almost 83% in the third quarter of 1969 (8).

According to the scheduled airlines, the major reason for this charter ascendancy is the lenient attitude of governments concerned. Where article 5 of the Chicago Convention, according to the scheduled operators, was originally intended to cover what amounted to truly irregular services, this article, which in principle puts less severe restrictions on charter operations than on scheduled operations, became the protective umbrella under which programmed air charters mushroomed to such proportions that by the beginning of the seventies they comprised 30% of the North

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8. Source: CAB Bureau of Operating Rights Exhibit 16, Docket 20569.

Atlantic traffic.

The Director General of IATA, the trade association of the world's scheduled international airlines, Knut Hammarskjold, sees as another reason, more specifically for the US market,

> "the unleashing on major markets in late 1966 of originally non scheduled airlines whose main operational and financial raison d'être until that time had been to provide a supplementary operational military transport fleet. As this military requirement was expected to decrease over the coming years, these carriers were given supplementary operational permits on key routes in order to replace the dwindling government contracts with entitlement to a certain share of the market, supposedly having its own characteristics. To make these permits effective it was necessary to obtain liberal treatment at the receiving end for these charter carriers, particularly on the North Atlantic. This brought about at least twice the number of so-called "unscheduled operators" in the other direction". (9).

The criticism of the scheduled airlines on the charter airlines to this degree is amazing if one considers that charter services can be provided both by scheduled and charter airlines.

Of the total tonne-kilometers performed on all international air services in 1972, 83% were performed on scheduled services and 28% on charter services. Charter operators and scheduled airlines performed charter services almost equally 50-50. Considering international operations only, scheduled airlines carried 46% of the charter traffic and charter operators 54%. In terms of gross business, charters are still a small segment of air transportation: charter operators in 1972 represented only 9% of the total traffic tonne-kilometers performed on both scheduled and charter services and 15% of the total of all international traffic carried. (10).

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9. K. Hammarskjold: The State of the World Air Transport Industry. ITA Bulletin 73/1 at 2.

10. Non Scheduled Air Transport 1972. ICAO, Special Digest of Statistics, No 184.

There are quite a few different modes of air charter transport.

In the case of a Single Entity Charter, the charterer pays the total cost of the flight and offers it, without charge, to the passengers of his choice. This type of charter has become increasingly popular with corporations which provide sales-incentive vacations and is also widely used for the transportation of sport teams and theatre groups.

An Affinity Charter is the most widely used type of charter. It is available to organizations such as social, fraternal, religious or ethnic, that were not created for the purpose of air travel. Costs are usually prorated among the passengers who must be bona fide members of the group and these charters are, therefore, sometimes referred to as pro rata charters. Most national regulations attach a membership requirement of at least 6 months to eligibility.

An Inclusive Tour Charter (ITC) is a fixed price packaged vacation, offered to the general public by a tour organizer who charters the aircraft, arranges for accomodation, meals, tours etc.

An Advance Booking Charter(ABC) is offered to the general public by a travel agent. The public can participate in the charter by committing itself through booking and payment of the trip 60 days before actual departure. In the US this group of charter is operated under the name of Travel Group Charters (TGC).

A Special Event Charter (SEC) is performed on special occasions like sports events, fairs, conventions etc., and is open to the general public. Such charters can not yet be operated under the US CAB regulations. They are

only operated in Europe.

A Study Group Charter is available to members of the general public who are bona fide participants in a formal course of academic study outside the US. A period of sightseeing and travel is often included in the program before or after the formal academic study course. Study Group Charters are only operated from the US.

Paragraph 2 : The Scheduled - Charter Controversy.

Scheduled and charter services are entirely different from the legal and economic viewpoints in terms of what they have to offer as well as the resulting economic consequences.

The two types of service are governed respectively by articles 6 and 5 of the Chicago Convention.

These two articles have so far been responsible for the division of the airline industry into carriers that operate as designated carriers under bilateral air transport agreements, the scheduled carriers, and carriers operating under the unilateral approvals, granted under regulation of the governments concerned, the charter carriers.

Article 5 of the Chicago Convention provides that aircraft not engaged in scheduled international air services, shall have traffic privileges subject to the right of the state concerned to impose such regulations, conditions or limitations as it may consider desirable.

Bilateral agreements for scheduled services have their basis in article

6, which provides that no scheduled international air service shall be operated into a state except with special authorization of that state.

Both scheduled and charter services have undergone far reaching changes incharacter over the last three decades. The pace of change has been so rapid and extensive that formerly accepted principles have been left behind. The confusion between the two types of traffic has become so serious that the conventional distinction between scheduled and non scheduled charter transport has ceased to have any real meaning.

The long established definitions of a scheduled service, in the Chicago Convention itself, and the one developed by the ICAO Council (11), emphasize the regularity of the operations. This regularity criterion was no doubt a valid and meaningful characteristic, descriptive of scheduled services and distinguishing them from charter services, at the time the definition was drafted, but as a criterion it is no longer valid. Although some charter services are, to this day, irregular in pattern and frequency of their operation, a very large proportion of charter services is no less regular than scheduled services. This is particularly true where charter operators have acquired modern equipment, which can only be operated profitably on the basis of high levels of utilization.

Between 1947 and 1955 the charter carriers in the US were called "Irregular Air Carriers", reflecting the irregularity of their operations. Before this, between 1938 with the birth of the Civil Aeronautics Board, to 1946 they were known as "non scheduled carriers". As such, they were exempt from the certificate of convenience and necessity requirements

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11. The ICAO Council definition will be dealt with in Chapter II, paragraph 5.

which were placed on the scheduled carriers. The purpose of this exemption was to study the characteristics of the various classes of air carriers and determine the type of regulation appropriate to each.

At the time the US Civil Aeronautics Act was passed in 1938, the activity of these non scheduled carriers was small and was generally confined to adjunctive activities, such as sales, maintenance, training and advertising. By the time the Civil Aeronautics Authority was reorganized into the Civil Aeronautics Board (12) in 1940, the non scheduled airlines had grown enough to pose a threat to the scheduled carriers and preparations were made to regulate non scheduled operations. These preparations were delayed by World War II, but in 1947 the CAB abolished the classification "non scheduled" and replaced it with "irregular air carriers". The purpose of this regulation was to provide the public with reasonable charter transportation and to limit the scope of these operations to prevent competition with the scheduled carriers.

On 10 July 1962, Public Law 87-528 was enacted by the US Congress. It abolished the designation "irregular air carriers" and replaced it with "supplemental air carrier" : a carrier authorized to provide air charter transportation to supplement the scheduled airlines. According to the regulations, each supplemetal carrier must have a certificate of public convenience and necessity, providing for commercial charter transportation. The certificates are granted by the CAB. For international charter operations

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12. The US CAB is an independent government agency, responsible for the economic regulation of air transport. It was created under the name Civil Aeronautics Authority by section 201 of the Civil Aeronautics Act of 1938 (replaced by the Federal Aviation Act of 1958) and redesignated as the Civil Aeronautics Board by Reorganization Plan No. IV of 1940.

the CAB issues certificates, with the approval of the president. The international authorizations are based on regional or geographical assignments. The nomenclature "supplemental" is hardly appropriate since, at least in these days, this is not he major characteristic of charter operations. Charter carriers now are serving, independently, their share of the transportation market.

Another criterion that has been used to distinguish scheduled services from charter operations, apart from the regularity criterion, and which in the United States has been incorporated in related legislation, is the criterion that a scheduled service is a service for the carriage of individually ticketed traffic. This criterion represents a closer approach to reality insofar as it concerns itself with the nature of the service which the passenger is purchasing. Yet, this criterion does not go far enough because many kinds of charter traffic, are in reality individually ticketed, in that somebody can purchase a ticket from a travel organizer or a tour operator. Moreover, the requirement that a charter operation be not individually ticketed has had crippling effects in the development of new charter formulae in the US(13).

The one characteristic of a scheduled service which distinguishes it from a charter service is the fact that seats on a scheduled service are sold on a retail basis, by the operator himself or by his agent, direct to the public, and without intervention of a wholesaler. On this basis it follows that a charter service is one on which no seats are sold retail; on such a service all the seats are sold wholesale, in bulk. either to a wholesaler for resale or to a single buyer for his own use.

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13. See Chapter IV.

The great bulk of charter traffic is carried on the basis of resale by a wholesaler. The distinction between scheduled services and charter operations has become a distinction of marketing method.

Robert Goodison(14), derives from this concept that scheduled services are not in any case a pure concept. The fact is, according to him, that seats on scheduled services may be sold in both modes, wholesale and retail. Only the charter service is conceptionally pure, in the sense that no seat on a charter flight may be sold by the operator direct to an individual member of the public.

Apart from the wholesale - retail distinction, other distinctions could be made. The Edwards Report of 1969 (15) for example, chooses to draw a line between the collective demand for continuous available service that underlies scheduled air transportation and the large areas of demand in which continuous availability is of little importance and the main concern of the customer is to secure the cheapest possible price for a particular flight that underlie charter transportation.

The Report also discerns a high degree of obligation for the scheduled carrier to provide regular, continuous and reasonably available capacity for all who want the service. This means that the scheduled operator must accept an obligation to meet the needs of the public in a manner considered reasonable by the regulatory authorities.

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14. Deputy Chairman of the British Civil Aviation Authority in ITA Bulletin 74/23 at 601-604.

15. British Transport in the Seventies. Report of The Committee of Inquiry into Civil Air Transport (The Edwards Report). Her Majesty's Stationery Office, London, at 55-60 (1969).
See for a further elaboration on the subject, Chapter II, paragraph 7.

According to the Report, other types of operation are best distinguished by the lesser degree of the obligations of their operators. Charter operators are confined to operate charter flights. This gives them a much greater flexibility than the scheduled carriers that are obligated to provide regular service over designated routes. The charter carriers do not have the same obligation to provide continuing service; their only obligation is to perform the specific charter flights which they have contracted to perform(16).

Still another standard could be found: one concerning the type of passenger respectively the business man and the holidaymaker.

In the world of consumerism there are those who only want a scheduled air transport system and there are others who require, due to the necessities of their business, a dependable scheduled service. At the same time there is a vast number of consumers who want a low-cost air transport system. They want vacation travel, package holidays and the flexibility to attend special events. They want to enjoy these services at the lowest possible cost. This vast group of world travelers wants charters because they realize that the economics of operating full planeload charters as distinguished from properly reduced loadfactors on scheduled services, produce the lowest possible cost. This does not mean, however, that scheduled services only carry executives and doctors, and that participants on charter flights are only little old ladies on tennis shoes, but expeience with inclusive tour flights in Europe showed, at least initially, that participants in these

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16. Statement of Edward J. Driscoll, president of NACA, before the Military Airlift Committee of the Committee on Armed Services of the US House of Representatives on 2 February 1970.

flights belong to a social category with modest incomes and that, without the formula, they would not have taken the aircraft for this kind of trip. To make such a classification based on the type of passenger, would in fact be wrong. There is a well-off section of the market which prefers to use the charter formula in organized travel with luxury hotels at the destination, for which direct charter flights are not only more economic, but also more convenient since they avoid bothersome connections.

It, therefore, seems that a distinction between scheduled and charter flights based on the category of passenger would be just as erroneous as a distinction based on the regularity of these operations.

The distinction between the different categories of passengers only shows that there are two components of the one air transportation market, the one traffic volume of passengers being transported by civil aviation. One component is that group of travelers that will not or can not fly at other than charter rates. The other component is that group of travelers which will not or can not travel under charter conditions.

> "Any distinction that may have existed (in this market) in the past no longer has any validity when we talk about inclusive tour movements, or any other form of what has come to be regarded as "bulk" or "mass" travel. When one talks in those broad terms, no degree of separateness exists any longer, all of these passengers are part of the same overall market".(17).

The contention that the market is divided in two parts -charter and individually ticketed passengers- has also been rejected by the CAB.(18).

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17. Knut Hammarskjold, D.G. of IATA before the subcommittee on Aviation of the US Senate Committee on Commerce, on 21 September 1971.

18. Brief to the Court of Appeals for the District of Columbia in NACA v CAB et al. No. 23988 at 76.

The Nixon Policy Statement was not unmindful of this development. It focused attention on the role of the US charter carriers in relation to scheduled services:

> "Scheduled services are of vital importance to air transportation and offer services to the public which are not provided by charter services.....Accordingly, in any instances where a substantial impairment of scheduled services appears likely, it would be appropriate, where necessary, to avoid prejudice to the public interest, to take steps to prevent such impairment.
>
> Charter services by scheduled and supplemental carriers have been useful in holding down fare and rate levels and expanding passenger and cargo markets.....Charter services are a most valuable component of the international air transport system, and they should be encouraged.If it appears that there is likely to be a substantial impairment of charter services, it would be appropriate where necessary, to avoid prejudice to the public interest, to take steps to prevent such impairment(19).

The elimination of this former obsession with the claimed differences between the nature of scheduled and charter services and the public they serve, is leading towards the eventual provision of a <u>standard and equally regulated system</u> for the <u>total market</u>, balanced for all types of traffic while still preserving the possibility for essential business and commercial travel required by the governments and trade interests.

To date, the two distinct systems -scheduled service and charter operation- are for the major part still regulated in different manners.

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19. President Nixon's <u>Policy Statement on International Air Transportation</u>, 22 June 1970, 63 Department of State Bulletin (1970) at 6-8. The Statement was prepared for him by an interagency group of experts under the leadership of Dr. Paul Cheritan, professor of transportation at Harvard University.

Paragraph 3 : Regulatory Consequences.

As mentioned above, charter operations and scheduled services are governed by respectively article 5 and article 6 of the Chicago Convention.

Article 5 entitles the ICAO member states to issue whatever regulations, conditions or limitations they may consider desirable, to regulate the non scheduled traffic to and from their territory.

Article 6 provides that no scheduled international air service shall be operated over or into the territory of a contracting state without the authorization of the state concerned.

As a consequence of these separate provisions for the two systems of air transportation, international charter operations sofar, have mainly been regulated by the unilateral regulations of the states concerned, while the international scheduled air services are governed by bilateral air transport agreements between the states involved. These bilateral air transport agreements, governing international scheduled air services, contain provisions regulating routes, frequency, designation of airlines and capacity. These are either predetermined or determined on an ex post facto basis.
As a rule, the bilateral agreements with other countries, do not cover charter operations, and landing rights for such charter services must be secured outside the existing system of bilateral agreements.
Negotiations on these traffic rights may be conducted on the basis of reciprocity: the foundation for charter authority must rest upon the principles of comity and reciprocity. Nevertheless, because of the concept of charters as merely ancillary to scheduled service rights, such reciprocity frequently does not exist in fact.

The authority to conduct scheduled international air services is given to the scheduled airlines through the bilateral agreements. The authority to conduct international charter flights is given to an operator through the issuance of a permit for individual or series of charter flights. In the US the CAB issues charter permits to charter carriers, authorizing the operation ofcharter flights to and from the US, subject to conditions and limitations for three to five year periods.

To regulate charter operations by charter carriers in the form of bilateral agreements between states, instead of unilaterally, would establish these carriers and their operations on a basis comparable to that of scheduled carriers and could thereby change the "supplemental" character of charter transportation.

This is what happened with the conclusion of bilateral agreements governing charter operations between the US and respectively Yugoslavia, Jordan and Canada.

Here, charter flights are treated as full-bodied operations, not supplementing scheduled operations. These bilateral agreements contain an exchange of rights between the countries, and each party agrees to grant the other party a right to conduct charter services.

It remains to be seen if this system of separate bilateral agreements for charter operations will prove to be as viable a system as the bilateral system governing international scheduled air services, in as far as the latter system may be esteemed feasible, or if a bilateral system comprising both modes of air transport or a multilateral system would not appear to be preferable. We will revert to this problem later.

Paragraph 4 : Economic Consequences.

Where the regulatory differences between scheduled and charter operations are hardly noticeable for the layman, this is not the case with the economic differences.

For a layman, the only visible difference between a charter operation and a scheduled air service operation is the price he pays.

On heavily traveled routes like the North Atlantic, where there is an abundant choice of both scheduled and charter services, this virtually has become the only substantial difference between the two modes of air transport. This underlying difference between the characteristics of scheduled services and charter operations may not be entirely self evident.

A scheduled operator maintains his services to a definite timetable, which is published in advance. In effect, he undertakes to offer transport on the days and at the time which he states in his timetable, and he must do this regardless of the actual traffic that is being offered. The scheduled operator accepts the obligation to meet the needs of the public in a manner considered reasonable by the regulatory authorities. By doing so, the scheduled airline provides a public service, and thus accepts unavoidable handicaps.

Despite forecasts and marketstudies, the scheduled operator does not know how many passengers he will be carrying on a scheduled flight on a given route. This uncertainty becomes greater when competition is keen, for although the total number of passengers can be roughly estimated on a given market, it is impossible to know what the share of each airline will be.

Moreover, should the operator fail to operate his service on time, for technical or other reasons, an elaborate system of interchange arrangements makes sure that the passengers and cargo are taken to their destinations by other carriers as quickly and as conveniently as possible. Comprehensive procedures have been devised by IATA for this purpose and there is no question of a passenger being stranded.

In addition to these uncertainties, there is the fact that the scheduled airline does not know until the last moment the exact number of passengers it will be embarking. It supports the consequences of "no-shows", a serious problem to which no satisfactory solution has been found, apart from overbooking.

The scheduled carrier must therefore calculate fares, taking into account these uncertainties, but the biggest drawback of being a scheduled operator is the compulsory loss of a minimum of 30 to 35% of the seats. Once the average loadfactor exceeds about 65-70% on any route, there is a prima facie case that the scheduled service is inadequate because there will be an unduly high percentage of occasions on which passengers are unable to be accomodated on the flight of their choice. On routes of a low traffic density and/or a high degree of seasonal variation in traffic, the maximum annual loadfactor for adequate public service may be lower; as low as 55 to 60%. (20).

Average annual loadfactors on scheduled services can never exceed 65 or 70%, unless the carrier decides to offer services which do not meet transport demand. This situation exists in certain countries where, owing to

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20. See the Edwards Report at 57.

the lack of transport media, a monopoly or other reasons, very high load-factors are recorded: 77% in the USSR, 78% in Poland and 93% in Cuba.(21).

The loss of 30-35% makes it necessary to calculate and work out fares giving an average unit revenue per passenger of at least 43 to 54% above the unit revenues per passenger that the same airline could obtain with a full aircraft.(22).

A charter operator uses the full aircraft, which results in full or near full flights, and produces the lowest per-passenger cost and maximum utilization. As the price to be paid for the chartering of an aircraft, covers the entire capacity of the aircraft, the charterer can offer a seat price corresponding to a 100% loadfactor, which is not the case with scheduled services. The charter operator does not fly at all unless the full capacity of the aircraft has been paid for, normally at a rate per mile flown. It is true, indeed, that the organizer of a charter flight, in which the total cost is prorated among the passengers, may not be able to fill every seat, but he will not arrange the flight unless he can be relatively certain that the group will require the total capacity of the aircraft. In these circumstances, the per capita rate which becomes available from a full aircraft must be appreciably less than the level needed to cover costs at the average loadfactor attainable on scheduled operations. An example can clarify this.

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21. Figures from ICAO Statistical Digest No 169 of 1971. The loadfactors are for domestic transport only.

22. See ITA Bulletin 73/11 of 19 March at 248.

Say a Boeing-747 roundtrip flight America - Europe costs $70.000,-. including profit, either a scheduled or charter service.

If 400 seats are provided, the revenue with the charter formula, where the cost is prorated among the passengers, would be $175,- per return passenger. With the scheduled formula and a 65% loadfactor, i.e. 260 passengers, the unit revenue for the airline, if it wants to make profit, would have to be $269,- or54% more than in the charter formula. If the loadfactor were only 50%, which would result in 200 passengers, the revenue would have to be raised to $350,- per return passenger, or 100% more than the charter fare. These comparisons between the two transport formulae show the considerable differences involved.

On the average, the operating cost of carrying a passenger on a charter flight is about a third of the cost of carrying a passenger on a scheduled flight. This difference is not wholly, or even mainly due to the high load-factors achieved on charter flights.

---Direct costs are halved, partly by packing in more seats and partly by operating at higher loadfactors;

---Indirect costs are reduced much more. In the first place, the sales costs to an airline of chartering a whole aircraft through appointed agents are small compared with the cost of maintaining an individual ticket sales organization and paying commission to ticket selling agents.
Secondly, the overhead structure of a scheduled airline is inevitably substantially higher than that of a cut-rate charter carrier.

Although the fuel costs have forced an increase also in charter prices, the economics of full planeload transportation still make charter flights

possible at about half the cost of scheduled airfares.(23).

The potential of the charter concept is staggering. The only absolute limitation seems to be population, the only barrier cost.

Charter air transportation, to the extent that it almost causes a "population exchange", had never been foreseen in the early days of international tourism.

A 1945 CAB report expresses this view the following way:

> "It is the non recreational travel categories, however, which are most generally regarded as offering the greatest promise for expansion. Purpose-of-travel surveys conducted by domestic carriers prior to the war indicate that non recreational travel ranges from 75 to 80% of total travel. The ultimate effect of the development of transatlantic overseas air transportation upon non recreational travel categories can only be conjectured. However, it seems probable that growth in these categories will be great compared to the growth of recreational travel, and that this travel will be well balanced both seasonally and directionally",(24).

Since at least three-fourths of the transatlantic air traffic is currently composed of recreational or pleasure travel, this error was substantial(25).

A 1953 working paper of ICAO's Air Transport Committee did not see the charter concept as a vehicle for mass transportation: It said:

> ".....there cannot be any real future in international non scheduled air transport since the scheduled air services can carry any loads

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23. In relation to the total expenses, the cost of fuel for a scheduled airline has risen from about 7% of the overall cost to close to 20%. In the case of a charter airline, the 20% went up to a third of the total cost.

24. 6 CAB 319 (1945) North Atlantic Route Case.

25. The Port of New York Authority survey of 1968-1969 indicated that only 20% of the US citizens flying to Europe have business as their motivation, which is reasonable since only 18% indicated that their trip was paid for by their employer. ITA Bulletin 71/5 at 95 of 1 Febr. 1971: Motivations of Transatlantic Passengers on Flights from New York City.

carried by the non scheduled airlines and in the long run can carry them cheaper and more efficiently".(26).

Paragraph 5 : Tourism Trends.

For developing countries, the charter formula is the one which will provide the largest number of visitors and the highest volume of tourist revenues and enable them to plan their economy. Through co-operation between all the parties concerned, it would also enable a policy designed to reduce seasonal peaks to be implemented.

An example within Europe of a country that has picked up the fruits of cheap bulk charter transportation is Spain.

In 1969, Spain's receipts from international tourism exceeded 75% of its total receipts from merchandise exports.(27).

Charters were the key to this development since 70% of the airline passengers traveling to Spain from the rest of Europe in 1969 arrived on charters(28).

As a receiving country, Spain housed 37 million tourists in 1973, which exceeded its own population by 6 million(29).

This charter traffic was mainly carried on inclusive tour charters originating in the Northern European countries.

The number of travelers forming such ITC traffic from the major countries generating this type of traffic in the Europe - Mediterranean region repre-

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26. AT-WP 311 of 23 Febr. 1953.

27. Tourism in Member Countries (1970) of OECD; IMF, International Financial Statistics (jan 1971).

28. ITA Bulletin 72/6 of 14 February 1972: Tourist Migrations and Population.

29. ITA Bulletin 73/13 of 2 April 1973 at 283.

sents an appreciable percentage of the population of these countries. For instance, in the case of Scandinavia, the number of persons traveling on ITCs to the Mediterranean basin in 1973 represented 7.9% of the total population of Denmark, Sweden and Norway. The figure for the UK is 6.1%, for the Netherlands it is about 5% and for the Federal Republic of Germany 3.8%.

One would think that in the US, with similar distances, climates and seasons, the situation would be identical. This does not turn out to be the case. As in Europe, the large cities in the US, New York, Boston, Chicago, Denver, Seattle etc., are in latitudes where there are long cold winters with relatively short daylight hours. Both the culture and climate conditions of North American resort areas (Mexico, the Carribean) are similar to that of European resort areas (Riviéra, Spain, North Africa).

There are also close ethnic links between residents of the US and Northern Europe, which would indicate that their desire and propensity to travel would be similar.

Thus, it is surprising, in principle, to find 10 million Europeans taking inclusive tour charter holidays in 1973 but only some 120.000 Americans taking corresponding ITC holidays. Fact is, that in the US, 50% of the population has never taken a vacation by air. Fifty million Americans have never flown and only 12% of US adult citizens have been abroad in the last five years(30).

The prime reason why Americans have not experienced vacation air travel is that the CAB rules and regulations, especially of ITCs are very restrictive.

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30. Air Charter Travel, The Dawn of a New Era. Speech by Ralph Ditano, V.P. of NACA, 23 April 1973 before the United States Travel Service at Washington D.C.

Another reason is that for instance in Scandinavia and France, annual paid holidays last at least 4 weeks; most West Germans and Dutchmen have 3and a half weeks and the British 2 to 3 weeks. The Americans generally have to make do with just 2 weeks to which a third is added after 10 years with the same firm or same sector of activity and a fourth after 15 years.

Most of the charter traffic originating in the USA is carried on affinity charters and has Europe as its destination. Americans show a marked preference for Europe. In 1961, 37% of US tourists traveling abroad, not including the neighbouring countries of Mexico and Canada, visited Europe , as compared with 50% in 1968 and 57% in 1972.(31).

1974 opened to a set of gloomy prognostications for international tourism due to the petroleum crisis. It was feared in many quarters that tourism would decline during the year and that an imminent recession would further discourage tourists.

Particularly badly affected were the European receiving countries: tourist arrivals in Yugoslavia in the first 4 months of 1974 declined 32%, in Greece 13%, Switzerland 10% in the first 6 months and in Spain 9% in the first 7 months, In general, Far Eastern destinations seem to have done relatively well. SriLanka recorded an increase in tourist arrivals of 18.8% in the first quarter, Hong Kong had a more modest increase of 5.3% for the first 6 months due largely to a sharp fall (-6.3%) in tourists from Japan (32).

While the European experience has been somewhat negative during 1974, it would seem that there have been other areas that have continued to attract tourists in spite of a rather bleak outlook in the main originating countries.

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31. ITA Bulletin 74/41 of 2 Dec. 1974 at 986.

32. ITA Bulletin 74/42 of 9 DEC. 1974 at 1009.

This might indicate a trend away from Europe: Europeans tend to travel further, and begin to consider Africa and the Far East as feasible holiday destinations. North Americans, having to cope with a 20% devaluation of the dollar on the European markets, are enjoyed away from Europe with its strong currencies and staggering inflation.

Although the general outlook in the major originating countries is not very optimistic, there were a number of differences in the experiences of the various countries (33).

In the USA, mainly due to the circumstances mentioned above, the pattern of destination choices altered. American tourists tended to remain in North America, either as domestic tourists or going to Mexico or Canada. US departures to Europe were estimated to have fallen by 10% over the first 10 months of 1974. There was continued interest in South America with departures by US citizens increasing by 16.8% in 1973 and a further 4% in 1974. Traffic to Oceania and Australia also increased slightly.

In Great Britain, because of the temporary 3-day work week and the inflation rate increase of 17-20%, the real disposable income decreased by 2.25%. In addition, the weakness of the pound sterling increased the price of fuel and of foreign currencies and acted as a deterrent to international tourism. As a consequence, the number of ITCs to foreign destinations decreased by 25%.

In France, with the same rate of inflation, the real disposable income was expected to increase by 4.5% in 1974. Roughly the same proportion of French tourists, 18-20%, spent their holidays outside France.

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33. ITA Bulletin 74/42 of 9 December 1974 at1010.

Although in Germany real disposable income increased by only .75%, the inflation rate remained below that of most European countries and its currency was one of the strongest. As a result, its foreign tourism continued to rise by roughly 5% in 1974.

Charter passenger departures from Denmark during the first quarter of 1974 increased by nearly 10%,while Sweden had a decrease in charter passengers of approximately 10%. It is assumed that the Scandinavian market may have reached its saturation point (34).

Despite the dim economic situation, the actual evolution of international tourism still seems to be better than could have been expected in such circumstances. One could draw the conclusion that a tourist habit is now deeply ingrained , that for those who have tasted the benefits of low-cost travel there can be no turning back, that people do not willingly give up their holidays, although they may be forced to compromise on their destination, a trend which is visible especially in the US.
Low cost charter availability has taken on the character of a right, which governments are increasingly expected to protect and promote.

Paragraph 6 : Impairment of Scheduled Services.

Governments are also expected to protect the interests of the scheduled airlines. Scheduled airlines have the obligation to provide regular scheduled services as a public service.
Through the years, governmental regulations have been issued that restricted

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34. See for an elaboration on the saturation point, Chapter IV, paragraph 3.

the scope of charter operations. Through these restrictions, governments meant to prevent charter operations from impairing scheduled operations or from diverting traffic from them.

Already the Paris Agreement of 1956, concluded between the ECAC member states, regulating traffic on non scheduled operations between the territories of the member states, read in its preamble:

> "Considering that it is the policy of each of the States, parties to the Agreement that aircraft engaged in non scheduled commercial flights within Europe which do not harm their scheduled services may be freely admitted to their territories for the purpose of taking on or discharging traffic....".

Recommendations adopted by ECAC in 1967, suggested as a common policy for its member states, restriction on the number of incoming transatlantic Inclusive Tour Charters, in order to prevent substantial diversion from transatlantic scheduled operations.

In 1974, the CAB, proposing One-Stop Inclusive Tours, restricted the domestic operation of such OTCs, not to exceed one quarter of a percent of the number of passengers carried in a specific market on scheduled service during the most recent twelve month period. The purpose of this restriction was to insure that domestic charters under this rule would not unduly divert traffic from scheduled services.

The Economic Commission of ICAO, in 1947, explained the diversion concept as follows:

> "If a new scheduled service opens up on a route where there is already a scheduled service, the immediate effect will be a loss of traffic to the original service. But since the new service is a regular competitor, giving notice of its activities in advance, the original service should in general be able to adjust its frequency or capacity to the new condition and should not have to operate at excessively low loadfactors. Moreover,

> since scheduled services normally advertise and otherwise help to build up demand, it is probable that in the end there will be more total traffic than there was before. If the route is a fairly popular one, therefore, a certain amount of scheduled service competition is probably desired.
>
> On the other hand, when a charter company runs an aircraft along a route operated by a scheduled carrier , and collects its load from the general pool of passengers through a travel agent, its load will come straight out of the scheduled service's anticipated load, leaving just that many empty seats. Such charter flights neither give warning to enable the scheduled service to adjust capacity, nor, in general, assist in the promotion of traffic" (35).

Of course, the allegations the statement makes are oversimplified and hardly correct. At least in present days, they do not retain their value as the opposite has been demonstrated. Charter operations, on the whole, do not divert traffic from scheduled operations, but on the contrary, generate new traffic.

Some elaboration might seem warranted here.

Although both scheduled carriers and charter carriers engage in charter activity, the scheduled carriers consider it as an adjunctive activity. To protect scheduled services, which they feel are threatened by charter activity, the scheduled carriers have consistently argued that charter services should be restricted and curtailed.

The charter carriers, however, depend principally on charter passenger activity for their existence, and understandably have consistently argued for relaxed regulations and increased charter availability.

These two carrier groups are the opponents in the continuing debate.

The scheduled carriers charge that charter services divert a substantial number of scheduled passengers and thus that the intrusion of charter

carriers in the peak summer months and in the major US/European markets impairs their opportunities for growth and profitability on the North Atlantic. And as they depend on peak season profits in that market to counter the losses in other markets and in that market in the off season, the scheduled carriers claim that this intrusion jeopardizes the entire international scheduled airline system.

As one scheduled carrier executive put it:"If this continues, it will progressively undermine the economic viability of the scheduled route system on which the public must place its reliance(36).

The scheduled carriers claim that they are under the obligation to provide a public service and that the charter operators must not be permitted to impair their ability to satisfy that obligation.

To provide scheduled services on unprofitable routes, the carriers claim that they must earn sufficient profit on the lucrative routes to balance losses elsewhere and to produce overall profitability.

The scheduled carriers maintain that the charter carriers should not be permitted to compete with them on these routes. They contend that if the charter carrier is allowed to offer the general public a fare based on a full planeload trip, charter services will divert a substantial number of the passengers that would have purchased scheduled services on that route.

The scheduled carriers contend that, in fact, this process has been

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35. ICAO Doc. 4522 A1-EC/74 Discussions of Commission No 3 of the 1st Assembly. Distinction between scheduled and non scheduled operations in international civil air transport. May 1947 paras 28-29 at 21.

36. The Supplemental Issue, remarks by M.H. Brenner, V.P. of Marketing and Planning of TWA, at the Aviation and Space Writers Assoc. Luncheon, 14 April 1970.

underway since the beginning of the surge in charter activity and that scheduled services have been impaired by the activity of the charter carriers. They support this contention with claims of substantial diversion, decreasing growth and deteriorating financial results.

*1 The claim central to all the others, most important and most often aired to the public is that of diversion.

The scheduled carriers claim that a substantial portion of the passengers traveling by charter are diverted passengers that would have traveled by scheduled service except for the availability of charter services.

The charter carriers claim that most of their business has resulted from their development of the low-cost, mass travel market, that charter services do not divert scheduled traffic, that any diversion which has occured has been insignificant and has had no effect on scheduled services and that charter carriers serve a different segment of the market. They claim that their passengers would not be able to fly were it not for charter services and, thus, that they have enabled an entirely new group of people to travel. In fact, they claim that the scheduled carriers plunder their market by using special discount fares.

> "The new (charter) areas of the market are only concerned with low-cost traffic and are clearly distinguishable from the high-fare market, developed by the scheduled carriers....If it so happens that we are running counter to the scheduled carriers due to the fact that they are trying to sit down at the table laid down by us, i.e. trying to get into the established low-fare market, it is then not us, but the scheduled carriers which are committing an act of infringement"(37).

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37. Low- and High-Fare Traffic, Anders Helgstrand, President of Sterling Airways and IACA in ITA Bulletin 74/25 of 1 July 1974 at 596.

Both groups of carriers have relied on charter-passenger surveys to support their claims of the number of passengers diverted. PanAm and TWA have presented the results of two surveys to the CAB. One, submitted by TWA(38) is actually an analysis of a survey of both economy-class scheduled passengers and charter passengers, conducted by the Port of New York Authority. This analysis establishes a demographic similarity between the two types of passenger-: both have medium family incomes of $14,000,=, are likely to come from white collar families, have significantly more education than the average and are likely to have been to Europe one or more times during the last five years. Based on this similarity, TWA argues that the charter passenger must have been a prospective scheduled service traveler, diverted by the lower charter fares.

The survey submitted by PanAm purported to quantify the extent of this diversion. Conducted by Louis Harris and Associates(39), the survey comprised personal interviews of 1238 departing charter passengers at 7 US airports, in charter flights of PanAm, six US supplementals, five foreign route carriers and 4 foreign charter carriers. When asked what they would have done if the charter flight on which they were traveling had been canceled, 35% responded that they certainly would have taken a scheduled flight, 22% said that they probably would have taken a scheduled flight, 37% answered that they would not have gone and 6% were not sure. Based on the demographic similarity of the transatlantic economy class passenger and the charter passenger and the results of this latter survey

38. Exhibit No TWA R-13, CAB Docket 20569.

39. A Study of Charter Passengers to Europe, Louis Harris & Associates. Inc., Exhibit No. PA-291 Docket 20569.

PanAm and TWA contended that 57% of transatlantic passengers are diverted scheduled passengers.

The 57% diversion estimate which PanAm derived by adding the "certainly would have taken scheduled flight" and "probably would have" responses in the Louis Harris survey was rejected by the CAB Hearing Examiner during the Transatlantic Supplemental Charter Authority Renewal Case (40) on the grounds that "subjective motivations attend a decision to make a trip to Europe in a very high degree and they continue to attend the selection of the mode of transportation, the degree of acceptable inconvenience and the price that will be paid"(41).
During cross examinations, Harris himself recognized the accuracy limitations inherent in questioning passengers who are departing immediately for Europe about their determination to make such a trip; he stated that he could support an estimate of 35 % diversion, but no more.

The survey submitted by the charter carriers contradicted the diversion estimates of the scheduled carriers. Over the 3-year period 1967-69, Lennen and Newell (42), conducted a survey for World Airways, a US charter carrier, which showed that only 15% of World's transatlantic passengers had considered traveling on an individual basis, rather than with a group. This survey was also rigorously questioned by the Hearing examiner and the estimate was revised to 25-30%. Consequently, the Examiner concluded

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40. CAB Docket 20569.

41. Transatlantic Supplemental Charter Renewal Case, Recommended Decision of W.J. Madden, Hearing Examiner 21 December 1970 at 21.

42. Air Fares and Charter Service, Hearing before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce. House of Representatives Serial No. 91-80 at 189.

that 30-35% of charter passengers were diverted from scheduled services. to the extent that the "amount of diversion from scheduled service flights to charter flights can be deduced from the surveys"(43).

The Examiner found sufficient evidence to indicate that whatever the percent diversion, it had not been sufficient to impair scheduled services(44).

In a January 1969 report(45), investigating the impact of ITCs on scheduled North Atlantic services, the CAB Bureau of Economics concluded that charter services as a whole, had, in fact, diverted no traffic from scheduled services.

Looking at the growth rates of scheduled traffic before and after the growth in charter service began and at the growth rates of charter traffic the investigators concluded that more travel on both types of service had occured with the advent of charter growth than would have occured in its absence. After examining the growth rates of scheduled traffic, IATA charter traffic and non IATA charter traffic, the CAB investigators concluded that both US and foreign charter carriers had not diverted scheduled traffic but that they had diverted a small percentage of the charter traffic formerly carried by IATA route carriers.

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43. See footnote 41 at 21-22.

44. He concluded:"It is not essential that an amount be reached as to the number that constitutes passengers diverted from the scheduled services since the record does not support a claim that the number is ordinately large, or at or approaching a point where substantial impairment of the scheduled services may be imminent. Idem at 30.

45. Economic Impact of ITCs on Scheduled North Atlantic Services. Bureau of Economics of Civil Aeronautics Board, January 1969 at 18.

*2 The second claim made by the scheduled carriers is that charter carriers' growth rates on the North Atlantic represent "massive inroads" into the primary scheduled routes and that these inroads impair the scheduled carriers' opportunities for growth.

An S.S. Colker and Associates report conducted for the National Air Carrier Association, in 1970 (46), concluded that scheduled service in the North Atlantic market has not suffered as a result of the growth in charter operations. The report emphasized the independent growth trends of the two classes of carriers.

The two groups of carriers, according to the report, cater to different groups of people, and each has maintained a substantial rate of growth. Proportionally, the charter carriers have shown larger year to year percentage gains until the mid-seventies, but it must be recognized that these gains were made on a considerably smaller numerical base. The significant observation is that scheduled traffic has maintained a high growth rate during the period of charter traffic development.

In its climb to 5.3 million passengers in 1969, IATA scheduled traffic registered the following growth rates:

1957-1963.....16.8%

1963-1969.....16.0%

The 1969 traffic results in the London - New York market illustrate the point that differentials in percentage growth rates do not constitute evidence of diversion. Charter traffic in this market grew 47% in 1969 over the prior year, compared with a 14% increase in scheduled traffic.

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46. Forecast Charter Potential under Updated Rules and an Inquiry into the Matter of Impairment of Scheduled Services at 74.
A report to NACA BY S.S. Colker & Associates.

The gain in charter traffic, however, was on a base of 94.000 passengers, compared with nearly half a million scheduled passengers. Thus, in absolute terms, the gain in scheduled traffic was 57% greater than the gain in charter traffic: 69.000 passengers vs. 44.000(47).

In the first six months of 1973, charter operations of the scheduled carriers alone on the North Atlantic, increased by 30.6%.

Obviously, the scheduled airline marketing people do not believe that charter flights are going to divert passengers from their scheduled operations. On the contrary, the marketing managers of PanAm and TWA have publicly stated that their charter operations are attracting new passengers into the market, people who would not have traveled on their scheduled services.

Scheduled traffic in the same period over the previous year was up by 11.4% -- a rate growth that is about twice as large as that of the scheduled system within the US(48).

Such facts hardly suggest that the scheduled airlines really believe that charter operations "skim the cream" off the scheduled system.

The leading intra European charter markets provide substantial evidence that charter operations and scheduled operations can co-exist and thrive. The London - Oslo market is one of the numerous examples of parallel charter and scheduled growth in the intra European market.There, while charter traffic increased its share in 1969 over a year earlier -from 13% to 16%- scheduled traffic enjoyed a growth of 17%. Similarly, in the London - Dubrovnik market, where charters account for 80% of all passengers, scheduled traffic increased by 59% in 1969 over 1968.

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47. Colker report at 52.

48. Congressional record. Senate S. 18495 of 30 October 1973.

Intra-European scheduled revenue passenger miles increased by 53% in the 1966-1970 period, a growth rate higher than that of the US domestic scheduled carriers. It is also noteworthy, since Spain is the principal receiving country for intra-European ITCs, that the intra-European scheduled traffic of Iberia, the Spanish flag carrier, has shown an even more rapid growth than the European average(49).

It is highly pertinent that many markets that are primarily charter markets had little or no scheduled service until they were developed by charters. Cases in point are London - Ibiza, which had no scheduled service in 1965 and in 1969 had 13 weekly roundtrips. The London - Las Palmas market, where 86% of the traffic moves via charter, had but 2 scheduled roundtrips per week in 1965. In 1969 it had 8.

Opponents of charters frequently cite a lack of schedules between the Scandinavian countries and Spain as evidence that intensive charter activity thwarts scheduled operations. The critics, however, are ignoring the essential point that the community of business interests in these markets, necessary to support a scheduled service is negligible(50) Only 1% of Sweden, Norway and Denmark's total exports involve Spain.

In the transatlantic markets, charter operations have filled voids in direct scheduled US - Europe service. To illustrate, half the revenues of World Airways and Trans International Airways, two US charter carriers,

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49. E.J. Driscoll before the Subcommittee on Aviation of the Committee on Commerce of the US Senate on 14 May 1974.

50. Regular fares in intra-European markets are appreciably higher than in the US. Therefore, European scheduled services are relatively more dependent upon business traffic than are the US domestic carriers.

during the first 5 months of 1970 was earned in markets not served with "single plane" schedules. The fact that about one fourth of the US charter traffic is in the four leading transatlantic markets, reflects the concentration of demand for charter services, not an intrusion of charter services into scheduled "territory".

*3 The third claim made by the scheduled carriers is that their declining profits on the North Atlantic are a result of the growth in charter activity.

Revenue losses of scheduled carriers, however, have been prompted by a combination of factors. Lower scheduled fares have been put into effect in order to attract new traffic and to divert charter traffic, thereby diluting the overall yields per passenger mile. The chief obstacle to profitability for the scheduled operators has been overcapacity, resulting from premature acquisition of jumbo jets. Carriers have been trying to find an equilibrium between capacity and demand, and as is shown by the heavy losses suffered by the scheduled carriers, adjustments have not always been smooth.

In short, the evidence indicates that:

1. charter operations do not divert traffic from scheduled operations, but that, on the contrary, they attract a whole new contingent of the population into low-cost air travel, and therewith have a traffic generating effect;

2. charter traffic has grown independently of scheduled traffic, by catering to those who can not afford scheduled fares. During the period of spectacular charter growth in transatlantic markets, scheduled traffic has continued to increase;

3. European and US flag carriers grew even faster than previously during the crescendo of charter growth;

4. the cause for the scheduled carriers' financial ills must therefore be sought elsewhere, notably in the problem of overcapacity.

With these data in mind, governments should be urged to reconsider their charter policies and to free charter operations from such artificial restrictions as the governments of the United States, Canada and those of the ECAC member states have burdened the charter operations with.

The charter carriers pioneered the affinity charters. Since the beginning of the 50's scheduled carriers have had their share in the affinity market.

The charter carriers pioneered the ITC concept and now scheduled carriers, both in Europe and North America have entered this market and are now flying inclusive tour charters.

The scheduled carriers are now flying more advance booking charters than the charter carriers.

The scheduled carriers now have big enough a share in the charter market to justify a relaxation of the charter rules, without doing much harm to the scheduled airlines. The rules, on the whole, are too restrictive and hamper the development of innovative forms of vacation travel. A substantial relaxation of these rules will benefit the traveling public, the charter operators and the scheduled operators in as far as they have penetrated the charter market.

Paragraph 7 : Charter Associations.

Most of the world's scheduled international airlines are united in one trade association: the International Air Transport Association(IATA). At present, IATA has 112 member airlines, of which 91 are active members providing international and domestic services, and of which 21 are associate members providing only domestic air services.

Together, the IATA airlines carry 90% of the world's scheduled airline traffic. In September 1974, IATA decided to amend its Act of Incorporation to admit charter operators to membership. This change made it possible for a charter company anywhere in the world to apply for IATA membership. However, only charter companies operating across the North-, Mid-, and South-Atlantic would be eligible to participate in Traffic Conferences on charter rates and to vote on the rate proposals covering the area. Charter operators would not participate in conferences on scheduled airline fares.

By May 1975, no charter operator, not even a subsidiary of an IATA member airline had joined the association.

The statement of J.W. Bailey, president of Overseas National Airways, a US charter carrier, may be considered representative of the feeling towards this opportunity among charter carriers:

> "I think it is very kind of them to condescend to take us into their hallowed establishment, but as far as ONA is concerned, our answer is "No, thank you". What bothers me about this is that it prohibits us from accomplishing what we were basically certificated to do. If we get to the point in our business where we have to rely on unanimity agreement with all other carriers before we can make changes in the rate structure, then I seriously question if there is further need for this class of carrier in the US

transportation system. If we agree to become a part of a pricing cartel that is going to virtually eliminate the free enterprise system, then we effectively will destroy the market we have created".

The charter carriers have their own associations: the International Air Carrier Association (IACA), the Air Charter Carriers Association (ACCA) and the National Air Carrier Association (NACA). The activities of these associations are not nearly as comprehensive as those of IATA but still are worth mentioning (51).

IACA was created on 11 June 1971 at Strasbourg by a group of 12 charter airlines. A month later it adopted its articles of association at a conference held in Paris on 12 July. It stated its work program at Oakland (California) on 24 August 1971.

IACA's primary aim is to broaden the base of air travel through the encouragement of charter services. In its continuous contact with the governing bodies of air transport and tourism, IACA strives to create an awareness of the benefits of low-cost charter travel to international tourism and seeks to ease restrictions which hamper its growth.

The resolution establishing IACA ,adopted the following guidelines:

---to develop an economically sound and balanced international air transport system that best serves the needs of the traveling public;

---to promote increased understanding and recognition of the benefits

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51. See for an elaboration on IATA's functions: "The scheduled international airlines and the Aviation Consumer. Unpublished thesis of P.P.C. Haanappel Institute of Air and Space Law, McGill University, March 1974.

of international charter operations and by doing so, broaden the base of air travel;

---to improve the quality of international air charter services;

---to foster a co-operative spirit among international charter airlines in order to provide a forum for an exchange of views;

---to work towards the establishment of standardized and liberalized charter flight rules;

---to ensure that the charter airlines' voice is heard at international conferences and that world organizations are fully aware of their aims and objectives.

The following actions have been taken since the formation of the association:

---It has been invited to advise the Philippine government on studies of charter-tourism-potential to the Philippines and has been requested to assist in the formation of charter airlines in Latin America;

---It established a special European Committee to focus on problems peculiar to European charter airlines;

---It participated in the formation of the North Atlantic Charter Fare Conferences held in Brighton, Montreux and San Diego in 1973 and 1974;

---It worked to ensure that until the more marketable ABC system was adopted, the affinity group rules be retained on the North Atlantic.

On 7 January 1972, the US CAB gave final approval for the formation of IACA. In giving approval, the CAB said the activities of IACA would be closely monitored, and any decisions which normally fall within the Board's jurisdiction, would require Board approval(52).

52. CAB Order 72-1-12 of 7 January 1972.

In 1973 IACA counted 14 members: Air Spain (Spain), Capitol International Airways (USA), A/S Conair (Denmark), Euralair (France), Ihex Adria Airways (Yugoslavia), Overseas National Airways (USA), SATA-S.A. de Transport Aërien (Switzerland), Saturn Airways (USA), Spantax (Spain), Sterling Airways (Denmark, Transavia Holland (The Netherlands), Trans International Airlines (USA), Wardair Canada (Canada), and World Airways (USA). Pomair (Belgium) joined IACA in July 1974. Bavaria, Germanair, Itavia and Transeuropa (Spain) have met with IACA officials concerning possible membership (53).

The creation of IACA immediately led to that of another association, ACCA, whose members are the charter subsidiairies or affiliates of European scheduled carriers. Participating in the association are: Aëromaritime (UTA), Air Charter International (Air France), Condor (Lufthansa), Kar-Air (Finnair), BEA Airtours (British Airways), Aviaco (Iberia), Balair (Swissair), Martinair (KLM), Scanair (SAS) and Sobelair (Sabena) (54).

The specific interests of the US charter companies are represented by NACA. NACA has been very active in pursuing liberalization of charter regulations. To that purpose it supported efforts of US charter airlines to gain legislative approval of ITC rules similar to those which have proved so successful in Europe; it participated, reluctantly, in the inter-carrier discussions in order to arrive at minimum charter fares. to eliminate below-cost operations; it suggested revisions to the regulatory bodies in an attempt to improve the marketability of TGCs and, until then,

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53. Aviation Daily 15-8-74 at 259.

54. ICAO Bulletin . May 1972 at 27.

to maintain affinity charters and helped to introduce the Low Cost Air Transportation Bill into Congress, introducing ABCs and redefining ITCs.

NACA members are Overseas National Airways, Saturn Airways, Trans International Airlines, World Airways and Capitol Airways.

All NACA members have certificates of public convenience and necessity issued by the CAB, to perform TGCs, affinities, single entity and ITCs as well as cargo charters between any points in the US including Hawaii. Internationally, these carriers possess presidentially approved certificates to operate commercial charters to and from virtually every area in the world.

CHAPTER II : THE REGULATORY FRAMEWORK.

Paragraph 1 : The Chicago Convention of 1944.

> "The Chicago Conference is a classical demostration of the postulate that nations, no matter how enlighted, are not capable of understanding and comprehending anything beyond their own national interest"(1).

Before the end of World War II, president Roosevelt invited the allied and neutral states to a conference, to be held in Chicago. The conference was held from 1 November to 7 December 1944 and was attended by representatives of 54 nations.

The most important achievement of the Conference was the formulation of the Convention on International Civil Aviation, normally referred to as the Chicago Convention, which amongst others created the International Civil Aviation Organization(ICAO).

This Convention cameinto force on 4 April 1947. In the intervening period there was in existence the Provisional International Civil Aviation Organization (PICAO) which was established on 6 June 1945 and which operated under an Interim Agreement on Internation Civil Aviation, also concluded at the Chicago Conference.

In addition to the main Convention and the Interim Agreement, the Conference drew up two other agreements. These were the International Air Services Transit Agreement, also known as the "Two Freedoms Agreement", and

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1. Jones, The Equation of Aviation Policy, 27 JALC 221 (1960).

the International Air Transport Agreement, sometimes referred to as the "Five Freedoms Agreement".

The failure of the Chicago Conference to find a multilateral solution to the problem of exchange of commercial rights, can be ascribed to the differing views of three groups of nations.

1. The United States on one hand, supported among others by Sweden and the Netherlands, campaigned for the principle of freedom of the air, in a commercial sense. This idea was not proposed to weaken the principle of the sovereignty of each state over its airspace, as laid down in article one of the Convention, but merely to modify that sovereignty, by subjecting it to certain restrictions, which, almost a contradictio in terminis, became known as the freedoms of the air. There were five of these freedoms, and they were later set out in the International Air Transport Agreement, which the US and a few other nations accepted at Chicago. This agreement provided that

> "Each Contracting state grants to the other Contracting States the following freedoms of the air in respect of scheduled international air services:
> 1. the privilege to fly across its territory without landing;
> 2. the privilege to land for non-traffic purposes;
> 3. the privilege to put down passengers, mail and cargo, taken on in the territ-ry of the State whose nationality the aircraft possesses;
> 4. the privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses;
> 5. the privilege to take on passengers, cargo and mail, destined for the territory of any other Contracting State and the privilege to put down passengers, cargo and mail coming from any such territory.

According to the US proposal, the scheduled carriers of parties would have nearly unrestricted rights of commercial operation. Economic decisions

as to fares, frequencies and routes would be left to the discretion of airline managements.

2. At the other extreme, Australia and New Zealand championed the internationalization of commercial air transport. They considered that international ownership and operation, at least on the main trunk routes of the world, offered the only economic solution to the future development of international air transport.

3. In the middle, the United Kingdom, supported by Canada, favored what it called, order in the air. According to this policy, countries would exchange the first four freedoms multilaterally but not the much more extensive fifth freedom. The exercise of this right would have to be negotiated bilaterally.
Also, there would be an International Air Authority, which would have power to license operators and in addition, to control the capacity provided and the rates and fares charged.

The divergent views of the US and the UK reflected clearly the state of their respective aviation industries. The US possessed in 1944 a competitive advantage in commercial aviation of overwhelming magnitude. The US had not only a huge surplus of transport equipment but also thousands of experienced pilots already familiar with the routes to be flown.
The UK and most of the European countries were left with devastated economies and obsolete equipment. A competitive market would have meant extinction of their aviation capabilities. Only a protectionist system would give them a fair chance.

It proved impossible to reconcile such divergent viewpoints. At the end of the Conference, most of the unsolved problems were simply postponed. For example, the questions of capacity and rates were not considered until the Bermuda Conference in 1946.

Although the Conference failed in the area of economics, it was extremely productive in standardizing technical, safety and navigational regulations. The establishment of the International Civil Aviation Organization endowed with the right to promulgate, interpret and enforce regulations in this area, was one of the major achievements of the Conference.

Paragraph 2 : Relevant Provisions.

Confirming the principles laid down in 1919 (2), and long since strengthened by uniform state practice, article 1 of the Chicago Convention provides that "the Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory". This priciple confers upon a state the right to either close or open its airspace to commerce with other nations. The only way for a state to procure commercial rights in international aviation, is through the conclusion of bilateral or multilateral air transport agreements.

Article 2 describes the territory of a state as including the "land areas and territorial waters adjacent thereto". It does not mention sovereignty over the airspace above the High Seas. The High Seas them-

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2. Paris Convention, 13 October 1919, article 1: The Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

selves are free, so it should be concluded that also the airspace above the High Seas is free. This was later laid down as a principle in the 1958 Convention on the High Seas(3).

These two provisions in the Chicago Convention are reinforced by article 6, which specifically prohibits the operation of international scheduled air services over a contracting state, except by special permission: the convention rejected both the British and American proposal for a general multilateral grant of traffic rights. Instead it provided that all rights of overflight must be procured by special authorization of the overflown state. Article 6 reads:

> No scheduled international air service may be operated over or into the territory of a contracting state, except with the special permission or other authorization of that state, and in accordance with the terms of such permission or authorization.

This provision, requiring special permission from a state, was the legal expression of the impasse reached by the Conference in its search for a multilateral exchange of commercial rights in scheduled international air transport.(4). This meant that states had to settle for a bilateral exchange of scheduled air transport rights.

The first bilateral air transport agreement in this field was concluded between the UK and the US at Bermuda in 1946.

The only general grant of rights given in the Chicago Convention is found in article 5 which provides:

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3. Adopted by the United Nation Conference on the Law of the Sea. 29-4-58 UN Doc. A/Conf. 13/L53. article 2(4).

4. Bin Cheng, The Law of International Air Transport at 173 (1962).

> Each Contracting State agrees that all aircraft of the other Contracting States, being aircraft not engaged in scheduled international air services, shall have the right, subject to the observance of the terms of this Convention, to make flights into, or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State overflown to require landing. Each Contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities, to follow prescribed routes, or to obtain special permission for such flights;
>
> Such aircraft, if engaged in the carriage of passengers, cargo or mail, for remuneration on other than scheduled international air services, shall also, subject to the provision of article 7, have the privilege of taking on or discharging passengers, cargo or mail, subject to the right of any State where such embarkation or discharge takes place, to impose such regulations, conditions or limitations as it may consider desirable.

What rights exactly does this article confer upon states? Are the rights of any practical value or use? To what extent does it establish any freedom of the air?.

Article 5 paragraph 1.

Article 5 paragraph 1 specifies the system applicable to commercial and non-commercial flights over a state and stops for non-traffic purposes as performed by non scheduled aircraft. This system enables them to be operated without any prior authorization of the other state, i.e. they are merely subject to notification and the right of states involved in these flights to subject them, when necessary, to their safety or operational requirements. It is a system of maximum liberalization.

Article 5 paragraph 1 gives certain rights of transit to the aircraft not engaged in international scheduled air transport, and to that extent

is a multilateral agreement, a treaty within a treaty. It confers upon the non scheduled international carriers of the contracting states the first two freedoms, namely the right of overflight and the right to make a technical landing for non-traffic purposes.

The International Air Services Transit Agreement, in its article 1, section 1, provides the same for international scheduled services. Section 2 of that article provides that the exercise of these freedoms shall be subject to the provisions of the Chicago Convention. The remaining provisions of the Agreement are taken verbatim from the Chicago Convention, without the least variation.

The question then arises why these provisions were not included in the Convention itself, why article 6 could not give the same transit rights to scheduled services, as article 5 gives to non scheduled services. At the Conference, no specific objections were raised to the first two freedoms; however, only 26 nations signed the Transit Agreement in December 1944 (5). This factor probably accounts for the necessity of drafting two separate agreements. Although no state wished to voice disagreement with the principles of the first two freedoms, they would have been reluctant to sign the Chicago Convention if these priciples had been incorporated (6).

The ICAO Council in its official analysis of article 5, says that

> "three types of flights are included in this right;
> ---entry into and flight over a State's territory without a stop;
> ---entry into and flight over a state's territory with a stop for non-traffic purposes;

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5. W. Wagner, International Air Transport as affected by State Sovereignty. Bruylant, Brussels at 140 (1970).

6. By 1966 the Transit Agreement had been ratified by 72 states. Wagner at 141

---entry into a State's territory and final stop there for non-traffic purposes".(7).

The analysis of the Council expresses the view that the freedom to "stop for non-traffic purposes" should be taken to include the freedom to load and unload passengers or goods not carried for remuneration or hire.

The term "stop for non-traffic purposes" as defined in article 96(d) is a "landing for any purpose other than taking on or discharging passengers, mail or cargo", without distinguishing between those passengers who have paid for the transportation and those who have not done so. From the internal evidence of article 5 itself, however, it appears that the intention was that taking on or discharging of passengers not carried for remuneration should be covered by the expression "flights into" in the first paragraph, since the only exception from the generality of the provisions of the article in this respect is related to the taking on or discharging of passengers, cargo or mail carried for remuneration or hire in the second paragraph of the article.

Who are the recipients of the right in the first paragraph?

According to the article "all aircraft of the other Contracting States" and therefore not the operators or owners of the aircraft. Similar to international maritime law, a right is given to a thing. The Council recognizes this principle in its analysis of the article:

"The expression "aircraft of the other Contracting States" refers to aircraft registered in and therefore....having the nationality of other Contracting States.The responsibility of

7. ICAO Doc. 7278-C/841 of 10-5-52 at 8.

States under the Convention with respect to aircraft registered in their territory, remains the same regardless of the nationality of the owner or operator of the aircraft(8) (9).

The article provides that this right may be exercised without the necessity of obtaining prior permission. This phraseology clearly aims to give a right of operation without prior negotiation other than notifications necessary for air traffic control, customs, public health and other similar purposes. A requirement for prior negotiation over the routes or landing places would, in general, be in contravention of this clause(10). The only general right to designate routes and airports conferred by the Convention relates to scheduled services(11). The absence of any such reservation under article 5 is therefore significant.

Any non scheduled aircraft of a contracting state has been granted the right according to this article, to circulate freely into, through and across the airspace of all other contracting states without the necessity of obtaining prior permission, even if the states do not elect to receive it.

The right granted in this first paragraph is not to be exercised without conditions. Non scheduled operations are submitted to the following:

(a) observance of the terms of the Convention;

(b) the right of the state overflown to require landing;

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8. ICAO Doc. 7278-C/841 at 7.

9. This in contrast to most bilateral air services agreements that require that substantial ownership and effective control are vested in nationals of either contracting party.

10. ICAO Doc. 6894-AT/694 at 8 para.3e.

11. Article 68.

(c) the right of the state overflown to restrict flights over certain regions;

(d) the advance notice to be given of the approximate time and place of arrival.

(a) The aircraft must observe the terms of the Convention.

This qualification refers to the observance of the terms of the Convention (12), by the aircraft whose rights are under consideration on the flights when they desire to exercise those rights. Says the Council:"A failure to observe some provision of the Convention by these aircraft at other times or by aircraft of the same nationality...would bring this qualification into effect(13).

(b) Subject to the right of the state flown over to require landing.

This right of a state to require landing, may be exercised on a very large scale; the Council says that this right is unqualified, but that it can not be exercised in such a general way that it would annihilate the right granted to non scheduled aircraft to make flights non-stop across

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12. The relevant articles are the following:
Art, 4 : misuse of civil aviation.
Art. 8 : Pilotless aircraft.
Art. 10: Landing at customs airport.
Art. 11: Applicability of air regulations.
Art. 12: Rules of the Air.
Art. 13: Entry and Clearance Regulations.
Art. 16: Search of aircraft.
Art. 18: Dual Registration.
Art. 20: Display of marks,
Chapter V: Conditions to be fulfilled with respect to aircraft.
Chapter VI: International Standards and Recommended Practices.

13. ICAO Doc. 7278-C/841 at 10.

the territory of a contracting state(14). The right to require landing does not equate the right to stop an aircraft indefinitely. A state, when it entertains suspicions, may require an aircraft to land, it may search it "without unreasonable delay"(15), it may make sure that the aircraft and its crew observe the terms of the Convention, but, when everything is found in good order, it should let the aircraft take off without further delay(16).

(c) The right of states to restrict flights over certain areas.

This third condition is contained in the last sentence of the first paragraph. The condition applies when an aircraft desires "to proceed over regions which are inaccessible or without adequate air navigation facilities" and can be imposed only "for reasons of safety of flight".

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14. Idem, at 11.

15. Article 16 of the Chicago Convention.

16. Portugal always required landing except in special cases where prior exemption was obtained from the government. Portugal explained its position in the following way:"In respect of the first freedom, the Portugese government will certainly not agree that an aircraft may fly over Portugese continental territory without landing at Lisbon. This provision has been included in all the bilateral agreements entered into by the Portugese government since the Chicago Conference. Because of its geographical situation, Portugal will be expected to maintain and operate at Lisbon, the Azores and other parts of the world, airports and other aeronautical facilities which will be out of proportion to the requirements of its own national air services. The resulting expenditure will by far exceed the revenue obtainable. Under these circumstances, it would appear reasonable that the Portugese government should attempt to assure the greatest possible use of the facilities it provides. The requirement for landing at Lisbon is therefore a safeguard which is both reasonable and fair for us " ICAO Doc 7008-AT/702.
Portugals position was understandable but in defiance of the last paragrpah of article 15 of the Chicago Convention which provides that "no fees dues or other charges shall be imposed by any Contracting State in respect of the right of transit over or entry into or exit from its territory of any aircraft of a Contracting State or persons or propoerty thereon".

The state overflown has the right in such cases "to require these aircraft to follow prescribed routes or to obtain special permission for such flights". This condition was inserted at the request of Brazil and Canada(17), for a very practical reason. Both countries are so vast and certain regions so inaccessible without proper air navigation facilities, that flights in those regions may cause considerable hardship, physically to the persons involved and financially to the governmental rescue teams.

The Council recommended that

> "each government should decide which regions in its territory are inaccessible or without adequate air navigation facilities. Such regions should be publicly described, as in the case of the prohibited areas under article 9 and the nature of the restriction to be imposed should be stated. Thus the description should be explicit as to whether the requirement is
> (i) merely that a particular route be followed;
> (ii) that permission be required;
> (iii) or both, since the requirements thereby seem cumulative, notwithstanding the use of the disjunctive "or".(18)

Article 5 does not, as does article 9, forbid discrimination between aircraft of the state whose territory is involved and the aircraft of another contracting state. If this provision wants to make any sense though, it has to be assumed that article 5 means to include here the aircraft of the state whose territory is involved.

(d) Avance notice of approximate time and place of arrival.

A fourth limitation is not embodied in the article, but its existence must be recognized. Every aircraft falling under this first paragraph, as well as those aircraft covered by the second paragraph, must give advance notice of the approximate time and place of arrival. This is necessary for air traffic control, public health, customs, immigration procedures etc. It may be interesting to note the explanation given by the drafting Committee on this

Committee of this provision:

> "Your Committee has omitted the provisions that appeared in both articles 6 and 7 (of the draft, i.e. 5 and 6 of the Convention) that the appropriate authorities of each State may require that notice be given of the point and approximate time of arrival of such aircraft in its territory. We are advised that adequate provisions are being made for such notices as may be necessary either for traffic control or customs purposes in the appropriate annexes or regulations to be adopted(19).

Article 5 paragraph 2.

Article 5 paragraph 2 concerns only non scheduled commercial flights, i.e. those carried out for remuneration or hire. In this category come all the conventional charter formulae.

Paragraph 2 creates a system of relative and conditional liberalization and was adopted mainly to protect the viability of the scheduled services.

The beneficiary of the privilege granted by this second paragraph, is the same aircraft which benefits the right of the first paragraph.

The words "for remuneration or hire" make a delimination of the aircraft that are specially envisaged by the second paragraph.

To fall under the second paragraph, an aircraft must necessarily be devoted to transport :"if engaged in the carriage". Therefore, whenever an aircraft in general, is not engaged in carriage, it can not be classified under article 5 paragraph 2, because it simply is not engaged in carriage operations; nor can it be classified under article 6, because a scheduled air service according to article 96, must be performed for "public transport". It follows that such an aircraft must necessarily be governed

17. Proceedings of the International Civil Aviation Conference, Volume I at 686.
18. ICAO Doc. 7278-C/841 at 11.
19. Proceedings Volume I at 671.

by article 5 paragraph 1. This is rather importaht, because those aircraft that fall in the category of pargraph 1, such as aircraft engaged in airwork, private operations for pleasure or business purposes, are entitled to the full benefit of the first paragraph and cannot be subjected to the conditions, regulations and limitations of the second pargraph.

The Council-analysis of "remuneration or hire" is very, almost too general. It says:

> "The expression for remuneration or hire means any kind of remuneration whether monetary or other, which the operator receives from someone else for the act of transportation."

One way or the other, every type of international transport is made for remuneration. Since no human being ever does anything gratuitously, since even friendship and love seek to receive compensation of one kind or another, it may be assumed that even so-called humanitarian flights are carried out in view of remuneration. If this interpretation were to be followed, these humanitarian flights would be classified as commercial flights and therefore would fall under paragraph 2, which has never been the intention.

The interpretation as proposed by the ICAO Secretariat seems much more down to earth and therefore more valid. The Secretariat interpreted the term "for remuneration"

> "In the simple practical sense, meaning money, which the passenger or owner of the cargo pays to the operator of the aircraft for the act of transportation"(20).

"Such aircraft...shall also...have the privilege".

The word "also" makes a liaison between the two paragraphs.

> "It indicates that these aircraft should have the right given by the first paragraph of article 5 as well as the privilege given by this paragraph. That is to say, they have first the right to enter, fly over and stop for non-traffic purposes without the necessity of obtaining prior permission and not subject to the regulations, conditions or limitations mentioned in the second paragraph. Then, in addition, with certain qualifications, they have the privilege of taking on or discharging passengers, cargo or mail at a stop. Here again, the expression "passengers, cargo or mail" is clearly intended to refer to passengers, cargo or mail carried for remuneration."(21).

The article, when mentioning passengers, cargo or mail, does not make any restriction on origin or destination. This implies that the second paragraph of article 5 is granting third, fourth and fifth freedom traffic rights, which, however, can be restricted by certain conditions under which they may be exercised.

Non scheduled commercial flights are subject:

(a) to the provisions of article 7 and

(b) to the right of any state involved, to impose such regulations, conditions or limitations as it may consider desirable.

(a) Commercial non scheduled flights are subject to the provisions of article 7. This means that carriage of cabotage traffic is forbidden: they cannot carry passengers, cargo or mail from one point in a foreign country to another point in that same country. According to the latest sentence in article 7, a state is not prevented from entering into any arrangement specifically granting cabotage privileges "as long as these rights are not restricted to any one carrier or State"(22).

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20. ICAO Doc. 6894-AT/694.

21. ICAO Doc. 7278-C/841 at 12.

22. ICAO Doc. 6894-AT/694 at 15.

(b) The question of what regulations, conditions or limitations may or may not be imposed has been troublesome from the very outset(23). How could it be otherwise? The formulation is so general that the right of non scheduled aircraft to perform operations, can be completely annihilated, through the imposition of those limitations by the different states directly involved. If the state so desires, it may even go as far as to impose on the non scheduled international air services which engage in commercial operations, such regulations, conditions or limitations as to wipe out the difference with article 6.

The wording of the article does not expressly authorize the imposition of the condition of prior permission, but according to an analysis of the article by the ICAO Secretariat, this was not the intention of the article:

> "It is assumed that the enjoyment of this privilege, like the enjoyment of the right in the first pargraph, would not be subject to prior permission from the state concerned. The second paragraph of article 5 does not expressly rule out the possibility of prior permission being required in connection with this privilege, and it is possible to hold that prior permission may be one of the regulations, conditions or limitations envisaged in the last sentence of the article. Nevertheless, the Secretariat believes that it was the intention of those who drafted and adopted the article, that carriers, covered by the article should enjoy this privilege without the necessity of obtaining prior permission"

This belief was based on the following reasoning:

(i) The close relationship between the two paragraphs of article 5 suggests that the same type of freedom of operation is envisaged in each, any difference being carefully specified. If the second paragraph had intended to differ from the first in so important an issue as prior permission, it is felt this would have been spelt out.

(ii) The obtaining of prior permission is laid down in article 6 for scheduled services. There would be little point in distinguishing between scheduled and non scheduled services

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23. E.D. Weld Some notes on the Multilateral Agreement on Commercial Rights of Non Scheduled Air Services in Europe 1957, JALC at 180.

if permission is to be required for the commercial operation of the latter as well as the former.

(iii) if it had been envisaged that prior permission would have to be obtained for each exercise of the privilege, it would have been unnecessary to spell out the reservations relating to cabotage or to regulations, conditions or limitations. Such reservations suggest precautions which States felt they might need to take against the abuse of free operations of non scheduled aircraft. Aircraft that have to obtain prior permission for each flight need no such precautions.

(iv) A privilege to do something that would in general be subject to prior permission in each instance would be scarcely worth formal statement in an international convention. On the other hand a situation where some States require prior permission and others did not, would be seriously inequitable. The Secretariat believes that article 5 was adopted in order to avoid these difficulties(24).

The Secretariat's analysis was prepared as a guidance for the analysis by the Council, but the Council did not follow this guidance. In its own analysis, it says that the right to impose regulations, conditions or limitations is unqualified. This unqualified right enlarges the scope of action for a contracting state tremendously:

> "It should be understood, however, that this right would not be exercised in such a way as to render the operation of this important form of air transport impossible or non-effective".(25).

The Statement of the Secretariat recognizes that there are two basic rights in article 5 paragraph 2: one for the aircraft to perform non scheduled commercial operations; one for any contracting state to impose regulations, conditions or limitations; that these rights must coexist together, and that one of them must not kill the other one.

The statement of the Council does not negate the existence of the rights

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24. ICAO Doc. 6894-AT/694 at 13.

25. The Secretariat's analysis dates from 26 August 1949. The Council's is dated 28 March 1952.

aircraft have, but it puts so much emphasis on the rights states have that it amounts to saying:"the aircraft have a right, but that right is opposed to the right of the states, and this latter right is unqualified". The Council forbids the states to kill the rights of the aircraft, but not to harm them as much as possible.

When resuming the contents of article 5, the most conspicuous provisions are the following:

The first paragraph grants the first two freedoms of the air to all non scheduled aircraft, commercial and non commercial. The conditions imposed are bearable.

Paragraph 2 is a granting of the third , fourth and fifth freedom to commercial non scheduled aircraft, but, as a whole, is much more restrictive, since the operation of these rights is subject to certain regulations conditions and limitations.

These restrictions should not amount to a prohibition of the privilege contamplated. At all events, they can be imposed only on aircraft engaged in commercial non scheduled traffic operations, never on aircraft that are wholly covered by the first pargraph.

Paragraph 3: Implementation of Article 5.

If one draws up a balance sheet on how the contracting states incorporated the regulations, conditions or limitations, provided for in article 5 of the Chicago Convention, into their national regulations, with respect

to the granting of operating rights to foreign non scheduled operators, one can say that the majority of these states adopted fairly liberal regulations with regard to non commercial flights, but, as was to be expected with regard to commercial non scheduled flights, were ultimately stringent. By 1952 the situation was the following(26):

A. Private or non commercial or non transport aviation.

Subject to the conditions of reciprocity, the majority of contracting states adopted the policy outlined in the annex to Assembly resolution A2-17 of granting freedom of entry to private or non commercial flights of foreign aircraft. The restrictions imposed on the category were mostly of a technical or formal nature. Only a limited number of states required prior permission for such flights and these restrictions were apparently due largely to safety and security considerations.
It seems that practically all states granting freedom of admission to these types of flight, required either the filing of a flightplan or some form of prior notification for air traffic control, immigration, customs and public health purposes(27).
While freedom of admission for private or non commercial flights had been extended generally to aircraft of contracting states, aircraft of non

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26. The data are based on a survey, undertaken by the ICAO Secretariat which was published in AT-WP/295 of 15 December 1952 as revised on 3 February 1953. Contemporary regulations will be discussed in Chapter IV.

27. Canadian regulations provided that the transport "for individuals, friends and business associates" from point to point in Canada by foreign aircraft, is permitted as long as the number of trips and volume of domestic traffic are of an incidental nature and are kept within the limits of casual transportation.
Brazilian regulations on the other hand stated that the carriage of passengers or goods by any foreign aircraft, whether for remuneration or not, is not allowed between points in Brazil

contracting states were, as a rule, required to apply for prior permission for such flights.

B. Transit Flights of Non Scheduled Commercial Operations.

States' policies in respect of foreign non scheduled commercial flights in transit, with no stop or only with a technical stop, were generally the same as those for the flights of the previous category.

C. Traffic Stops of Non Scheduled Operations.

National policies with respect to the taking on or discharging of traffic in their territory by foreign non scheduled aircraft, took a variety of forms, ranging from stringent restriction to complete freedom.
The methods by which the states exercised regulatory control in this matter can be regarded as follows:

(a) Requirement of prior permission for each individual flight or series of flights(28). The granting of permission was based on the circumstances in each separate case, and subject to compliance with whatever conditions or limitations might be attached to such permission.
A very arbitrary and stringent adaptation of article 5.

(b) Requirement of prior permission for each flight or series of flights with prescribed regulations, conditions or limitations, generally applicable in all circumstances(29).

(c) Freedom of admission or requirement of prior permission according to the

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28. Brazil, Burma, Chile, Columbia, France, Ireland, Iraq, Italy, Peru, Portugal, Spain, the United Kingdom and the United States.
See for these regulations at AT-WP 295.

29. Australia, Canada, Ceylon, Dominican Republic, India, New Zealand, Pakistan and South Africa. Canada and the US had such arrangements for transborder flights.

circumstances determined by bilateral agreements. Five European states(30) had made such arrangements by means of formal bilateral agreements or an exchange of notes, for the regulation of non scheduled commercial flights between their territories(31).

(d) Freedom of admission on condition of reciprocity was granted by Denmark, Sweden and Norway, the latter mentioning specifically the existence of bilateral agreements.

The Netherlands granted freedom of admission on certain conditions relating to fares and rates. A very liberal position it seems, but its action was virtually nullified by the requirement that the fares on these flights could not be lower than fares charged on scheduled operations on the relevant route section(32).

As opposed to the charter operations along the routes of scheduled services we know these days as "on-route" charter operations, strict prohibition of non scheduled operations along the routes of scheduled operations was fairly general in the immediate post war years. Different approaches to the problem of competition with the scheduled air services could be distinguished.

Australia's definition of charter operations indicated that "permission

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30. France, Italy, Spain, Switzerland and the UK.

31. The main emphasis in these arrangements is on defining certain common conditions applicable to non scheduled flights of the aircraft of both states; particularly in respect of flights over routes operated by the scheduled airlines of the states concerned. Such conditions related to the control of capacity and frequencey of flights, categories of traffic ownership and nationality.

32. This condition did not apply in the case of charter flights using aircraft leased as a whole to a person or a group wihtout the resale of space to individual members of the public.

will only be granted to foreign aircraft to operate....over a route of a scheduled airline if the frequency of such operations does not exceed one flight in any period of four weeks". According to the United Kingdom - Switzerland arrangement of 1952, certain classes of traffic were allowed to be carried on non scheduled flights over scheduled routes without the necessity of prior permission. Similar provisions were found in the France - Italy, France - Spain and UK - France arrangements(33).

Canada and Mexico, held the position that permission to operate non scheduled flights by foreign carriers between points served by domestic scheduled carriers, would be granted "only if the scheduled airlines concerned are not in a position to perform such flights". This policy was also referred to in the policy statement made by the US in March 1951, where it said that no more transatlantic charter operations would be authorized "except where the regularly authorized transatlantic carriers, US or foreign, were unable or unwilling to provide reasonable adequate charter services, at established charter rates"(34).

This policy statement put the"large irregular air carriers", as non scheduled air carriers were named in that time, in a genuine "supplemental" position(35).

In contrast with these restrictions, most states in 1952, granted freedom of admission to foreign non scheduled commercial aircraft, where the traffic carried was small, so that it would be unlikely to afford serious competition to the scheduled airlines.

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33. Respectively of 1949, 1948 and 1950.

34. CAB Policy Statement on Transatlantic Charters, 16 March 1951.

35. The term "supplemental is dealt with in chapter I.

South Africa required no prior permission for foreign non scheduled flights, "so long as not more than 7 persons are taken on or discharged". In the European bilateral arrangements referred to above, provisions had been made for free admission of non scheduled flights of aircraft carrying four passengers or less. This applied to aircraft operating between France and Switzerland, France and Italy, the UK and France and the UK and Switzerland.

Control of Frequency.

Many states prevented commercial non scheduled international air services from competing unduly with scheduled services by establishing limitations on frequencies of operation. In the UK - France agreement, flights of aircraft, carrying more than 4 passengers over the routes of designated scheduled carriers, required prior permission if operated on the same route by the same operator more than once in any period of 30 days. In the agreement between the UK and Switzerland, flights carrying more than 4 passengers were limited to one in each period of 10 days(36).

Control of Fares and Rates.

Some states protected their scheduled air services from low price competition from the non scheduled airlines by incorporating provisions in their regulations, conditions and limitations, governing the fares and rates to be charged on non scheduled operations. Australia's regulations stated that the aeronautical authorities could direct that the charges to be made in respect of passengers taken on or discharged on Australian territory "shall not be less than the stated amount".

Ceylon and India required that fares to be charged for the carriage of traffic to and from their territories on non scheduled flights, "shall

not beless than the rates charged by scheduled airlines operating the same or equivalent routes".

The Netherlands had a similar regulation for non scheduled flights that were open to use by individual members of the public. Columbia required that rates and fares of non scheduled services must have prior approval of its national authority. Cuba specified that excursion flights by foreign operators "shall bemade at rates higher than those for scheduled operations over similar distances".

Many states adopted provisions limiting the types of traffic which non scheduled carriers could carry. Virtually all states prohibited the carriage of fifth freedom traffic on such operations without permission.

Group charter flights held a special position in the regulations of several states. National regulations required usually that the charter group be not made up of passengers who have simply been sold tickets by an agent. Another general provision was that "space shall not be resold to the public". These national regulations clearly show the influence of the charter resolution regulating affinity charters, as it was adopted by IATA. This resolution 045 (37) adopted two principles: on the one hand, charters should be planeload contracts;(38)on the other hand, resale of the

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36. See also the Australian regulations mentioned above.

37. IATA and resolution 045 will be dealt with more extensively in ChapterIV, paragraph 1.

38. Resolution 045 provides in its third paragraph "that the charterer shall be charged for the entire capacity of the aircraft, regardless of the space to be utilized by him.

transportation by the charterer, whether by a subcharter contract, or by sale of individual tickets was not permitted. Resolution 045 was denunciated by the CAB in 1972. Transatlantic affinity charters since 1972 have been governed by the different national regulations, which, since the adoption of 045 have been somewhat modified, but which, on the whole, are still adhering to the principles of 045.

In the regulations of the Union of South Africa, there was the condition that permission would be granted to charter flights of foreign aircraft only if passengers discharged in the Union, were taken on by the same aircraft on its departure. Under the terms of the UK - France exchange of notes, no prior permission was required for flights between the two territories, on any route, in cases where the aircraft was wholly chartered by, or hired to one person or corporate body and where none of the seats were sold to third parties.

Paragraph 4 : Regulatory Distinction.

The total of national regulations governing these non scheduled operations had assumed fairly large proportions by 1952. The adoption of these national, unilateral regulations, was a direct corollary of the phrasing of article 5 of the Chicago Convention, which provides that aircraft not engaged in scheduled international air services, shall have traffic privileges, subject to the right of the state concerned to impose such regulations, conditions or limitations as it may consider desirable.

Bilateral agreements for scheduled services on the other hand, have their legal basis in article 6 of the Convention, which provides that no scheduled

international air service, shall be operated into a state, except with special authorization of that state. The Chicago Convention created two separate regulatory systems for two separate transportation formulae, scheduled and non scheduled.

Before World War II, charter services were normally different from scheduled services in nearly all respects; that is to say, they in general used smaller aircraft, carried fewer passengers and operated less frequently and less regularly than scheduled services, and above that, at a passenger-mileage charge, considerably above the scheduled air service charge.

Since the war, the position has changed, largely owing to

---the availability of large numbers of cheap, ex-military aircraft suitable for air transport;
---a substantial amount of private capital looking for investment;
---a plentiful supply of trained aircrew;
---an increased demand for air transport resulting partlyfrom war-time displacements and the inadequacy of surface transport, and partly from the suddenly felt effect of eight years of world development in aviation matters;
---the shortage of capacity on scheduled airlines.(40).

As a result of these factors, a number of new charter air services was offered to the public on aircraft of size and type similar to those used by the scheduled services. Already one year after the European Armistice there were about 30 different French charter companies, flying mainly between France, North Africa and the British Isles. In the US it was estimated that some two thousand charter companies were active (41).

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40. These are mainly reasons that hold true for the US. ICAO Doc. 4522 A1-EC.74, Discussions of Commission No.3 of the First Assembly May 1947 at 15-16.

41. Jacob W.F. Sundberg, Air Charter, Stickholm, P.A. NOrstedt & Soners Forlag, 1961 at 25.

Some charter companies operated infrequently over any particular route, but with aircraft as large as many used by scheduled airlines; ohters operated frequently but irregularly on the same route, using both small and large aircraft.

Because of this growth, some of the uses of the scheduled / non scheduled air services distinction were abandonded. In the US, the regulation that only scheduled air service operators had to report full statistics to the CAB was altered to include the larger charter services as well as the scheduled services. Certain safety regulations in the US were made applicable to all forms of public air transport(42). Gradually, the sharp distinction between the two formulae, as drawn up by the Chicago Convention, was fading.

A clear and workable distinction between scheduled and charter services is mainly needed for regulatory purposes. The two transport formulae fall under different sets of regulations. The main objective of the regulation of charter operations has always been the protection of scheduled air operations. The fundamental objective of the government regulations before the war, was the control of excessive or uneconomic competition in the scheduled air services field. Non scheduled services were exempt from the regulations, because they did not seriously compete with the scheduled services(43). After the war the tide turned, and non scheduled services did become serious rivals to scheduled services.

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42. Economic Regulations Draft Release No. 14, 14 November 1946: Proposed revision of section 292.1 of the Ec. Regs.

43. The Civil Aeronautics Act of 1938 provided for the performance by scheduled airlines of "charter trips....and ohter special services" These operations were deemed to be of so little importance, that according to the Act, no license was required for their performance.

To achieve a satisfactory relationship between scheduled and non scheduled services, each type should have its own separate and distinct function to perform and would have to be restricted to that performance by regulations.

Urban road transport provides a most interesting analogy with air transport in the matter of scheduled and charter services. In nearly all urban areas, passenger transport is provided by buses running scheduled services over fixed routes, and also by taxis, running non scheduled charter services from any point to any point.

As in the case of air services, competition between services is normally regulated by a licensing system allocating certain routes or areas to specified operators. These regulations forbid any operators, other than those specified, to carry passengers on regular bus services on those routes or in those areas and, as in the case of air services, it is either understood or expressly stated that the special charter service, provided by the taxi, is exempted from those restrictions. It is therefore interesting to note that, although urban taxis take full advantage of their exemption from the restriction placed on the buses, competition between bus and taxi services is seldom excessive or destructive and each type of service appears to be free to operate and develop in its own sphere. This healthy relationship between scheduled and non scheduled services in urban road transport is achieved because each type of service has its own separate and distinct function and is restricted to the performance of that function either by <u>regulation</u> or by <u>economic factors</u> or by a combination of both.

One of the proper functions of charter services is the important one of <u>supplying the elasticity and personal service that cannot be supplied by the scheduled services</u>, that is, it is the function of carrying persons between

places not served, or not conveniently served, or not served at the desired time by the scheduled airlines. Commission No. 3 of ICAO's first Assembly put it this way:

> "Any attempt to define the proper field of the non scheduled services in terms of frequency or regularity of operation, will inevitably prove troublesome or unduly restrictive, since these qualities are not the real qualities that distinguish that field. The real quality distinguishing the functions of the non scheduled services, is the negative quality that these functions could not be performed by the existing scheduled services"(44).

The Commission recognized that it did not appear practicable by verbal definition, to effect a division between scheduled and non scheduled commercial services which would hold good in all cases. To make a segregation between the two services and thus prevent undue competition, the Commission suggested:

---"....the establishment of an international register of "scheduled air services", presumably under the auspices of ICAO, in which the member states will enter from time to time the names of their international air transport services which they regard as regularly scheduled. Only those airlines would be eligible for entry in the register, which operate on a public schedule or timetable over fixed routes;

---The international routes, of course, would have been fixed pursuant to the various means (bilateral agreements) available for granting the permission or authorization required by article 6 of the Convention;

---The member states could then agree amongst themselves in the exercise of the power conferred by article 5 of the Convention, that they would permit the operation of air transport enterprises other than those listed, provided that they charged a fare per seat mile, exceeding by a given percentage the fares generally in effect on the scheduled airlines in the area in question. Unlisted commercial operators, not charging fares in accordance with this schedule, would be allowed to carry passengers internationally only by specific authorization by the States in which passengers were to be picked up and discharged;

---This arrangement would be applied according to the nature of the services rendered rather than according to the identity

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44. ICAO Doc. 4522 A1-EC 74 at 26.

> of the carrier; that is to say, one of the airlines listed in the register... and desiring to operate a special service on charter, otherwise than along its authorized routes, would be heldto the same excess fare as an air service not so registered"(45).

These suggestions were never realized; maybe because they were too much based on the analogy with urban transport. A system where non scheduled services charge more than scheduled services, may very well work in an urban transportation system; on a large scale it has never worked in an air service system. After the war, the large majority of non scheduled operations was performed at a price level well below the price level of normal scheduled services and this has been the major reason for their success.

The Commission, however, appears to be far ahead of its time, when it wishes to make a distinction between the two formulae, based not on the identity of the carrier, but on the "nature of the service rendered"

Both the Edwards Report of 1969 and the Nixon Policy Statement of 1970, describe the bulk market in terms of the character of the traffic, rather than the type of carrier that serves it, departing herewith from the pre-occupation with labels that had been a central feature of charter regulation ever since the adoption of the definition of scheduled international air services by the ICAO Council in 1952.

Paragraph 5 : ICAO's Definition of an International Scheduled Air Service.

Adopted by the Council on 25 March 1952, for the guidance of contracting states in the application of articles 5 and 6 of the Chicago Convention, the definition reads as follows:

> "A scheduled international air service is a series of flights that possesses all the following characteristics:

(a) it passes through the airspace over the territory of more than one state;
(b) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by the members of the public;
(c) it is operated, so as to serve traffic between the same two or more points, either
(i) according to a published timetable, or
(ii) with flights so regular or frequent that they constitue a recognizably systematic series".

The definition is based on three criteria:

(a) a criterion covering the international aspect;
(b) a legal criterion and
(c) an operational criterion.

The definition has never enjoyed general acceptance. Nevertheless it might be interesing to note some of its features.

According to this definition, a flight can be considered a scheduled international air service, only if it fulfils all the requirements of the definition, since the "main elements are cumulative in their effect". If one of the characteristics is missing, the flight must be classified as non scheduled.

A scheduled international air service must in the first place consist of a series of flights. A single flight by itself could thus never constitute a scheduled international air service, although it might form part of such a service(46).

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45. ICAO Doc. 4522, A1-EC 74 at 27-28.

46. The definition does not state how many flights are necessary as a minimum to constitute a series in this sense. For the purpose of considering whether any series of 1fights constitutes a scheduled international air service, any flight or flights fulfilling the conditions specified in the definition can be included and any flight or flights not fulfilling those conditions can be excluded: ICAO Doc 7278-C/841 at 4.

In order to be scheduled, a series of flights must be performed by aircraft "for the transportation of passengers, cargo or mail". Thus, a series of flights performed for other purposes, such as training or cropspraying could not be regarded as scheduled, even if it fulfilled the other elements of the definition.

The prerequisite that each flight must be open to members of the public, does not mean that all the flights can be classified as non scheduled if one of them is not open to the public, since that one could be excluded from consideration and the remainder might then form a series that could be classified as scheduled. The Council, in its "notes on the application of the definition" distinguishes two categories of commercial air transport, not open to use by members of the public:

(a) where an aircraft is wholly chartered for one or more flights, by one person or undertaking for the use of that person or undertaking, including the carriage of their employees and goods, without the resale of space or seats on the aircraft to members of the public;
(b) where an aircraft is chartered for one or more flights by an organized group of individuals (such as a club) or of firms (such as a trade association) and separate seats are sold or space made available to those individuals or firms, provided that the group in question has a genuine existence with defined objectives, independent of the need for transport and is not so large as to be in effect a substantial section of the public".

Describing the modes of charter transportation that existed at that time, the Council does not actually label them. It is clear that the Council is giving a description of "single entity" charters and of what would become known as "prior affinity"charters. As IATA resolution 045, it includes the planeload principle and the no resale rule.

In the words of the Economic Commission the definition

> "does not, of course, enable absolutely definite and standardized decisions to be taken as to the status of every international flight throughout the world, but it does, nevertheless, tend to remove much of the difficulty and doubt that existed before, and the more widely it is accepted, the more certain it is that in the future few international air services of a nature to compete seriously with the scheduled air services, will be able to operate as non scheduled services(47)".

The suggestion by the Secretariat, to have the definition accepted by means of an international agreement never materialized. During discussions on improvement of the definition, some countries, among them France and the Netherlands, proposed to add either to the definition or to the notes on its application, the concept of "irrespective of payload", which they viewed as essential to any international scheduled air service.

The Netherlands delegate believed that

> "any unwillingness to include this element in the definition was largely caused by the fear that it would allow services which were in fact scheduled, to pass themselves off as non scheduled by occsaionally canceling a flight when the payload was low"(48).

He was in fact referring to the Silver City cross Channel ferry services. These services wereclaimed to be scheduled services within the meaning of the definition of the ICAO Council, and to be governed by aryicle 6 of the Chicago Convention; but these operations were carried on with full regard to payload. The Silver City services were operating according a published timetable and flights left every quarter of an hour in the summer and less frequently in the other seasons. Individual flights were omitted if the payload was insufficient, and additional services were laid on, if necessary.

The British delegate submitted that this was a service with flights so regular and frequent that they constituted a recognizably systematic series; that although a particular flight might be delayed, the public could rely on the service with reasonable certainty.

According to the French and Dutch delegates it was a non scheduled service, because it was not carried out "irrespective of payload".

According to the British delegate , this was a scheduled service; passengers could be reasoably certain that they would get transportation if they came to the point of departure at the times indicated on the time-table. This was an entirely different situation from one where a particular flight was organized weeks in advance, or where a plane was being chartered by an individual or a company.

The proposal to add the requirement "irrespective of payload" was not added to the definition(49) out of fear that this addition would throw the definition open to abuse; operators of services which constituted a recognizably systematic series and otherwise complied with the definition would be able to claim they were non scheduled operators on the strength of occasionally canceling a flight because of insufficient payload. Their operations would be "respective of payload" and the operators would thus not need to comply with the more stringent regulations applicable to scheduled operations; this would lower their costs and place them in a more favorable position than the other scheduled operators with whom they were in fact competing.

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47. A-7 WP 311/EC at 9.

48. AT-WP/Min XXIII-7 of 22 Nov. 1954 at 38.

49. The prsposal was lost on a tie vote of 6 to 6,AT-WP/Min XXIII-8 at 44.

It must be said that the definition, at the time it was drafted did make sense; it reflected a sensible and important distinction between the existing different categories of airline operations.

The development of the airline industry, ever since the conception of the definition , the growth and economic importance of both scheduled and charter operations, have stripped it of every value.

Charter flights, be it affinity, inclusive tour or ABC, are operated according to a published timetable and above that , are operated so regularly and frequently that they do constitute a recognizably systematic series and, therefore, according to the definition, should be cosidered as scheduled operations. Regularity is no meaningful characteristic anymore. Other criteria must accordingly be sought; criteria that make a closer approximation to the present reality.

The lack of definitions that correspond to reality, may not be harmful in itself so long as regulators of the industry have a clear awareness of the reality. But the absence of practicable definitions might hamper a smooth regulatory action insofar as it is an obstacle to clear vision.

What corresponds mostly to reality now, is the fact that seats on a scheduled service are sold on a retail basis, by the operator himself or by his agent, direct to the public at large and without the intervention of a wholesaler. A non scheduled or charter service is one on which no seats are sold retail: on such a service, the seats are sold in bulk either to a wholesaler for resale or to a single buyer for his own use.

In these days, this is probably the most conspicuous distinction between scheduled and charter services. In the beginning of the fifties it was the regularity criterion.

The ICAO definition has only found a limited measure of acceptance from Member States. In 1955 only a dozen out of the 64 member states had accepted it without qualification(50). The UK hoped that the definition could "in due time be given some status higher than its present one of mere guidance for Contracting States" and could gain widespread acceptance among contracting states. It would thus provide a "basis for future bilateral agreements and possibly even for a multilateral"(51).

The US felt that no higher status should be given to the definition.

> "It should not be rendered unduly rigid at a time when the situation was changeable and when various types of scheduled and non scheduled operations were gaining in importance(52).

In US air transport, the fundamental distinction lay between common carriage, governed by the Civil Aeronautics Act, and non common carriage, governed by the Air Commerce Act; a distinction which was not altogether coextensive with that between scheduled and non scheduled operations in the ICAO sense.

> "The definition, as it stood, was capable of interfering unduly with the development of interesting new forms of non scheduled services, which contributed to the growth of aviation as an every day means of transport, and which it was certainly not the role of ICAO to handicap or impair(52).

The main difficulty in having the definition accepted by the Contracting States, stemmed from the fact that different countries faced problems

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50. Three expressed qualified acceptance, while four had found the definition unacceptable or inapplicable to their particular circumstances. Only 19 states bother to comment on clause 2 of Resolution A7-16, on the "improvement of the definition of a scheduled service" and fill out the questionnaires. AT/WP/356, Appendix I complemented by AT-WP/362.

51. AT-WP/Min XXIII-7 at 34.

52. Idem.

so diverse that no definition would suit them all, unless it were made so general as to become practically meaningless.
It was doubtful therefore, whether any "useful purpose would be served by attempting to refine or improve on the definition still further"(53).

General belief within ICAO was, that after many years of work and thought on the definition, the organization had gone as far as it could go in perfecting it; it was now up to the states to adapt it in so far as necessary, to meet the special needs of their courts and administrations(54).

Herewith, ICAO left the definition for what it was and planned to take measures for further liberalization of non scheduled operations.

It convened an international conference on non scheduled air transport for late 1955, but later decided it would be best to postpone the date and await, on the one hand, the outcome of the Irregular Air Carrier Investigation which had been instituted in September 1951 before the CAB and whose report would become available only in late 1955, and on the other hand, the result of the developments arising out of the Strasbourg Conference.

At this Strasbourg Conference the emphasis was being laid, not so much on the theoretical aspects of the question or on attempts to obtain agreement over the terms of the definition, as on the practical aspects: how to get the largest possible measure of common positive action.
A practical common denominator had been worked out: liberalization of non scheduled operations insofar as they did not encroach on the scheduled

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53. Mr Bouché. France delegate, AT-WP/MIn XXIII-7 Of 22-11-54.

54. As expressed by Mr. Keel, UK delegate, AT-WP/Min. XXIV-4 of 25-5-55.

services. This was a rather negative but still a very promising approach. It was "more important to establish a uniform policy than a uniform definition , to help out the non scheduled services"(55). Generally it was believed that the European conference should be given a chance to serve as a useful pilotplant. If the experiment should fail in Europe, there was little chance that it would succeed on a world-wide scale. If it should be successful in Europe, then valuable experience would be gained to assist in the attainment of a general multilateral agreement.

In April 1954 the Conference on Co-ordination of Air Transport in Europe (CATE), formally convened by ICAO in December 1953, met at Strasbourg(56). This conference was charged with discussing the methods of improving commercial and technical co-operation between European airlines and of securing closer co-operation by the exchange of commercial rights. Among other recommendations concerning various aspects of air transport, it adopted one which brought into being the European Civil Aviation Conference, which would continue the work of the conference, review the development of intra-European air transport in order to promote the co-ordination, the better utilization and the orderly development of such

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55. Mr. Bouché, AT-WP/Min XXIII-6 of 8-11-54.

56. The ICAO Council, in response to an invitation of the Council of Europe, adopted in May 1953 at Brighton, a resolution expressing ICAO's desire to co-operate with the Council of Europe, but suggesting that before a full scale conference was actually convened, a preparatory committee consisting of nine states should be established, in order to define more precisely ICAO's role and to determine clearly the issues involved. The Preparatory Committee met in Paris in Novemebr 1953 and reported to ICAO that it had reached unanimous agreement on an agenda for the pleary meeting which should be convened in the spring of 1954.

transport and to consider such transport and to consider any special problem that might arise in that field.(57).

ECAC enjoys full autonomy with regard to its policy but the means of implementing that policy are provided by ICAO: ECAC staff consists of ICAO Staff placed at the disposal of the president of ECAC; ECAC's headquarters are in the European Regional Office of ICAO in Paris, and ECAC shares the administrative infrastructure of that organization. All ECAC decisions are taken in the form of resolutions, recommendations or other conclusions, submitted to the member states for approval(58). ECAC presently consists of 20 member states(59).

ECAC held its inaugural session in Strasbourg at the end of 1955. An attempt was made to come to a multilateral agreement for scheduled services, but already early in the discussions it became clear that most delegations considered that the time was not yet ripe for an attempt to conclude such a multilateral.

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57. Recommendation 28, Report of the Conference, Doc. 7575, CATE 1. This recommendation was ultimately adopted as ECAC's Constitution.

58. Normally such decisions are adopted by the Plenary Conference. If circumstances so require, they may also be taken by mail vote between sessions. A plenary session may be convened very quickly in case of emergency, which is one of the flexible features of ECAC; for example there was the Special Intermediate Session of November 1972, which adopted the Ottawa Declaration on ABCs. and the Sixth Intermediate Session of January 1974 which was mainly concerned with the fuel crisis.

59. They include 16 of the 17 members of the Council of Europe.: Austria, Belgium, Cyprus, Denmark, the Federal Republic of Germany, France, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Turkey, the United Kingdom, Sweden and Switzerland, together with Finland, Greece, Portugal and Spain.
According to the constitution of ECAC, such European states as the Conference may unanimously admit as members, may join ECAC.

Paragraph 6 : The Paris Agreement of 1956.

At the CATE session, the delegates discussed the possibility of liberalizing the operation of commercial non scheduled operations. The question was, whether member states would be prepared to agree not to exert their right to impose the restrictions of article 5 of the Chicago Convention for intra European traffic, to reduce such restrictions for certain types of operations or under certain circumstances(60).

There was general agreement that non scheduled flights could be allowed to operate within Europe, without prior permission from governments, if such flights did not compete with established scheduled services.

Although this criterion would be difficult to define, the Conference decided to accept it and to determine certain classes of flights that would fall within its limits.

Thereupon the Conference adopted an interim measure based on these decisions to be followed, until a multilateral agreement be concluded(61), and it requested the ICAO Council and the proposed European Civil Aviation Conference to have a draft made up for such a multilateral agreement, taking into account the views put forward at the conference(62).

The Interim Measure was used as a basis for the multilateral agreement developed by ICAO, which was presented at the first ECAC session (63).

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60. See for the state of affairs on how article 5 was being implemented in national regulations, paragraph 3 of this chapter.

61. ICAO Doc. 7575, recommendation No. 5.

62. Idem, recommendation No. 6.

63. ICAO Doc. 7676, ECAC/1 at 13-15.

The "Multilateral Agreement on Commercial Rights of Non Scheduled Air Services in Europe", or in short the Paris Agreement, was adopted at the first intermediary meeting of ECAC in Paris in 1956 (64).

In the preamble to the agreement(65), the parties consider that it is their policy that intra European commercial charter flights, insofar they do not harm scheduled operations, may be freely admitted to their territories. Considering that the treatment provided by the provisions of the first paragraph of article 5 of the Chicago Convention, is satisfactory, they desire to arrive at further agreement as to the second paragraph of article 5.

The Paris Agreement reflects the general system and spirit of article 5: it recognizes, like the article, degrees of liberalization, varying with the categories of flights and geared to the competition with scheduled transport. Unfortunately, the Agreement restricts charter services to the fullest possible extent.

Under article 2 of the Agreement, prior approval pursuant to article 5 of the Chicago Convention, is not required for charter services when performing

(a) flights for the purpose of meeting humanitarian or emergency needs;

(b) taxi-class passenger flights of occasional character on request, provided that the aircraft does not have a seating capacity of more

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64. ICAO Doc. 7695; adopted 30 April 1956; effective 23 July 1957.

65. General litterature on the Paris Agreement can be found in:
Edward M. Weld, Some Notes on the Multilateral Agreement on Commercial Rights of Non Scheduled Air Services in Europe. 23 JALC (1965) 180-187. Mr. Weld at that time was Assistant Scretary General of ICAO.
Otto Riese, Das Mehrseitige Abkommen ueber Gwerbliche Rechte im Nichtplanmaszigen Luftverkehr in Europa. 8 Zeitschrift fuer Luftrecht und Weltraumrechtsfragen.
D.H.N. Johnson, Rights in Airspace (1965) at 63-65.

than six passengers and provided that the destination is chosen by the hirer or hirers and no part of the capacity of the aircraft is resold to the public; (note 66)

(c) flights on which the entire space is hired by a single person, (individual, firm, corporation or institution) for the carriage for his or its staff or merchandise, provided that no part of such space is resold;

(d) single flights, no operator or group of operators being entitled under this subparagraph to more than one flight per month between the same two traffic centers for all aircraft available to him.

The Agreement also provides that

the same treatment shall be accorded to aircraft engaged in eiher of the following activities:
(a) the transport of freight exclusively;
(b) the transport of passengers between regionswhich have no reasonable direct connections by scheduled air services.

In this latter case however, it is provided that "any State may require the abandonment of the activities specified in this paragraph if it deems that these are harmful to the interests of its scheduled services operating in the territories to which the agreement applies". Finally, the Agreement contains provisions in its article 3 for simplifying the procedures for obtaining prior permission in those cases where permission is still required(67).

The sad thing is that in most cases prior permission is still needed-Affinity and inclusive tour charters, which carried the bulk of intra European

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66. The Dutch delegate declared that through limitation to airplanes with only six seats, non scheduled airtraffic would virtually be made impossible, since no small modern airplanes had less than 8 seats.
ECAC/1 Min,Cr 7 of 10-12-55.

67. Where a series of not more than 4 flights is involved, the terms upon which such permission may be required must be prescribed in a prepublished regulation, and the Agreement then proceeds to specify the nature of the information, the length of notice etc. that may be required.
Where a more extensive series of flights is contemplated, states are left at liberty to require more information and a longer period of notice.

non scheduled traffic, could be operated only once per month, without special permission. For the other flights, special authorization was required.

The Paris Agreement is certainly not as liberal as it pretends to be. The rights that it grants are very limited and do not go much beyond what contracting states already granted in practice. It has been drafted by people who had decided that the European system of air transport should rely entirely on scheduled services.

The ICAO Council interpretation of article 5, which gave states the unqualified right to impose restrictions, was a sign of its time. This was the way non scheduled operations were treated in those days, because they were economically unimportant.
By the time the Paris Agreement was signed, charter services had emerged as a very successful new air transport mode. Its development within Europe was now being hampered by the regulations of this Agreement.
ECAC simply missed a chance to liberalize the charter industry in a formal way and followed the path already beaten by ICAO and IATA(68) of restricting charter operations, thus protecting scheduled operations.
Later, however, ECAC promoted charter traffic within Europe, by recommending a liberal charter policy.

The Paris Agreement is significant in that a completely selfsufficient system for granting rights was worked out rationally, and that it has shown that it was possible to tackle commercial aspects of civil aviation

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68. Although technically a private body, IATA has had an exorbitant amount of influence on the development of charter policies since the adoption of res 045 which served as amodel for both ICAO as well as attempts by the individual states to define non scheduled services.

on a multilateral basis.

Paragraph 7 : Need for a definition?

Like the Chicago Convention, the Paris Agreement does not give a defintion of non scheduled flights. Instead it gives a morphology of non scheduled operations,i.e. a classification of the different types of flights and a description of their characteristics.
There is a large gap between this morphology of non scheduled flights and the definition of scheduled flights.

The concept of the Inclusive Tour Charter presents a striking illustration of the inadequacy of the scheduled and non scheduled concept.

An Inclusive Tour is an all-inclusive, fixed-price vacation, arranged by a tour organizer, which usually includes a charter flight, hotel rooms, meals and ground transportation and sold to the general public by a travel agent. The tours depart frequently enough to constitute a systematic series and space is for sale to anyone who buys the complete holiday package. These tours show some obvious acheduled characteristics and still are considered to be non scheduled.
But not everybody agrees on this matter. The question that has to be answered is the following: Do Inclusive Tours fall under article 5 of the Chicago Convention or under article 6? For the purpose of regulation, the problem is of prime importance. If they come under article 5, they can be dealt with separately from scheduled services. If not, they affect the trade of traffic rights laid down in bilateral air transport agreements.

Gazdik argues that the question can be answered by determining whether or not ITC flights should be considered "public transport"(69). Public transport, he states, is closely linked with the definition of a scheduled air service in article 96(a) of the Chicago Convention. Furthermore, article 6 of the Convention provides the framework within which public transport is to be carried out in the form of scheduled services. Article 5 ,however, does not extend the freedoms of the air to public transport. Therefore, according to Gazdik, it is doubtful whether any public transport can be performed under this article.

IT charter flights, he then argues, involve the holding out of transportation to the public for a single price per person. Therefore, IT charters are public transport and consequently, being scheduled services, would have to come under article 6 and bilateral air transport agreements.

Others argue that IT charter flights are non scheduled and come under article 5. Wassenbergh for instance holds:

> Article 5 of the Convention adopts the criterion of "non scheduled" which is not necessarily the same as "non public" transport, or charter flights. Single flights, for instance, may be performed under article 5 even if they are open to the public. On the other hand, article 6 may indeed concern public transport, although the ICAO definition merely states that each flight should be open to use by members of the public. This is so, however, only insofar as such transport is offered in the form of scheduled services and the possibility of public transport in forms other than scheduled services is open(70).

He then goes on to say that in the case of IT charter flights, it is not the carrier but the tour operator, the charterer, who holds out to the

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69. Gazdik, Are ITCs scheduled or non scheduled services? in the Freedom of the Air , edited by E. McWhinney and Martin A. Bradley. 1968 A.W' Sijthoff,Leiden.

70. H. A. Wassenbergh: Aspects of Air Law and Civil Air Policy in the Seventies, the Hague, 1970 at 181.

public by resale of individual seats. It would be difficult to bring the tour operator under bilaterals.

In practice, this question has never been a problem. Inclusive Tours have developed as non scheduled services and are generally reagarded and regulated as such(71).

If one wants to get a clearer vision into this matter, one should drop the obsolete distinction between what is normally called scheduled and non scheduled operations. This distinction does not make sense anymore.

For the regulation of air transport another distinction should be sought, one based on a different criterion, one closer to reality. As already mentioned, the main feature of charter services these days is the fact that they are wholesale contracts between the carrier and the charterer. Scheduled services are retail contracts, in that seats are sold directly to the public at large.

Another important distinction, is the one laid down in the Edwards Report(72) of 1969, the distinction resting upon the "collective nature of the demand", and the obligations placed upon scheduled operators to provide continuously available service, which underlies scheduled transportation.

> "By collective here we mean, not that it is required by everyone at the same time, but that a significant proportion of the community could be expected to take the view that it should be available if they wish to use it".

Other types of operations would be best distinguished by the lesser degree of the obligations of their operators, not by reference to the regularity

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71. Only in the UK, ITCs are treated as a separate category of flights, distinct from both scheduled and non scheduled operations.

72. British Air Transport in the Seventies, Report of the Committee of Inquiry into Civil Air Transport (London 1969) at 57-60.

of flights operated. And this lesser degree of obligation is in turn a reflection of differences in public demand for different kinds of air service:

> "Continuous availability is of little consequence and the primary concern of the customer is to secure the cheapest possible price for a particular flight. The basic feature of this type of demand is that the customers are willing to adapt their own requirements to some extent to the requirements of other people if this ensures a lower operating cost and hence a lower price for the individual seats".

Working with these criteria, the wholesale - retail, and the collective demand criterion, there should remain no doubt whatsoever about the question into what category Inclusive Tour operations should be brought.

Inclusive Tour operations are wholesale contracts between the actual carrier and the tour operator(73).

An Inclusive Tour operator has no obligation to ensure that space is available for late-comers; his purpose is to see that loadfactors are maximized in order to give his customers the lowest possible price. Continuous availability is of little importance here, and the customer's main concern is the low price of the package.

It is clear that ITCs, for regulatory purposes should be classed in the category of what is still known as non scheduled operations.

The distinction made in articles 5 and 6 of the Chicago Convention, has become more academic than practical, as most states now require prior permission for both scheduled and non scheduled services. It has been suggested

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73. True, when a cust omer buys a package, this can be considered as a retail contract, but this contract is of no interest for regulatory purposes in the air transportation field.

to amend article 5 and thus adjust it to the new developments in air transportation.

That there are new developments was well illustrated by the managing director of Pakistan International Airlines who stated (74) that it was not uncommon to see a service operated once a fortnight described as scheduled, while two or more flights a day were operated with published timetables as non scheduled services.

This is something that actually happens and it shows that the conventional concepts of frequency and publication of timetables and schedules, no longer hold water.

We have seen that the criteria which are closer to reality, are based on on the degree of obligation for the carrier, and on the sort of contract, either a wholesale or a retail contract.

For regulatory purposes, a distinction between scheduled and charter operations has to be made. A flight can be considered scheduled or regular, when it is based on a retail contract and when there is a high degree of obligation for the carrier to carry.

A flight can be considered as a charter flight when there is a wholesale contract, the main objective of the customer is the low price he pays for his seat.

Wassenbergh has made an attempt in drafting a definition of the charter product. It consists of a number of criteria. They are, next to the criterion that the entire capacity of the aircraft must be hired:

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74. At the 26th Annual General Meeting of IATA in Tehran.

(a) hiring by someone, other than the direct air carrier;

(b) performing the flights for the exclusive commercial responsibility of the charterer for his own use, or for the use of a group which he represents;

(c) reselling individual seats by the charterer, subject to
  (i) fare limitations;
  (ii) the prohibition of one-way transportation;
  (iii) the resale being affected on the basis of an all-expense paid tour of minimum duration;
  (iv) the charterer being a recognized travel agent or tour operator.

(d) reselling of blocks of a minimum number of seats to groups of passengers subject to:
  (i) fare limitations;
  (ii) the groups being identifiable as such;
  (iii) the charterer being licensed as an indirect air carrier permitting consolidation of different groups into a whole planeload to be carried in one aircraft (split charter).

This definition describes single entity charters, IT charters and affinity charters(75) and has as main objective the protection of the viability of the scheduled air carriers, in that it tries to impose minimum charter fares(76

> "It would seem that to the extent affinity requirements cannot be enforced, fare limitations become necessary"(77).

As soon as any question of detail is involved, as in the above definition, the problem of practical implementation comes in, and such provisions seem quite unsuitable for insertion in an instrument as the Chicago Convention. The most effective solution might be to seek international agreement based on common standards. This should not be an impossible task, despite the real difficulties resulting from the differences in national systems.

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75. At the time Wassenbergh wrote the definition, advance booking charters were not yet in existence. This proves the unfeasibility of an elaborate definition.

76. The subject of minimum charter prices will be dealt with in Chapter V

77. Wassenbergh, op. cit. at 83.

The method whereby an attempt is made to characterize and gauge competition between scheduled and charter transport, is the most thankless of all, since it provokes immediately divergencies between national interests(78).

Maybe the time is not yet ripe for a solution being translated into the specific language of an international rule.

The lack of proper basic regulation in the Chicago Convention may be an obstacle to clear vision, but, at least so far, has not hampered proper regulatory action.

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78. In 1970, the US Department of Transportation conducted a study on this subject on the national domestic level. The recommendations in the study were made for the FAA, the technical branch of the aviation administration. The study showed the main aspects of the policy problem: recognition of the existence of charter transport as part of the general system, and the necessity of reviewing the organization and regulation to adapt them to a new situation. ITA Bulletin 71/29 at 671.

CHAPTER III : LATERALISMS.

Paragraph 1 : Unilateralism.

Governmental regulations give almost carte blanche treatment to scheduled services, by enabling the operators to meet and agree, mainly through IATA, upon price, conditions of carriage and type of accomodations to be made available(1). Governments agree bilaterally on the capacity to be offered, frequencies to be offered and the like.

Charter operations sofar have remained relatively free from government control, as far as price levels and services offered are concerned. Sofar, the price of chartering an aircraft has been determined by the free forces of the marketplace. However, governments seek to restrict not only the capacity of charter services, but also, by rules and regulations, the type and quantity of service to be made available and the economic rules under which they should operate. This is done in such a hodgepodge of unilateral restrictions that it is impossible to comply with all and run an effective service.

The unilateral restrictions imposed by governments on charter operations take a wide variety of forms.

***Virtually all governments require the charter companies to apply for advance

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1. The ratemaking function has been delegated to IATA by the governments of the world in their bilateral air transport agreements. Most of the bilaterals delegate the ratemaking power to IATA's Traffic Conferences whose resolutions are subject to governmental approval. Even if such a bilateral does not refer to the IATA ratemaking machinery, this does not necessarily imply that the machinery will not be used, as long as the agreement does not explicitly provide the contrary.

approval of each individual charter flight(2); application procedures are often burdensome with extensive documentation required; approvals are often not received until immediately before flying time.

***Some governments impose a minimum restriction of 7 days on an ITC,

***Other governments ban ITCs between their territories and the United States(3), Israel bans charters altogether;

***Some governments impose a geographical discrimination;

***Other governments recognize affinity type services, others, ABCs or TGCs;

***Still other countries impose volume restrictions or quotas on charters;

***Some countries ban split-charters,i.e. charters in which two or more separate groups each purchase a part of the capacity of the aircraft;

***Many countries use "first refusal" restrictions against charter carriers requiring that charters developed by those countries first be offered to scheduled and charter carriers of the particular country involved.

The fact that charter operations are being governed by unilateral governmental regulations should not be surprising, if one considers that this is exactly the way it was "planned" by article 5 of the Chicago Convention and also regionally by the Paris Agreement. Ever since the adoption of the Chicago Convention, charter policy has been a government matter, while the

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2/ The US CAB, However, issues charter permits to charter carriers, authorizing the operation of charter flights to and from the US, subject to conditions and limitations, for three to five year periods. Each such permit contains a condition that empowers the CAB to invoke a prior approval requirement. In CAB Order 72-3-67 of 20 March 1972, the Board exercised this right for the first time against two UK charter airlines(Donaldson Line and Laker Airways) that had flouted its charter regulations. More recently, Pomair, a Belgian charter carrier, has been subject to prior approval. The advance approval requirements for Pomair were relaxed on 10 October 1974 (CAB Order 74-10-61).

3, Danmark, Norway, Sweden, Finland, Italy, Japan and Bermuda.

policy of the scheduled airlines has largely been determined by the airlines themselves, mainly through IATA.

With the defacto developments in the charter industry (4), the dejure government regulations have also changed. While the latter, at the outset, were very restrictive, they have through the years become more liberal, thanks to a fairly liberal attitude of the governmental regulatory agencies. An interesting example of this unilateralism and the way it developed, is the charter policy which the US Civil Aeronautics Board followed with regard to on- and off-route charter authorizations(5).

Virtually all foreign air carriers authorized to engage in scheduled route service, hold permits, authorizing them to engage in charter air transportation, subject to the terms, conditions and limitations prescribed by Part 212 of the Board's Economic Regulations(6).

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4. These being the enormous growth of charter operations as an industry and the equation of scheduled and charter operations in economic importance. See for statistical data, chapter I.

5. The choice of (a) the CAB and (b) its on- and off-route charter policy is completely arbitrary. An on-route charter is defined in Part 212 as a charter performed by a foreign air carrier between points between which it holds authority under a foreign air carrier permit to engage in foreign air transportation on an individually ticketed basis, including homeland charters which operate via and land at the homeland terminal point, named in the foreign air carrier's permit. An off-route charter consists of any charter which is not within the defintion of an on-route charter trip.

6. The restrictions applicable to on-route charters include amongst others:
--a requirement that prior Board approval will be obtained in the form of a Statement of Authorization for wet-lease charter trips performed by a direct air carrier: sections 212.8(a)(4a), 212.6(b)(2).
--a prohibition against performing IT charters other than between the homeland of the foreign air carrier and the US, unless prior approval in the form of Statement of Authorization has been granted by the Board: section 212.8(a)(8), 212.6(b-1).
--a provision pursuant to which the Board may require prior approval of on-route charters and (subject to presidential stay or disapproval) may disapprove such charters if it finds such action to be in the public interest. Section 212.4(b). (more)

With the exception of recent amendments to Part 212 (7), these charter regulations are basically an outgrowth of the Foreign Off-Route Charter Service Investigation(8). Prior to this, around 1950, only on-route charters were authorized to non-US scheduled carriers, and this authorization was considered to be only incidental to the general authority of the foreign air carrier to engage in scheduled transportation(9).

Similarly, the authorization granted to foreign carriers to perform off-route charters was considered a right incidental to the primary rights to perform scheduled route services, and the grant of such authority was not considered of major economic significance. Rather, the primarypurpose of the Off-Route Charter Investigation was to provide a means for the grant of what were then considered rather insignificant ancillary rights(10)

Since these basic concepts were formulated, the place of charters in the spectrum of foreign air carrier transportation has changed enormously:

Every off-route charter,in addition to complying with the other requirements of Part 212,requires prior approval in the form of a Statement of Authorization:212.4(a).

7. In 1974 the CAB granted exemption authority for off route charters "only if the carrier applicants can demonstrate that they have sufficient bonded fuel available to perform the services without having to cancel any charters under contract, in any areas covered by operating certificates." AViation Daily, 18 February 1974 at 31.

8. 27 CAB 196 (1958).

9. 14 CFR Section 211.5-c The application for a permit could specify that the services were not only to be rendered in scheduled operations but also on a non scheduled basis. Historically, the CAB has included charter authority in foreign air carrier permits authorizing scheduled services. In two cases the Board refused to include charter authority in such permits and indicated that it was considering the institution of proceedings to review the charter authority granted to foreign air carriers. Trans Mediterranean Airways, S.A.L. Foreign Air Carrier Permit, CAB Order 72-12-91 at 3; Polskie Linie Lotniczp, Foreign Air Carrier Permit, CAB order 72-12-56 at 2.

10. Foreign Off Route Charter Service Investigation: 27 CAB 197-198. Part 212.6 (1958) required prior permission for off-route charters.

In 1963, only 13.7% of the total transatlantic passenger traffic was attributable to charters. In 1972, the proportion of passenger charter traffic in the transatlantic market, ~~increased~~ 96.2% to 27% of the total transatlantic passenger traffic(11).

It is therefore apparent that charter authorizations should no longer be considered as rights merely incidental to the scheduled route service of scheduled services.

This is what the CAB concluded in March 1974; it determined that its charter regulations should be revised to reflect the changed role of charters, and to provide a solid foundation for such operations on the basis of a bilateral exchange of charter rights, or the existence of reciprocity in fact; it proposed (a) to abolish the distinction between on- and off-route charters;

(b) and to permit foreign route carriers to operate charters between all points in their homelands and all US points without prior approval, as was required for off-route charters, subject to

(1) a directional balance requirement, identical to one which the Board has applied for foreign charter-only carriers;(12)

(2) a provision which permits the Board to require prior approval of any or all authorized charters, if it finds that the public interest so requires.

Foreign scheduled carriers would be granted the same freedom of homeland - US charter operations, as authorized for foreign charter carriers.

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11. CAB Order 74-3-71, Docket 26509 at 2. In 1972 the transatlantic charter market represented almost three quarter of the total US charter market.

12. I.e, a limitation on the number of US-originated charters that may be carried on a 4 to 3 ratio to the number of homeland originated charters carried in one calendar year: this in order to encourage the foreign route carriers to develop their homeland originating markets.

The CAB proposal has not yet been adopted.

Another example is a UK charter regulation: article 73 of the Air Navigation Order(13), laid down the general principle that foreign aircraft require prior permission to operate charters into the UK. But within this broad framework, government policy has varied: thus in the summer of 1971, the British government temporarily banned fifth freedom charter flights by foreign airlines which involved aircraft, seating more than 252 passengers. This in effect, excluded the use of Boeing 747's.

These policies are an example of how a country can determine and develop its regulatory practice at will. Each country, each regulatory agency determines such regulations according to its own views.
This may cause serious problems. For instance, at one end of the charter trip, there may be more restrictive rules than at the other. This is a kind of government-caused problem. That is not to say that any government is to blame for this unfortunate situation. It is just in the nature of things that there are bound to be almost as many ways of dealing with the same situation as there are independent entities required to do so(14).
This is a big disadvantage of a unilateral system.

Paragraph 2 : Bilateralism.

Ever since charter operations started to fulfil a more important economic

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13. That is before the Civil Aviation Act of 1971.

14. Secor D. Browne: The International Angle, 77 Aeronautical Journal, No. 745 at 30 (January 1973).

role in the air transportation industry, there has been a tendency towards a bilateral and multilateral approach for regulating these operations as opposed to a unilateral one.

For a sound and healthy development of the charter industry, it would seem to be the only logical way out, to make some pre-arrangements, to prevent other countries from issuing too divergent regulations.

The Western European countries within ECAC, have had a common policy in the charter field for over 20 years now.

ECAC only has a consultative function and it takes its decisions mainly in the form of resolutions or recommendations. It is therfore the more amazing, that within Europe, where the reaching of an agreement often appears to be problematic, ECAC member states have been able to develop a common policy in respect of charters.

The tremendous development of ITCs within Europe has been brought about by a very liberal application of article 3 of the Paris Agreement, which was a result of a recommendation made by ECAC in 1961:

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

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

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

THE CONFERENCE RECOMMENDS

I. That the study group established by COCOLI, to consider non scheduled services and inclusive tours, should now consider the principles that should govern the operation of inclusive tour charters with the object of establishing the maximum possible liberalization of this type of traffic;

II. that, in the mean time, Member States, having regard to their policies of coordination for air services, should continue to adopt a liberal attitude toward flights exclusively reserved for inclusive tours.(15).

ECAC's liberal policy within Europe has not been extended to the Atlantic market. After US Supplementals in 1966, were authorized to operate transatlantic inclusive tours(16),ECAC suggested as a common European policy, restriction on the number of incoming transatlantic ITCs, "such number not to exceed 1% of the number of incoming transatlantic flights performed in the corresponding month of the previous year"(17).

While ECAC is in favor of a multilateral agreement for charter flights on the North Atlantic(18), the US has been urging a bilateral approach, following a not so clear mandate contained in the Nixon Policy Statement:

> "The foreign landing rights for charter services should be regularized as free as possible from substantial restriction. To accomplish this, intergovernmental agreements covering the operation of charter services should be vigorously sought, distinct, however, from agreements covering scheduled operations. In general, there should be no trade-off as between scheduled service rights and charter service rights. In negotiating charter agreements, the continuation of and the nature of the charter rights of foreign carriers will be at issue"(19).

Although the policy statement takes no explicit position on the question of whether these intergovernmental agreements should be bilateral or multilateral ones, the US tended to incline to a bilateral approach.

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15. Recommendation No. 6 of the Fourth Session of ECAC, Strasbourg, July 1961.

16. CAB Order 24240, 11 March 1966.

17. ECAC,ITCR/1 report 7, paras 18 and 19. 17 November 1969. This percentage was later set at 2.

18. See:Proposed Definition of and Conditions Apllicable to a New Category of Non Scheduled Operations.Second Meeting on Trans Atlantic Charter Services. Paris, 21-22 March 1972 TACS/2-DP/3.

Under the leadership of the US Department of State, a tentative draft of a bilateral agreement was prepared and discussed with foreign authorities(20).

The Nixon Policy Statement excluded the possibility of exchanging authority for charter operations with scheduled authority, included in the same agreement, but opted for complete separate charter agreements.
Because charter traffic cannot properly be separated from scheduled traffic one would advocate the inclusion of charter authority in existing bilateral air transport agreements.
This need not necessarily follow; charter services are a special device and a separate product for transporting international traffic, and they could very well be regulated by separate bilateral arrangements(21).
We will revert to this problem later.

Not only are charter services a special device and a separate product, but the problems as to (1) capacity and (2) fares, have to be dealt with in a different way also.

1***Where in bilateral air transport agreements, governing scheduled services between two countries, the capacity of these operations following the Bermuda principles, was for decades determined on an ex post facto basis, predetermination of such capacity seems to become the rule for the seventies.

***For charter operations, the situation is a different one, since "charters are

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19. Statement of International Air Transportation Policy, as approved by Nixon on 22 June 1970. Weekly Compilation of Presidential Documents 804 No. 2 (1970)

20. The draft served as an example for the charter bilaterals which were concluded between the US and Yugoslavia, Jordan and Canada.

21. H.A. Wassenbergh: Aspects of Air Law and Civil Air Policy in the Seventies. Nijhoff, Den Haag, 1970.

solely a function of consumer demand"(22) and it is this consumer demand that determines the level of capacity. Where capacity reduction agreements have been concluded between scheduled carriers, charter carriers capacity has not been taken into consideration, although both scheduled and charter operators compete in the same market. The higher loadfactor of charter services is apparently a sufficient argument for excluding these operations from any capacity controls (23).

2** Mutatis mutandis the same has to hold true for fares; they are being determined by consumer demand and supply. So far, charter rates have been freely set by the forces of the marketplace. Because of the heavy competition on the North Atlantic, charter rate levels and yields from scheduled services, have steadily declined; therefore, discussions were held between scheduled and charter carriers, to come to an agreement on transatlantic charter rates. These talks have not been successful. The result of this failure was a threat by governmental agencies, both in Europe and in the US, to impose minimum charter rates. So far, these threats have not materialized in the US. Following a number of ECAC recommendations, which were implemented by a majority of the member states, most European government regulations now include charter fare minima(24).

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22. Jerold Scoutt Jr. and Frank J. Costello: Charters, the New Mode: Setting a New Course for International Air Transportation. 39 JALC 1973 at 22.

23. Wassenbergh in ITA Bulletin 74/38 at 914. nt 3, says that another consideration may be, that the point-to-point characteristic of these operations makes them less controversial in aviation policy terms and charter traffic more easily controllable in the light of the distinction between third/fourth and fifth freedom transport.

24. The fare problem will be dealt with more extensively in Chapter V.

***Most existing air trnaport bilaterals governing scheduled operations, delegate the ratemaking power to the Traffic Conferences of IATA, whose resolutions are subject to government approval.

It would be difficult to bring separate rate provisions (one for scheduled and one for charter operations) within one bilateral agreement, unless of course a formula were to be found that would regulate both. Masefield(25) thinks he has found one. He sees a solution in the arrangement of advance booking charters and advance purchase excursions, and suggests that a limited number of designated airlines should provide scheduled and charter capacity, at two basic fares, one about 44% of the other---that is the basic scheduled fare to be about 2.3 times the basic charter fare for each seat sold.

IATA, in an attempt in the same direction' decided to modify its act of incorporation so as to enable charter carriers to become members of the association(26). If charter and scheduled carriers together could agree upon a common fare policy, an important obstacle on the road to all-covering agreements,bilateral or multilateral, would have been done away with.

The IATA invitation was not greeted with any enthusiasm from the charter operators. Most of them had no interest in becoming a member. The president of a US supplemental airline put it this way: An IATA membership plus a common fare policy would prohibit us from accomplishing what we were basically certificated to do"(27).

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25. Sir Peter Masefield The Air Charter Challenge. Flight International, 5 April 1973 at 551.

26. 30th AGM, Montreal, September 1974.

27. Overseas National Airways President, J.W. Bailey. Aviation Daily 23-9-4 at114.

With the exception of a bilateral air transport agreement that was concluded between France and Germany in 1955, which governed both scheduled and charter operations, no such arrangement has been made in recent years(28).

The first separate bilateral arrangement, solely governing charter flights, was signed by the US and Belgium in the form of a Memorandum of Understanding (29), in October 1972. Belgium, at that time, was one of the most irreconcilable nations in Europe on the question of charters. It had banned all charters originating on the US East Coast because its national carrier, Sabena, did not get landing rights at Chicago.

This Memorandum grants unrestricted charter rights, under country of origin rule, to the properly designated carriers.

Even though it specifically stops short of becoming a bilateral agreement, it is in many respects the equivalent of a bilateral agreement. The Memorandum itself states that "a bilateral agreement governing non scheduled services, is not possible at this time".

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28. See article 21, III of the German - Freanch bilateral agreement of 4 October 1955 (BGBL 1956 I S. 1077)which governs charter operations, and which gives each state the right to refuse permits to operate charter flights when it feels that such traffic would be detrimental to its own air traffic specifically its own scheduled traffic. Foreign traffic was not being protected. See further K.H. Friauf: Gelegenheitsluftverkehr auslandischer Unternehmen 23 ZLW 1974 at 30.
The bialteral Air Transport Agreement concluded between the US and Canada of 8 May 1974, TIAS Series 7824, can not be considered such an all-covering bilateral. It consists of three separate agreements, one governing scheduled operations, one governing charter operations, and the third one preclearance arrangements. The three agreements have been adopted on the same day and adoption of each of them was inter-related with adoption of the other agreements.

29. US - Belgian Understanding on Civil Aviation Charter Services.
Dep. of State Press Rlease No. 264. 17 October 1972, valid until 31 Dec. 1975.

The Memorandum sets forth mutual adherence to the principles of the Chicago Convention and the parties recognize that the qualification of particular carriers to perform charter flights shall be equivalent to the treatment accorded to the parties' scheduled carriers under the US - Belgium bilateral agreement governing scheduled flights. The Memorandum provides that passenger charter operations shall be permitted without advance approval of flight, subject only to reasonable notice requirements.

In the first annex, the US agrees to continue the on-route charter authority of Sabena for all charter types as are or may be authorized to scheduled airlines, and treat the carrier's off-route operations , as it did prior to 1970, when the ban on East Coast charters was imposed. The Memorandum also authorizes Sabena to perform ITCs and the airline became hereby the first foreign scheduled carrier to perform such flights to and from the US. In addition, the US agreed to continue in force the foreign air carrier permit, granted to Pomair, a Belgian charter airline(30).

Belgium agreed to permit

> "all US carriers, certificated to perform charter services to and from Belgium....to pick up and set down in Belgium, charter traffic

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30. See Pomair N.V. CAB Order 72-6-111 of 27 June 1972.
On 31 July 1973, the CAB ordered Pomair to obtain CAB approval in advance for every charter passenger flight. The Board said it had substantial reason to believe that Pomair might be "regularly engaged in foreign air transport under terms that do not conform with CAB regulations in that it is transporting persons who do not qualify for charter transport authorized by the regulations. CAB Press Release 31 July 1973 No. 73-143.
On 11 October 1974, the CAB relaxed the advance approval requirement because significant changes had taken place in the carrier's charter eligibility screening procedures. The CAB established an interim procedure which granted the carrier blanket approval for all flights for which it filed certain flight documentation with the Board at least 2 days in advance or 10 days if good cause is shown CAB Order 74-10-61.

between the two countries, including flights that serve intermediate countries ot points beyond Belgium, forall charter type traffic as is or may be authorized by the CAB"(31)

After the US-Belgium Memorandum of Understanding, several other Memoranda were exchanged between the US and respectively the United Kingdom, Germany, France, Ireland and the Netherlands(32).

While the understanding with Belgium was meant to stabilize an environment which would permit the airlines of the countries concerned, to conduct charter flights without arbitrary restraints, the memoranda with the other countries, in their original form, were more specific and also more confined: they only dealt with the conditions,governing Travel Group Charters and Advance Booking Charters, under which each party would accept as charterworthy transatlantic traffic, originated in the territory of the other party(33).

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31. Annex II, paragraph 1.

32. US - UK, 2 April 1973 until 31 March 1974. Dep. of State Press Release No. 97.
US - Germany, 13 April 1973 until 31 March1974 Dep. of State Press Release No 113.
US - France, 7 May 1973 until 31 March 1974. Dep of State Press Release No 134.
US - Ireland, 29 June 1973 until31 Dec. 1975.Dep. of State Press Release No. 233.
US - Netherlands, 11 July 1973 until 31 Dec.1975. Dep of State Press Release No.255

33. TGC means those rules of the US embodied in Part 372a of the Special Regulations of the US CAB and any amendments thereto.
ABC means those rules of :
the UK, embodied in Schedule 8 to the Civil Aviation Authority Official Record Air Transport Licensing Series No. 1 and any amendment thereto.
Germany, embodied in the Federal Republic's Notam N 31/73 of 1 February 1973 and any amendments thereto.
France, embodied in Circulaire d'Information N/Ref 555/D.T.A./F dated 25 January 1973 of the Ministry of Transport, Secretariat General of Civil Aviation, Air Transport Directorate and any amendments thereto.
Ireland, set forth in the Department of Power, Ireland, Advance Booking Charter flights, Rules of Charterworthiness, June 1973 and any amendments htereto.
The Netherlands,embodied in the Decree of the Minister of Transport, Water Control and Public Works of 2 March 1973. No. JUR/L21516. Civil Aviation Department and any amendments thereto.

To that purpose the regulatory authorities of the concerned countries would

> "immediately take the administrative measures necessary under their own laws, to accept as charterworthy, for the duration of these agreements and of any arrangement which may supersede them, traffic originated in the territory of the other party and conform to their advance charter regulations".

The memoranda reflect a certain develoment in time, in that they become more extensive and more detailed. The understanding with Belgium is very general and for example does not contain any rate provisions; nor does the understanding with the UK. The two following memoranda have these provisions relating to fares:

> "To assure that prices are neither unreasonably high or low, taking into account all the relevant costs, each party shall require the filing of tariffs or price schedules and enforce conformity to tariff or price scheduled on all flights operated"(34).

The two latest memoranda, those signed by the US and respectively Ireland and the Netherlands provide:

> "the regulatory authorities of each party shall....
> (7) consult with the appropriate authorities of the other party about uneconomical, unreasonable or unjustly discriminatory charterrates charged or proposed to be charged for services conducted pursuant to this understanding and, in the event of no resolution by consultation, may take the appropriate action to prevent the inauguraition or continuation of uneconomical, unreasonable or unjustly discriminatory rates(35)".

By March 1974, the memoranda that were to expire by that date, were amended (36) to include, apart from the advance charters, prior affinity charter traffic:

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34. US - Germany and US - France.

35. US - Ireland and US - Netherlands.

36. US - UK 29 March 1974 - 31 March 1975 :TIAS 7832.
US - Germany 12 March 1974 - 31 December 1975 TIAS 7804.
US - France 29 March 1974 - 31 December 1975,TIAS 7815.

"to accept as charterworthy prior affinity charter traffic organized and flown pursuant to the extant rules of the aeronautical authorities of the other party...(37).

The UK, implementing the principles envisaged by the Ottawa Declaration, discontinued affinity charter flights, after the end of 1973, but was willing to accept affinity charters from the US, under certain conditions(38). Parties further agreed to "use their best efforts to accept as charterworthy charter flights of a Special Event character organized in and flown from the territory of the other party, and to conduct capacity surveillance of ITC flights. For this purpose parties may require applicant carriers to file their ITC programs before a certain date, which they may approve or disapprove(39).

The Memoranda of Understanding indicate some shifting of the balance between the regulatory role of the charter originating state and charter receiving state, which departs somewhat from the original interpretation of article 5 of the Chicago Convention.

This article 5 bestowed upon the receiving state the right to impose such regulations, conditions or limitations as it considered desirable; as a result

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37. US - Germany and US - France.

38. As a condition of such acceptance it was required that all passengers carried on such flights "have been named on a list furnished....at least 30 days before the flight.

39. These ITC provisions only appear in the memoranda between the US and Germany and France.
US - Germany provides additionally that parties will accept as charterworthy splitcharters including splitcharters combining more than one charter type on the same aircraft, if such splitting is allowed under the rules of the country of origin. For the time being, the regulatory authorities of Germany will not permit the commingling of ITC traffic.

the receiving state issued its own charter regulations with which it fixed its charter policy.

The receiving state, by recognizing traffic, that originates in the other state and that is organized and operated according to the rules and regulations of that state, as charterworthy, gives up some of this power, and accepts the rules of the originating state as those that govern these charter operations.

This may again be the beginning of a development of certain practices which, if more broadly accepted, may remove at least those difficulties with article 5 that relates to the application of national regulations of the receiving state.(40).

On 27 September 1973, the US signed its first comprehensive Non Scheduled Air Services Agreement. This agreement was concluded with Yugoslavia.(41).

It is said that this agreement is the result of an attempt by the US to deter Yugoslavia from initiating scheduled services into the US. Whatever the reason behind it may be, this agreement marks a significant step in the development of international civil aviation relations.

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40. See Dr. Joseph Gertler: Amendments to the Chicago Convention: lessons from proposals that failed. 40 JALC 225-258 (1974).

41. Non Scheduled Air Service Agreement between the government of the United States and The Socialist Federal Republic of Yugoslavia, signed at Belgrade on 27 September. Department of State Press Relase No, 352.

The agreement includes many elements not contained in any other charter arrangements and sets forth in considerable detail the rights the two countries have exchanged.

Each party agrees to grant the other party "rights....for the carriers of the other party to enplane, deplane and re-enplane non scheduled air service traffic, moving on non scheduled air services"(42).

One of the main objectives of the agreement is the elimination of the requirement for prior approval of charter flights: after the party has designated its carriers, the operation of flights is, however, subject to the appropriate operating and technical permission of the aeronautical authorities of the other party. Such permission shall be granted by the other party "with a minimum of procedural delay" and after this initial operating authority has been obtained "neither party shall require any additional operating authorization for individual charter flights(43). Parallel with the system of bilaterals governing scheduled operations, the designation of air carriers is left to the unilateral determination of each party.

US airlines, according to the Agreement, have the right to conduct a broad range of charter operations to and from Yugoslavia. Yugoslav airlines have equally comprehensive rights to conduct charters to the US, However, rights

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42. Article 2 of the Agreement. Enplane means the first boarding of an aircraft of any carrier by non scheduled air service traffic. Deplane means the leaving of an aircraft of a carrier by non scheduled air service traffic, but does not include stops for non traffic purposes. Re-enplane means the boarding of an aircraft of a carrier by non scheduled air service traffic, which has enplaned and deplaned. Article 1, paras: 7,8 and 9.

43. Articles 3A and 3C.

to conduct charters originating in the US are considerably broader than those available to the Yugoslav airlines and reflect the fact that US residents constitute the large bulk of air travelers between the two countries.(44)

Article 11 of the Agreement deals with rates.

It provides i.a. that rates have to be reasonable and that they are subject to the approval of the aeronautical authorities of the contracting parties, In cases where a party finds that rates "charged or proposed to be charged" by a carrier of the other party are unreasonable, "it may so notify the other party and thereafter parties shall endeavour to reach agreement on resolution of the complaint"(45). If, however, the complaint is not resolved:

> "each party may take whatever steps it considers necessary to prevent the inauguration or continuation of the objectionable rates....provided that the party taking such action shall not require the rate charged by the carrier of the other party, to be higher than the rate charged by its own carriers for comparable service"(46).

In conclusion, the two annexes to the agreement describe the regulatory regime each party applies and the detailed exchange of rights between the two parties.(47)

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44. Article 8. The volume of non scheduled air services traffic between the territories of the two parties, transported by the carrier of one party shall be reasonably related to the volume of such traffic. enplaned outside the territory of the other party, and deplaned in the territory of the other party, taking into account the commercial nature of the respective markets.

45. Articles 11A and 11C.

46. Article 11E: this concept was derived from provision in Bermuda type agreements and from section 1002j of the Federal Aviation Act as amended in March 1972

47. Annex B authorizes those types of charters authorized pursuant to Parts 214 and 317 of the CAB regulations:i.e. single entity charters, pro rata.affinity, inclusive tour, study group, overseas military personnel and travel group charters, plus split charters of the types set forth. In additio, for Yugoslavia-originating charters;with stopovers in Yugoslavia for third country originating charters: Common Purpose, Advance Booking, and Inclusive Tour Charters, performed pursuant to Yugoslavia charter regulations are also allowed.

In September 1974, the CAB renewed and modified the foreign air carrier permit of JAT (Jugoslovensko Aerotransport). Under the revised permit, the Yugoslav air carrier is authorized to engage in [illegible] charter foreign air transportation with respect to passengers and 10 annual planeload cargo charter flights. In addition to these, charters of passengers to US and other countries which include stopovers in Yugoslavia; European originating charters of passengers to the US and European originating and terminating circle tour charters to the US and other countries were authorized(48).

In January 1974, the US and Jordan concluded a charter bilateral agreement (49) and on 8 May of that year, Canada and the US executed a Non Scheduled Air Service Agreement, governing charter operations between their respective territories. It allows both countries to operate charter flights under bilaterally agreed rules rather than the unilateral conditions which had existed until then.

The agreement provides that neither Canada nor the US may impose any requirement that prior approval be obtained for any individual flight or series of flights, enplaned in the other's country. For this purpose, the CAB decided to waive section 212.4(a) of its Economic Regulations, which imposes a prior approval requirement for off-route charters, with respect to all charters by Canadian carriers between the US and Canada.

The agreement also provides that the regulations of the party in whose territory the enplanement occurs, shall govern(50). The agreement provides that

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48. See CAB Order 74-9-23 at 6-7 valid until 31 December 1976.

49. Aviation Daily 14 January 1974 at 67.

50. Charters originating in Canada are: Single Entity(Passenger/Property);Pro Rata Common Purpose;ABC;ITC and certain split passenger charters. Charters originating in the US:Single Entity(Passenger/Property);Pro Rata Affinity;Mixed(Entity/Pro R ITC;Study Groups;Military Overseas Personnel;TGC and certain split charters CAB Order 74-11-154 Press Release 74-260 of 3 December 1974.

the US can object if Canada substantially changes its charter rules. "Thus should the Canadian charter rules be changed in such a way as to blur the distinction between charter and individually ticketed air transport, the Board has an avenue of redress which would lead to non acceptance of such charters(51)".

Generally, airlines of either country are required to operate three charters originating in their own country for every four which the carrier originates in the other country. Exceptions are made for the markets which are predominantly Canadian travel destinations such as Hawaii, Florida and Puerto Rico(52).

Paragraph 3 : Multilateralism.

So far, there are in existence six Memoranda of Understanding and three bilateral agreements, governing charter operations. They are the palbable result of the wording used in the Nixon Policy Statement that "foreign landing rights for charter services should be regularized, as free as possible from substantial restrictions". And indeed, one can say that to a certain extent, this goal has been reached, in that these agreements have done away with the prior approval requirement, a relic from the interpretation of article 5 of the Chicago Convention, and in that they oblige states, in as far as they want to commit themselves, to accept the regulations of the other states.

It is, above all, the United States that pushes for a bilateral system. Not only does it take a positive bilateral stand, it is also "anti-multilaterally oriented". Secor D. Browne illustrated this point of view by reasoning that

what proved impossible in 1944 in the infancy of international air transport, is hardly worth even initial attempts in today's complex air traffic situation. (53). He thought that from a practical point of view, none of the objectives that are being handled bilaterally, that is capacity, frequency, rates, designation of air carriers etc., is capable of being handled multilaterally.

> "Regulating capacity of charters on a multilateral basis, would, with regard to any bi-national market involve extra governments without valid interests. Government interests such as promoting tourism, vary from country to country(54)".

** Capacity of charters, however, does in principle not have to be regulated at all neither bilaterally not multilaterally; since this capacity is automatically determined by consumer demand. As long as the loadfactor is high enough, charter capacity control does not have to be taken into account.

*** Browne further condems a multilateral control of rates. This would be done, he says, by placing a floor under them, which would be a percentage of a scheduled rate, which means an IATA rate:"Such action would amount to entrusting the future of this very important component of the market to the desires of some of the participating carriers". To do so would not meet the interests of all the carriers or all the governments involved. Minimum charter rates do not necessarily have to be a percentage of a scheduled rate.

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51. CAB Order 74-5-37 at 4.

52. For instance in the Hawaii-Canada market, carriers will progress annually from US 10% and Canada 90% in 1974 to US 25% and CAnada 75% by 1979.

53. Mr. Browne seems to forget here that article 5 of the Chicago Convention is a multilateral agreement on its own, a treaty within a treaty, the first one in its kind.

54. Browne before the Royal Aeronautical Society in London, Mimeograph, 13 March 1972

Agreement on an "absolute minimum"charter rate floor could very well be reached without comparison with any scheduled rate. Such a minimum should be based on charter industry data. A multilateral minimum charter rate floor will chiefly be needed to prevent below-cost charter operations.
Talks that had as main objective the reaching of such a charter price floor, have so far been abortive and it is very doubtful if they ever will be successful, the main obstacle to such an agreement being the charter carriers themselves, who do not opt for such a floor.

*** In bilateral agreements, the designation of air carriers is left to the unilateral determination of each party. If the provision of such a unilateral designation can fit into a bilateral agreement, there is no reason why it should not fit into a multilateral agreement.

Paragraph 4 : A Multilateral Solution.

Both the bilateral and the multilateral approach have their advantages and their drawbacks. The advantage of a system that is based on bilateral agreements is that in each case, the regulatory structure can be adapted to the specific economic, social and political circumstances of the countries concerned.
In a multilateral agreement these specific circumstances must be disregarded. Such a multilateral agreement can only represent the lowest common denominator because of the disparate interests of the countries involved, and could only be written in vague and general terms, which,in the extreme case, would render it largely impotent in practice.
The big advantage of a multilateral structure is that such an agreement

is the most direct and effective way to establish international rights.

ECAC, taking the line that it has gained experience from the Paris Agreement, favors some form of multilateral understanding. The ECAC member states, together with Canada and the US entered into a "Declaration of Agreed Principles for North Atlantic Charter Flights" in October 1972. Since then, several other meeting have taken place between delegates from these countries, Through these continuous talks, ECAC hopes to arrive eventually, at a multilateral solution.(55).

Such a solution could be found by either concluding a new multilateral agreement, or using a multilateral agreement already in existence. The most logical vehicle to be used in the latter case would be the Chicago Convention, which could be adapted by amending the second paragraph of article 5 to read as follows:

> "Such aircraft, if engaged in the carriage of passengers, cargo or mail for remuneration or hire on other than scheduled international air service-, shall also, subject to the provisions of article 7, have the privilege of taking on or discharging passengers, cargo or mail without restrictions"(56).

The Chicago Convention, however, seems a ponderous vehicle for this purpose. According to article 94(a):

> "any proposed amendment to the Convention must be approved by a two-thirds vote of the Assembly....".

and it is highly dubious whether such a quorum could be attained when dealing with such a heavy topic. In addition article 94(b) provides that

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55. Although ECAC, in January 1974, dropped its opposition to opening discussions on bilateral agreements concerning charters, between the Conference member states and the US, this does not imply that it is relinquishing its multilateral strive.

56. Scoutt and Costello, op. cit. at 25.

> "the Assembly may provide that any State,whichhas not ratified within a certain period....shall cease to be a Member of the Organization and a Party to the Convention".

and this would seem too severe, as a possible punishment(57).

The alternative, concluding a new multilateral agreement, would, therefore, seem more feasible.

Such a multilateral agreement would govern both charter and scheduled operations. It would have to create a balanced air transportation system, which recognizes retail and wholesale concepts of air transportation, and which recognizes that the two systems -scheduled and charter- are complementary.

The two systems are of vital, and in some markets,of equal importance. In the total intra European market, charter air traffic accounts for over 38% of the total passengers flown, while scheduled traffic accounts for 62% of the total. In the transatlantic passenger market, charter passengers in 1973 accounted for 27% of the total market, while scheduled passengers were 73% of that total. It is obvious then, that charter operations representing 38% and 27% in certain markets, are highly significant and this significance warrants the promotion of a one-system approach to international air transport.

Another reason for creating a one-system approach is the fact that a mending process between the two mode operandi has made itself visible. Scheduled carriers have started to conduct charter operations either in separate charter movements, apart from their scheduled services and until

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57. See for a general article: Amendments to the Chicago Convention; lessons from proposals that failed. See footnote 40.

1972 subject to the conditions of IATA resolution 045, or as part of their scheduled operations, usually referred to as part charters;

Charter carriers have, for a number of years, tried to enter the scheduled market, so far without any tangible success.

1a. The United Kingdom was the first to tackle this question of part charters, in the course of a major reclassification of air transport license categories. In place of the former scheduled service license category, it introduced a new Class I license, under which services, in certain markets, are authorized, where at least 50% of the seats on any flight, or such percentage as may be authorized in a particular license, must be reserved for sale direct to the public at large by the airline itself or its agent, without the intervention of a wholesaler.(58).

Japan introduced the part charter concept in 1973 (59).

The US CAB is still opposed to the co-mingling of charter and scheduled passengers. The Board, in 1973, approved an IATA resolution authorizing the transfer of charter passengers to scheduled flights, if carriers could demonstrate that they were unable to meet charter commitments due to operating conditions or mechanical failures, requiring the off-loading of passengers from charter flights. The Board found that several carriers were interpreting

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58. Civil Aviation Authority Official Record, Series I at 3.

59. About 63% of the passengers flown by Japan Airlines in 1972 in overseas flights were charter passengers. This number persuaded the carrier to adopt the part charter concept. Complaints from scheduled passengers against being integrated with charter groups on scheduled flights forced the airline to set aside sections in aircraft as off-limits to charter travelers: AWST 18-2174 at 31,

the resolution to apply to charter flights canceled because of lack of sufficient fuel and warned carriers that such action was not in accordance with its policy(60).

Within ECAC, a draft definition of part charters was formulated to serve as a guideline at further discussions on this subject within ECAC.

It reads:

> A part charter is an operation where a defined part of the capacity of an aircraft in scheduled service is contracted for transportation of one or several charter groups on charter conditions which shall include
> 1) the charter price to be applied;
> 2) the charter category and the conditions applicable to it(61).

Member states are in general more or less interested in developing and examining part charters as such, but at this stage the views of different states are not definite enough to form a common ECAC policy in this field.

1b. Another step in assimilating charter with scheduled capacity was made by Trans World Airlines (TWA) when it introduced its Demand Scheduling concept. According to this idea, a passenger books his seat on a scheduled flight 3 months in advance. Each customer simply states the day on which he wishes to travel, and unlike the ABC-participant, is not dependent on any day set by the airline.

The demand scheduling program is a direct corollary of a suggestion made in the Ottawa Declaration of 1972:

> Scheduled carriers, in addition to their planeload charter operations should consider offering the public an opportunity to benefit from the economics of advance commitment in the context of scheduled operations. It was recognized, however, that this question was one

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60. AWST 28-1-74 at 27.

61. ECAC/ECO-I/7-WP/6 of 20-5-74 at 6.

for the scheduled air carriers to determine in the first instance(62).

The Demand Scheduling concept was later adopted by United Airlines and American Airlines and appears to be a great success.

In January 1975, the 3 months advance commitment was reduced to 60 days, to bring it in line with the advance purchase conditions of the ABC and TGC concepts, and the Advance Purchase Excursion Fare (APEX), which was introduced by the IATA carriers in the beginning of 1975 (63).

1c. Another step was taken by the CAB in October 1974, as it reversed an earlier decision and approved requests by PanAm, TWA and NorthWest Airlines for authority to carry military charter passengers on scheduled flights. The Board said that approval was in response to the softening of international traffic, the continued fuel crisis and its impact on the US balance of payments and the need to take whatever responsible steps were available to assist the financially pressed international carriers. The Board emphasized that its action was not an endorsement of the part charter concept and warned carriers not to expect an extension of the authority beyond 31 March 1975. Only military charters already contracted for with the Military Airlift Command (MAC), were included(64).

In April 1975, however, the Board approved a request by the carriers to continue carrying military charter passengers on scheduled services at military rates, despite opposition from the supplemental carriers, "because PanAm

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62. Para. 12 of the Ottawa Declaration, Dep. of State Bulletin, 1 January 1973 at 23.

63. See for more details Chapter V, footnote 35.

64. Aviation Daily 1-21-74 at 2.

and TWA can save about $4.5 million in operating costs and .5 million gallons of fuel(65).

2a. Since quite some time, charter airlines have tried to obtain the right to conduct scheduled operations. The champion in this field is without any doubt, Laker Airways.

On 26 September 1972, the British Civil Aviation Authority, approved a proposal by Laker Airways, a charter carrier, to offer so-called "Sky-Train" services, with no advance reservations, between London and New York City on a daily basis, at one way fares of $92.50 in the summer and $81.25 in the winter season.

At the same time, Trans Interantional Airlines(TIA), a US charter airline, filed a tariff with the CAB, offering a daily service, NYC-London at a fare of $75,= one way. In support of its proposal, TIA reportedly told the CAB:

> "that it was only fair and logical that supplementals should be allowed to conduct scheduled services, because the scheduled airlines had invaded the charter field in a major way"(66).

The proposals were strongly opposed by the major scheduled airlines. PanAm estimated that 70% of the diverted traffic to Sky Train would come from scheduled services and 30% from charter services. Fred Laker himself, thought that it was highly "unlikely that diversion of the scale estimated would occur"(67).

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65. Aviation Daily 2-4-75 at 178.
66. AWST 2-10-72 at 28.
67. Aviation Daily 29-11-73 at 159.

So far, the CAB has not yet authorized Laker or TIA to initiate their planned services.

In January 1975, British Airways requested the CAA to revoke Laker's Sky Train proposal. This request was denied by the Authority with a recommendation however, that the Sky Train introduction should be delayed for at least 12 months, until the whole economic situation and in particular the transatlantic traffic would improve(68).

It is unlikely that the US government willsoon move to grant Laker's Sky Train permit. If it does, the CAA itself has left the door open for a conditional permit which could be inoperable by Laker for years.

2b. In the US, World Airways, a supplemental carrier, has requested scheduled authority for operations between the West and the East Coast. The authority has not yet been granted.

These developments show that the two transport systems are getting closer to one another and that a regulatory framework governing both classes of carriers is warranted.

One of the major issues in such a framework would be an understanding that those carriers that are authorized to perform charter services are accepted on an equal basis with those that are authorized to perform scheduled services.

A recent study on United States international air transport policy, conducted by Harbridge House, showed that the airlines would be healthiest

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68. Aviation Daily 10-2-75 at 218.

in a highly regulated environment, and that a significantly unregulated policy would destroy the charter airlines(69).

In an open multilateral policy, designed to allow airlines as much freedom as possible, air rights, according to the study, would be exchanged on a multilateral basis among the participating countries, and there would be separate multilateral agreements for each of the types of service, -scheduled charter and all cargo. There would be no controls on air fares or capacity. The effect of such an open multilateral policy would a.o. be low fares to Europe and Central America, as measured by average yields which would fall 10% below breakeven (breakeven point would contain a 12% return on investment element).Fares to the Pacific and South America would be 5-10% above breakeven. This would result in considerable fare discrimination in all trading areas.

Scheduled carriers to Europe would experience a return on investment of less than 5%. Under this policy, charter service would, in all likelihood disappear as a mode of transportation.

Under a highly regulated multilateral policy, negotiations would be combined for scheduled, charter and all-cargo carriers under one multilateral agreement for all the participating countries within a particular trading area. Scheduled carriers would be allowed to enter into capacity agreements. Charter carriers would not be allowed to enter into capacity or pricing agreements- Under this policy, traffic growth to most trading areas in 1983 would only range 25-50% above 1973 levels. Charter service traffic

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69. The study was published in Aviation Daily; issues of 3 and 4 March 1975.

growth would increase more than 100% above 1973 levels. Scheduled service fares would range between 5-10% above the breakeven point. Charter service fares would be much lower, as measured by their much lower average yields. All the segments of the industry would be very profitable in the 1983 time period, with the most profitable segment being the charter carriers. These carriers would earn a return on investment that would be greater than 18% to most trading areas.

The study does not elaborate on any details.It only points out, for example that charter carriers would not be allowed to enter into pricing agreements.

How then should charter prices be determined?

By the forces of the marketplace?

That has been the procedure for decades. It is a system that can very well determine capacity, but it is questionable if it can determine an operable pricing scala for charter operations.

Experience has taught that seemingly endless price cutting is not a feasible way to keep the industry in healthy operation(70). A viable industry must have a solid base in some form of regulated pricing policy. Therefore, it would seem most appropriate that certain "absolute minima" be established, in a non artificial way, based on industry data, below which no charter operations should be conducted.

Some other provisions such a multilateral agreement would have to include are the following. The provision

---that the states, parties to the treaty, will accept as charterworthy, charter traffic originated in the territories of the other states, and organized pursuant to the charter rules of those parties;

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70. See Chapter V on charter rates,

---that the definitions of the different modes of air charter transportation, i.e. single entity, affinity, inclusive tour, advance booking and special event charters, as they have been adopted, shall be incorporated in the respective national legislations;

---that parties can object to or simply refuse charters, originated in a state, party to the treaty, should that state change its charter rules substantially;

---that capacity of charter operations shall be determined by the free forces of the marketplace;

---that designation of air carriers shall be left to the unilateral determination of each party;

---that routes shall be agreed upon through exchange of notes.

Presently, the majority of the regulations, governing charters, are still of a unilateral nature. Some separate bilateral arrangements governing charter operations have been concluded between the US and other countries.

The conclusion of these bilateral arrangements should be considered as a first step towards an all covering multilateral agreement. More bilateral agreements governing charter operations should be concluded between countries; agreements that govern the same points in the same manner. To this extent, NACA suggested the US government consider imposing a condition on all foreign air carrier permits -scheduled and charter- making the permits valid only upon completion of bilateral agreements covering charter services between the countries(71).

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71. Aviation Daily 11-4-75 at 236.

Once a substantial number of states has concluded such bilateral agreements, then governing both scheduled and charter operations, governing the same topics in the same manner, a multilateral agreement will have come within leaping distance.

CHAPTER IV : CHARTER TYPES.

Paragraph 1 : Prior Affinity Charters.

Until 1953, member airlines of IATA operated charters, which were only subject to the unilateral regulations and conditions of their own national governments and to those of the government of the country of destination(1). As long as these operations corresponded with the regulations of the country of origin and the country of destination, no major problems were encountered.

Because the IATA resolutions, establishing the level of fares and rates to be charged on scheduled services, stipulate that no member may charge less than the specific amounts, it was considered that from a legal aspect, operating charters which provided per capita rates below these amounts might be considered as a violation of these IATA agreements. Consequently, a resolution was prepared which permitted members to operate charters, but defined the conditions under which this was permissible; the resolution became known as IATA resolution 045 and was adopted in 1953 (2).

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1. When a bilateral agreement governing charter operations or a Memorandum of Understanding is in operation between the two countries, charter operations are not subject to the regulations of the country of destination(except of course for technical and air navigational regulations)since the latter country recognizes in such a case this charter traffic, when not too much departing from its own charter principles, as charterworthy.

2. Actually, resolution 045 was first adopted as a simple 17 line document, at the Traffic Conference at Bermuda in November 1948 and issued on 7 April 1949. Sunberg, op. cit. at 102.

To some extent therefore, resolution 045 was intended to legalize an existing situation rather than to create an entirely new one:

> "In drafting this resolution, the whole concept of charter traffic was examined very closely and the resolution was designed to permit organizations and other legal entities to derive benefits which could be obtained by chartering a whole aircraft, while at the same time preventing charters being used by carriers or others, simply as a means of undercutting the fare structure on regular services"(3).

The resolution took into account many of the then existing government regulations on the subject and recognized established practices.

On the other hand, it has had an enormous influence on government regulations themselves, in that governments have transposed its provisions into their national regulations.

Since the adoption of the resolution, charter flights operated by IATA members, were subject to three sets of regulations: the rules of the country of origin, of the country of destination and those of IATA resolution 045.

IATA resolution 045 laid down three important principles:

1. On the one hand there was the rule that charters, performed by member airlines, should be planeload contracts:

> "An IATA member may perform air transportation by chartering the entire capacity of an aircraft whether or not the price, when reduced to a unit basis, is lower than the applicable IATA agreed individual fares and rates"(4).

The rigidity of the planeload principle was mitigated by the IATA carrier's

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3. Agreeing Fares and Rates; A Survey of the Methods and Procedures Used by the Member Airlines of the International Air Transport Association. First Edition January 1973.

4. Paragraph 1 of Iata resolution 045, expiry date 31 March 1973.

insistence on so-called "fill-up priviliges": the carrier may stipulate that any space, not utilized by the charterer, may in the case of passenger aircraft be used by the carrier for the carriage of mail or cargo, or the carrier's own personnel and property(5). In 1954, this privilege was somewhat modified by the introduction of the requirement that it only be exercised "with the charterer's consent".

The fill-up privilege was a close result of technological developments. New constructions combined passenger seating in the cabin with belly lockers for cargo.

2, On the other hand there was the no-resale rule, which also originated in one of the first issues of IATA resolution 045:

> "that all charter agreements....shall contain a stipulation that the party to whom such space is sold, will not resell or offer to resell it to the general public at less than IATA fares and rates"(6).

3, The third principle set by 045 was the regulation that

> "charter agreements shall be made only with one person:.... (b) on behalf of members of a group which has principal purposes aims and objectives, other than travel and sufficient affinity existing prior to the application for charter transportation to distinguish it and set it apart from the general public".

This regulation has become known as the prior affinity rule, regulating affinity charters(7). This prior affinity rule has been subject to a number of conditions. The most conspicuous one was the six months rule:

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5. These privileges first appeared in issue 19-9-52, clause 1a.

6. Issue 19 September 1952, clause 1a; Issue 1971, clause 7a. One of the exceptions of this principle was that the agents of shipping companies were entitled to charter aircraft for the movement of crews of more than one vessel or company: Issue 19-9-52, clause 1a.

7. They sometimes are also referred to as "closed group charters", "common purpose charters" or "pro rata charters".

> "Each member of the party to be transported is a member of the group to be transported, at the time of application for the charter and has been such a member for at least 6 months immediately prior to the date on which the charter operations are to be commenced.(8).

The latest version of the resolution raised the maximum number of members from 20.000 to 50.000, except with respect to charters originating in Scandinavia, which would remain at 20.000 members(9).

Another condition was the pro-rata rule.

> "the cost of the charter shall be prorated equally amongst all passengers"(10).

Many of the provisions of 045 have been adopted by governments into their national legislations. The British regulation prior to 1960, for example, consisted of mere reference to the resolution.

Other governments virtually copied the principles of 045, using their own wording(11), and still other governments adopted principles which did not always harmonize with the principles of 045:In the US for instance, the CAB introduced an extensive regulation of charter matters, which differed from 045 in some important respects.

Resolution 045 restricted group charters to such groups as had prior affinity; domestically, Part 295 of the Board's Economic Regulations permitted charters by "spontaneous groups"(12).

8, Rés. 045 Paragraph 4b(viii), latest version.

9. Res. 045 Paragraph 4b(i). Since 1964, the CAB has set no maximum on the membership of charterworthy organizations, whereas 045 maintained such a maximum.

10. Res. 045 Pragraph 4b(vii)(a).

11. For instance, the Dutch regulations relating to "closed group transprt". No. Jur. 18472 22 June 1972.

12. Affinity groups in the US were first regulated in Part 207, later in Part 295: Transatlantic flights by US supplementals, and Part 212 governing charters by foreign air carriers.(more)

The Board wanted IATA to give up this strict prior affinity criterion because of its discriminatory character(13).

In another case, the IATA rule was less strict than the CAB regulation. 045 permitted fill-up privileges, which allowed elusion of the planeload principle. The Board put an end to this privilege in so far as US bound and flights originating in the US were concerned(14).

To preserve harmony between the IATA resolutions and the national regulations, governments could make reservations to 045. In those reservations they could express the differences between their national regulations and the rules of 045. Resolution 045 has been the one most often burdened with reservations in the nature of condítional approvals(15).

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12. A spontaneous group is any group of persons which has not been publicly solicited by the air carrier, the travel organizer, a member of the travel group, an agent or representative of them. See further AWST, 16 April 1962, where IATA clarifies the concept; IATA members carried spontaneous groups for a short period in the beginning of the sixties, after conditioned approval of 045 by the CAB which stated that approval would not be given unless the prior affinity rule were modified to include spontaneous groups. Subsequently, IATA amended 045 by adding a provision specifically called Charters for Spontaneous Groups.

13. The Board took the position that the nature of the group itself could not be sufficient ground to refuse a charter. This was the first time that the Board accused IATA 045 of being discriminatory This criticism would ultimately lead to denunciation of the resolution. See for a report on this clash between the CAB and IATA: Bebchick: The International Air Transport Association and the Civil Aeronautics Board. 25 JALC 33 (1958).

14. CAB E-9969. The Order permitted continuation of these fill-up privileges only with respect to the carrier's own personnel and property, provided that the charterer consent to it.

15. IATA resolutions are subject to government approval. Disapproval prevents the resolution from coming into effect. The unfortunate consequences attached to disapproval(such as open rate situations) have made governments disinclined to use this power. The peculiar status of IATA resolutions in case of conditional governmental approval is discussed by Sheehan, IATA Traffic Conferences, 7 SW. L.J. 149-152(1953).

IATA resolution 045 has had an exorbitantly great influence on the charter industry as a whole. Originally it was meant for IATA members who chose to operate charter flights, and as such it was purely meant for internal use. Within the framework of IATA, charter operations, at the outset, were never meant to expand to a large degree.

By the beginning of the fifties, the governmental regulatory agencies had relatively little knowledge of the problems involving charter activity. Most agencies accepted the IATA resolution as a logical approach to the problem: they either copied the IATA resolution without more ado, or were pressed to do so by their national carrier(16).

The IATA resolution was adopted to govern only operations of IATA members. It was not adopted to govern charter operations of non-IATA members. Such carriers are subject the national regulations. These regulations, however, are virtually identical to IATA 045, although on the whole more liberal. This means that IATA 045, in reality governed almost all charter traffic, directly through resolution 045, indirectly to a certain extent, through the government regulations that were based on 045.
On the whole, however, the unilateral government regulations were less restrictive than the IATA resolution.
IATA members became so disenchanted with their own charter regulation, that they set up non-IATA charter subsidiairies, thus circumventing the re-

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16. By 1974, of the 112 IATA member airlines, 40 were entirely state owned, and 23 more than 50% state owned, 24 were privately owned and 4 more than 50% privately owned. The ties between the airlines and the government in the latter categories should, however, not be underestimated.

quirements of 045(17).Limitations applying to IATA members but not to their charter subsidiairies include amongst others an exclusion of the IATA members from offering split charters on transatlantic inclusive tour charters(18).

Dissatisfaction with such divergencies caused the Board to disapprove the resolution in June 1972. In the final disapproval order, it was pointed out that these discrepancies resulted in an unfair disadvantage for carriers not in a position to circumvent the more restrictive IATA rules by the formation of non-member charter subsidiairies. This path was not open to US airlines. Secondly, the Board noted that US charter operations had been restricted by many foreign governments "solely because the proposed operations, which would not otherwise be considered to be contrary to the public interest, did not conform to the IATA requirements"(19).
The Board further noted that 045 in effect assumed a licensing role, which was a matter for governmental determination.

Since the denunciation of 045, transatlantic affinity charter traffic has been governed by the regulations of the countries of origin and destination(20). Resolution 045 is still in operation in other parts of the world.(21).

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17. Most of these subsidiairies are united in ACCA, the Air Charter Carrier Association. See Chapter I.

18. CAB Order 72-3-112 of 31 March 1972. See also note 20.

19. Order 72-6-91 Of 22 June 1972 at 5.

20. These regulations allowed scheduled North Atlantic Carriers to carry several groups of 40 persons or more on so-called split charters which 045 forbade. Similarly, the maximum of 50.000 members for the size of any association willing to benefit from charter fares was eliminated, as was the obligation for such an association to have been in existence for at least two years.

21. For instance on the haul from Europe to South Africa,

Another reason for the CAB's disapproval was the impossibility, in practice, to give effect to the rules to which the organization concerned must conform, in order to pass the affinity test: aims and objectives other than travel, six months memberships, no advertising etc These affinity restrictions led to the proliferation of fictitious organizations, bogus aims, pre-dated memberships, false subscription lists and safely dis-associated middle-men who did the advertising and sollicitation.

As a result, the affinity group charter had become an open door to any member of the public, looking for a cheap ride and willing to take a little trouble to get it. In a number of instances, groups of passengers were stranded because unscrupulous promoters failed to pay the charter operator(22).

"It would fill you with pride as a member of the human race, realizing the ingenuity of the human mind, because the forms of discounting -the tricks and deceits- are of an infinite variety"(23).

This growing abuse of affinity charters, through fare discounting and the illegal sale of charter seats, was the chief impetus for a number of European governments, through ECAC, to call for the elimination of their governmental affinity charter rules(24).On 19 October 1972 an agreement was

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22. A report indicated that in New York City it was possible to join an organization retroactively for a fee of $6,- and thus become eligiblr for a charter trip. See for more interesting examples:J.H. Goldklang,Transatatlantic Charter Policy; A Study in Airline Regulation. 28 JALC at 117-118 and 103-104.

23. Interview with CAB Enforcement chief Mr. Gingery in Aviation Daily 28-6-74 at 335

24. ECAC's Fifth Intermediate Session in Paris, 27-28 November 1972. Doc 9044, ECAC/INT.S/5(SP). Those states were:Austria, France, Germany, Luxembourg, Portugal, Switzerland and the UK. Abstained: Belgium, Cyprus, Denmark, Sweden, Norway, Finland, Ireland and Italy,Against: The Netherlands.

Austria originating affinities were discontinued as from 1 April 1975. Germany abolished US originating affinity charters on 31 December 1974. The Netherlands will abolish Netherlands originating affinities some time in the course of 1975. ECAC/ECO-II/7-WP/7 of 17-4-74.

signed in Ottawa, between the ECAC states and Canada, to abolish affinity flights between their territories.

Other countries retained their regulations, among them the US, which decided to maintain affinity flights on the North Atlantic until 1 November 1974(25). The US based its policy on the reasoning that, as long as no viable alternative to the affinity concept was found, the regulations governing this concept would remain in force.

Ever since the denunciation of 045, the CAB has been looking for such viable alternatives, by issuing or proposing to issue non affinity charter concepts, in the form of Travel Group Charters(26) Special Event Charters(27) and One Stop Inclusive Tour Charters(28).

So far, none of these alternatives has succeeded in replacing the affinity concept, which has been extremely successful in the US.

The number of affinity charter flights, operated by US supplementals in the US - Europe market rose from 314 in 1963 to 1623 in 1968 (29).

By 1973, approximately 21.000 affinity charters were operated by US carriers, of which 6.000 domestically, The affinity type authorization continues to be the mainstay of the US charter market, representing about 80% of the

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25. CAB Press Release 73-110 of 22 June 1973. The European States that abolished the affinity concept decided to accept this category of flight from the US until that date.

26. 14 CFR Part 372a, 37 Fed. Reg. 20674 of 3 October 1972.

27. Notice of Proposal to Adopt Part 369, Special Event Charters, issued 18 June 1974.

28. Notice of Proposal to Adopt Part 378a, One Stop Inclusive Tour Charters, issued 30 October 1974.

29. Charter Travel and Economic Opportunity, CAB, Washington D.C.June 1969.

supplemental carriers' charter programs(30).

The CAB proposal to eliminate affinity charters came, therefore, under heavy attack from especially the supplemental industry. "The CAB proposal to eliminate affinity charters threatens to diminish the availability of low-cost air transportation to American consumers"(31). The CAB then proposed to extend the elimination date until 31 March 1975(32). Thereupon it received more comments than on any other proposal it had made. More than 12 consumer groups, joined NACA in attempting to continue the affinity charters. Nineteen tour operators agreed to take a strong stance against elimination as did the major scheduled airlines, with the exception of PanAm.
IACA said:"Now there is no realistic alternative available in the US, because TGCs even coupled with one stop ITCs and SECs will not satisfy the needs of the public".
NACA said the elimination proposal was disastrous "because the charter market cannot be accomodated by existing or proposed charter rules". It said the Board needs additional charter modes rather than substitute charter rules. If the Board would establish a viable one-stop Inclusive Tour Charter and would adopt realistic advance booking type regulations, then affinity charters would gradually diminish in importance and could be eliminated.

In the beginning of 1975, the Board said it would allow the sale of affinity charters at least through 1975, and would need more time to consider the comments it had received concerning the termination.

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30. Letter from Ed Driscoll, president of NACA to Robert Timm, then chairman of the CAB, dated 30 September 1974-

31. Idem.

32. Aviation Daily, 4-11-74 at 10, issued simultaneously with the OTC proposal, see note 28.

Acting CAB chairman O'Melia commented that "it has never been the intention of the Board to terminate affinity charters despite their problems of discrimination and enforceability, until one or more adequate substitute forms of charters have been authorized(33).

True, the Board should not eliminate affinities until a viable alternative is developed, but ultimately it will have to eliminate the affinity concept, because the concept is still of a discriminatory nature where it only allows members of an association, be it the Knights of Columbus, the Masonic Orders or B'nai B'rith, to partake in a charter. Apart from this aspect, there are the problems of enforceability of the regulations.

In years past, it were mainly the bucket shops operators, selling phony affinity tickets to the public, then closing their doors and leaving travelers stranded, who caused the problems.

Most of these bucketshops have been eliminated through extensive CAB enforcement. The lingering problems concern the difficulties, operators and carriers encounter in adhering to the letter of the CAB affinity regulations. Few, if any charter flights are operated in complete accord with CAB rules, because of the ambiguity and complexity of these rules(34).

Basically, the regulations require that a club official who wants to arrange an affinity flight for his charterworthy organization, contract with a carrier for an airplane. To comply with the rules, the club official must approach a carrier to obtain a bid for the flight. The airline then sub-

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33. Aviation Daily:8-11-74 at 90; 18-11-74 at 93; 17-12-74 at 252; 20-12-74 at 273; 31-12-74 at 325 and 3-1-75 at 17.

34. Travel Weekly, 16 September 1974 at 1.

mits a bid(35). Before the official can solicit members of the organization he must sign a contract for the plane of say $25,000,=.Under CAB regulations he can not solicit the members until this financial commitment is made. He must also advise club members that the cost of the trip may vary from $250,= if one hundred members sign up, to $25.000,= if only one signs up.

Needless to say, it does not work this way. Affinity firms have come into existence which reserve planes on a back-to-back basis; they approach travel agents who have access to charterworthy organizations and offer them an air package at what amounts to a guaranteed price. An affinity firm that operates in this manner, however, is in violation of the CAB regulations. Only the chartering organization and the carrier can put together an affinity movement and if there are empty seats on the plane, the passenger and not the tour operator is required to pay for them.

It is often difficult to know, for the carrier, if the organization he carries is charterworthy. The simplest way to find out would be to ask the CAB, but that does not always solve the problem. According to Travel Weekly Magazine, a typical Board response to such a query from an airline is "Carry them and we"ll tell you. If we find they weren't charterworthy, we'll cite you for violations"(36).

In June 1974, the CAB went to court in an attempt to prevent 33 travel promoters and organizations from operating hundreds of illegal affinity charters.

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35. The airline then mostly includes an allowance for ferry mileage on each side of the trip. This, unless of course it happens to have planes positioned properly for both legs of the trip, a highly unlikely assumption.

36. Travel Weekly, 16 September 1974 at 77.

The Board alleged that the operators, acting both as wholesalers and retailers, solicited the general public for so-called affinity flights, sold tickets at fixed prices and issued phony membership cards(37).

The Board held the tour organizers responsible for not checking the charterworthiness of the group, while under Board regulations, it is the responsibility of the direct air carrier, that is the airline, to ensure that its affinity clients are charterworthy. This regulation was heavily criticized during the court procedures. The supplemental airlines argued that this approach was unrealistic, since tour operators are responsible for putting the groups on the plane. They pointed out that the CAB rules should be changed to make agents and wholesalers accountable, and not the direct air carriers, who are not in a position to check the charterworthiness of the groups they carry.

NACA, representing its members, proposed that the Board classify affinity operators as independent principals, that is, indirect air carriers, rather than as agents of the airlines, making them accountable to the Board for the legality of affinity movements(38).

A similar procedure is followed for TCCs, ITCs and Study Group Charters, where the Board views the intermediary agent not as a mere instrument or agent of the airline, but as an indirect air carrier, who is subject to the regulations of the Board.

For affinity flights, however, which in the US are much more numerous than ITCs or TCCs, the Board apparently prefers to see the compliance responsibility

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37. Travel Weekly, 1 July 1974 at 1.

38. Aviation Daily, 19 June 1974 at 275.

vested in several dozen airlines rather than in several hundred operators acting as indirect air carriers. Despite the support of NACA and the domestic trunklines, the Board is not likely to adopt a rule that would relieve the carriers of the duty of policing affinity groups.

In the same case, the tour operators also argued in favor of fixed, rather than pro rata prices for affinities. While the supplemental carriers were silent on that issue, the scheduled airlines argued vigorously against it, claiming that fixed prices would tend to make the charters undistinguishable from individually ticketed services.

The case ended with an injunction against six charter organizers(39) requiring them to emphasize in their advertising that their flights are only for bona fide groups, that the cost of the trips may vary on a pro rata basis and that the people and firms arranging the charters have complied with CAB regulations.

Such problems with the enforceability of CAB regulations, as were brought to the fore in this case, will always remain to exist if the rules stay the same.

What the Board can do, is change the rules and bring them in a better accord with the actual situation, by allowing an affinity firm to charter the airplane and to offer a trip for a fixed price instead of on a pro rata basis. Such a solution would, however, be unacceptable to scheduled airlines.

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39. The other tour organizers were dropped from the case because they individually agreed to abide by the CAB regulations: Travel Weekly, 1o October 1974.

They would argue that such a procedure would carry too much resemblance to individually ticketed services, for which they are responsible. Justifiably so, because in those circumstances, nothing would be left of the original principle that an organization or an association charters a plane, the principle on which the affinity concept is based.

Therefore, the only logical way out, would seem a complete abolishment of the affinity idea, as soon as a proper alternative has been worked out and tested during a long enough period of,say, two years.

After all, the affinity concept is a dated one; it is something from the past. At the time the regulations were issued, affinity travel was virtually the only way, although still a discriminatory one, to travel cheaply. It differed completely from the scheduled service system, in that access was limited.

Now that other means of low-cost air transportation have been conceived, means that allow anybody to take advantage of them, these new concepts should be developed. Ultimately they should replace the affinity concept.

Paragraph 2 : Advance Booking Charters.

The first concept that was conceived to replace affinity charters was the Advance Booking idea. It was designed to bring the economics of full planeload charter travel to any member of the public who is willing and able to make his travel arrangements well in advance. The idea can therefore be described as non-discriminatory, as opposed to the affinity concept.

The relative simplicity of the advance booking regulations also reduces to a substantial degree any problems of enforceability. The advance listing of passengers on these flights, greatly simplifies the enforcement task and airlines have greater assurance that their flights will not be cancelled by the enforcement authorities; such cancellations still do occur quite regularly with respect to affinity charter flights.

The advance booking principles were developed both in North America and in Europe. The UK was the first to come with the idea of an advance booking system, as a replacement of the affinity concept. They called it Advance Booking Charters(ABCs).

On the European continent similar rules were considered under the name of Excursion Travel Charters. These were not further developed.

In the US, this new class of non affinity charters was called Travel Group Charters.

The original US and UK rules differed in some important aspects.

** The US regulations (1) required an advance booking period of 90 days, while the UK rules required booking 3 months prior to planned departure.

** According to US provisions, the passenger was required to pay 25% of the total price of the trip at least 90 days prior to flight departure. 100% of the price of the trip had to be paid 60 days before departure. These accounts were not refundable, except in cases of force majeur such as illness or death of the participant. The UK regulations did not require any deposit.

** The two countries adopted the same rule as to the deposit of the main list of participants: the carrier must deposit such a list with the administration three months before the flight departure date. Modification of this main list, that is the replacement of passengers on the main list who have cancelled their trip, could affect a maximum of 20% of passengers on the main list, according the US rules. Only passengers on the stand-by list could be accepted as replacements. According to the UK regulations, such changes could not affect more than 10% of passengers on the main list.

** The UK rules allowed the carrier to market ABCs directly to the public, at fixed prices. TGCs, according to the US rules, could be marketed only through independent organizers, at pro rata prices.

The legality of the action of the US CAB, in issuing these TGC rules was disputed in Saturn v. CAB (2). It was found that the Board acted within the scope of its authority and was neither arbitrary, unreasonable nor

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1. 14 CFR 372a.

2. Saturn Airways Inc. versus CAB. US court of Appeals. District of Columbia 11 July 1973. 12 Avi. 17.986.

capricious in the promulgation of the TGC regulations. The judge stressed two items that had particularly influenced him:

> "First, the test we must apply is result-oriented. One cannot really know how the public will react and how the TGCs will affect scheduled travel until they are tested in the crucible of the marketplace.....Secondly, the consistent lamentations and predictions of doom by diversion raised by the scheduled carriers in the past have proved.....to be considerably overstated. The actions by the Board in this area have provided for steady growth in both the scheduled and supplemental markets".

Discussions among the European countries, members of ECAC and with the aviation authorities of Canada to come to a mutual understanding on the matter of advance booking charters were set in motion in 1971. These discussions culminated in October 1972, just after the announcement of the new class of experimental non-affinity charters by the US and the UK, with the signing of the Ottawa Declaration(3), which outlined the basic conditions for introducing advance booking charters.

While not a treaty or an executive agreement, the Declaration provides a generally agreed framework which permits all North Atlantic states to establish substantially similar rules with respect to the new class of charter.

The Declaration pointsout that

---the new charter category should be premised on a commitment to hire an entire aircraft on behalf of one or several groups of at least 40 persons, at least 90 days in advance of the commencement of the trip.

---travelers on such trips should be identified at least 90 days before the flight, in that their names must appear on a passenger list, the main list.

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3. Declaration of Agreed Principles for North Atlantic Charter Flights. Ottawa, 19-21 October 1972. Department of State Press Release No 296 of 1 December 1972.

At that date, the list containing the names of the participants, plus a list containing those of a reasonable number of stand-by group participants should be submitted to the appropriate authorities.

---between the 90th and 30th day before commencement, stand-by participants may be transferred to the mainlist, provided that the number of transfers does not exceed 20% of the total number of passengers on the main list of pro rata priced flights as they are operated in the United States and Canada, or 15% of the total number of seats contracted for on another basis. The fact that the UK regulations were based only on an advance booking while those of the US and Canada included an advance payment, explains this difference in percentage.

In the latter case, where the prospective passenger pays a 25% non refundable deposit, the passenger is supposed to be more committed to travel than when he has not paid any deposit, and therefore a greater flexibility of replacement could be allowed.

---members of the participating group should depart and return together and a minimum stay of 14 days in the summer and 10 days in the winter season should be required.

---charter prices should be related to the actual cost of operation.

The Declaration compromised the differences between the regulations as they were established by the US and Great Britain.

The Declaration was accepted by Canada and the US and by the European states in a plenary session of ECAC(4). During this ECAC session the Declaration was approved — although not convincingly — by a majority of the member

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4. Fifth Intermediate session, Paris 27-28 November 1972. Doc. 9044,ECAC/INT.S/5(SP).

states(5). Most of the countries that abstained from voting or voted against, did so, because they thought it would be difficult to foresee the consequences as to the relations between scheduled and charter operations. This, despite the built-in anti-diversion device in the Declaration.(6).

The UK ABC regulations became effective 1 April 1973 (7), simultaneously with those of the ECAC member states that accepted them.
The US TGC regulations came into effect 27 September 1972, for an experimental period through 31 December 1975. Canada's ABC rules became effectiye 29 December 1972.

The differences between the ABC regulations of the ECAC countries and Canada that were based on the original UK rules on the one hand, and the US TGC rules on the other hand, can be explained by the fact that the US developed its TGC concept independently, without consultation of the other states. The US CAB did not participate in the meetings with Canada and the ECAC member states. MOst of the provisions governing the travel group charters were, however, adopted within the Ottawa Declaration as a result of the negotiations of the US Department of State during the final meeting at Ottawa.

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5. 14 states approved:Austria, Belgium, Cyprus, Finland, France, Germany, Ireland, Luxembourg, the Netherlands, Switzerland, Portugal, United Kingdome, Greece and Spain. One Against: Italy and three abstained: Denmark, Sweden and Norway.

6. Paragraph 8 of the Declaration: The impact of the new charter category on the ability of scheduled carriers to continue adequate on-demand services and economically viable operations, as well as the success of the new category in meeting the desires of the traveling public, should be carefully observed by the governments. To this end, there should be agreement on common statistical techniques and exchange of data.

7. They were first released on 12 July 1972. Originally they were issued for a trial period of a year lasting until 1 April 1974.

The differences are also due to the legal necessity in the US that the CAB distinguish between individually ticketed services and group travel on charters: this legal circumstance explains two of the most pragmatic differences between the original regulations governing European ABCs and US TGCs.

According to TGC regulations, the cost of the charter must be prorated among the participants(8), while the European ABC rules allow fixed rates(9): the ABC regulations require the air carrier to file the individual ABC prices to be paid by each participant, not later than 120 days before the flight. In practice this dissimilarity can have quite different consequences.

For instance when a travel organizer charters an airplane for $10.000,= and this airplane can carry 100 passengers, the price of the ticket, according to ABC regulations is fixed, e.g. at $100,= per person. When the plane is only filled for 60%, the travel organizer will only collect $6,000,=. It is this travel organizer who bears the risk.(10)

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8. Part 372a.10(g):the total cost to each participant shall be the sum of the pro rata cost o f air transportation, the service charge of the charter organizer and the charge for land accomodations, if any.

9. See Doc. 9044 ECAC/INT.S/5(SP) at 13. Annex 1(D). The air carrier shall file the individual ABC prices to be paid by each participant either (1) not later than 120 days before the flight...or(2)...at the time when the post-flight list is filed. The Dutch regulations provide the following:(d) before the beginning of each travel season,i.e. before 1 April or 1 November, as the case may be, and not less than 120 days before the first of a series of flights, the air carrier concerned shall submit to the Director General of Civil Aviation, particulars of (i) the minimum charter rate or rates which it intends to charge for a flight or flights during a specific period (ii) the minimum price to be paid by each participant in the flights referred to in (i) for the air transport alone....If no objection has been raised to the rates and prices within 30 days of their submission....these rates and prices may be considered as having been approved. Nr. Jur/L 21516, 27 March 1973. AIP Netherlands FAL-1-3-6 article 4(d).

10. Usually the rates will be fixed at a slightly higher level to allow the travel organizer to make profit.

According to TGC regulations, where the cost of the charter is prorated among the participants, it is the traveler who bears this risk: when there is a loadfactor of only 60%, the cost of $10.000,= will have to be shared by the participants present. The fare in that case would amount to $166,= a person, instead of $100,=. Therefore, to protect the passenger from such hardships, the CAB issued the rule that at least 80% of the airplane must be filled, otherwise the flight shall be cancelled.(11). The minimum fare a TGC participant can pay in this case is therefore $100,=; the maximum $125,=. There is no finalty to the rates charged until as late as flying time.

Advertisements must include a maximum and minimum fare. Passengers pay the full maximum fare 60 days in advance. If there are no cancellations after that time, that cannot be filled up with passengers from the stand-by list, the minimum fare becomes effective, but if up to 20% of the passengers on the main list do cancel, then the maximum fare holds.If more than 20% do so, the flight must be cancelled altogether.

The complexity of these TGC rules was reason enough for Washington lawyer H.S. Boros, to write a letter to the CAB. Any resemblance between the deal Boros, the headtoaster, offers the CAB, and TGC regulations is intentional:

> "The B&G Toaster Company is making this introductory offer to only five selected customers. You may procure the enclosed toaster for $9.99. However, should the anticipated response to this fall short of expectations, we may be compelled to charge as much as $14.99. Alternatively, should our firm's customers be unwilling to pay $14.99, please understand that we will be required to seize all toasters previously sold. Moreover, should any toaster be used without the customer first having paid the appropriate price, which may range from anywhere between $9.99 and $14.99 (you will be notified of the exact price before you intend

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11. Part 372a.26

to use the toaster) we are required by the Federal Toaster Regulatory Board, to bring suit for the difference"(12).

The other major difference was that according to the original UK rules ABCs could be marketed directly to the public. TGCs can be marketed exclusively by independent charter organizers. The CAB's reasons for requiring an idependent organizer is simple. It is a further mechanism for separating the supplemental carrier from the marketing of individual tickets to the general public.

The main drawback of the TGC rules is the uncertainty they create for the passenger, in that prospective travelers will not know the exact amount that is due for the trip until as late as flying time, and that they cannot be 100% certain that the flight will actually depart.

This uncertainty is one of the reasons why TGC operations so far, have not been very successful. Fewer than 50.000 passengers were flown on TGC flights in 1973. This contrasts with the most conservative of forecasts calling for 200.000 TGC passengers that year(13). On the other hand it is sometimes thought that the failure to gain widespread public acceptance of TGCs is not caused by any undue restrictiveness of the rules but rather the "ease" with which affinity charters may be operated(14).

The American Society of Travel Agents(ASTA) argued that TGCs made a poor showing partly because there was no built-in incentive for retailers to promote and sell when commission levels were left to the discretion of individual charter operators(15)

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12. Letter published in Travel Weekly, 8 July 1974.

13. AWST 28 Jan. 1974 at 20. Only 1.5% of transatlantic charters were carried on TGCs:Aviation Daily 3-12-74 at 169.

14. Comments by the US trunkdines in Aviation Daily 9-5-74-at 53.

European and Canadian ABCs have been very successful, especially on the UK - Canada run, where they completely replaced affinity charters. Passengers pay a fixed price here and are assured in advance that their flight will operate, even if all seats are not sold, because the organizer assumes the risk of any unsold seats.

The original ABC provisions that no deposit would have to be made 90 days in advance, but only an advance booking, and that the carriers could market their ABCs directly to the public, were altered pursuant to an ECAC recommendation(16), which encouraged the member states to take all measures necessary to assure that the participants on the main list make a 25% deposit, at the latest 90 days before departure, refundable only in case of replacement of a participant on the main list by a participant on the stand-by list, and that seats aboard the airplane are "the object of a contract between one or several travel organizers and the air carrier".

Most of the member states implemented these recommendations. Accordingly, the present UK rules provide that

> "seats shall not be occupied on the flight unless they have been sold by the operator to a travel organiser and made available by that travel organiser to the passenger"(17).

The regulations of the Netherlands provide that

> "at least 90 days before the journey, the participants entered on the main list....shall have made a deposit of 25% of the air transport price; the deposit shall be refunded if the participant concerned is replaced by a participant entered on the waiting list"(18).

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15. ASTA had called for a 11% commission, which it did not get, A.D.22-8-74 at 47.

16. Doc 9044 ECAC INT.S/5(SP) at 8-12.

17. Civil Aviation Authority Official Record, Series I, Amendment 30, Schedule 5 Article 1(1).

18. AIP Netherlands FAL-1-3-8 article 4(k).

By i April 1973 all the ECAC member states, with the exception of the Scandinavian countries and Italy, authorized ABC flights originating in their territory.

In January 1973, the CAB made known that it could not accept ABC flights from other countries unless prior intergovernmental agreement had been reached on the basis that each country would accept traffic originating in the other country under the rules of the country of origin.

This represented a going back on the Ottawa Declaration, to which the US had subscribed. The Declaration provided that "charter flights should not be interrupted by the states of destination". Nonetheless, a number of European states negotiated and signed Memoranda of Understanding with the US broadly on the basis proposed(19). These Memoranda were not concluded until March 1973. The effect of this was that the industry and the public were kept in a state of uncertainty until a very late stage. As a result ABC traffic to the US has been on a much smaller scale than had been hoped(20) Traffic from the US to Europe under US TGC rules has been virtually non existent.

In September 1973, the CAB proposed a rule which would permit US and foreign airlines to operate foreign originating TGCs and ABCs organized in compliance with the rules of the country of origin provided that (i) there is in effect between the country of origin and the US a formal agreement concerning the charterworthiness of such operations, and (ii) that these foreign rules contain certain minimum restrictions similar, but not identical to those

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19. See for these Memoranda of Understanding Chapter III, paragraph 2.

20. See Civil Aviation Authority, Annual Report and Accounts 72/73 at 25.

in the CAB TGC rules(21). In March 1974 the rule was adopted without any modifications(22).

Beginning of January 1974, the CAB authorized new tariff regulations, designed to make TGCs more attractive to air carriers, by enabling passengers "to assume a portion of the risk"; it authorized air carriers to meet spiraling fuel and operating costs by increasing prices after charter contracts had been signed. Previously, the minimum and maximum pro rata air fares were based on loadfactors with the minimum fare representing a full load. If the TGC was not booked completely, the pro rata price was allowed to climb a maximum of 20%. After this authorization the fares could climb by 20% but were not restricted to the loadfactor basis. The CAB commented:

> "We fear that our TGC experiment could be seriously impeded, unless the TGC rule is amended to provide some needed flexibility. Otherwise

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21. CAB press Rlease 73-170 of 7 September 1973. SPDR-33 adopted March 1974 as Part 372a.60: In order for a foreign country rules to be considered substantially similar to the TGC regulations they would have to include the following restrictions and conditions:
    - The participants in each ABC/TGC group must travel together on both the inbound and outbound portions of the trip.
    - Each contract must cover at least 40 seats.
    - The main list of passengers must be filed with the authorities 90 days before departure.
    - For European ABCs where the cost is not prorated, the number of standby's cannot be greater than the number of seats contracted for; if the cost is prorated, as with TGCs and Canadian ABCs, then the number of standbys cannot exceed 3 times the number of participants.
    - In the case of prorated charters, standbys may be substituted at any time prior to the flight departure; no more than 20% of the participants may be persons whose names were included on the standby list.If the cost is not prorated, standbys may not be substituted for participants within 30 days prior to the flight, and no more than 15%of the number of seats contracted for may be sold to persons whose names were on the standby list.
    - If the cost is prorated, TGC/ABC groups may be commingled with other categories of charter traffic(which are also prorated) but if the cost is not prorated, commingling is not permitted.

22. CAB Press Rlease 74-61 Of 19 March 1974.

> carriers will be completely shied away from TGCs....They will understandably be reluctant to commit themselves to perform charter flights at a price unalterably fixed many months in advance"(23).

In November 1973, the UK Civil Aviation Authority (CAA), in conjunction with Canadian and Carribean authorities, cut from 90 to 60 days the period of advance filing of flight details and advance payments(24) The ECAC member states which authorized ABC flights, adopted this provision with the exception of Finland and Spin. The latter country, however, is intending to reduce the advance filing period to 60 days(25).

The CAB, followed suit in March 1974, as it issued proposed changes in the TGC rules which would:

---Reduce the advance purchase time from 90 to 60 days;

---Allow a TGC to be filed with only 90% of the seats contracted for, instead of the full 100%;

---Eliminate the stand-by list and

---Allow 15% of the contracted seats to be assigned up to members of the general public until as late as flying time.

The proposal was received with mixed feelings. The main feature of the proposal was , that TGC passengers would be allowed to resell their seats to the general public up to the date of departure; 15% of those seats could be resold to the public, through the travel organizer. Former rules allowed 20% of the seats to be resold to passengers whose names appeared on a standby list.

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23. Aviation Daily of 10-1-74 at 51-
24. Aviation Daily 29-11-73 at 157.
25. ECAC/ECO-II/7 at 3 of 17-4-74.

The main objection to the proposal was that it would eliminate the advance purchase requirement for 15% of the seats.

British Airways reacted by saying that the advance purchase requirement "is not only the central feature of the TGC experiment, but it also breaks diversion for scheduled services. If...the Board finds it cannot live with TGCs except by opening them for sale to the public without the advance purchase requirement, then it is time to close the book on the TGC experiment as a failure"(26).

ECAC was"deeply concerned with the proposal" and described it as "contrary to the terms and the spirit of the OTtawa Declaration".(27).

NACA, however, supported the rule changes, but said "more basic revisions in the regulations are required if TGCs are ever to become a viable form of charter service". NACA said the rules should permit charter organizers to market TGCs at a fixed price rather than at a pro rata share, tour operators should assume the risk of unsold seats, the advance filing requirement should be reduced to 45 days and seats not sold by that date should be able to be sold thereafter(28).

Under a "wait and see" approach, the Board rejected the proposals. It favored a "gradual step-by-step" approach" in fashioning suitable charter rules. "Consistent with that approach we shall at this time relax only those restriction

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26. Aviation Daily of 22-5-74 at 124. British Airways was backed by KLM, Aerlinte, SAS and Iberia. The latter commented with ardor:to liberalize TGCs is to court economic disaster for the scheduled route carriers. BA commented further that tickets may be purchased originally for resale:There is nothing to stop an entrepreneur wishing to trade in cut-rate airline tickets from purchasing 15% of a TGC for resale. Besides, there is no requirement that the ticket be resold at the TGC price.

27. Telegram sent by Victor Veres, president of ECAC to the CAB on 26-4-74.

28. Aviation Daily of 9-5-74 at 53.

which we believe have rendered TGCs virtually unmarketable(29).

On 13 August 1974, the Board adopted the rules it had proposed without modification and also explained why it permitted this limited right of assignment to members of the general public: TGC participants, according to the Board must be allowed some opportunity to be relieved from total forfeiture of their charter payments by the availability of a limited right of assignment, and since stand-by lists have not effectivley served that purpose, limited assignments to the general public should be tried. The Board rejected the argument that such a right would stimulate speculators to participate in TGCs noting that the rules do not permit assignments to be made for profit(30). The rules may not permit profitmaking, but still the rules will not be able to prevent such profitmaking in reality.

It is difficult to see why the Board decided upon this "public assignment" rule where such is not necessary at all.
The argument that it enhances the marketability does not hold, for European ABCs fare very well wihtout such a regulation. What would really enhance the marketability of TGCs, is a fixed price rule combined with a guarantee that the charter flight will depart. The lack of such regulations is the major cause why TGCs have been a complete failure so far. If the Board feels that participants should "be relieved from total forfeiture" of their payments, it should not issue a rule which is in defiance of a principle it subscribed to,i.e. advance commitment. It could very well find a solution which does not violate this idea, for example by inflicting a less stiff penalty on

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30. CAB Press Release 74-175 of 13-8-74 at 2.

withdrawal. To this purpose it could require only a 10% non-refundable deposit as the Canadian regulations do (31), or widen the possibilities where a refund, partial or whole, may be obtained.

At first glance it might appear that the Board's relaxation of the rules would help enhance the marketability of the TGCs, which ,after all is the aim of the CAB. But on further reflection, the surgery appears to be more cosmetic than substantial, in that two main reasons for the unmarketability of TGCs have not been cut away.

First, the TGC organizer still cannot assure a customer at the time of the initial commitment, that the flight will operate. Cancellation of the charter remains possible, in case not 80% of the seats are sold.

Secondly, the promoter of the flight still cannot tell the customer exactly what the trip will cost him, since the final fare depends on the number of passengers who sign up.

European ABCs have been successful because passengers pay a fixed price and are assured in advance that their flight will operate even if not all the seats are sold.

Senator Cannon(32) said that,since the Board had recently authorized foreign originating TGC and ABC flights to operate under country-of-origin rule "it seems clear that there is no legal impediment to revising the US regulation so that they will be more consistent with the European model(33).

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31. Canada Gazette Part II, Volume 107,No 23 SOR/DORS/73-689,section 43.19(1) as amended on 27-11-74.

32. Democrat senator in the US COngress, from Nevada, has been the champion of liberalized charter rules for years.

33. Aviation Daily of20-5-74 at 109.

At the time of their adoption, the TGC rules were meant to last only until 31 December 1975 on an experimental basis. On 2 December of 1974, the CAB announced that it considered a plan to drop this termination date, still believing that "TGCs can become a viable form of charter transportation, particularly under their liberalized rules"(34). NACA contradicted this by saying that they were still not a viable alternative to affinity charters(35).

To create such a viable alternative to affinity charters, senator Cannon introduced the "Low Cost Air Transportation Act", which would amend the Federal Aviation Act (FAA) of 1958 to include definitions of Advance Booking Charters and Inclusive Tour Charters(36).

As proposed, the bill would do away with TGCs and establish ABCs. These charters would be sold to the public by CAB approved organizers under the rules to be established by the Board.

"""However, the bill specifically prohibits the Board from imposing an advance purchase requirement of more than 30 days before departure, that means a maximum of 30 days.

"""The organizer would be allowed to keep up to 25% of the available seats open for sale up to departure.

"""The organizer, instead of the passenger, would be allowed to assume the risk of unsold seats and would not be required to prorate the cost among passengers. This latter rule would allow the organizer to charge fixed prices.

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34. CAB Press Release 74-258 of 2-12-74.

35. Aviation Daily of 7-1-75 at 28.

36. S. 421 By adding ITCs and ABCs to the FAA, the US Congress can assure that the CAB will adhere to congressional intent in formulating charter policy. The bill includes also a provision to permit the carrier to reduce air fares for handicapped persons, youths, the elderly, ministers and families. Avaition Daily of 24-1-75 at 129.

"""The minimum duration of the trip would be reduced from 10 to 3 days within the America's and from 14 to 7 days elsewhere.

Reaction came from ASTA, which encouraged the Board to experiment more with non-discriminatory discount services on scheduled flights, "the backbone of the air transport industry". Such discounts should be supplemented with "a carefully designed selection of non-discriminatory charter services available on both scheduled and charter flights, which do not impair essential scheduled services". ASTA also suggested i.a. that all seats on an ABC should be subject to a 30-day advance purchase requirement instead of allowing 25% to be sold up until departure time(37).

Shortly upon Cannon's proposal, the Board came with an alternative. It asked the US Senate for legislation defining the term "charter", to eliminate the legal requirement, that a distinction be maintained between individually ticketed services and group travel(38). The FAA does not define the term charter but courts have held that "while the Board has considerable freedom to evolve a definition of charter to meet the changing needs, the Board must maintain the distinction between group and individually ticketed travel"(39).

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37. Aviation Daily of 18-2-75 at 259.

38. See on this subject Chapter I.

39. Pan American World Airways v. CAB, 380 F.2d 770(2nd Cir.1967), aff'd by equally devided court, 391, US 461 (1969); American Airlines v, CAB348 F.2d 349,354 (D.C. Cir. 1965).
While the effect of those decisions has been somewhat ameliorated by the subsequent statutory amendments which specifically included inclusive tours, within the Act's defintion, as well as by a subsequent judicial decision (Saturn Airways vs. CAB)(483 F.2d 1284 D.C' Cir. 1973), the limitation inherent in the statutory charter concept, as a result of those decisions, serves to impede an expansion of charter authority.

Because the Board, by law, has been necessarily occupied with ensuring that charter travel be available, only where the charter participants have some kind of group identity, the Board has been hampered in advancing the goal of simple regulation, that would make low cost planeload travel available to the public without impairing the viability of scheduled services.(40).

As attested by the Board, statutary definition of "charter" should incorporate two basic concepts:

(i) that a charter consists of a planeload air transportation and

(ii) that such transportation shall be authorized to the extent consistent with the public interest, including the interest of the public in preserving needed scheduled services.

Such a definition would allow the Board to evolve a charter program which would increase the availability of low-cost air transportation for broad segments of the public. Such an approach "is far preferable to attempting to incorporate in the act the specific provisions covering particular kinds of charters as ABCs or ITCs , as Cannon proposed". "Any attempt to freeze into the statute, specific provisions dealing with particular charter types would inevitably tie the Board's hands in dealing with the changing circumstances of this volatile and dynamic industry"(41).

> "By adoption of the statutory amendment we propose, the Congress would remove any legal doubt that "charter trip" encompasses not only the various types of charter rules already promulgated by the Board, but also encompasses the types of charter rules whose adoption the Board has proposed in proceedings currently pending.
> Enactment of the proposed definition of"charter trip", would thus enable the Board to fashion charter rules which are free of the kinds of artificial restrictions which have heretofore been imposed, not so much because of their intrinsic desirability, but because they have been regarded as necessary to bolster the legality of a particular rule"(42).

The Ottawa Declaration contains principles on charter flights over the North Atlantic.

The US TGC regulations, however, permit such flights to be operated from and within the United States.

The Canadian regulations donot allow ABC flights between Canada and the US(43), while within Europe no ECAC resolution has ever recommended intra European ABC flights. There may be some limited experiments on a multilateral basis, but, at least for the time being, nothing more.

The UK delegation to ECAC proposed that the question of introducing ABCs within Europe should be included in the ECAC workprogram and a time table established with a view to their possible introduction, at least experimentally from 1 April 1975(44).

The UK proposal was inspired mainly by the adverse effects on intra European charter traffic of economic events in 1973 and 1974, like the fuel crisis, inflation and the economic situation in the UK itself, and by a desire to reactivate the market through an attempt to create new demand.

The majority of the member states appeared to be rather opposed to the introduction of intra European ABC flights, essentially for three reasons:

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40. CAB acting chairman, Ricard O'Melia before the Senate Aviation Subcommittee Aviation Daily of 14-2-75 at 175.

41. Idem.

42. Letter from Richard O'Melia to Howard Cannon, chairman of the Senate Aviation Subcommittee, dated 28 February 1975.

43. No ABC shall be operated between Canada and the US. Canada Gazette, Part II, Volume 107, Nr 2 SOR/DORS/73-26 section 43.11(2).

44. ECAC/ECO-II/7-WP/5 at 7 of 12-4-74.

(i) Economic conditions and the development of charter traffic in most countries did not follow the UK pattern;

(ii) The market seemed well served by the existing types of charters and

(iii) Experience of transatlantic ABCs was not yet sufficient to warrant an extension of this concept to other regions(45).

45. ECAC/ECO-II/7-Report of 26-4-74.

Paragraph 3 : Inclusive Tour Charters.

An Inclusive Tour is a fixed-price, packaged vacation, offered to the general public by a tour operator who charters the aircraft, arranges for hotel accomodations, meals, tours, etc.

Inclusive tours can use the scheduled services of IATA airlines.
In that case one commonly speaks of Group Inclusive Tours(GITs);IATA inclusive tour fares apply(1).
They can also use aircraft specially chartered for the carriage of groups, either from IATA carriers or from charter-only non-IATA carriers(2).
In the latter case one speaks of Inclusive Tour Charters(ITCs).

The ITC phenomenon found its matrix in Europe, more precisely in the United Kingdom. Of the larger countries in Europe, only the UK was in any position after the war to encourage cheap charter flights. The French had no need for air travel to reach the Côte d'Azur. The market in Scandinavia was considered to be too small to be economic, while West Germany was prevented from engaging in air traffic of any kind until 1953.

The UK restrictions on non scheduled operators were, however, almost crippling. It was decreed that all air services should be nationalized and that "independent operators" would not be allowed to operate scheduled services. Still, about 70 small independent companies were registered

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1. Normal IATA fare resolutions apply. See res. 080 series.
2. In the case of IATA carriers, res 810 applies.
   In the case of charter-only carriers the operations are governed by the regulations issued by the concerned governments.

depending mainly on air trooping and quasi-military contracts such as the Berlin airlift. The independents ran into difficulty when British European Airways(BEA) raised the question of "material diversion" from their scheduled routes. This stimulated the independents into more creative ideas. One of these was the Inclusive Tour to a destination which was not served by a scheduled airline.

The regulation of the 1939 Civil Aviation Act restricted the use of inclusive tour charters to closed groups. More liberal interpretations of the Act in the early fifties, opened the way for wider promotion of ITCs by allowing direct sales to individuals(3).

A number of European governments commenced granting authorizations to their own and to foreign charter operators,to operate such services for the general public at prices well below the price at which comparable tours could be offered on the scheduled services.

Inclusive tour charters started to be operated from the Benelux countries, Scandinavia and Germany.

The mainstay of European ITC traffic originates in the northern countries. Combined, the UK, Scandinavia and Germany account for 80% of the total originating charter passengers in Europe. In the early years of their operation, the principal destination of ITCs was the Mediterranean basin. Gradually,their field of activity was enlarged and ITCs began to be operated to Eastern Europe, the Middle East and Africa.

In 1958, some 200.000 passengers were carried on inclusive tour charters

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3. See for more details:The European Charter Airlines, a market research report No.C1-804-1873, presented by McDonnel Douglas Corp. Revised December 1970.

within Europe. Inclusive tour traffic multiplied by nearly seven times between 1960 and 1965 in terms of one-way passengers carried: from 560,000 to 3.700.000(4). By 1972 this figure was put at 10.300.000 one-way passengers, which represented 38.5% of the total intra European traffic, scheduled plus non scheduled.

While ITCs account for over 91% of intra European charter traffic, they account for only 21.5% of the total number of passengers carried from ECAC states to destinations on other continents; however, this share is rapidly rising, since it was only 13% in 1970 (5). The balance was mainly carried on affinity charters.

ITCs are mainly a European affair. Compared to approximately 10 million Europeans who travel on ITC each year, there were only 120.000 US citizens who do so. Although ITCs have existed in the US since 1966, they have never become a significant factor on the American air travel scene because of three major regulatory restrictions:

a) a three stop requirement;

b) an artificial price floor and

c) a requirement that ITCs be organized and sold through independent tour operators.

In Europe the restrictions are not so strict and those restrictions that do exist in Europe are of a more liberal nature. As a result. ITCs are an accepted form of vacation travel in Europe, while in the US the amount of ITC traffic is minimal.

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4. Volume and Main Traffic Flows of Charter Inclusive Tours in the Europe-Mediterranean Area. ITA Study 66/10 at 9 (1966)

5. Non Scheduled Air Traffic Within and From the "EU-MED" Region. 1972. ITA Study 1974/1.

One of the reasons why ITCs have become so successful within Europe, is that ECAC has played a very active role in harmonizing and liberalizing the different national regulations of its member states.

By the end of 1958, four European governments (those of Austria, Germany, the Netherlands and Sweden) commissioned the Institut du Transport Aérien (ITA), to make a study of inclusive tour services in Europe to ascertain the facts of the situation. This study was made available to the third session of ECAC in March 1959, where it was decidedthat a further study should be carried out in order to facilitate the formulation by ECAC member states of agreed policies for the regulation and development of this type of traffic(6). For this purpose, ECAC established in 1960 the Non Scheduled and Inclusive Tour (NSIT) study group which held several meetings and made a number of recommendations which have been accepted by the Conference.

In the early stages of its activities, the NSIT group devoted all its time and efforts to a better knowledge of the evolution of inclusive tours. The results of such a study would show what measures could be contemplated in order to promote, in an orderly manner, the development of this type of traffic within the ECAC region -- such development being regarded as potentially beneficial to the overall development of air transport in Europe as long as it was not creating unfair competition with the scheduled airlines.(7).The main goal was liberalization on a multilateral basis, of inclusive tour charters.

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6. Recommendation No. 44 of ECAC'sthird session Doc. 7977 ECAC/3-1 at 44 The recommendation is no longer in force The NSIT study group was later replaced by the ECO-II Committee.

7. ICAO Doc. 8694, ECAC/6, Appendix 5 paragraph 1 (1967).

In analysing the relationship of ITCs to its own definition, ICAO concluded that ITCs should be treated as non scheduled and therefore be subject to article 5 of the Chicago Convention (8)- This brings most inclusive tours within article 3 of the Paris Agreement(9) and under the prior approval of states. Most European States did require prior authorization for long series of inclusive tours. The procedures and information required differed.

With a view to easing these practical difficulties for the charter operators, the NSIT study group was asked to examine the procedure for authorizing inclusive tour services(10). In examining this matter, the group found that many governments required detailed information on conditions under which the ITCs were organized. Taking these requirements into consideration, the study group adopted a standard form for notification of or application for inclusive tour charters and drafted a recommendation which was adopted by ECAC during its Sixth session; the recommendation followed as closely as possible the form suggested by the NSIT group.

To some extent, the form went beyond the scope of article 3 of the Paris Agreement, in that it also requested information on conditions under which the IT was organized such as the minimum price payable by the passenger, duration of the tour, number of meals included per day, plus evidence of insurance(11).

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8. ICAO Doc. 8244-AT/717(1962) at 15-18.

9. See Chapter II, paragraph 6 at page 87.

10. ECAC/NSIT/3-WP/13 paragraph 4 of 23-4-61.

11. ECAC.CEAC Doc. No. 2 at 6-4/2. Most member states implemented this recommendation The UK, however, does nor require applications to be made on a preprinted form, but does ask for information to be provided in the order shown in the recommendation. The UK does not require item 7 (insurance) to be completed because the UK view is that it is for the state of registry to accept res-

"Where prior permission is required, the flight programs should as far as practicable, be submitted to the intersted governments:

(i) by 15 January of a given year in respect of flights to be performed during the period beginning on 1 April and ending on 31 October of that year, and

(ii) by 1 September of a given year in respect of flights to be performed during the period beginning on 1 November of taht year and endinf on 31 March of the following year,

and such governments shall give their decisions as soon as possible and, in so far as practicable, not later than 1 March in respect of the summer season flights and 1 October in respect of the winter season flights(12).

This recommendation was implemented by most of the member states, except the Netherlands which does not require air carriers to stick to the time limits set forth in this recommendation(13).

The US regulations which were adopted in 1966, require that "at least 90 days in advance of the date of departure of the proposed tour by a US certificated air carrier or a foreign route air carrier, such carrier shall file with the Board a Tour Prospectus.."(14).

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ponsibility for imposing insurance requirements. The US regulations which were adopted later can be found in Part 378.13. They require in addition to the ECAC forms, information on the equipment to be used, the number of passengers expected to participate and samples of sollicitation material proposed by the tour operator. Canadian rules in the Canadian Gazette Part II division E section 40 c and d, require a copy of the pro forma charter contract between the tour operator and the air carrier and a summary of the tour operator's experience as additonal documents.

12. Recommendation No. 7 of ECAC's 4th session (ICAO Doc. 8185 ECAC/4-1 at 5,1961) The recommendation was reinforced by Recommmendation No. 3 adopted at ECAC's 6th session (ICAO Doc. 8694, ECAC/6 at 15) to overcome difficulties encountered in the implementation of recommendation No. 7.

13. According to article 5 of the Netherlands regulations, governing charter flights, application should be made at least two full work days in advance in the case of a single flight or a series of not more than 4 flights; in the case of a larger series of flights, application should be made one month in advance, However, if circumstances so require, deviation from the time limits stipulated, may be permitted: ECAC.CEAC DOC. No.2 at 4-7/3.

14. 14 CFR 378.19 as amended by amendment no. 7 effective 22 August 1973.

Canadian regulations provide that "every application shall be made..... at least 90 days prior to commencement of the proposed inclusive tour or series of tours(15).

The amdended Memoranda of Understanding with France and Germany provide that

> "each Party shall (C) conduct any surveillance of ITC flights which they may wish to undertake, by setting a date, reasonably in advance of each chartering season, by which time applicant carriers will normally be expected to file their ITC programs, and informing such carriers approximately one month thereafter of the acceptability of such programs. If such Party's regulatory authorities perceive a problem of program size, it will inform the other Party reasonably in advance of final decision".

As already mentioned, ECAC recommendations have played an essential role in the harmonization and liberalization proces of the ITC regulations of the different European governments.

Although the dejure regime governing these charters, was very restrictive, the practice of the European States was somewhat different. European states adopted a very liberal policy towards ITCs, by implementing most of the ECAC recommendations.

Although states cannot be forced to implement these resolutions, because of their mere advising character, the member states realized that a liberal policy towards ITCs, would either benefit the national carrier or the national economy on the whole.

One of the most important ECAC recommendations concerning ITCs was Recommendation No. 6 of the Fourth Session of ECAC in 1961. Amended by Recommendation No. 4 of ECAC's Seventh Triennial Session, it reads as follows:

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15. Section 40(d).

"WHEREAS Inclusive Tours in Europe make a contribution to the economies of the countries to which they are operated and have a social value in enabling people who might not otherwise be able to travel, to see and become acquainted with foreign countries, and

WHEREAS many persons traveling on Inclusive Tours in chartered aircraft at prevailing low prices might not otherwise travel by air, and

WHEREAS Inclusive Tour charters are not, therefore, necessarily detrimental to the scheduled carriers, and have, on the contrary, in some cases at least, been the forerunner of new scheduled services, thus generating new traffic for the scheduled carrier,

THE CONFERENCE RECOMMENDS

(i) that the ECO-II Committee should continue to study the principles that should govern the operations of inclusive tour charters, with the object of establishing the maximum possible liberalization of this type of traffic,

(ii) that in the meantime, member states, having regard to their policies of co-ordination for air services, should continue to adopt a liberal attitude towards flights exclusively reserved for inclusive tours".

This recommendation was implemented by most member states: they adopted a liberal policy towards intra European ITCs, some with reservations(16), but on the whole the member states adhered to the principles laid down in the recommendation.

As a consequence, ITC traffic within Europe boomed to a degree where it cannot be thought away anymore in the life of an average European citizen. Forecasts profess that by 1976, 21 million passengers or approximately 17% of the Northern European population will take ITC vacations(17).

In 1966, the US CAB authorized the US supplemental carriers to operate transatlantic ITCs.(18).

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16. Germany implemented the recommendation as regards 3rd and 4th freedom traffic in Europe, as did Austria. Switzerland implemented it on the basis of reciprocity.

17. Analysis provided by ITA, Boeing Company and McDonnell Douglas. Used in a speech by Ed Dingivan, V.P. of NACA, before the Carribean Travel Association at Aruba, Netherlands Antiiles, 13 September 1973.

18. CAB Order E-24240, 11 March 1966. Accordingly the US Congress amended the FAA

It also authorized two foreign carriers to conduct the same operations(19). In 1973 the CAB authorized US scheduled carriers and, subject to conditions, foreign route air carriers, to perform flights for ITCs. The regulation confined the general ITC authority of foreign route airlines, solely to charter trips between those points in the US and the carrier's home country, between which "the carrier provides at least one roundtrip per week". ITCs not performed in that way, should be subject to prior approval similar to that which the CAB requires for off-route charters(20).

ECAC's attitude towards these transatlantic ITCs has been far less liberal than towards intra European ITCs. It recommended that

> "in cases, where they are permitted, they should be limited to a proportion of transatlantic scheduled flights so that the volume of such charter traffic does not impair the services provided by scheduled carriers(21).....that any state should feel free to impose more stringent criteria than another state(22).

As criteria for such a common policy, ECAC suggested i.a. the inclusion of at least three stops in the IT program. "Removal of this requirement might open the way to abuses and to diversion of business trafficto charter flights over the Atlantic"(23).

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of 1958 to authorize expressly the operation of ITCs by supplemental air lines. Public Law 90-514 82 Stat. 867 (1968).

19. CAB orders E-24679 and E-25017; Suedflug from West Germany and Caledonian from the United Kingdom.

20. CAB Press Release 73-136 of 19 July 1973.

21. ECAC suggested such number not to exceed 1% of the incoming transatlantic scheduled flights performed in the corresponding month of the previous year. ECAC/ITCR/1-Report 7, paras. 18-19, of 17 November 1969. This percentage was later set at 2.

22. ICAO Doc. 8842, ECAC/INT.S/2 Recommendation No. 7.

23. Idem at 21, paragraph E.

The three stop recommendation was later abolished(24) but recommendations pertaining to minimum duration and price remained in force.

Recommendation No. 3 of the Sixth Intermediate Session of 1974 reads:

a) "that the minimum duration of an inclusive tour should not be less than six nights at the holiday destination(s);

b) that in cases of tours lsting six or seven nights, the total minimum price.....should not be less than 110% of the agreed GIT basing fare and that, for tours of longer duration, but not exceeding nine nights, US $10,= per night should be added;

c) that in case of tours lasting not more than 14 nights, the total minimum price.....should not be less than 110% of the appropriate agreed mid-week all-year GIT basing fare and that for tours of longer duration than 14 nights, US $7,= per night should be added.

These minimum duration and minimum price recommendations have not been implemented unanimously by the member states. The Italian administration considered that reference to 110% of an IATA fare made ITC tariffs totally uncompetitive, and put ITCs in a disadvantageous position with respect to other charter types . The Netherlands regulations provide that "the flights are operated for not less than the minimum tour prices laid down by IATA for inclusive tours for groups"(26).

If these ECAC recommendations for transatlantic recommendations can be labeled as "strict", the regulations that were adopted by the CAB in 1966 are even stricter.

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24. ECAC/ECO-II/7-Report of 26-4-74, appendix 8 Draft recommendation.

25. ICAO Doc. 9086, ECAC/INT'S/6(SP) at 14. This recommendation has been updated for the year starting from 1 April 1975. See draft recommendation ECAC/CPS /3-Report of 3-10-74.
ECAC's ITC price policy will be dealt with more extensively in chapter V.

26. AIP Netherlands FAL-1-3-5, Aticle 5.2.A.

The CAB decided to grant ITC authority to the supplemental air carriers, finding that "inclusive tours would provide desirable low-cost transportation services which would attract new passengers to aviation and otherwise stimulate overall traffic growth....There is no reason to believe that the diversion which may take place, cannot be absorbed by normal traffic growth in the transatlantic market"(27).

The orders issued by the Board, granting both domestic and foreign ITC authority to US supplementals, were challenged in courts by the scheduled carriers on the grounds that the Board did not have the statutory power to grant this authority(28). The Court of Appeals of the District of Columbia, held that the Board did have the authority to authorize domestic ITCs. The Second Circuit court on the other hand, disagreed in a case involving international operations. In appeal, the US Supreme Court split 4 to 4 with one abstention in the latter case(29). Since this split decision did not resolve the conflict, Congress acted to settle the matter by amending the Federal Aviation Act of 1958, to expressly provide that ITC authority could be granted to the supplementals.

The earliest grants of ITC authority, emphasized tours originating in each carrier's home country. However, the concept was broadened by permitting each carrier to originate tours at the foreign point, as well as in its own country.

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27. Opinion by the Board, Docket 11908, et al.,reopened Transatlantic Charter Investigation(All Expense Tour Phase), served 30 September 1966 at 7-11.

28. World Airways Inc. v. Pan Am World Airways, Inc. 88 S. Ct. 1715(1968)aff'g by an equally devided court. Pan Am World Airways, Inc. v, CAB. 380,F 2d 770 (2d Cir. 1967)

29. See further:"The Power of the CAB to grant ITC authority to the supplemental air carriers under the 1962 amendment to the Federal Aviation Act." by John Steinkamp, 44 Indiana Law Journal (1968) 78-85.

The rules which the CAB established were designed to maximize the availability of the service in order to create new air markets and to minimize diversion from scheduled carriers by effectively precluding use of the tour for point-to-point travel. These rules require:

---a minimum of 7 days between departure and return;

---overnight hotel accomodation at a minimum of 3 places, no less than 50 airmiles from each other, with the price, including at a minimum, all hotel accomodations and trans portation between all places on the itinerary;

---the charge for the passenger not to be less than 110% of any available fare or fares embodied in a tariff on file with the Board, charged by a route carrier for individually ticketed services(30).

Many of the restrictions were designed to prevent undue diversion from scheduled services. In contrast to those restrictions, the scheduled carriers have been permitted and are free to provide a broad range of Group Inclusive Tours, which are not subject to the 3-stop requirement.(31).

Transatlantic ITC traffic has been limited by the CAB restrictions as well as by those of the ECAC countries. As a result, a mere 120.000 persons

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30. 14 CFR 378.2

31. GIT fares are airfares agreed upon by IATA carriers, plus a minimum of $70,= in ground accomodation. They are applicable to groups of 15 or more passengers on scheduled services(while ITCs are required to carry groups of 40 passengers), are valid for 14-21 days and can be marketed through the scheduled carrier's own travel agents. GIT fares are apllicable all year round, although slightly higher fares exist during peak periods. The Montreux, North- and Mid- Atlantic Traffic Conference of IATA in August 1974 reduced the minimum group size to 10 persons. The min-mum tour price was increased from $100,= to $120,= for the first 14 days and from $7,= to $10,= per day thereafter. CAB Order 74-9-21 of 5 September 1974.

used the transatlantic ITC program in 1973. Out of a total of 10.450 transatlantic charter flights, only 295, less than 3% were ITCs(32).

Apart from the Memorandum of Understanding that was signed by Belgium and the US in 1972, none of the understandings that were signed by other European states, includes a general authorization to conduct transatlantic ITCs. The understandings with France and Germany include in their amended version only a provision, based on which parties would conduct capacity surveillance of ITC flights. To this extent parties can require applicant carriers to file their ITC programs before a certain date, which they may approve or disapprove.

During negotiations, prior to the conclusion of an agreement governing charter operations between the US and Switzerland, the Swiss offered to allow US carriers to operate one-stop ITCs from Switzerland in accordance with Swiss regulations. This proposal was rejected by the US in light of the substantial differences between US and Swiss regulations on ITCs(33). The bilateral charter agreement between Yugoslavia and the US, however, does provide for transatlantic ITC operations between the two countries, operated according to the rules of the country of origin. After initial authorization has been obtained, "neither Party shall require any additional operating authorization for individual non scheduled flights"(34).

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32. Figures are based on a CAB staff study: Ed, Driscoll, president of NACA before the subcommittee on Aviation of the Committee on Commerce of the US Senate, 14 May 1973 on S.455 and S.1739 14 May 1973 Serial No. 93-95 at 15.

33. Letter from CAB chairman Timm to the director of the office of Aviation, department of State, Mr. Meadows, dated 23 May 1974.

34. See chapter III, paragraph 2. Articles 3A and 3B of the Agreement.

---One of the main reasons for the failure of the US ITC program is clearly the three-stop requirement. This rule prohibits a group from traveling to a vacation spot and remaining there for the duration of the tour. As a practical matter, it effectively precludes short duration ITCs of a week or 10 days, since it is almost impossible to plan a sensible 3-stop vacation of less than two weeks. Long weekend packages are totally ruled out. Also, this requirement makes ITCs more expensive. It precludes the tour operator from offering a one-stop program at low price, domestically, to the Carribean and also to Europe.

---The second restriction is that the total tour price must not be less than 110% of the lowest scheduled airline fare applicable between the points involved. In markets where no promotional fare is offered, the price must be 110% of the normal fare, which is usually too high to permit the development of a low-cost tour. And if a promotional fare does exist, then the ITC will have to conform to all the restrictions applicable to the promotional fare. Thus, if the promotional fare is not available on weekends, the ITC cannot involve weekend travel; and if the fare requires a minimum stay of 14 days, the ITC must be of 14 day duration(35).
The main objection to such a price rule as adopted by the CAB and also recommended by the ECAC for transatlantic ITCs, is that it is based on a comparison with a fare charged by a different type of carrier for an entirely different mode of transportation.

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35. Non-transatlantic ITCs originating in Europe offer a quite different view. English vacationers in 1973, could buy a 2week London to Thailand package tour for $380,-. The equivalent economy fare alone was $1.192 at that time. Germans could have a 2-week Kenya holiday for $349,-. The scheduled air fare alone would have cost them $841,-. From: Air Transport Facts No, 9 , issued by NACA.

---The third restriction is the prohibition against either direct marketing of ITCs by supplemental carriers or their control of ITC operators. What this means is that unless independent tour operators undertake to organize and market ITC programs, there simply cannot be ITCs. Supplemental airlines, in a way, have to wait around, hoping that somebody else will decide to assume a risk to market their services.

In some European countries, common control of tour operators and charter airlines is an accepted practice.

It has been argued that the reason for the success of intra European ITCs was the lack of substantial restrictions and a very liberal application of the existing rules; and that adoption of the European rules into the American system, would boom the US ITC Industry.

The comparison of the European and US experiences would suggest that a liberalization of the US regulatory restrictions is in order, if the traveling public and the tourist industry are to attain the benefits of low-cost, increased tourism(36). But one has to be cautious in using the European experience as the basis for predicting the likely outcome of liberalized ITC authority in the US(37).The two markets can hardly be compared. The intra European passenger fares on scheduled operations are in many instances double the US fares, in markets of comparable size and distances apart(38). The US scheduled domestic network is probably the most advanced in

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36. Articles of adoption of European ITC rules into the US system appeared i.a. in The Seattle Times of 19 August 1973, The Boston Globe of 26 August 1973 and the Christian Science Monitor of 27 August 1973.

37. Robert H. Binder before the Aviation Sibcommittee on S.455 and S.1739. 14 May 1973 See footnote 32.

38. AWST of 28 May 1973 at 34-36, Robert Timm, then CAB chairman.

the world; with its overall relatively low fare structure, it already carries large numbers of tourists on scheduled flights.

Still, a new ITC concept was pushed by NACA, in the form of a bill to amend the Federal Aviation Act of 1958 to provide a definition for ITCs. The bill would remove existing restrictions, particularly the 3-stop requirement. It would also permit supplemental air carriers to sell individual tickets directly to the public.

ITCs would be sold at a price which is "no less than the just and reasonable fare for charter air transportation plus a compensatory charge for land accomodations"(39).

Because of the strong opposition against the bill(40), it was later amended to preclude supplementals from selling ITCs directly to the public. According to the bill, the scheduled airlines would receive the same authority as the charter airlines. The bill was declared moot at the end of the 93rd Congress and replaced by the Low-Cost Air Transportation Act.

The CAB, in November 1974, issued its own proposal on the subject, introducing a new class of charters named "One-Stop Inclusive Tour Charters", or OTCs, describing them as "something of a hybrid between TGCs and ITCs". They were meant to replace affinity charters(41).

The proposal retains the distinction between individually ticketed services

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39. Bills S.455 and S.1739.

40. Strong opposition came especially from the scheduled airlines who feared that the liberalization would result in the sale of point-to-point air transportation by charter or supplemental airlines. Aviation Daily 28-5-74 at 146.

41. CAB Press Release 74-239 of 1 November 1974. CAB Docket 27135.

and group travel and, through its restrictions, is aimed at preventing diversion from scheduled services. OTCs, according to the proposal, could be operated by both scheduled and supplemental carriers, in both the domestic and international markets. The potpourri of restrictions attached to the proposal is, to say the least, absurd, and will certainly not enhance its marketability.

---The tour operator would offer roundtrip tours at a pro rata price, which may not be less than a prescribed minimum. The price must include accomodation, transportation and baggage handling. North American OTCs would have a per diem pricing requirement of $25,= per day per person. The same Big Brother philosophy prevails for transatlantic flights: 110% of the lowest applicable scheduled fare (this restriction was foundto be one of the major reasons for the failure of the US ITC concept).

---Passengers would be obliged to make a full payment 30 days in advance, and a list with their names would have to be filed with the Board 30 days prior to departure.

---Minimum stay requirements would be 7 days; 10 days for high-season transatlantic OTCs.

---Domestic OTCs would be limited to a quarter of a percent of the number of passengers carried in that market on scheduled services during the most recent 12-month period. According to NACA's calculations, this would allow a carrier to transport only 390 passengers in the New York - Las Vegas market in a three-month period.

The proposal, as it stands now, seems somewhat unrealistic and will probably reduce opportunities for inexpensive travel; and this cannot be said to be one of the Board's goals. True, the Board is still obligated to make a

distinction between individually ticketed and group travel, but it should not use this obligation as a peg to hang on all the restrictive rules it keeps on issuing.

True, the Board must protect the interests of the scheduled airlines, but it should not do this at the expense of the supplementals, especially not when these scheduled operators can also conduct charter operations. The Board must just as well look after the interests of the supplemental carriers. It is doubtful if it actually does so- It is therefore no surprise that a special commission has been created whose task it is to look into the regulatory powers of the CAB.

The regulatory situation in the US in 1975 is rather complicated. Three major proposals are awaiting adoption: The CAB CTC proposal, Cannon's Low Cost Air Transportation Act and the CAB'c proposed legislation to define the term charter, in order to eliminate the legal requirement that a distinction must be maintained between individually ticketed services and group travel.

It must be possible to distill a proper charter regime from these proposals, a regime that will strike a just balance between the interests of both the supplemental and scheduled carriers, a regime, that above all protects the rights of the consumer to travel cheaply.

The regulatory situation in Canada, concerning ITCs is fairly stable. The Canadian governement has maintained a considerably more liberal policy on ITCs than has the US.

Presently, the Canadian policy on ITCs has been further liberalized. On 31 July 1973, Canadian carriers were authorized to operate single-stop ITCs within Canada and into the US(42).Previously, ITCs within Canada and to the US adhered to a two-stop restriction imposed by the Canadian government. One-stop ITCs, however, were permitted to Hawaii and the Carribean. Candian ITCs are still subject to price conditions: "the tour operator agrees to sell ITCs.....in an amount not less than 115% of the lowest scheduled unit toll return available to an individual on a non-affinity basis and applicable at the time of travel"(43).

Although according to the charter bilateral concluded between Canada and the US,a charter would be governed by the regulations of the country of origin, the CAB did invoke a prior approval requirement on some ITC flights. Prior approval is required for any ITC operated by a Canadian scheduled carrier(that is either Air Canada or CP Air) that does not provide overnight accomodations at a minimum of three points at least 50 airmiles apart. Canadian charter carriers may operate without prior approval, ITCs that provide overnight accomodations at a minimum of two places at least 50 airmiles apart.One stop ITCs require Board approval(44). On 19 March 1975 the CAB dropped its reservation against Can. 1-stop ITC's.

42. 31 July 1973 Amendment SOR/DORS/73-425 revoking section 41(g).

43. Canada Gazatte, Part II, Vloume 106, No 10 SOR/DORS/72-145 section 41(b).

44. CAB Order 74-5-37 of 8 May 1974 at 4-5.The regulation has an interesting history; When Canada, in 1973 changed its two-stop rule to mainland points and allowed its carriers to operate one-stop trips, the US, complaining that this was an attempt to pressure them to accept one-stop ITCs as part of the bilateral, refused to sign until the original two-stop provision governing CAnada-originating charters was reinstated. In response, Canada then kicked US carriers out of the Canada - Hawaii and - Florida markets and banned ABC/TGC operations in either direction. Travel Weekly, 1 July 1974 at 3. Presently, Canadian carriers may still operate one-stop ITCs to Hawaii and Puert Rico/Virgin Lelands, without prior approval--an authority unchanged by the bilateral.

In comparison, everything remains fairly quiet on the European front, apart maybe for the tariff control recommendations for transatlantic ITCs, that have been adopted by ECAC member states(45). Intra European ITC traffic is still thriving, although at less encouraging levels than before.

The number of UK residents departing on ITCs in the first quarter of 1973 was up 18% on the same period of 1972; this figure, although apparently impressive, needs to be compared with the 74% increase, recorded in the first quarter of 1972, with the ending of winter price controls on ITCs to Mediterranean destinations.

Although there was still a 9% increase in charter passengers leaving Sweden in the first half of 1973, there was an 8% drop in those departing from Copenhagen airport, as compared with a 12% increase in the first half of 1972(46). The combined result would seem to indicate a stagnation in the Scandinavian market: the total number of outgoing passengers only increased by 0.6% in the first 6 months of 1973. This stagnation may be interpreted as either the first sign of a market saturation in Scandinavia, or as a reflection of the decrease in discretionary spending due to the overall economic situation in the mid-seventies. Until fuller or more recent results and data are available, no definite answer can be given.

Where according to the US and the Canadian regulations, "shopping flights" that is, ITCs of a duration shorter than a week, are not allowed, it appears that such short-duration-ITCs are already being operated to quite an extent, in certain European countries. Attitudes of aeronautical authorities are on the whole fairly flexible, but vary according to the case.

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45. This subject will be dealt with in the next chapter.
46. ITA Bulletin 74/1 at 10.

being more liberal towards arriving flights than departing flights, as is the case in the three Scandinavian countries; restrictive where such flights are projected on routes suitably served by scheduled services, as is laid down in the Netherlands regulations(47); or without any limitations as is the case in the UK and Germany(48).

The question of these short-duration-ITCs was already placed on the work program by ECAC's Seventh Triennial Session(49). In view of the concern aroused by the development of such flights, ECAC decided upon a detailed study on the subject(50).

The results of this study are not available yet; it may be anticipated that ECAC will come with a resolution recommending its member states to adopt regulations, authorizing these shopping flights liberally, without, however, compromising scheduled services.

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47. AIP Netherlands FAL-1-3-3 Article 5,1,B,1 and 2.
48. ECAC/NSREC/4-WP/5 of 15-2-74 Appendix 1.
49. ICAO Doc. 8887, ECAC/7 at 31, paragraph 46.
50. ECAC/NSREC/4-Report of 8-3-74, and ECAC/ECO-II/7-Report 7 of 26-4-74.

CHAPTER V : CHARTER AIR FARES

The question of charter air fares has been a complicated one from the outset on. Attempts have been made to set minimum fares for passenger charter operations, either by inter-carrier agreement or by governmental regulation. Generally, however, most charter fares so far have been determined by the forces of the marketplace, be it

(1) charter fares charged by IATA carriers or

(2) charter fares charged by non-IATA charter-only carriers.

The fares that are charged on the scheduled operations of IATA carriers, are set by the IATA Traffic Conferences(1). The function of IATA to set the fares of the scheduled operations of their member carriers has been delegated to it by the great majority of the governments of the world through their bilateral air transport agreements(2)

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1. See for general litterature on the IATA Traffic Conferences:
--Gazdik, Ratemaking and the IATA Traffic Conferences. 16 JALC at 312(1949)
--Pillai, the Air Net, the case against the world aviation cartel, Grosman publishers, N.Y. at 53-67(1969)
--Dirlewanger, Die Preisdifferenzierung im Internationalen Luftverkehr, Verlag Herber Lang & Cie., Bern,(1969)
--Wood, The IATA Traffic Conferences, an airline man's view,Paper presented to the second Air Transport Conference of NYU at NYC on 24 May 1962.

2. Paragraph (b) of AnnexII to the Bermuda Agreement that was concluded between the US and the UK in 1946, governing scheduled operations between the two countries reads as follows:"the CAB of the US having announced its intention to approve the rate conference machinery of the I.A.T.A.....as submitted, for a period of a year beginning in February 1946, any rate agreements, concluded through this machinery during this period and involving US carriers will be subject to approval by the Board" CAB Order E-9305(1955) made the CAB's approv permanent.
Of the 1248 bilateral air transport agreements registered with ICAO up to January 1967, 789 agreements made direct reference to the IATA rate making machinery, while 74 agreements made indirect reference to IATA and 367 agreements made no reference at all to the method of rate making, See Chuang: The International Air Transport Association, A case study of a quasi governmental organization, A.W. Sijthoff, Leiden at 41.

The IATA TRaffic Conferences to date, have never fixed fares for passenger charte. services.

Minimum charter prices have never been fixed on an international, multilateral basis.

However,

1) there has been in existence, for a great number of years, a multitude of national, unilateral regulations that contain rules pertaining to charter fares. Most of these regulations may not have fixed charter fares, they did and still do contain provisions relating to the fares to be charged for charter operations.

2) More recently, such fare regulations have been incorporated in bilateral understandings and agreements between certain countries.

3) IATA resolutions pertaining to the fares to be charged for ITC operations, can be arranged under a multilateral heading as can the ECAC resolutions that recommend certain fares to be charged for the different modes of charter air transportation.

Most of the rate clauses in these regulations, are based on a comparison with fares charged by scheduled operators.

1) Unilateral regulations have been in existence since charter flights started to be operated. The majority of these national regulations, was rather stringent in that in most cases prior permission must be obtained in order to operate the flight. Only a limited number of states knew rate clauses in their regulations. The main idea behind these rate provisions was the protection of the scheduled airlines from low-price competition from the charter airlines.

The earliest regulations of Ceylon and India for instance, provided that fares to be charged for the carriage of traffic to or from their territories on non scheduled flights "shall not be less than the rates charged by scheduled airlines, operating the same or equivalent routes".

The Netherlands had a similar regulation for charter flights that were open to use by the members of the public. In the case of single entity charters where the aircraft was leased to a person or a body, without the resale of space, carriers were free to set charges for the entire aircraft.

Cuba specified that excursion charter flights by foreign operators "shall be made at rates higher than those for scheduled operations over similar distances"(3).

The only states that actually fixed minimum charter rates were Australia and the US. Australia for both domestic and international flights, the US only for domestic operations. The Australian regulation in the early fifties stipulated that charges for passengers taken on or discharged on Australian territory "shall not be less than such amounts as may be directed by the Director General of Civil Aviation".

Before World War II, charter fares in the US maintained themselves on a level higher than the fares that were charged on scheduled operations. As this situation reversed, the Air Traffic Conference of America in 1941, agreed upon resolutions fixing uniform charges to be made by all airlines of the Conference, for charter and other special flights. The Conference filed with the CAB two tariffs entitled "Charter Fares for United States Government" and "Charter Fares for Other Than United States Government"(4).

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3. See for more info on national regulations i.a. Sundberg, op. cit at 109-116.

4. Contract CAB No. 183 filed 13 May 1941 and Contract CAB No. 195 filed 17 June'41

The impetus for adoption of these resolutions is believed to have been in part "informal complaints" received by the Board, and apparently referred to it by the Conference, to the effect that "charered services have resulted in the sale of air transportation at less than published (scheduled) tariff rates"(5).

Since 1947, the CAB had required that the domestic airlines file and adhere to "tariffs providing rates and charges for charter trips and special services" and, if not expressly subjecting foreign air carriers to the same requirement, the Board at least paved the way to make them file and adhere to charter rate tariffs(6).

In 1950 the Board suggested the formulation of rates for all charter operations. European airline managements pointed out, however, that

> "a serious question exists as to whether the publication of charter tariffs would not be in violation of the commitments of the IATA members embodied in the IATA articles of Association and Resolutions" and that "insufficient experience has been gained thus far by the carriers, particularly in the transatlantic operations, to permit of the present formula of a universally acceptable set of rates and rules for all charter operations"(7).

The CAB suggestion was never realized.

More recent regulations deal also with fares to be charged on charter operations. They do so to a greater extent than before. Most fare clauses in these regulations suggest fares to be charged in relation to IATA fares, many national regulations do so in respect of ITC prices. Other fare clauses are based on a general consensus among a group of states, as is the case in the national regulations of the ECAC member states, pertaining to a.o. ABCs.

Therefore, it seems more proper to deal with these more recent national regulations under the "multilateral"heading.

2) The earliest bilateral agreements governing charter operations, that were concluded between a number of European states(8) did not enclose any rate provisions. The first time a rate provision actually emerges in a bilateral charter arrangement, is in the Memoranda of Understanding that were signed by the US and a number of European states(9). The Memoranda signed by the US and Germany and France(10) respectively, provide:

> "To assure that prices are neither unreasonably high or low, taking into account all relevant costs, each Party shall require the filing of tariffs or price schedules(as applicable)and enforce conformity to tariffs or price schedules on all flights operated".

The two other understandings that were signed that year, by the US and respectively Ireland and the Netherlands, go a little further in providing that

> ".....the regulatory authorities of each Party shall....
> (7) consult with the appropriate authorities of the other Party about uneconomical, unreasonable or unjustly discriminatory charter rates charged or proposed to be charged for services conducted pursuant to this understanding and, in the event of no resolution by consultation, may take appropriate action to prevent the inauguration or continuation of uneconomical, unreasonable or unjustly discriminatory rates".

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5. See G.C. Neal, Some Phases of Air Transport Regulation 1942/43. 31 Georgetown Law Journal 355-380, and Sundberg, op. cit.at 12 and 47.
6. This rule appeared as Part 207.4 in the 1951 Charter Regulation.
7. Letter from BOAC,KLM,and SAS to the CAB of 16 February 1950.
8. See for more information on these bilateral agreements Chapter II ,para. 3.
9. The Memoranda of Understanding are dealt with in Chapter III, para. 2.
10. The Understanding signed between the US and Belgium does not, as do the subsequent understandings in their original form,only cover advance booking charters, but is of a much broader conception it covers all modes of charter transportation, including ITCs. Neither this Memorandum nor the one signed by the US and the UK contain any rate provisions.

The Non Scheduled Air Services Agreement that was concluded between Yugoslavia and the US contains a rather extensive rate clause.

Article 11 provides i.a.

> "(A) the rates charged by each carrier shall be reasonable, considering all the relevant factors bearing upon the economic characteristics of prescribed non scheduled air services. Such rates shall be subject to the approval of the aeronautical authorities of the Contracting Parties, who shall act in accordance with their obligations under this Agreement, within the limits of their legal competence;(nt 11)
>
> (C) If one party, upon review of the rates charged or proposed to be charged, or practices followed or proposed to be followed by a carrier of the other Party, finds that these rates or practices are or will be uneconomical, unjust or unreasonable or unjustly discriminatory, or unduly preferential or unduly prejudicial, it mat so notify the other Party and thereafter the Parties shall endeavour to reach agreement on resolution of the complaint;(nt 12)
>
> (D) In the event that the agreement is reached pursuant to paragraoh(C) each Party will exercise its best efforts to ensure its implementation;
>
> (E) In the event that the complaint is not resolved pursuant to paragraphs (C) and (D), each Party may take whatever steps it considers necessary to prevent the inauguration or continuation of the objectionable rates or practices, provided, however, that the Party taking such action, shall not require the rate charged by the carrier of the other Party to be higher than the rate charged by its own carriers for comparable services".

The charter agreement concluded between the US and Canada provides also that rates to be charged shall be reasonable "considering all relevant factors bearing upon the economic characteristics of prescribed non scheduled air services". It further stipulates that no carrier shall rebate "any portion of such rates by any means, directly or indirectly, including the payment of excessive sales commissions to agents".

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11. Paragraph B requires Parties to file proposed rates with the authorities of the other party, 30 days before proposed day of introduction.

12. Cf text of section 1002j of the Federal Aviation Act.

Some general remarks are warranted here.

Firstly, it may be noted that neither the rate provisions in the Memoranda of Understanding, nor those in the bilateral charter agreements, make any reference to IATA fares. The Memoranda and agreements give rate provisions that are based on such economic factors as being "reasonable, taking into account all relevant costs" and being "non discriminatory and non preferential".

Secondly, it may be pointed out that no distinction is being made between charter fares, as they are charged by IATA carriers and charter fares, charged by other carriers.

Thirdly, these arrangements leave the charter rate making in the first instance to the carriers themselves. Governments show an active interest in the level of international charter fares.

Before the existence of these arrangements, international charter fares were freely determined by the forces of the marketplace, by supply and by demand. Heavy competition on especially the North Atlantic routes pushed the average level of charter rates downwards. This occured to such a degree, that many charter flights were operated with substantial losses. Governments came to conclude these understandings and agreements i.a. to prevent any further financial deterioration of the transatlantic charter operations of their national carriers. The agreements do not fix any charter rates. They give a set of minimum standards, a set of minimum conditions that have to be complied with: charter flights may not be operated at a rate level which is below the rate level of the operating costs; prices charged should be reasonable, non discriminatory and non preferential, and are subject to government control on an ex post facto basis.

3) Multilateral regulation of charter fares has been virtually non existent. The Paris Agreement of 1956 is silent on the subject.

There were relatively few charter operations in that era, and the problem of what fares should be charged, in order to enhance the health of the industry, did hardly pose itself. Prices were determined by the forces of the marketplace. General standards were set for ITC operations by the appropriate resolutions and scattered national regulations.

The Ottawa Declaration of 1972 contains the following paragraph:

> "Carriers should offer capacity for the new category of operations at prices which are neither unreasonably high or low, taking into account the aircraft cost per mile, the distance involved and other relevant costs. Not less than four months before the commencement of their first operation, carriers should file appropriate tariffs with concerned regulatory authorities, In the absence of a challenge to such tariffs, contracts incorporating them, shall be regarded as valid in this respect"(13).

Worded in rather general terms, the Declaration leaves the carriers relatively free in determining what price they wish to charge. It only urges them to charge prices that are cost related, prices that do not depart too much from the actual operating cost.

The rivalry, however, between IATA carriers and charter operators and between these carriers amongst themselves, mainly on the North Atlantic routes, reached such a competitive stage, that it brought both classes of carriers in serious financial trouble. In order to solve these financial difficulties, three groups of solutions were brought to the fore, virtually all based on a multilateral approach:

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13. Paragraph 7 of the Declaration of Agreed Principles, signed at Ottawa in October 1972. The "new category" the Declaration mentions, is the advance booking charter concept.

(a) Both classes of carriers took up the idea of reaching multilateral agreement on charter fares, on an inter-carrier basis.

(b) IATA, in September 1974, decided to amend its Act of Incorporation in order to admit charter operators to its membership and thus set minimum charter rates. No charter operator has applied for membership yet.

(c) Governments proposed guidelines for minimum charter prices.
The US CAB withdrew its guidelines in February 1975.
ECAC recommendations pertaining to minimum charter fares have been widely implemented by the member states.

The market conditions which created these difficulties have been present since 1969. Those conditions include, first, the acquisition of vastly excessive widebodied aircraft capacity by the scheduled airlines serving the North Atlantic routes and, secondly, the decision of those airlines through IATA, to institute below-cost discount fares on their scheduled flights, in an effort to deprive the charter carriers of any significant share of the bulk passenger market.
As a conseqence of the introduction of these below-cost fares, roughly 80% of transatlantic scheduled service passengers traveled at discount fares. In 1972 Lufthansa, for example, carried 26.6% more passengers across the North-Atlantic, but increased its revenue on that route by only 0.7% :"Only one fifth of our North Atlantic passengers paid the normal fare while all the others used special reduced fares(14)

The charter airlines responded to these IATA discount fares in the only way they could, namely, by reduting charter rates to marginal and

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14. See ITA Bulletin 73/36 of 22 October 1973 at 819.

ultimately to below-cost levels. Tariffs on file with the CAB in the spring of 1973 for transatlantic charter services indicated a prevalent range of peakseason prices (N.Y.C.-London) of between $112,= and $160,= This equates to a range of 1.62 ¢ and 2.31¢ on a per seat mile basis.

On 9 May 1973, the member carriers of NACA(15) filed an application with the CAB, requesting that it permit all US and foreign flag carriers holding certificate or permit authority to perform transatlantic charter services, to engage in discussions, the objective being an agreement on passenger charter rates and the basic elements of service to which the rates would be applicable."The goal of such discussions was not to eliminate competition by setting specific fares as IATA does(16)but rather to establish minimums which would preclude below cost operations". These are the words used by the CAB , in the order with which it grants the authority. The words are not too happily chosen, since also IATA establishes minimum fares. Member airlines are free to charge any amount above those "specific minimum fares", not below. These minimum fares become the fares that are actually charged by the member airlines. Therefore, there is hardly any difference between the established system

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15. Overseas National Airways,Inc., Saturn Airways Inc.,Trans International Airlines,Inc., and World Airways, Inc.

16. 56 prominent US Independent Tour Operators feared that approval of the application would lead to the establishment of an IATA-like cartel for the setting of transatlantic minimum charter rates, with the end result that American and European consumers would lose their present availability of low-cost transatlantic services. The CAB, however, did not read NACA's request as contemplating a first step to evolution of a permanent forum akin to the IATA Traffic COnferences Machinery since the application made no reference to an administrative secretariat, and is silent on the procedural rules under which the discussions would be conducted: CAB Order 73-6-79 og 19 June 1973 at 2 and 4.

used by the IATA Traffic Conferences and the system as it was proposed by NACA.

NACA contended that the development of a rational and economical trans-atlantic fare structure requires that charter rate levels be established in the context of known promotional fare levels of scheduled operations and vice versa; it acknowledged that this could be accomplished by either:

(1) conducting simultaneous discussions at the time and place scheduled for the IATA Traffic Conferences, with each meeting acting in full knowledge of the fare levels being arrived at by the other, or

(2) holding charter rate discussions at a separate time and place and predicating those discussions on an agreement that promotional fares on scheduled services would subsequently be established at levels, sufficiently above charter rates to permit marketing charters on an economic basis.

NACA's application was supported by other US and foreign carriers and on 19 June 1973 the Board granted the requested authority noting that

> "Our action is of course a departure from historical policy which left charter rates to the forces of the marketplace. In our opinion this policy has worked well, and has resulted in aggressive promotion of charter service and a competitive spur to scheduled service. On the other hand, the competitive environment on the North Atlantic has quite clearly changed significantly in recent years. Charter services now account for some 30% of the market and no longer can be considered a fledgling industry"(17).

Following receipt of Board authorization, a steering committee was formed by the carriers to make arrangements for an inter-carrier fare conference. 22 scheduled and 17 charter operators met at Brighton (England) from

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17. Idem at 3. In Order 73-10-99 of 26 October 1973 this authorization was extended for another 90 days.

27 to 31 July 1973. The Brighton Conference ended without agreement as there was substantial disagreement among the carriers not only as to the minimum rate levels themselves, but also as to whether there should be rate differentials to reflect the different operating efficiencies of various aircraft types and seating configurations(18).

The Press Release issued at the end of the Conference stated:

> "While no specific agreement was reached, notable progress was made. The Conference enabled the delegates to exchange views for the first time on the make up of an acceptable package covering charter rates and serives, and while the views differed, many common approaches were found. Notable among these was the agreement in principle on a program covering standards of services which would become an integral part of a rate understanding"(19)

In view of the inability of the carriers to reach agreement, the CAB, on 7 September 1973, issued a Notice of Proposed Rule Making(20) containing proposed minimum transatlantic charter rates. It would be the policy of the Board, according to the proposal, to regard as prima facie unjust and unreasonable, charter tariff rates below the minimum levels stated in the proposal and to suspend and investigate such charter rates(21)

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18. One problem during the talks was that delegates from charter carriers did not fully understand the tactics and bargaining manoeuvres used by IATA representatives, who were more practiced in such techniques as a result of many years' experience with one another in IATA Traffic Conferences.

19. Annual Report of the Director General of IATA to the 29th AGM, 12-15 November 1973 at 6-7.

20. PSDR-37, Docket 25875 where the Board proposed to amend PArt 399 of its Policy Statements by the addition of a new section 299.45.

21. The Board found that north atlantic charter rates below 2.2¢ per seat mile for midweek charters and 2.4¢ for weekend charters may be unjust and unreasonable and should be investigated and suspended in the absence of the most convincing justification. Subject to comments from interested parties, the Board decided not to structure its minimum charter rate standards on a seasonal basis.

The US Department of Justice called the proposal a major step in the wrong direction:

> "The proposal is an unwise departure from traditional principles, a departure designed to protect the revenues of the scheduled carriers at the expense of the charter flying public. It should be either withdrawn or a hearing should be held before minimums are adopted ..... Results of the proposal could well be a decline in efficiency of the charter industry, increased costs and no increased profits for any member of the industry(22)."

On the other hand the Department of Transportation felt the proposed levels were too low and suggested seasonal differentials, varying by aircraft type(23). Such a price differential would reflect the more efficient operating characteristics of widebodied and stretched DC-8 aircraft in high density configurations. The proposal was never adopted because the Board believed that the airlines would succeed in establishing their own minimums.

ECAC, on the other hand, did give some guidelines for minimum charter retail prices to be paid by the passenger, and minimum charter wholesale rates to be paid by the travel organizer.

During its Eighth Triennial Session in June 1973, it recommended that

> "for the purpose of calculating a minimum price to be paid by the passenger....the following ABC rates per return seat statute mile should apply:
> --US¢ 2.2 during the off-season, and
> --US¢ 2.5 during the peak season(24)

As is the case with most ECAC recommendations, the majority of the member states adopted the recommendation, some , however with reservations(25).

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22. Aviation Daily of 6-11-73 at 26.

23. Aviation Daily of 9-11-73 at 53.

24. ICAO Doc. 9062, ECAC/8 at 12.

25. The recommendation was not adopted by the Scandinavian countries, Belgium and

The recommendation was amended during ECAC's Sixth Intermediate Session in January 1974 , to read:

> the minimum ABC rates quoted in paragraph one of the recommendation should be
> --US¢2.90 during the off-season and
> --US¢3.30 during the peak season.

The Conference then encouraged its member states

> "in considering applications for charter operations other than advance booking or IT types, to require the carriers to declare the wholesale charter price paid to them by the organizers and use the following criteria as a guideline before authorizing such charter operations: the wholesale charter price per return seat mile is not les than US ¢ 2.40 during the off-season and US ¢ 2.80 during the peakseason, and a margin of approximately 5% between wholesale and retail prices of such charter operations is reasonable"(26)

It must be noted that these minimum price recommendations only concern charter operations that originate in Europe.

For transatlantic ITC operations, ECAC maintained its policy that the total minimum price of such tours should not be less than 110% of the IATA GIT basing fare. This in contrast with its policy towards intra European ITCs which from the outset on has been very liberal, This liberal attitude , for

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Switzerland. The UK delegation stated that its country did not apply price control over advance booking charters but exercised surveillance of such prices. On Jan 21, 1975, however, the CAA amended its regulations to include ABC wholesale tariffs:(1) the tariff to be charged to an air travel organizer for seats on a roundtrip ABC flight from the UK to the US and/or Canada shall not be less than the number of seats purchased, multiplied by the seat mile rate specified in paragraph (3) hereof.....(3) The seat mile rates are
from 1-11-75 to 10-12-75 and 1-1-76 to 31-3-76: 1.08 p.
from 1-4-75 to 30-6-75 and 16-9-75 to 31-10-75 and 11-12-75 to 31-12-75: 1.19p.
from 1-7-75 to 15-9-75: 1.48 p.

26. Recommendation No. 2 of ICAO Doc. 9086, ECAC/INT'S/6(SP) at 10-11. The delegates of Ireland and the Netherlands stated that, although in favor of the principle of a price floor for charter operations other than ABCs and ITCs, for practical reasons they were obliged to reserve their position on the latter part of the recommendation.

example, allows the Dutch regulations to provide i.a. that the prices for tours of a duration of at least a week should amount to at least 60% of the reasonably most comparable IATA return fare, during the summer and 50% during the winter. For tours of a duration of less than a week, the price should amount to at least 55% of the comparable IATA price in the summer and 45% in the winter season(27)

The restrictive policy towards transatlantic ITCs can be explained by the fact that the situation on this route is of a different nature. The social element which plays such an important role in the performance of intra European ITCs(28) lacks altogether on the transatlantic haul. Moreover, transatlantic ITC flights are mainly operated on routes that are served by the scheduled airlines. In general, these transatlantic hauls, are considerably longer than the intra European hauls, and, therefore, more vulnerable to diversion from charter operations.

In May 1974, under the auspices of the US Department of Transportation, an understanding was reached whereby the NACA carriers, PanAm and TWA jointly filed a request with the Board for renewed authority for an inter-carrier conference of all airlines engaged in transatlantic charter operations, to discuss agreement on minimum charter rates. This application was granted by the CAB on 17 May 1974 (29).

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28. See on the importance of intra European ITCs, Chapter IV, paragraph 3.

29. AIP Netherlands FAL-1-3-2 and 3. Article 5A and 5B.

29. CAB Order 74-5-89 of 17-5-74.

On 22-23 May representatives of Canada and the US and the member states of ECAC, held a meeting in Paris on the subject of North Atlantic passenger fares. They agreed that (a) there should be some reasonable relationship between the lowest scheduled fares and the prices offered on the charter market and that (b) a minimum charter price regime should be worked out through negotiations between the carriers themselves, scheduled and charter. According to the delegates, this method was greatly preferred to determination by governmental authorities, although in a number of cases government approval would be required(30).

On 15 May 1974, US airlines asked for prior Board approval of a plan to establish a Charter Conference within IATA, as proposed by the Association itself(31).

Establishment of an IATA Charter Conference would mean that international scheduled airlines, for the first time would agree to charter rates, as is done with passenger fares for their scheduled operations.

The scheduled carriers said that government regulation of charters is "far from being uniform" and that there is a need "for the specialized Charter Conferences for discussing and perhaps taking action on charter rates and fares with the objective of achieving compensatory charter price levels...."(32

NACA urged the CAB to disapprove this IATA proposal calling for the establishmen of such a separate charter conference. "Approval could only serve to undermine the chances for success of the inter-carrier discussions.

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30. ECAC Press Release No. 26E of 24-5-74.

31. Aviation Daily 15-5-74 at82.

32. Aviation Daily 16-5-74 at 89.

If the Board does not disapprove this proposal, full hearings should be held, because the proposal would not only constitute a basic change in the role of IATA, but also poses serious anti-trust questions and threatens to alter the competitive balance between IATA and non IATA carriers in international charter markets(33)."

While non IATA carriers were at that time ineligible for membership, any international charter airline operating under the authority of its government, would be eligible for the Conference. The plan was never materialized.

On 29-30 May, the Steering Committee, which had previously made arrangements for the Brighton Conference, was called into session in Geneva. It made arrangements for a full conference of scheduled and charter carriers to be held in Montreux on 16 July 1974.

This July meeting at Montreux ended without agreement an was adjourned until 9 August. The discussions were resumed at Montreux on that date and again ended without agreement. The CAB then renewed for a period of 60 days the authority of North Atlantic charter and scheduled carriers to hold charter rate talks(34).

The inter-carrier discussions at Montreux broke up primarily because of two disagreements:

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33. Aviation Daily 6-8-74 at 204. In reply, US IATA members said:"The purpose of the proposed amendmentsis, to improve the working agreements of the Traffic Conferences by separating discussions on charter mattersfrom other subjects and thus have the requisite direct interest in these matters". The carriers also said that the Traffic Conferences will operate the same way they do now except for the administrative segregation of discussions on charter matters: Aviation Daily 4-9-74 at 10.

34. CAB Order 74-8-62 of 15-8-74.

I Differences over the volume of Advance Purchase Excursion (APEX) traffic that scheduled airlines could carry(35) and

II Differences over charter rates for different configuration(36)

The breakdown of the inter-carrier negotiations was to have serious effect on the transatlantic fare situation as a whole, for the North Atlantic fare agreement reached by the IATA Traffic Conference, also at Montreux , was tied to establishment of minimum charter rates.

Said IATA:"The formal Traffic Conference resolutions now agreed on in Montreux, make provision for minimum charter rates and conditions of service and implementation of the full scheduled fare package is subject to the early formal acceptance, implementation and continuation of such agreed minimum charter prices and conditions as a component of the total pricing structure for the North Atlantic routes"(37).

If charter minimums would not be established, the IATA package would not take effect. Since the APEX fare was the lowest in the package, it was the key to the charter minimums(38).

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35. The APEX fare idea was put forward for the first time by BOAC at the Montreal IATA Traffic Conference in 1971. APEX fares can solely be used on scheduled flights. Reservation and full payment must be made 90 days in advance(later changed to 60 days) of departure by the passenger. A minimum/maximum stay of 22/45 days applies; no stopovers are permitted; the point of friction between the two classes of carriers was whether 20% of the capacity of the aircraft in scheduled operation should be offered to APEX passengers, as proposed by the scheduled carriers, or only 10% as backed by the charter operato

36. The CAB in 1973 reviewed available cost data, filed by the US supplemental carriers. Operating costs showed to approximate $5,- per aircraft mile for the stretched DC-8 or in terms of cost per seat mile 2.0¢. For the standard DC-8 and B-707 they approximated respectively $4,30 and 2.4¢ per seat mile Inclusion of a return element would produce seat mile costs of respectively 2.6¢ and 2.9¢.

37. Aviation Daily 27-8-74 at 321.

38. See i.a. the joint US-Canada-ECAC agreement of 23 May 1974, that there should be some reasonable relationship between the lowest scheduled fare and the prices offered in the charter market.

An attempt to come as yet to an understanding on minimum charter fares was made at the inter-carrier conference at San Diego in September 1974.

On 11 September a tentative agreement was reached(39).

On 12 September, four charter operators opposed the adoption of the charter floor agreement, basically because they considered the price levels too high(40).

On 27 September, the Department of Transportation invited both classes of carriers to Washington, urging them to reach agreement on minimum charter rates in order to avoid the governments forcing an agreement upon them

On the same date, representatives from the ECAC countries, Canada and the US met at Montreal, to discuss such governmental action, in view of the failure of the charter fare conference to arrive at an understanding.

The outcome of this Montreal meeting was a request to both conference co-chairmen(41), to reconvene the discussions and again seek an agreement, with a not-so-veiled warning that if the conference failed to arrive at an agreement, ECAC, Canada and the US would seek to remove any obstacles to a rational transatlantic fare structure by government action(42).

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39. The following minimum charter prices were proposed. For the smallest size aircraft in respectively Low, Shoulder and Peak Season:3.1¢,3.4¢ and 4.1¢ per seat mile. For the biggest size aircraft respectively:2.75¢,3.05¢and 3.75¢ per seat mile.

40. Aviation Daily 12-9-74 at 58.
The four carriers were ONA, Saturn, Wardair Canada and Capitol.

41. Ed Driscoll, president of NACA, representing the charter carriers and Mr. Champion of PanAm representing the scheduled carriers.

42. See for more detailed information on these and previous discussions: Statement of E. Driscoll before the Subcommittee on Administrative Practice and Procedure, committee on the Judiciary, US Senate on 7 November 1974.

Subsequently, carriers, meeting again at San Diego, extended through 8 October their deadline for reaching agreement.

By 8 October the talks collapsed because neither group would accept the other's proposal: Charter carriers believed the rates proposed by scheduled carriers were too high. Scheduled carriers thought those proposed by the charter operators were too low(43).

The CAB then announced that it would issue guidelines, for a charter rate minimum, based on current costs of all airlines.

Charter airlines, members of IACA and meeting in Montreal, agreed that governments should not set minimum charter rates.

They described as

> "undesirable, both from the consumer and carrier standpoint any attempt to establish uniform rates for charter services by governments. Rate setting other than on the basis of economic justification by the individual carrier tends to produce artificially high fare levels and removes the element of competition, all to the detriment of the consumer and therefore, is not in the interest of the public(44)."

ECAC, in November 1974 adopted a recommendation, amending the previously adopted recommendations, dealing with minimum ABC rates(45) It reads:

WHEREAS modification in the economic situation calls for updating of minima and conditions for the period commencing 1 April 1975;

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43. Minimum charter rates as proposed by charter operators were as follows, for the smallest size aircraft in respectively Low, Shoulder and Peak Season: 2.95¢, 3.15¢ and 3.70 ¢ and for the biggest aircraft:2.60¢,2.80¢ and 3.35¢ per seat mile.Interesting to compare them with those mentioned in footnote 39.

44. Aviation Daily 17-10-74 at 250.

45. Recommendation on price control or surveillance of North Atlantic charters other than ITCs from 1 April 1975 to 31 March 1976.

WHEREAS the inter-carrier Conference has regretfully not come to a definite agreement,

THE CONFERENCE

A. RECOMMENDS:

that certain provisions contained in recommendation No. 2 of ECAC/INT.S/6(SP) be amended as follows:

a. the minimum ABC retail price per seat statute mile should be:
--US ¢ 3.34¢ in the off-season;
--US ¢ 3.57¢ in the shoulder season;
--US ¢ 4.39¢ in the peak season.

b. the minimum wholesale charter price should be:
--US 2.85¢ in the off-season;
--US 3.05¢ in the shoulder season;
--US 3.75¢ in the peak season.

B. ENCOURAGES

member states, in considering applications for North Atlantic charters other than ABCs or ITCs, to take as guidelines with regard to the wholesale prices, the minimum levels mentioned in Part A b) of this recommendation.

On 21 October 1974, the CAB approved the IATA North Atlantic fare package including the APEX fare(46), without a charter price floor being established. Simultaneously, however, it adopted, immediately effective, minimum charter rate guidelines, to remain in effect through 1975(47). Rates filed below the minimum guidelines would be investigated and suspended unless they could be adequately justified.

---IATA negotiators, surprised with the CAB guidelines, also because they were lower than expected, agreed to modify their lowest fares to more effectively

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46. It was determined that sales were limited to 20% of each airline's weekly economy class capacity between any two points.

47. The minimum rates, based on season and aircraft capacity were for aircraft with less than 230 seats for Low, Shoulder and Peak Seasons respectively: 3.1¢, 3.4¢ and 4.1¢ per seat mile. For aircraft with more than 229 seats respectively: 2.4¢,2.7¢ and 3.4¢ per seat mile.

compete with charter operations.

On 30 October, two days before the package, already approved by the CAB would go into effect, they filed a revised scheduled fares package with the CAB. The revisions includ[illegible].a. elimination of the APEX fare, and lowering of the 22/45 day excursion fare. The CAB approved the package(48).

---Airline Charter Tour Operators Association(ACTOA) regarded the guidelines as [illegible]n unwarranted intrusion into the free market of charter competition and feared that the minimums would severly discourage mass travel.

> "The guidelines give the operator no latitude or room to negotiate charter prices and will make it difficult to come up with good low-priced charter packages(49)."

---Aviation Consumer Action Project(ACAP) stated that the CAB was, in effect setting fares, while Congress specifically withheld that power from it(50).

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48. The original fare package was voided when Alitalia, CP Air and Iberia withdrew from the agreement, rescinding the rates, They then agreed to compromise as a result of the elimination of APEX and reduction of the 22/45 day excursion fare. Unanimity was achieved, but the package was accepted only as a temporary structure principally to prevent an open rate situation.

49. Aviation Daily 31-10-74 at 325.

50. The Board, according to section 1002j(5) of the Federal Aviation Act does not have the power to do more than suspend and investigatenon-compensatory rates. This authority requires the Board to review the reasonability of such rates on an individual basis and disapprove them if they fall under the "incremental" costs, associated with transportation in question. Suspending and cancelling rates, merely upon showing that those rates are below fully allocated costs for the industry in general, is not within the Board's authority, as Justice charged:"If the Board does not stay and reconsider its policy statement the general public will be denied the opportunity for charter travel at compensatory, competetively set rates". Justice further held that the CAB order is, in effect, final, because chances are slight that a carrier will file a tariff lower than the minimum and face a possibly lengthy tariff suspension and requirements for showing of compelling justification. See Aviation Daily 1-11-74 at 5 and 11-11-74 at 54.

---The Department of Justice believed the CAB violated the Federal Aviation Act by prescribing minimum fares.

In defense, the CAB said the guideline rate levels were clearly what they purported to be: specific guidelines for the purpose of evaluating existing and proposed charter rates. By establishing guidelines, the Board said it has "merely made it known that it does not intend to review charter rates which are filed above that level, while rates filed below that level will be scrutinized against industry data and information provided in the justification of the airline filing the charter tariff". The Board pointed out that it has the authority to suspend any North Atlantic charter rate it deems unreasonable under established criteria, whether policy statement guidelines exist or not(51).

ACAP and NACA, in November 1974 asked the US Court of Appeals for the District of Columbia, to review the CAB's minimum charter rate guidelines(52). The Court decided to hear the case for reversal of the guidelines on 14 February 1975.

On 6 February 1975 the CAB sought postponement, pending requests from PanAm and British Caledonian for guideline revisions to eliminate the higher rates for narrowbodied aircraft(53).

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51. CAB Order 74-12-40 Of 11-12-74.

52. They were later joined by ACTOA, Spantax and the National Student Travel Bureau(NTSB).

53. BCAL said that the minimums are designed to produce an average annual yield of 2.9¢ per seat mile for operators of stretched and widebodied jets and 3.6¢ per seat mile for narrowbodied jets operators such as BCAL."The differential of 0.7¢ is decisive in terms of market penetration. It represents a difference in the roundtrip journey price of $48,= -NYC-London- and $76,= -L.A -London- This rate difference gives avirtual monopoly to the operators of big aircraft and this category is comprised almost exclusively of the US transatlantic supplemental airlines. Avaition Daily 10-1-75 at 53.

On 10 February, the US Court of Appeals denied these requests and on 11 February the CAB withdrew its guidelines.

Its comment: "It seems apparent from the nature of the charter market that any program to improve the economics of the carrier's operations by a more managed approach to rate levels must be in place sufficiently in advance of a selling season so that all the operators can plan accordingly. That situation has not materialized and we do not believe that the disruptive consequences of such an effort at this late date would be in the public interest"(54).

In answer to the Board's withdrawal, Department of Justice said it was opposed to industry wide cost averages, because it requires low-cost operators to charge higher rates in order to protect the revenue needs of the least efficient high-cost carriers.

In the meantime, because of the cancellation of the Board's guidelines the charter rate situation on the North Atlantic had gotten somewhat out of balance.

ECAC had adopted a number of recommendations dealing with minimum charter -wholesale and retail- rates for transatlantic operations. In the course of time, these minimum rates had been adapted to the higher overhead charges that operators incurred, mainly because of the risen fuel prices.

(ECAC minimums are much higher than those that were proposed by the CAB. The ECAC minimums apply only to charter operations that originate in Europe, although there has been some indication that the ECAC rates could be applied to the return legs of the US originating charters)

ECAC, foreseeing difficulties in the form of a price war on the North Atlantic market and concerned that a lack of minimum rates would create difficulties in implementing the IATA North Atlantic fare package, requested an

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54. Aviation Daily 12-2175 at 233.

emergency meeting with US and Canadian governments. The meeting was held 14 March 1975 and accomplished little. ECAC reiterated its belief that minimum charter rates must be established and concluded that scheduled and charter airlines should discuss minimums and governments should apply some charter price control or surveillance(55). The US represented by Department of State, mainly listened.

If a regulatory balance on the North Atlantic is to be obtained, a uniform policy must be followed on both continents, either a policy that regulates fares, in that it prescribes minimums, be it government ordered or based on inter-carrier agreements or a policy which does not regulate fares, which leaves fares to bedetermined by the forces of the marketplace.

As the affairs stand now, the European countries within ECAC seem to favor regulatory determination of charter fares. ECAC has adopted recommendations calling for minimum charter rates; many member states have implemented these recommendations.

In the United States, the CAB was forced to withdraw its guidelines which "set" minimum charter fares for transatlantic operations.

This conflict in viewpoints is very well illustrated by opinions expressed respectively by British Airways in Europe and ACTOA in the US.

British Airways, claiming that the US cannot operate in a vacuum with respect to international rates, asked the CAB to develop minimum transatlantic charter rates"at the earliest opportunity as yet". It further said

> "Transatlantic charter rates have been virtually unregulated in the US and there are undoubtedly those who would like to see this continue. It cannot, at least while transatlantic scheduled fares are regulated as they are. The transatlantic scheduled services have been forced to forego promotional fare development, which could be fully cost-justified by individual carriers, in the interest of avoiding

> undue damages to charter services and maintaining a healthy scheduled service system. A necessary concomitant to this is a transatlantic charter rate policy which requires charter rates that avoid undue damage to scheduled services and maintains a healthy charter industry".

In other words, if scheduled fares are regulated, so should charter fares.

ACTOA on the other hand says that

> "minimum charter rates are contrary to the public interest. Any attempt to resuscitate minimum charter rate guidelines should be abandonded. The free market which has characterized charter air transportation -the only form of transportation where price competition prevails- must be preserved. The interests of the traveling public,the tour operator industry and the airline industry dictate that government price fixing of charter service should not be invoked"(56)

The ACTOA viewpoint is representative of what has been the United States policy towards charter fares for over a decade.

In April 1963, president Kennedy approved a Statement on International Air Transport Policy which recommended "continued United States support of practicable means which help to achieve reasonable rates such as charter services".

The Nixon Policy Statement of June 1970 recommended that "continued support should be given to the establishment of IATA and non-IATA charter rates on a free competitive basis".

The question that poses itself here is: must charter prices be controlled, and, if so, to what extent. Must charter prices be fixed or prescribed either by governments or by groups of carriers, or must they be freely determined by the forces of the marketplace.

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56. Aviation Daily 27-2-75 at312.

---So far, inter-carrier discussions, aiming at an agreement for charter prices to be charged by IATA and non-IATA carriers, have been abortive.

---Government imposed minimum charter fares are being implemented in some European countries. This policy is based on related ECAC recommendations.

---The system of freely determined charter prices is practice in the US.

Whatever solution may be chosen, it must be an overall solution and cannot be reduced to some isolated components.

It also should be a universal system, a system adhered to by all parties involved.

Such uniformity is prerequisite to a healthily functioning system.

The formula comes on the second place. What formula is being used is of less importance. As long as the same formula is being used in all countries, no major problems should occur, given the feasibility of the chosen formula.

All three systems mentioned above, seem feasible.

---The free system of demand and supply has been rendering its services for a few decades now, and some people contend that its time has come. Simple forces of the marketplace would fail as regulators of such a complex industry. Besides, it is argued, when one part of the aviation industry -the scheduled component- is so heavily regulated, it is not logical that the other part should not be regulated.

---Rate setting by governments has become practice in a number of European countries. Such unilateral imposition of minimum charter rates was a corollary of the failure of the carriers themselves to come to an agreement on minimum charter rates.

---The establishment of minimum charter rates through inter-carrier discussions failed because the ideas both classes of carriers had on the subject differed too much. Especially among charter operators there was a reluctance and apprehension to begin the talks. The prospect of sitting down with the scheduled airlines, their competitors, to discuss minimum charter rates was anathema to most of the charter operators.
Most charter carriers were basically opposed to the establishment of minimum charter rates and considered the establishment of minimums as contrary to a free enterprise system.
It is mainly this rather negative attitude that can be blamed for the failure of the discussions; the negative attitude towards minimum charter rates at all, and the attitude of the charter operators towards the talks.

As mentioned above, each of these three formulae seems feasible as a system that could regulate charter operations. Each system can be put into operation; each system has its advantages and its drawbacks.
The principal point, however, is that, whatever system be chosen, the same system be used by all parties involved.

The most feasible of these systems, would still seem to be a system of free enterprise, with certain restrictions, certain conditions, certain built-in devices to prevent the re-occuring of mistakes that have been made before; a regulated system of free enterprise.

The major condition would be that fares must be calculated on the basis of the total costs of operations halfway between the audited results of the lowest- and of the highest-cost operators on the route, bolstered up

to achieve a reasonable margin on turnover and an acceptable rate of return on capital employed. This calculated minimum fare will prevent below-cost operations.

This minimum fare has the function of an absolute minimum, below which carriers should not operate. Above this minimum, free competition is allowed. Differentials according to aircraft size, seating configuration and seasonability could be introduced by the carriers, but should not go below the absolute minimum.

The level of this minimum should be agreed upon, if possible, at inter-carrier discussions. Governments should be given some sort of say in the matter, in the form of surveillance, thus striking a just balance between the interests of the consumers, the scheduled carriers and the charter operators.

CONCLUSION.

In spite of the very restrictive de jure regime, governing charter operations, this mode of air transport has put up an excellent display of de facto development.

Charter operations, these days, represent 38% of the air traffic volume within Europe and close to 30% on the North Atlantic.

Contrary to allegation of the scheduled airlines, charter operations have not diverted traffic from their scheduled operations to the degree that they impair these services, but, on the contrary, have generated new traffic, thus creating a whole new category of air travelers, a class that otherwise would not have been in a position to travel.

The definition of an international scheduled air service, as it was drafted by the ICAO Council in 1952, does not hold water anymore. Where the regularity criterion reflected a sensible and important distinction between the then existing categories of airline operations, it has now been replaced by other standards.

A scheduled services in these days is best distinguished from a charter service, in that seats on a scheduled service are sold on a retail basis, by the operator himself or by his agent, and that seats on a charter service are sold on a wholesale basis.

While procuring a public service, the scheduled carrier has also the obligation to provide continuously available service, where the only obligation of a charter carrier is to perform the specific flights he has contracted to perform.

Although a proper definition, distinguishing between scheduled and charter services so far has not been drafted, this does not appear to be an obstacle to proper regulatory action.

It remains to be seen if such a definition is actually needed, since the two transport formulae show signs of steady rapprochement.

A substantial percentage of transatlantic charter operations is now governed by bilateral arrangements. These bilateral arrangements indicate some shifting of the balance between the regulatory role of the charter originating state and the charter receiving state.

Article 5 of the Chicago Convention bestowed upon the receiving state the right to impose such regulations, conditions or limitations "as it may consider desirable". As a result, the receiving state issued its own regulations, thus fixing its charter policy.

Since the conclusion of these bilateral arrangements, the receiving state has given up some of this power and accepts the rules of the originating state as those that govern these charter operations.

This, however, does not prevent any receiving state from issuing certain regulations, that may condition the entrance of such charter operations.

The advantage of a system that is based on bilateral agreements, is that in each separate case, the regulatory structure can be adapted to the specific economic, social and political circumstances of the countries involved.

In a multilateral agreement, these specific circumstances must necessarily be disregarded; such a multilateral agreement can only represent the

lowest common denominator because of the disparate interests of the countries involved. But the big advantage of a multilateral structure is that it is the most direct and effective way to establish international rights. A multilateral air transport agreement, as proposed, would govern both charter and scheduled operations. It would have to create a balanced air transportation system which recognizes the retail and wholesale concepts of air transportation and which recognizes that the two systems -scheduled and charter- are complementary.

Charter rate provisions within such a multilateral structure would have to provide that carriers agree upon certain absolute minima, below which levels they will not operate. Above these minima, free competition would be allowed. Price differentials according to aircraft size, seating configuration and seasonability could be introduced by the carriers, but should not go below the absolute minima.

Governments, whose task it is to strike a just balance between the interests of the industry and of the consumer, should be given some say in the matter in the form of surveillance.

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