THE DEVELOPMENT OF NON-SCHEDULED INTERNATIONAL AIR SERVICES AND THEIR IMPACT ON THE SCHEDULED INTERNATIONAL AIR SERVICES IN RELATION TO THE APPLICABILITY OF ARTICLES 5 AND 6 OF THE CHICAGO CONVENTION.

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DEVELOPMENT OF INTERNATIONAL NON-SCHEDULED AIR SERVICES

ABSTRACT

Events of the First World War established and the Paris Convention of 1919 confirmed the State's sovereignty over airspace above its territory. Since then, attempts to reach a multilateral agreement on economic regulation of international scheduled air transport have failed, including the Chicago Conference of 1944.

Article 6 of the Chicago Convention left the matter to bilateral arrangements. Article 5 granted a relatively flexible position to non-scheduled services. A definition of scheduled and non-scheduled services was developed by ICAO Council in 1952 for the guidance of Contracting States.

Traditional non-scheduled services caused no problems. It was the so-called programmed or schedulized charters that made it difficult to classify them as scheduled or non-scheduled and their competition with scheduled services deteriorated the viability of international air transport.

Attempts to solve these problems made through ICAO and regional bodies have reached, as yet, no appropriate answer; thus, efforts still going on must continue.

RESUME

Les faits de la première guerre mondiale avaient établis, et la Convention de Paris de 1919 consacra la souveraineté des Etats sur l'espace aérien au dessus de leur territoire. Depuis, les tentatives pour établir un accord multilatéral sur la réglementation économique du transport aérien international régulier a toujours échoué, y compris e. 1944 à la Conférence de Chicago.

L'article 6 de la Convention de Chicago a laisse la matière dans le domaine des accords bilateraux. L'article 5 donne une certaine flexibilité aux services non reguliers. Une définition des services réguliers et non réguliers fut préparée par le Conseil de l'OACI en 1952 pour guider les Etats contractant.

Les services non réguliers traditionnels ne pose aucun problème. Ce sont les charters programmés qui sont difficiles à classifier et leur competition avec les services aériens réguliers mettent en danger la viabilité des transports aériens internationaux.

Des tentatives pour régler les problèmes ont été faites à l'OACI et dans les organisations régionales mais aucune réponse n'a été donnée à ce jour. Aussi les efforts qui se pousuivant devront encore continuer.

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INTRODUCTION

Sovereignty of the State over the airspace above its territory constitutes the fundamental basis on which the present international legal regime of international air transport is based. How this principle has developed and what attempts have been made to exchange commercial rights for international air transport operations between nations on a multilateral basis will be explored in the first chapter.

After World War II the first and most serious multilateral attempt was made at the Chicago Conference of 1944. While this Conference failed to reach any agreement as to international scheduled air transport, thus, the matter was left to States according to Article 6 of the Chicago Convention of 1944 which resulted in the continuation of the bilateral regime as the basic instrument governing this category of services , Article 5 of the Convention, however, granted relatively a more flexible position to international non-scheduled services which were regarded at that time as not important as compared with the scheduled services. No great amount of time had passed when the problems of the distinction between scheduled and non-scheduled as well as an interpretation of Article 5 were raised which led to the involvement of ICAO's Council in its attempt to solve these problems. These matters will be discussed in the second chapter.

The third chapter will be devoted to the different types of international non-scheduled air transport services, especially those developed through the years since the Chicago Conference of 1944.

The fourth and last chapter will focus on the problems brought about by the development of non-scheduled services and the attempted solutions effected by governments , regional bodies, and ICAO in

addition to some suggestions made by some commentators. This last chapter will be closed by final conclusions and observations.

Throughout this research the terms "charter", "irregular", "supplemental" and "non-scheduled" services are used as synonyms, specifically meaning "international non-scheduled commercial air transport services".

In conclusion, I would like to thank Dr. Jean-Louis Magdelénat under whose thorough supervision this research has been conducted. However, while his endless and valuable assistance is sincerely acknowledged, any errors remain my sole responsibility.

Acknowledgement and thanks are due to the staff of the Law Library, particularly Mr. Nazmy Mobarak for his ever-ready assistance and Mrs. Jeanne Sahni for her friendly help. Thanks are due also to the staff of the ICAO Library for their friendly cooperation.

CHAPTER ONE

State Sovereignty over the Airspace above its Territory and the Freedom of the Air for International Air Transport before Chicago Conference of 1944

The State sovereignty over the airspace above its territory constitutes the fundamental basis on which the present international legal regime for international air transport is based, be it unilateral, bilateral, or multilateral and regional or global in scope.

How the sovereignty of the State has extended to the airspace above its territory, instituting, thereby, one of the most important principles of the contemporary international law, will be discussed in the following pages.

THE DOCTRINE

It seems that the French Jurist Paul Fauchille has been regarded as the pioneer in the field of legal investigation relating to the regime of the airspace (1). For, as early as 1900, at an annual conference of the Institute of International Law held at Neuchâtel, he had proposed that the legal regime of the aerostats (2) be subject for discussion at the next session. Since this was accepted, he presented to the Institute a detailed study on the subject supplemented by a proposed legislative draft consisting of thirty-two paragraphs (3). Harold D. Hazeltine noticed that the appearance of Fauchille's important essay on "Le domaine aérion et le régime juridique des aérostats" in 1901 marked the beginning of a new period in the history of the discussion and settlement of questions in aerial law (4).

Many jurists, from different countries, mainly Europeans, contributed to the discussion on the legal regime of the airspace through publications and meetings carried on, particularly by the Institute of International Law and the International Law Association.

However, in answering the fundamental question of: To whom does the airspace over a subjacent State belong?, the various theoretical directions taken by jurists could be traced back to two main schools of thought; firstly, the airspace is of its nature free or the theory of the freedom of the airspace; secondly, the theory of the sovereignty of the subjacent State in the airspace above its territory (5).

The Theory of the Freedom of Airspace

Three main directions could be recognized within this theory: air freedom without restriction; air freedom restricted by some special rights of the subjacent State but not limited as long as height is concerned; air freedom restricted by a territorial zone (6).

Nearly all of the partisans of this theory admit that the subjacent State has certain rights necessary for its protection, and that of its inhabitants and their property, and, consequently, the argument for air freedom is a purely academic one based on the principle that the air is free and not susceptible to appropriation (7).

However, it should be pointed out that the reasons in support of the air freedom were largely founded on the fear that unless freedom is emphasized and conceded, States may close, or attempt to close, their airspace to air traffic (8).

The Comité Internationale d'Aviation at its Paris Congress, and the Institute of International Law at its Madrid meeting, held in 1911, seemed to favour this theory since both of them resolved that "aerial circulation is free save the right of subjacent States to take certain measures to be determined with a view of their own security and that of the persons and property of their inhabitants" (9).

Some of the criticisms of this theory advanced by its opponents were, firstly, that there is a distinction, as Zitelmann pointed out (10), between the air and the space which the air occupies and it is only the latter that should be considered. This was a fundamental point since a State cannot control the air, but it seemed quite sufficient that the State possessed the ability, whenever it might become necessary to enforce its rules in the airspace, and this possibility seemed to

exist through the then available equipment, (11) and consequently the airspace is susceptible to appropriation.

Secondly, who was going to define and determine the measures which a subjacent State may take to maintain its security and protect the persons and property of its inhabitants? Is it the State on its own sole authority and discretion? If so, it would be given power which does not, practically, stop short of absolute sovereignty. On the other hand if those measures were to be determined by agreement between States, or by some tribunal, this certainly would lead to a code full of exceptions and endless difficulties without any corresponding advantage (12).

Thirdly, as to the obstacles to the air traffic it was thought that would not necessarily follow from the acceptance of the principle of the State's sovereignty in the airspace above its territory (13), for the interests of the State itself in the international intercourse would certainly prevent it from closing its airspace to air traffic or impeding it (14).

The Theory of the Sovereignty of the Subjacent State in the Airspace Above its Territory

The partisans of this theory, though they agreed, in principle, on the sovereignty of the State in the airspace above its territory, differed in their views relating to the scope of this sovereignty. Some supported the idea of full sovereignty without any restriction; others advocated the principle of full sovereignty restricted by the right of innocent passage for aerial navigation; and the third part maintained the tenet of full sovereignty up to a limited height only (15).

However, this theory was largely based upon the security of the subjacent State, and its right to protect its subjects and their property (16). Furthermore, it was realized that States were tending to adopt this theory since it would practically meet their national desires and considerations (17).

Gradually, this theory gained more and more supporters among jurists, and, therefore, the Committee Upon Aviation (18) of the International Law Association, proposed and submitted, for the Association's consideration and adoption at its Madrid Meeting in 1913, the following resolutions:

> "1) It is the right of every State to enact such prohibitions, restrictions, and regulations as it may think proper in regard to the passage of aircraft through the airspace above its territories and territorial waters.
>
> 2) Subject to this right of subjacent States liberty of passage of aircraft ought to be accorded freely to the aircraft of every nation." (19)

As a matter of fact, these proposed resolutions were carried by the majority, since some members remained loyal to the principle of the freedom of airspace (20) notwithstanding the soundness of the opposing arguments and views (21).

STATES' PRACTICE BEFORE AND DURING WORLD WAR I

Following a number of German balloon landings on French soil, the French government, concerned about these incidents, decided in December 1908 to invite the European powers to hold a diplomatic conference on the regulation of air navigation (22). A conference was held in Paris, May 10, 1910, and adjourned June 29, 1910, without having signed a convention (23). The failure of this conference,

which was attended by eighteen States (24), to come to an agreement on a final draft convention, was due to almost entirely political reasons, and not, as popularly supposed, owing to the opposed legal theories of freedom of the air and State sovereignty (25).

John Cobb Cooper, after thoroughly studying and analysing some of the important articles of the draft convention approved at the plenary session of the conference, particularly articles 2, 30 and 34, concluded:

> "In summary, the Paris 1910 conference evidenced tacit but actual agreement of the delegations of the States there represented: (1) that each State had full sovereignty in flight-space over its national lands and waters as part of its territory; (2) that any division of such territorial flight-space into zones is impractical and unnecessary; (3) that no general right of international transit or commerce exists for aircraft of other States through such territorial flight-space. The conference demonstrated that the only practical legal method of regulating international flight was by international agreement providing for the grant of privileges of entry under terms and conditions there stated."(26)

However, after the breakdown of the Paris Conference of 1910, the international air law continued to develop, and several acts, relating to regulation of air navigation through their airspace, were promulgated in different countries.

In Great Britain, for example, on June 2, 1911, the Aerial Navigation Act of 1911 was adopted, which was amended in 1913 by the adoption of the Aerial Navigation Act of 1913. This amended act was an unequivocal assertion of the British position taken at the Paris Conference of 1910 that the airspace over British lands and waters was part of its national territory, and that no international rights of innocent passage existed through it (27).

Likewise, in France, Germany, and other European countries such as Russia, the Netherlands, Austria-Hungary, and Serbia, regulation

of air navigation through airspace over their lands and waters was annunciated. Furthermore, on July 26, 1913, an agreement was concluded between France and Germany by means of an exchange of letters between the French ambassador in Berlin and the German foreign minister, regulating air navigation between the two countries. All these acts seemed to have been based on the understanding that superjacent airspace was part of national territory in which a State had the same regulatory rights as it had with respect to the surface (28).

The most important and far reaching steps have been those taken by States on the eve and at the very beginning of the First World War. On July 31, 1914, the French government, by presidential decree, prohibited air navigation in the entire extent of its national territory, in Algeria, in Tunis, and in its remaining colonies. On August 2, 1914, Great Britain prohibited the navigation of aircraft of every class and description through the airspace over its lands and waters. The German Declaration of War on France, which was handed by the German ambassador at Paris to the French Minister for Foreign Affairs on August 3, 1914, appeared to have been based, in large part, on the allegation that French military aviators had violated the neutrality of Belgium by flying over its territory, and infringed, likewise, the integrity of German territory. Neutral States, such as the Netherlands, Switzerland and Sweden, closed their airspace to any air navigation as well (29).

Bearing all the foregoing considerations in mind, John Cobb Cooper seemed to have arrived at a very sound conclusion when he said:

> "Thus it is apparent by the outbreak of World War I the principle of sovereignty in usable space over national lands and waters had been accepted by the international community as a customary rule. None questioned the right

> of each State to control at its discretion all flight over its surface territories and prohibit the entry into its usable space of any foreign aircraft. Events during World War I and the preparation and signature of the Paris Convention of 1919 merely acknowledged and restated this already existing rule of customary international air law--namely, the absolute sovereignty of the subjacent State over usable space above its national lands and waters. This rule lies at the base of almost all subsequent developments in the field of public international air law." (30)

PARIS CONVENTION OF 1919 AND AFTER

The first Article of the Convention Relating to the Regulation of Aerial Navigation, dated October 13, 1919 (31), stated that "The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the airspace above its territory." (32) The territory was deemed to include "the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto." (33)

As it appears from the wording of Article 1, the Contracting Parties did not claim to declare the principle of air sovereignty for the first time. What they had done was just to "recognise that every power" had complete and exclusive sovereignty over the airspace above its lands and waters, the principle which had already been in existence as the result of its mutual recognition, not only by the participants in the First World War, but by the measures taken by States which had remained neutral during a portion or the entirety of the period covered by the War (34). Therefore, the principle of air sovereignty had been a rule of the international customary law even before the signing of the Paris Convention of 1919; that rule was furthermore affirmed and emphasized by this convention.

The obligation of every contracting State to accord freedom of innocent passage above its territory to the aircraft of the other contracting States in time of peace, stipulated by the first paragraph of Article 2 of the Convention (35), does not derogate from the principle of complete and exclusive sovereignty since it was a conventional arrangement or a privilege extended by the grace of the subjacent State and not an inherent right in any State, whether it was party or not to the Convention, with respect to any other - a privilege which could be granted by any sovereign government independent of conventions, and which assumes the form of an actual right only through conventional stipulation (36).

The Ibero-American Convention, which was signed at Madrid, on November 1, 1926; the Havana Convention, which was signed at Havana, on February 20, 1928; and the Chicago Convention, which was opened for signature at Chicago, on December 7, 1944, simply reiterated the announcement of the principle of air sovereignty contained in the Paris Convention of 1919 (37).

The principle of air sovereignty found expression in some of the bilateral agreements concluded between various States and it is implicit in all of them, and it was also adopted in many national legislations of some countries (38). No doubt it is a very well established rule of the contemporary international law.

FREEDOM OF THE AIR FOR INTERNATIONAL COMMERCIAL AIR SERVICES BEFORE THE CHICAGO CONFERENCE OF 1944

The first decade of the present century witnessed the very beginnings of practical aviation, and by its end it could be said that the aeroplane had matured technically, achieved an international popularity and was accepted as the world's new practical vehicle (39), even though the possibilities of aerial navigation were regarded by some scientists at that time as not a promise of a complete revolution in the means of transportation and communication like that effected once by steamboat and the railroad (4). The first powered aircraft to carry passengers had been the German Delag's first Zeppelin, LZ7 Deutschland, which made its first flight on June 19, 1910 (41). Delag had planned to operate a network of air services; first, in Germany, and, later, to other countries. To that end, Delag trained crews, built sheds, and published maps of the routes; but, the planned services were not operated until after the war (42), though five Zeppelins carried--between 1910 and 1914--over 35,000 passengers some 170,000 miles between various German cities without a single fatality or injury (43).

On January 1, 1914, the first scheduled airline in history was opened in Florida, between St. Petersburg and Tampa. This service was subsidized by the city of St. Petersburg, continued operating until the end of March, 1914, and carried 1,204 passnegers (44). However, it was not until August 25, 1919, that the first international daily commercial scheduled air service took place between

London and Paris, the flights carrying passengers and light freight (45).

Bearing the foregoing considerations in mind, it is conceivable that the discussions that took place before World War I between various jurists from different countries as to the legal regime of the airspace did not go, in a specific way, into the subject of commercial rights the aeroplane of a given State might enjoy within the airspace of another State. Rather, the discussions were concentrated on the basic and fundamental question of whether the subjacent State should have sovereignty over the airspace above its territory, or if the airspace would be free like the high seas (46). However, commercial rights were tackled, if not explicitly, in an implicit manner when discussing the principle of air freedom or sovereignty of the subjacent State.

The Committee upon Aviation of the Interantional Law Association reported in 1913 that:

> "If the reasons in support of the air freedom are examined a little more closely it will be found that, though they also make an appeal on international intercourse, they are largely founded on the fear that, unless freedom is asserted and conceded, States may close, or attempt to close, their atmosphere to air traffic." (47)

Hlewett Lee, commenting on the English Aerial Navigation Act of 1911, wrote in 1913 that "the most reasonable prospect for the amelioration of severe rules lies in the discovery of a way to make international aerial navigation commercially profitable." (48)

Certainly, commercial rights are implied in the principle of air freedom, and those who supported sovereignty of the subjacent State conceded a right of innocent passage for aerial navigation to foreign aircraft, or, in case of full sovereignty without any restriction, contended that there was:

> "no reason to anticipate that States will interfere with the passage of foreign airships through the air above their territories in an unreasonable manner, any more than they have interfered with the passage of foreign vehicles through their territories or of foreign vessels through their territorial waters,"

and that "considerations of reciprocal interest" would prevent States from taking any action of this character. (49)

During World War I, States asserted their sovereignty over the airspace above their lands and waters, and the controversial principle of air freedom or sovereignty of the air seemed to have been settled in favour of sovereignty of the subjacent State (50). During the period of the First World War, 1914-1918, the aircraft underwent sudden technical development (51), and, by the end of this War, the way was opened for use of aircraft for peaceable traffic (52). The Paris Convention was signed on October 13, 1919 (53).

By Article 2 of the Convention, contracting States undertook to grant "freedom of innocent passage" above their territories, in time of peace, to the aircrafts of each other, provided that the conditions laid down in the Convention are observed.

The last paragraph of Article 15 stipulated that "the establishment of international airways" would be subject to the consent of the States flown over. John C. Cooper pointed out that while:

> "the Italian text obviously could be properly construed as a reference to the operation of 'international lines', ...the English and French texts might well be construed as a reference to the establishment of air routes and not the operation of the lines themselves." (54)

Lambertus Hendrik Slotemaker asserted that the last paragraph of Article 15 had in view the institution of airlines (55) in the sense of air services citing the explanation of the Juridical Sub-Sommission as to paragraph I of Article 15, which stipulated that an aeroplane is entitled to cross the airspace of another State without landing, but it is bound to follow the route determined by the State flown over; this, as the Juridical Sub-Commission observed, was in effect for casual flights as well as for regular air services (56). He, then concluded:

> "From this and from the requirement of par. 2 (the obligation to land at certain aerodromes indicated for that purpose) it follows that already in the first two paragraphs of Article 15 the competence of the underlying State to determine certain air routes also with regard to the aircraft for regular international services has been laid down. Hence par. 3 cannot have reference to 'routes', but must refer to 'services'." (57)

The interpretation of Article 15, particularly its last paragraph, was discussed again in 1922, but, since no one dared to draw up a more distinct wording, the matter was left open in anticipation of its application in practice. However, it was not until 1929 that the question was again debated and, consequently, Article 15 was amended (58). Its last paragraph (which became paragraph 4) read:

> "Every contracting State may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory," (59)

The new text put an end to the controversial point as to the exact meaning of the term "international airways" (60) since it makes the establishment of airways as well as the creation and operation of regular international air services dependent upon previous authorization if the State concerned chose to (61). In practice, even before the amendment of Article 15 in 1929, the establishment of regular international air operations seemed to have been authorized only after special agreement (62).

The Convention did not specify the conditions upon which a State may refuse the granting of authorization, or, otherwise, what restrictive provisions may be attached (63), but, on the contrary, a British proposal to add to the amended text of Article 15 the following: "Such authorization may be refused only on reasonable grounds" was defeated (64). John C. Cooper, commenting upon the new text of Article 15 concluded:

> "The new text of Article 15 is more than clear. The privilege that merchant ships enjoy of passing through territorial waters and enter friendly ports to trade was not to be enjoyed by air transport. Commercial air lines could not fly over the territory of another nation or land to refuel or to trade without a special agreement, and this agreement could be withheld on any grounds satisfactory to the nation whose airspace is involved. The decision at Paris in 1929 took away any doubt for the meaning of the 1919 decision. National airspace control is absolute. It is an air power asset which any nation may use as selfishly as it desires, irrespective of the effect on world commerce." (65)

In conclusion, under the Paris Convention of 1919, the operation of international scheduled air services, which were, even after the second World War (66), the basic and important element of international air transport, was put under the discretionary will of the concerned State or States. The freedom of innocent passage, restricted by the various conditions stipulated in the Convention, applied only to foreign private aircraft, tourist and commercial, on non-scheduled flights (67).

The Ibero-American Convention, which was signed at Madrid in 1926 (68), followed, almost literally, the text of the Paris Convention of 1919, and, therefore it has been of no significance (69).

Article 21 of the Havana Convention, which was signed at Havana in 1928, read:

> "The aircraft of a contracting State engaged in international air commerce shall be permitted to discharge passengers and a part of its cargo at one of the airports designated as a port of entry of any other contracting State, and to proceed to any other airport or airports in such State for the purpose of discharging the remaining passengers and portions of such cargo and in like manner to take on passengers and load cargo destined for a foreign State or States, provided that they comply with the legal requirements of the country over which they fly, which legal requirements shall be the same for native and foreign aircraft engaged in international traffic and shall be communicated in due course to the contracting States and to the Pan American Union." (70)

Thus, this Article provided full freedom to commercial air navigation between the contracting Parties so long as that would not be contrary to any national legal regulations which must be the same for national and foreign aircraft (71). But, in practice, it was repeatedly construed as if it did not apply to the establishment and operation of regular commercial flights. Such practice was followed e.g. by the United States and Mexico in their mutual air transport relations (72). So, in practical terms, the Havana Convention had no more significant effects than the Paris Convention had had. As Oliver James Lissitzyn

concluded:

> "the establishment and operation of regular air transport lines requires the consent of every State flown over. The power to withhold such consent is used by most national States as a bargaining weapon to their own advantage. Air transport relations between nations frequently follow the trend of their general political relations." (73)

Only the casual, irregular, or non-scheduled flights seemed to enjoy some degree of freedom to fly, or, to put it in other words, they did not face, generally speaking, the same obstacles the institution of international scheduled air services was to face (74).

In the face of all that, there was but one way for instituting international air routes and operating international air services; that is to say through bilateral arrangements between governments, or, sometimes between governments and operators concerned directly— this bilateral approach prevailed and was dominant throughout the period up to the outbreak of the second World War (75). After the War another multilateral attempt to regulate international air transport took place at the Chicago Conference of 1944, which will be discussed in the following chapter.

NOTES

(1) Arthur K. Kuhn, "The Beginning of an Aerial Law", American Journal of International Law, Vol. 4 (1910), p. 111.

(2) Aerostate is used here to mean "a dirigible balloon, or other aircraft that is lifted and sustained by virtue of one or more containers filled with a gas lighter than air", (see Webster's New World Dictionary, Second College Edition, p. 22). As a matter of fact it was not until the 17th of December, 1903, that the first authenticated flight by man in a power-driven heavier-than-air machine took place in North Carolina, U.S.A., by the Brothers Wright (see Shawcross and Beaumont, Air Law, Vol. 1, 4th edition, (1977), p. 1).

(3) Op. Cit., Note 1.

(4) Harold D. Hazeltine, The Law of the Air, The University of London Press (1911), p. 4.

(5) "Report of the Committee upon Aviation", International Law Association, 28th Report, Madrid (1913), p. 530.

(6) Ibid.

(7) Ibid., p. 531

(8) Ibid.

(9) Ibid.

(10) Cited by Blewett Lee, "Sovereignty of the Air", American Journal of International Law, Vol. 7 (1913), p. 476.

(11) Harold D. Hazeltine, Op. Cit., note 4, p. 30.

(12) Op. Cit., note 5, pp. 531-532.

(13) Ibid., p. 531.

(14) Op. Cit., note 4, pp. 30-31.

(15) Op. Cit., note 5. p. 530.

(16) Sir Erle Richards, in his explanation of the Report of the Committee Upon Aviation of the International Law Association, op. cit., note 5, pp. 526-528.

(17) Op. cit., note 5, p. 532.

(18) This Committee consisted of the most prominent and leading jurists in the field of air law. The list was as follows:

Governor S. E. Baldwin
Mr. J. Arthur Barratt
Dr. Arthur Bartha
Dr. W. R. Bisschop
Professor A. Henry-Coüannier
Dr. W. Evans Darby
Mr. A. J. David
Dr. Paul Fauchille
Professor Dr. Harold Hazeltine
Dr. E. von Hofmannsthal
Professor J. Kosters
Señor de la Morena
Dr. J. Wolterbeek Muller
Professor T. Niemeyer
Mr. E. S. M. Perowne
Sir Erle Richards
Señor Sabater
Dr. Karl Strupp

See op. cit., note 5, p. 529.

(19) Op. cit., note 5, p. 533.

(20) Dr. Paul Fauchille, Dr. Karl Strupp, Professor Henry-Coüannier, and Professor T. Niemeyer expressed themselves as unable to agree with the Committee's report or the resulted proposed resolutions, and preferred to remain adherents to the idea of aerial circulation on the lines of the Resolutions of the Institute of International Law and Comité Juridique International d'Aviation referred to earlier in the text above. See op. cit., note 5, p. 533.

(21) See, e.g., Dr. J. F. LyeKlama à Nijeholt, Air Sovereignty, The Hague: Martinus Nijhoff, (1910), where she thoroughly studied and analyzed the main two theories of the air freedom and sovereignty of the State, and supported the latter.

(22) John Cobb Cooper, "The International Air Navigation Conference, Paris 1910", in Ivan A. Vlasic ed., Explorations in Aerospace Law, (McGill University Press, 1968), p. 104 and p. 106.

(23) Ibid., p. 105.

(24) Austria-Hungary, Belgium, Bulgaria, Denmark, France, Germany, Great Britain, Italy, Luxembourg, Monaco, Netherlands, Portugal, Romania, Russia, Spain, Sweden, Switzerland, and Turkey. See ibid., p. 107.

(25) Ibid., pp. 118-120.

(26) Ibid., pp. 123-124.

(27) John Cobb Cooper, "State Sovereignty in Space: Developments 1910 to 1914", in Ivan A. Vlasic ed., op. cit., note 22, p. 125, at pp. 126-128.

(28) Ibid., pp. 126-133.

(29) Ibid., pp. 133-136.

(30) Ibid., p. 136.

(31) Signed at Paris on October 13, 1919, and is referred to as the Paris Convention of 1919. This convention came into being as a fruit of one of the efforts made by the Peace Conference of 1919. The International Aviation Committee, which had been established upon the initiative of the French Government in 1917, was changed, after the commencement of the Peace Conference, into the Aeronautic Commission of the Peace Conference, and was entrusted, among other things, with the drafting of an air navigation treaty. See, e.g., John Cobb Cooper, "United States Participation in Drafting Paris Convention, 1919", in Ivan A. Vlasic ed., op. cit., note 22, p. 138; Manley O. Hudson, "Aviation and International Law", Air Law Review, Vol. 1 (April, 1930), p. 187; Lambertus Hendrik Slotemaker, Freedom of Passage for International Air Services, A. W. Sijthoff's Uitgeversmij N.V., Leiden, p. 15.

(32) Para. 1 of Art. 1 of the Paris Convention of 1919.

(33) Para. 2 of Art. 1 of the Paris Convention of 1919.

(34) See above, pp. 8-9; Clement L. Bouvé, "The Development of International Rules Conduct in Air Navigation", Air Law Review, Vol. 1 (January, 1930), pp. 5-6. He made it clear that "to say that the international recognition of State sovereignty which has come into being is a principle applicable to war time only, and hence is not of international acceptance with respect to peace conditions, would be to propound an inadequate premise on which to base a new doctrine adapted to such conditions; for there is involved more than a mere war custom established by the practice of nations in war time. That practice—the closing of air frontiers—was, it is true, due to the existence of a state of war and to that alone. But the custom was based on a new condition of fact, which cannot be affected by the exigencies of war or by a state of peace; the circumstance that new territory has, as the result of the capacity of mankind to fly, been added to that hitherto subject to State sovereignty".

(35) "Each Contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed."

(36) See Clement L. Bouvé, op. cit., note 34, p. 7; Manley O. Hudson, op. cit., note 31, pp. 196-197.

(37) For example, Article 1 of the Chicago Convention stated that the Contracting States "recognize that every State has complete and exclusive sovereignty over the airspace above its territory."

(38) See, e.g., Manley O. Hudson, op. cit., note 31, pp. 195-196.

(39) See Charles Harvard Gibbs-Smith, Aviation: An Historical Survey, (London: Her Majesty's Stationery Office, 1970), pp. 105-158.

(40) Arthur R. Kuhn, op. cit., note 1, pp. 109-110.

(41) John Stroud, "The Pioneers", in Bill Gunston, Consultant Ed., Aviation, (Hennerwood Publication Limited, 1978), p. 146.

(42) Ibid.

(43) Charles Harvard Gibbs-Smith, op.cit., note 39, p. 152.

(44) Ibid., p. 170; John Stroud, op.cit., note 41, p. 146.

(45) Charles Harvard Gibbs-Smith, op. cit., note 39, pp. 185-186.

(46) See pp. 3-6 and notes 1, 4, 5, and 21 supra.

(47) Report of the Committee upon Aviation, op. cit., note 5, p. 531.

(48) Op. cit., note 10, p. 493.

(49) Report of the Committee upon Aviation, op. cit., note 5, p. 533.

(50) See pp. 8-9, supra.

(51) Dr. D. Goedhuis, Air Law in the Making, (The Hague: Martinus Nijhoff, 1938), p. 11.

(52) Daniel Goedhuis, "Questions of Public International Air Law", Recuiel Des Cours, Vol. 81 (1952), p. 255.

((53) See note 31, supra.

(54) The Right to Fly, (New York: Henry Holt and Company, 1947), pp. 137-138.

(55) The original text proposed by the Juridical Sub-Commission read: "The establishment of international airlines shall be subject to the consent of the States flown over". The British delegation understood that "lines", in the sense of routes, kept within narrow limits, and argued that, as paragraph 1 of Article 15 gave an aeroplane the right to fly over a State without landing, such aeroplane should have the right to select the shortest or best route in the geographical sense and in relation to the prevailing weather conditions. So, unless the term "lines" be given the meaning of wide zones, which would enable the aeroplane to select the possible favourable route, this paragraph should be deleted. The French delegation, therefore, proposed to substitute the word "lines" by the word "ways" which appeared in the final text. See Lambertus Hendrik Slotemaker, op. cit., note 31, pp. 18-19.

(56) Ibid., p. 19.

(57) Ibid.

(58) Ibid., pp. 20, 23-25.

(59) League of Nations, Treaty Series, Vol. 138 (1933), p. 421.

(60) As to the interpretation of Article 15 before its amendment in 1929, three tendencies were observed. First, many nations considered themselves not bound with regard to the granting of permission, in any way whatsoever, basing that on the provision of Article 1 and the literal text of Article 15. They were of the opinion that they were at liberty to exercise the rights of sovereignty allotted to them.

Second, some nations gave a more generous interpretation to Article 15, mainly, aiming at developing their national air traffic, or instituting communications by air with their colonies and dominions, passing over many countries wishing that these objectives not be hampered by way of retaliation.

Thirdly, the English interpretation, which was to the effect that each nation has the right to fix certain routes for aircraft, and may submit the determination of new routes to previous permission, for the term "airway" has purely geographical significance (a route with the annexed aerodromes). Once a route has been established, any aircraft is free to make use of it, whether belonging to a regular international air service or not, without the permission of the country concerned. See Lambertus Hendrik Slotemaker, op. cit., note 31, pp. 38-42.

(61) Ibid., p. 25.

(62) See John C. Cooper, op. cit., note 54, p. 138. He pointed out that "considerable investigation has disclosed no clearly defined case in which, after 1919, a commercial air operation was organised by one nation over the territory of another solely under the general right of innocent passage provided by Article 2 of the 1919 Convention." See ibid; cf. note 60 supra.

(63) Lambertus Hendrik Slotemaker, op. cit., note 31, pp. 25-26.

(64) Ibid., p. 26; John C. Cooper, op. cit., note 54, p. 144.

(65) See his book, op. cit., note 54, pp. 144-145. Cf. Lambertus Hendrik Slotemaker, op. cit., note 31, pp. 43-43.

(66) See, e.g., ICAO Circular 136--AT/42, 1977, p. 1.

(67) Oliver James Lissitzyn, International Air Transport and National Policy, 1942, p. 368; John C. Cooper, "Air Transport and World Organisation", in Ivan A. Vlasic ed., op. cit., note 22, p. 356, and p. 360.

(68) See supra note 37.

(69) Lambertus Hendrik Slotemaker, op. cit., note 31, pp. 31-32; Clement L. Bouvé, op. cit., note 34, pp. 3-4; Manley O. Hudson, op. cit., note 31, p. 190.

(70) League of Nations, Treaty Series, Vol. 129 (1932), p. 237.

(71) Lambertus Hendrik Slotemaker, op. cit., note 31, p. 32.

(72) John C. Cooper, op. cit., note 54, p. 140; Oliver James Lissitzyn, op. cit., note 67, p. 372.

(73) See his book, op. cit., note 67, p. 421.

(74) See pp. 14-15 and note 67 supra. For examples illustrating the obstacles faced the institution of some of international air services see: Lambertus Hendrik Slotemaker, op. cit., note 31, pp. 44-59; John Co Cooper, op. cit., note 54, pp. 145-150.

(75) See Oliver James Lissitzyn, op. cit., note 67, pp. 378-382; Lambertus Hendrik Slotemaker, op. cit., note 31, pp. 44-59; John C. Cooper, op. cit., note 54, pp. 145-150.

CHAPTER TWO

Articles 5 and 6 of the Chicago Convention of 1944

DRAFTING ARTICLES 5 AND 6 AT CHICAGO CONFERENCE OF 1944

In response to the invitation of the United States Government, representatives of 54 nations met at Chicago from November 1 to December 7, 1944, for the purpose of formulating a multilateral aviation convention and international aeronautical body, setting up and adoption of standards and procedures in technical field, and making interim arrangements covering the transitional period (1).

At the Conference, New Zealand and Australia jointly revived the idea of internationalizing civil aviation, Canada and the United Kingdom favoured, generally, a more restrictive international regulation of the economic aspects of international air transport, while the United States, on the contrary, aimed at a relatively more liberal set of conditions which would allow their aeroplanes to compete freely and open up the way of world commerce to their merchandise.

The Joint Proposal of New Zealand and Australia

This proposal called for:

> "the establishment of an international air transport authority which would be responsible for the operation of air services on prescribed international trunk routes and which would own the aircraft and auxiliary equipment employed on these routes." (2)

The proposal, however, retained to each nation the right to conduct all air transport services within its own territory, subject only to any agreed international requirements relating to landing and transit rights and safety facilities (3).

The premises underlying the proposal, as indicated in the preamble and revealed throughout the related discussion, were:

> (a) The proposal would secure the fullest measure of cooperation between the nations of the world as regards the development of air transport services.

(b) It would avoid the unregulated development of air transport and, consequently, the misunderstanding and rivalries between nations.
(c) The joint utilisation of the material, technical, and operational resources of all countries for the development of air transport would be to the interest of all nations, particularly those smaller nations with limited resources.
(d) Accordingly, the proposal would be in the best interests of orderly world progress, and, thus, would contribute greatly to the maintenance of world peace and security. (4)

Arguments were advanced that the time was not and perhaps would never be ripe for the internationalization of civil aviation, and that while all hoped that this idealistic dream might, someday, come true, the Conference should proceed with the practical and possible means. However, when it was put to the voting at the plenary meeting of Committee 1, November 8, 1944, the proposal fell away (5).

Canada Proposal

The Canadian proposal called for the establishment of an International Air Authority consisting of an Assembly, Board, and Regional Councils. Any company wishing to operate an international air service should apply first to its own government. If its application was approved, then it goes to the appropriate Regional Council which will decide whether the applicant should receive a certificate and, if so, under what conditions. If more than one Regional Council is involved, the Board will consider the application.

Any service licensed would be granted the first four freedoms of the air; namely, the freedom of air transit over the airways of all the member States; the right to land at airports of the member States for refuelling and repairs; the right to carry passengers, mails, and cargo to the home country from other member States and vice versa. The fifth freedom is dependent upon the consent of the concerned States.

However, any nation would have the right to have, at least, one of its airline companies operate one round trip per week on any international route commencing in its territory.

Each contracting party may designate the route to be followed within its territory by any international air service and the airports which any international air service may use.

The other related provisions were those which provided for the fair and equitable division of international air routes and services between the various member States; the right of a particular airline company to expand its services under some conditions; and the possibility that an operator might be required to reduce its frequencies in particular cases.

Defending this proposal Mr. C. D. Howe, Chairman of Canadian Delegation, in his introduction thereof, said:

> "An international air authority, established along the lines of the Civil Aeronautics Board of the United States, is the principal proposal which Canada places before this Conference. We are firm believers in healthy competition. We are convinced that it will develop most fruitfully under an international authority. We want to see free choice for the traveller between competing airlines: competition in service, but not in subsidies; a guaranteed minimum of routes and frequencies to the airline companies of all nations, large and small; the most frequencies, where need exists, whether a nation is large or small; the substitution of international regulation for national restrictions; and the complete absence of discrimination, preferences, exclusive rights, and arbitrary landing fees and charges. We also seek control of subsidies, not through any impractical method of direct control, but rather through control of uneconomical consequences of subsidies, such as rate-cutting and the maintenance of services at levels greater than traffic warrants." (6)

And, having outlined the proposal, he continued that,

> "without an effective international regulatory authority, mere freedoms of the air would lead either to unbridled competition, or to the domination of the airways of the world by a few." (7)

United Kingdom Proposal

United Kingdom proposed that a new Convention should be drawn up superceding the Paris Convention of 1919 and Havana Convention of 1928, and provide for the regulation of international air transport. The first four freedoms should be granted under the Convention, while the fifth freedom would be a matter for negotiation.

Further, the Convention should define the international air routes which would be subject to international regulation and reviewed from time to time.

To eliminate uneconomic competition, the frequencies, their distribution between the countries concerned, and the fixing of rates should be provided for by the Convention. Provisions will be made for the licensing of international air operators, and in what cases they might be withdrawn.

An International Air Authority should be established, whose prime task would be to give effect to the provisions of the Convention relative to the determination and distribution of frequencies and the fixing of rates (8).

United States Proposal

Adolf A. Berle, Chairman of the United States Delegation, stating the United States position, asserted that, consistent with the right of each country to maintain sovereignty of the air above its territory, nations ought to subscribe to the rules of friendly intercourse between friendly States in time of peace so that air navigation might be encouraged, and communication and commerce might be fostered between all peaceful nations. He continued,

> "nations have a natural right to communicate and trade with each other in times of peace; and friendly nations do not

> have a right to burden or prevent this intercourse by discriminatory measures. In this respect, there is a similarity between intercourse by air and intercourse by sea." (9)

As to the International Authority, the United States supported an international organization in the field of air commerce having power in technical matters and consultative functions in economic and political questions (10). However, the United States was prepared to discuss ways and means by which minimum rates could be agreed upon and subsidies which are involved in all transport trade would be used for the purpose of legitimate air communication and not for the purpose of assisting rate wars or uneconomic competition (11).

The United States position was not quite specific as to the granting of the several freedoms. Article 5 of the proposed convention, which was submitted to the Conference, grants the first two freedoms of the air; namely, the right of transit and technical stops, to international scheduled services. Article 8 of the same proposed convention made the granting of the remaining three freedoms to scheduled air services dependent upon the consent of the concerned States (12).

Article 7 of the same proposal grants the five freedoms to the international non-scheduled air services subject to the conditions which might be provided for by the State flown over (13).

Judging this against the more broad freedom in many respects advocated by the United States, it may be that the United States wanted to withhold "the most important thing" it "had in its power to grant—the right to establish airline service to or from any United States point." Thus, regarding "the immense American traffic-generating power" as a "bargaining weapon through which it would obtain the most favourable world routes." (14)

The Dominance of United States and United Kingdom Positions and the Outcome of the Conference

As the Conference progressed it became apparent that the views of both the United States and the United Kingdom were dominating the discussion regarding the grant of air freedom to the future air transport. However, in the technical field, the Conference achieved very remarkable results. As to the organizational matters there have been less controversy related mainly to the powers of the proposed International Authority and whether they would be mandatory or consultative.

The granting of air freedom to the international scheduled air services was the battlefield of a waging war between the United States and the United Kingdom. It seems that all attempts made, during the forming stage of both views concerning regulation of post-war international air transport before the convening of the Conference, to reach a compromise have failed (15).

As a result of the wartime expansion of air transport, the United States found itself in a stronger position; more large planes, more trained personnal, and other related equipments and resources; in contrast with that of the United Kingdom who, owing to the war-effort rather specialized in the production of the much smaller fighter planes. Consequently, the United States wanted a more liberal system, whereas the United Kingdom was not yet ready and favoured a more restrictive set of conditions (16).

Canada tried patiently to bring the two differing views to agree on some compromising formula. The Delegations of the United Kingdom, the United States, and Canada met in closed conference in an effort to reconcile their divergent proposals (17).

The ultimate position of both the United States and the United Kingdom was represented by both respective representatives of the two

countries at the first meeting of the Joint Subcommittee of Committees 1, 3, and 4, which was held on November 24, 1944, and discussed at the third meeting of the same Joint Subcommittee of November 27, 1944 (18).

Without going into any details, it seems that both countries agreed upon the granting of the first four freedoms, and agreed in principle on the granting of the fifth freedom, but differed as to its application (19). However, even with the interference of the United States President, Roosevelt, in an attempt to persuade the United Kingdom Prime Minister, Churchill, the two countries failed to come to an agreement (20). Of course, some countries supported the United States views and others favoured the United Kingdom proposal.

In the face of that, the solution adopted as to the freedoms for scheduled services was that the first two freedoms, transit and landing for non-traffic purposes, be included in a separate instrument, known as the Transit Agreement, and the five freedoms be included in another separate instrument known as the Transport Agreement, to be opened for signature with the main instrument: the Convention on International Civil Aviation (21), so that States could sign whatever they wished in addition to the main convention.

However, in the main instrument, the Convention on International Civil Aviation, a provision on international scheduled air services, Article 6, was first approved by the joint meeting of Subcommittees 1, 2, and 3 of Committee 1, held December 4, 1944, in the form in which it was finally included in the Convention (22). It 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." (23)

As to international non-scheduled services, no serious discussions took place at the Chicago Conference, and no differences appeared other than those minor ones related primarily to the language used and which were settled easily. Article 5 of the Convention, which was a combination of Articles 6 and 7 of the United States draft convention (24), reads:

> "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 flown over 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 or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable." (25)

INTERPRETATION OF ARTICLES 5 AND 6 OF THE CHICAGO CONVENTION

According to Article 6 of the Chicago Convention, 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 the State concerned and in accordance with the terms and conditions of this permission or authorization. Thus, States that wished to have scheduled services between their respective territories

had to and are still having to resort to bilateral means, and, as a result, a worldwide system of bilateralism continued to develop (26), remaining the main instrument of regulating scheduled international air transport.

Article 5 of the same Convention, which is concerned with the rights of non-scheduled international air transport services, did not attract so much attention at the Chicago Conference of 1944; instead the focus concentrated on the rights of scheduled services which were regarded, at that time, the basic and important element in international air transportation. However, in practice, it has so soon become a controversial issue with respect to the kind and degree of the rights it conferred on contracting States in relation to non-scheduled international air transport services. In an attempt to clarify the situation the ICAO Council instructed the Secretariat to analyze Article 5 and suggest interpretation thereof. The Secretariat concluded, as to the second paragraph which relates to the commercial non-scheduled air transport services, that:

> (1) The word "also" indicates that commercial non-scheduled services are intended to have the right given by the first paragraph as well as the privileges given by the second. That is to say they enjoy, by virtue of the first paragraph, the following rights:
>
> a) Entry into and transit across a territory of any contracting State without a stop;
>
> b) Entry into and transit across a territory of any contracting State with a stop for non-traffic purposes;
>
> c) Entry into a territory of any contracting State and a final stop there for non-traffic purposes.
>
> In addition to those, and by virtue of the second paragraph, they enjoy the right of taking on or discharging passengers, cargo or mail at a stop. (27)
>
> (2) The first three rights accorded by the first paragraph were to be enjoyed without the necessity of obtaining prior permission. In other words, there would be no need for prior negotiation other than notification necessary for air traffic control, customs, etc. Any requirement for prior negotiations on the use of specific routes or landing places would generally be in contravention of this clause. (28)

(3) It is assumed that the enjoyment of the privileges contained in the second paragraph, like the enjoyment of the right in the first one, would not be subject to prior permission from the State concerned. However, the second paragraph of Article 5 does not expressly rule out the possibility of prior permission being required with respect to these privileges, and it is possible to hold that prior permission may be one of the "regulations, conditions or limitations" contemplated in the last sentence of the Article. Nevertheless, the belief is that it was the intention of those who drafted and adopted Article 5 that these privileges should be enjoyed without the necessity of obtaining prior permission. This conviction is based on the following argument:

"i) The close relation between the two paragraphs of Article 5 suggests that the same type of freedom of operation is envisaged in each, any differences 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 the condition laid down in Article 6 for scheduled services. There would be little point in distinguishing between scheduled and non-scheduled services if permission is to be required for the commercial operations 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 this privilege, it would have been unnecessary to spell out the reservations relating to cabotage or to regulations, conditions and limitations. Such reservations suggest precautions which States felt they might need to take against the abuse of free operation 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 required prior permission and other did not, would be seriously inequitable. The Secretariat believes that Article 5 was adopted in order to avoid these difficulties." (29)

Two more arguments could be added; first, the word "prohibitions" in the original American text was amended to "limitations". This having been so, Daniel Goedhuis pointed out, "obviously in order to prevent a State from making the right of free traffic for this type of flight illusory by enacting a complete prohibition." (30) Thus, a proposal by Panama to reintroduce the term "prohibitions"

was rejected (31).

Second, the provision that each contracting State reserves the right for reasons of flight safety 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, which was added to the first paragraph of Article 5, was "the condition which drafters stipulated on the general principle of the right to fly without prior permission." (32) It was "an exception which was deemed necessary for reasons of safety in air navigation." (33)

However, ICAO Secretariat was aware that the majority of contracting States do not accept its interpretation that, generally, prior permission is not needed for commercial non-scheduled international air transport services (34).

This interpretation contained in ICAO Doc. 6894, AT/694 (26/8/49) was circulated in September, 1949, in order that contracting States provide comments thereon (35). Comments of contracting States were reviewed by the Air Transport Committee which accordingly gave instructions to the Secretariat to prepare a new draft of its previous interpretation (36). ICAO Secretariat, in a latter redraft, had to readjust its interpretation to the effect that the right of the State to impose "regulations, conditions, or limitations" is unqualified, and the State concerned may require prior permission for all or some of commercial non-scheduled flights (37).

On the basis of the foregoing proposals and studies the ICAO Council presented, in 1952, to the contracting States its analysis of the rights conferred by Article 5 (38). This analysis, which was for

the guidance of contracting States in their application of the provisions of Article 5 (39), concluded as to commercial non-scheduled international air transport services that:

> (a) they have 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" stipulated for in the second paragraph;
> (b) they have the privilege, with certain qualifications, of taking on or discharging passengers, cargo, or mail at a stop;
> (c) the right of the State to impose "regulations, conditions, or limitations" includes the right to require its special permission for the operation of taking on or discharging passengers, cargo, or mail in its territory or for any specified category of such operations;
> (d) the right of the State mentioned in (c) above is unqualified. However, it should be understood 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 (40). Reading the two statements contained in (c) and (d) above together the Council itself admitted their unclarity with respect to their meaning (41).

No matter how sound and logical the ICAO Secretariat interpretation that there is no need for prior permission with respect to commercial non-scheduled flight, contained in ICAO Doc. 6894, may be (42), the ICAO Council prevailed, and most States require prior permission for the performance of virtually all international charter flights rendering the second paragraph of Article 5 almost inoperative (43). Thus, in practice, the effectiveness of this Article is almost limited to a multilateral exchange of the first two freedoms of the air for non-scheduled international air transport services (44).

In conclusion, apart from the first two freedoms granted to commercial non-scheduled international air transport services according to Article 5, it seems, generally, that there is no real difference in substance between the provisions of Articles 5 and 6, the only divergence being in form and procedure (45). That is to say:

"By virtue of Article 6, scheduled air services need a special authorization by any of the foreign governments involved.

By virtue of Article 5, non-scheduled services may be excluded or restricted at the discretion of any of the foreign governments involved.

In other words: without an express governmental yes, a foreign carrier cannot operate a scheduled service; without an express governmental no, a foreign carrier is entitled to operate a non-scheduled service." (46)

DEFINITION OF INTERNATIONAL SCHEDULED AIR TRANSPORT SERVICES

It was realized that the clarification of Article 5 would not be sufficient without, first, defining the services which fall under this Article and others falling under Article 6. Thus, considering that the Chicago Convention does not define the terms "scheduled" and "non-scheduled" services which determine the scope of each Article's applicability, ICAO Assembly held that making distinctions between scheduled and non-scheduled services is a prerequisite to the clarity of Article 5 (47), and instructed the Council to prepare a definition to that end (48). Acting on those instructions, the Council prepared and circulated, for the guidance of contracting States, the following definition of scheduled international air service:

"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 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 time-table, or
ii) with flights so regular or frequent that they constitute a recognizably systematic series." (49)

This definition was accompanied by notes on its application. The first one emphasized that the main elements of the definition are cumulative in their effect, and if any one of the characteristics (a), (b), or (c) is missing, the series of flights must be classified as non-scheduled (50).

However, contracting States were completely free to make use of this definition or to take and implement their own policies and decisions concerning this matter since the definition and its accompanying notes did not have the legal status of standard or recommended practices (51).

Nevertheless, at the end of 1952, the Netherlands declared its intention of using the definition in its own practice (52), and in 1955 it was observed that this definition, although not universally accepted, was widely used by governments for reference in questions relating to the regulation of non-scheduled air services (53). This may not be the case as non-scheduled services developed and, consequently, new questions have arisen, as will be explored in the following chapters.

NOTES

(1) United States Department of State, Proceedings of the International Civil Aviation Conference, Vol. 1, (Washington: Government Printing Office, 1948), pp. 14-15.

(2) Ibid., p. 540.

(3) Ibid.

(4) Ibid., pp. 539-543; 551-552.

(5) Ibid., pp. 544-546. The idea of internationalization was not a new concept. "Historically, the first important discussion of the subject arose as a result of the preparatory work for the 1932-1934 League of Nations Disarmament Conference. But actually such early discussions were based, not on security, but rather on economic considerations." John C. Cooper, "Summary and Background Material on International Ownership and Operation of World Air Transport Services", Second Edwin G. Baetjer II Memorial Conference, (New Jersey: October 23-24, 1948), p. 1.

(6) United States Department of State, op. cit., note 1, p. 67.

(7) Ibid., p. 73. For more details see ibid., pp. 67-74; 570-591.

(8) Ibid., pp. 63-67; 566-570.

(9) Ibid., p. 55.

(10) Ibid., p. 61.

(11) Ibid., p. 62.

(12) Ibid., pp. 556-557.

(13) Ibid., p. 557.

(14) William E. O'Connor, Economic Regulation of the World's Airlines, (New York: Praeger Publishers, 1971), p. 22.

(15) For more details regarding those attempts see: John Andrew Miller, Air Diplomacy: The Chicago Civil Aviation Conference of 1944 in Anglo-American Wartime Relations and Post-War Planning, Unpublished disseration, (Yale University, 1971), pp. 146-176.

(16) Ibid., pp. 51-77; Dr. L. H. Slotemaker, "Air Policy", in I. A. Vlasic and M. A. Bradley, The Public International Law of Air Transport, Materials and Documents, Vol. 2, (McGill University, 1974), p. 893, at p. 899; Cf Sir George Cribbet, "Some International Aspects of Air Transport", Journal of the Royal Aeronautical Society (1950), p. 669, at p. 677.

(17) United States Department of State, op. cit., note 1, pp. 2; 446; and 475.

(18) Ibid., pp. 467; 474; 595-608.

(19) For more details see ibid.

(20) See William E. O'Connor, op. cit., note 14, pp. 37-39.

(21) For details see United States Department of State, op. cit., note 1, pp. 486-488; 491-508; 510-516; 89-99.

(22) Ibid., pp. 654; 642-643.

(23) United States Department of State, International Civil Aviation Conference, Final Act and Related Documents, (Washington: Government Printing Office, 1945), p. 60.

(24) United States Department of State, op. cit., note 1, pp. 651-652; 659; 670-672; 679; 680; 684; 686-687.

(25) United States Department of State, op. cit., note 23, p. 60.

(26) This means that the Chicago Convention has brought no progress to the situation that existed between the two World Wars

under Paris and Havana Conventions of 1919 and 1928 respectively as far as scheduled international air transportation is concerned.

(27) "Analysis of the Rights Conferred by Article 5", ICAO Doc. 6894 AT/694 (26/8/49), p. 7 para. 3(b); p. 12 para. 8(a).

(28) Ibid., p. 8, para. 8(d).

(29) Ibid., pp. 13-14, para. 8(d).

(30) Daniel Goedhuis, "Questions of Public International Air Law", Recueil Des Cours, Vol. 81 (1952), p. 201, at pp. 262-263.

(31) Ibid., p. 263.

(32) Ibid.

(33) Ibid.

(34) ICAO Doc. 6894 AT/694 (26/8/49), pp. 14-15, para. 8(e).

(35) "ICAO Council's Report to the Assembly on the Year 1950", ICAO Doc. 7148 A5-P/1 (May, 1951), p. 47.

(36) Ibid., pp. 47-48.

(37) ICAO AT-WP/206 (27/2/51).

(38) ICAO Doc. 7278-C/841 (10/5/52), p. 1, para. 2.

(39) Ibid.

(40) Ibid., pp. 11-12.

(41) "ICAO Council's Report to the Assembly on the Year 1952", ICAO Doc. 7367, A7-P/1 (31/3/53), p. 51.

(42) See in particular Daniel Goedhuis, op. cit., note 30, pp. 261-269.

(43) Peter P. C. Haanappel, Ratemaking in International Air Transport, (Kluwer, the Netherlands, 1978), p. 13. For the practice of States see ICAO study: Policy Concerning International Non-Scheduled Air Transport, ICAO Circular 136-AT/42 (1977), pp. 17-20; 30; and 33; Information on ECAC's Policy on International Non-Scheduled Air Transport, ICAO AT Conf/2-WP/8 (22/11/79), pp. 2-3.

(44) Peter P. C. Haanappel, op. cit., note 43, pp. 13-14; ICAO Study: Policy Concerning International Non-Scheduled Air Transport, op. cit., note 43, p. 17.

(45) Werner Guldimann, "The Distinction Between Scheduled and Non-Scheduled Air Services", Annals of Air and Space Law, Vol. 4 (I.C.A.S.L., McGill University, 1979), p. 135; p. 147.

(46) Ibid.

(47) "Report of the Council to the Assembly on the Activities of the Organization in 1950", ICAO Doc. 7148, A5-P/1 (May, 1951), p. 48.

(48) "Definition of Scheduled International Air Services", ICAO Doc. 7278-C/841 (10/5/52), p. 1.

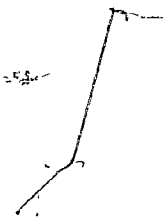
(49) Ibid., p. 3.

(50) Ibid.

(51) Werner Guldimann, "Scheduled and Non-Scheduled International Air Services, Confirmation or Elimination of the Distinction?", ITA Bulletin, No. 22 (June 9, 1980), p. 497; p. 498.

(52) "Report of the Council to the Assembly on the Activities of the Organization in 1952", ICAO Doc. 7367, A7-P/1 (31/3/53), p. 51.

(53) "Report of the Council to the Assembly on the Activities of the Organization in 1954", ICAO Doc. 7564, A9-P/2 (27/4/55), p. 35.



CHAPTER THREE

The Development and Types of International Non-Scheduled Air Transport Services

THE INCREASING IMPORTANCE OF NON-SCHEDULED SERVICES

Scheduled services constituted the major element of international air transport throughout the period between the two World Wars, and, as a result, Paris Convention of 1919, the Ibero-American Convention of Madrid of 1926, and Havana Convention of 1928 dealt mainly, among other things, with international scheduled services (1). However, along the scheduled services, some special flights took place here and there for the transportation of great sums of money and gold and instances of affinity groups chartering aircraft for travel to some points were reported (2). But since the governmental policies directed towards the subsidization and promotion of scheduled services, the non-scheduled services operated at high cost and—due to the lack of subsidy—had to charge higher rates (3), the thing which made their use limited to some sectors and individuals who could afford that, like newspapers and press agencies (4).

During the first decade following the end of World War II the international marketplace of air transportation had not changed that much, and in 1944 the provisions of Articles 5 and 6 of the Chicago Convention reflected the importance of scheduled services and the relatively non-importance of non-scheduled services in the minds of those who framed the Convention (5); whereby the latter category were granted, comparatively, more liberal rights (6); whereas scheduled services prohibited completely except with the special authorization of the State concerned and in accordance with the terms and conditions thereof (7).

However, it was not until the mid-1960's that non-scheduled air transport services have become a major element in international

air transportation (8), and by 1971 the estimated international non-scheduled passenger traffic share, which constitutes the major part of all non-scheduled traffic, reached 32 per cent of the total international passenger traffic (9). Though international non-scheduled passenger traffic's growing rate fluctuated considerably over the years 1972 through 1979, its percentage share of the total passenger traffic kept declining from the abovementioned rate down to 18.9 per cent in 1979 (10). This trend may be explained, in part, by the fact that many new promotional fare structures introduced on scheduled services generating new traffic and diverting some of the non-scheduled traffic.

Two major factors contributed to developing the importance of non-scheduled services; first, the growth in the disposable income which led to the growing market of personal, as opposed to the business travel market upon which scheduled services mainly relied, whose primary consideration to a large extent was the cost of air transportation with less emphasis on the characteristics of scheduled services like frequency, flexibility, and on-demand availability (11). Non-scheduled services have generally been able to serve this new market in a more viable and economical manner than scheduled. Second, there has been interaction between tourism and non-scheduled air transport services. Since non-scheduled services had been able to provide rates lower than could economically be provided by scheduled services, consequently, they have been instrumental in the development of the international mass tourism which has assumed economically and socially considerable importance for a large number of developed and developing countries (12). On the other hand, great pressure was put on governments by various groups of the travel and tourism

industry to introduce new types of non-scheduled services and relax their regulations (13).

Yet non-scheduled services have not reached the same level of development all over the world. Industrialized countries still generate and receive most of the traffic, and Western Europe with the North Atlantic regions constitute the largest and most important international non-scheduled air transport markets (14).

TYPES OF INTERNATIONAL NON-SCHEDULED AIR TRANSPORT SERVICES

Five basic types of international non-scheduled air transport services have developed over the years. These are: firstly, single entity or own-use charters; secondly, group (affinity and non-affinity) charters; thirdly, inclusive tour charters; fourthly, specialized charters; and, lastly, the emerging public charter.

Single Entity or Own-Use Charters

The IATA Traffic Conference, convened in Bermuda in November of 1948, adopted proposals relating to charter services which were issued as Resolution 045 Charters in April of 1949 (15). While this Resolution had been based on the charter concepts and practices in existence at that time (16), it still influenced various governments to incorporate many provisions thereof into their national regulations, and, consequently, its application stretched practically to cover other charters performed by non IATA carriers (17).

Two important principles were established by IATA Resolution 045. First, the plane-load concept, that is to say the carrier may perform air transportation by chartering the entire capacity of an aircraft.

Second, the no-resale rule which means all charter agreements should contain a stipulation that the party to whom such entire capacity was sold would not resell or offer to resell it to the general public and, therefore, be used for own-use or affinity group (18).

However, own-use charters may be defined as:

> "charter flights in which the entire capacity of the aircraft is hired by a single person (individual, firm, corporation or institution):
> (1) for the carriage of his or its staff provided that no part of such capacity is sold; or
> (2) where the hirer is other than a travel organizer, for the carriage of persons associated with the hirer for purposes other than those specified in (1), provided he does not wholly or partly, directly or indirectly, pass on the charter price to the passengers carried under the charter agreement." (19)

As ICAO Secretariat noticed in its study (20), national regulations governing own-use charters tend to be more uniform than those covering other types (21).

Group Charters (Affinity and Non-Affinity)

Affinity group charter is based largely on the rules and concepts established by IATA Resolution 045 discussed above (22). The basic principles governing this type may be summarized as follows:

(1) The group must have aims, objectives, and principal purposes other than travel.
(2) Sufficient affinity must exist prior to the application for charter transportation (23).
(3) The membership of the group may not exceed a prescribed limit, e.g., 50,000 persons.
(4) The cost of the travel must be pro-rated equally among passengers.
(5) The entire capacity of the aircraft must be chartered. If more than one charterer is involved (split charters), the minimum size of the group may be prescribed, e.g., 40 passengers, and some limitation may be placed upon the number of groups that may be carried (24).
(6) Minimum size limit may be prescribed for the group, e.g., 40 members.
(7) No part of the capacity of the aircraft chartered may be resold outside the association or to persons other than its members.

In addition, some other detailed rules and certain restrictions may be imposed by States through their national regulations and, in some cases, regional multilateral or bilateral arrangements (25).

Two problems were the reasons for shifting to non-affinity charters on the North Atlantic market; first, it became, owing to the volume of traffic moving on this type of charter, almost impossible to effectively enforce the regulations in a number of States; and, second, it was largely realized that affintiy group concept was inherently discriminatory (26).

ECAC Member States, Canada, and the United States, in tripartite negotiations on transatlantic air charter services, met in 1971 and 1972 and signed the Declaration of Agreed Principles at Ottawa on October 19, 1972. According to this Declaration, a new type of plane-load charter operations introduced on North Atlantic markets as of April 1, 1973 with view toward replacing affinity concept as the primary regulatory regime, as of December 31st, 1973 (27). The new type of air charter which termed advance booking charters (ABCs) in Canada and a number of ECAC Member States and travel group charters (TGCs) by the United States (28), was based on the following basic rules:

(1) The whole capacity of the aircraft is hired by one or more charterers.
(2) Passengers should book at least the prescribed time in advance (29). However, transfers from the waiting list to the main list may be allowed within a prescribed percentage limit, e.g., 15 to 20 percent.
(3) A prescribed minimum size for each group (30).
(4) Prescribed minimum duration of the journey from departure on the outward portion to arrival on the inward portion (31).

However, the rules regulating this type of charter are not quite uniform. Thus, unlike the United States TGC, the ECAC Member States ABC is not subject to cancellation 45 days prior to departure if there are

insufficient passengers (32), and TGC rules were based on a pro rata system and the ABC rules based on a fixed price (33). As a result, in September, 1976, the United States CAB approved advance booking charters (ABCs) as a move towards the harmonization of the rules governing this type of charter adopted by ECAC Member States and Canada (34). The CAB rules were more liberal than those of the ECAC, e.g., it reduced the minimum duration for advance booking and allowed charter organizers to find substitutes, within limited percentages, for ABC passengers who cancel their participation after the advance purchase date from the general public (35).

The basic difference between the affinity group charters and the new type of group charters lies in the fact that the latter did away with the requirement of prior affinity among the members of the group (36). However, the phasing out of affinity group charters has not received the same amount of consideration in the rest of the world where it continues in existence (37).

Inclusive Tour Charters

The Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe concluded at Paris on April 30, 1956, stipulated that the Contracting States agree to admit freely to their respective territories for the purpose of taking on or discharging traffic, without the imposition of the regulations, conditions or limitations provided for in the second paragraph of Article 5 of the Chicago Convention of 1944, the aircraft engaged in certain types specified in the Agreement (38). However, inclusive tour charters (ITCs) were not mentioned in the agreement, but they benefited, practically, from the treatment accorded to the transport of passengers between regions which had no reasonably direct connection by scheduled air services (39). This

circumstance in addition to the desire of some States to help develop their tourism industries contributed to the growing importance of inclusive tour charters on intra-European routes (40), which led European Civil Aviation Conference to take further measures to define and regulate this type of charter.

ITCs may be defined as follows:

> "Inclusive tour charter flights in which the entire capacity of the aircraft is chartered by one or more tour organizers for the transport of passengers who have purchased an inclusive tour comprising a round trip or circle trip performed in whole or in part by air, organized by a tour organizer and offered to the public at a comprehensive published price including, besides air transport, accomodation, for the duration of the trip, surface transport and where appropriate, other amenities. An inclusive tour is normally paid for before departure, is for a pre-determined period and is to an announced destination or destinations." (41)

In 1974, ECAC, in its recommendation of harmonization of conditions concerning North Atlantic inclusive tour charters (42), stipulated that the duration of stay at the destination or destinations would not be less than six nights; ITC groups who travel together on the outward and inward portions of the trip must not be less than 40 passengers; in case of force majeur, up to five per cent of the group may be returned by different flights; and the publicity for an inclusive tour should indicate the comprehensive price per passenger, the services offered and the name or names of the air carrier or carriers operating the flight (43). Most of those stipulations have been reiterated in the Annex to the Memorandum of Understanding between Civil Aviation Authorities of ECAC Member States on North Atlantic Charters (44).

In the United States there were some restrictions imposed on ITC. For example, its duration must not be less than seven days; it must include three overnight stops at least fifty miles apart; and the total price must not be less than 110 per cent of the lowest scheduled

airline fare (45). In 1975, the CAB adopted one stop inclusive tour charter (OTC) which unlike the ITC required only one stopover instead of three. As for transatlantic travel, OTC required a minimum duration of only seven days and prepayment only thirty days before departure (46). However, while the inclusive tour charter has become the dominant form of charter travel within Europe and the Mediterranean region (47), it met, generally, with limited success between Europe and North America (48).

Specialized Charters

Specialized charters are, generally, designed to meet more limited and specialized requirements. The most common types of such charters are:

(1) Student or study group charters, which may be defined as flights sponsored by recognized institutions or students' associations, in which the entire capacity of an aircraft is hired for the carriage of passengers who are full-time students, scholars, past students, or scholars who have completed a full-time course in the calendar year during which the flight or flights take place. Group leaders, spouses and dependent children of such participants may be included in the group (49). Those charters are authorized by a large number of States (50) and more detailed conditions and requirements are prescribed (51).
(2) Special event charters "in which the entire capacity of the aircraft is chartered for a round trip by one or more groups of passengers all attending or participating in the same special event of a religious, sporting, cultural, social, professional or other nature." (52) These charters may not, generally, be operated if it is possible for the passengers to travel under advance booking charter conditions. Further detailed rules are prescribed for eligibility for these charters (53).
(3) All-cargo charters which are generally governed by the regulations applicable to single entity or own-use charters must note the few States that have regulations applicable only to all-cargo flights as distinct from passenger flights. Many ECAC Member States consider this type of charter as being fully liberalized as a result of the European Multilateral Agreement. States' practices vary largely as to some requirements and conditions concerning the eligibility for all-cargo charters (54).

Public Charters

The United States Civil Aeronautics Board (C.A.B.) adopted, as of August 14, 1978, the public charter rules (55), according to which a public charter is a one-way or round-trip charter being performed by one or more direct air carriers, arranged and sponsored by a charter operator, and meets the following requirements:

(1) The charter be arranged and sold by a charter operator as an independent principal with respect to the air transportation included in the charter and not as an agent for a direct air carrier. Such a charter may, but not necessarily, include ground accomodations and services.
(2) The charter contract must be for not less than 20 seats.
(3) The departing flight and returning flight of a round-trip charter need not be performed by the same direct carrier.
(4) Passengers transported on a public charter flight should consist solely of charter participants. However, the unused space may be utilized by the charter operator for the transportation, on a free or reduced basis, of such charter operator's employees, directors, officers, and their parents and immediate families.
(5) The charter operator must not accept any participant's payment for the round-trip unless the particular return flight has been specified by such participant.
(6) Substitutes may be arranged for charter participants at any time preceding departure.

These rules have eliminated the advance-purchase period and the minimum group-size requirements with respect to passengers participating in the charter and permitted the one-way charters (56).

It remains to be seen to what extent this new concept of charter services will be accepted by other States. However, it seems that the United States is prepared to stand firm on the principle that charter services should be governed by the national rules of the country in which charter traffic originates. This principle, which has become to be known as the country of origin rule, is the main tool the United States uses, through its bilateral negotiations with other States, in trying to effectuate its policy with respect to liberalization of international charter services (57).

Other Related Charter Concepts

In addition to taxi charter flights which are limited to the using of small aircraft in some areas and charter flights performed for the transportation of military personnel and equipment especially in the United States, there are some other concepts that may be authorized by some States unilaterally or bilaterally according to their national policies, regulations, and interests. These concepts, briefly, include:

(1) Part-charter which means that some seats on a scheduled service be blocked off as a whole by the airline concerned under a charter contract with a charterer who will sell them on a per seat basis to charterworthy passengers. Generally, many of the charter worthiness rules applied to plane-load charters are applied to part-charter groups. Usually a limit is imposed on the number of seats or on the share of the capacity available on board an aircraft for part-charter passengers. IATA Resolutions, particularly 079, 084, 085, and 086 laid down many of the rules applicable to part-charter and in situations involving a country with no IATA-member airline government orders have been invoked to enable the operations to take place. As to the price per seat, in some cases it is specified at a minimum level or as a proportion of some economy fare, and in other cases it is not regulated at all. (58)

(2) Split-charter which means the right of more than one chartering entity to share or split the capacity of a chartered aircraft, as opposed to the concept of a plane-load charter. A minimum limit may be imposed on the number of seats each charterer may contract for and a maximum limit may be imposed on the number of groups that may be carried on the same flight. (59)

(3) Comingling which means the carriage of more than one type of charter on a split charter flight, for example, the carriage of groups travelling under advanced booking charters, inclusive tour charters and student charters. (60)

(4) Intermingling means that split charter groups which have flown together on the outward leg of a journey can return at a different date on a different aircraft. (61)

(5) Mixed charter means that the cost of a charter operation is borne partly by the charterer and partly by the participants as opposed to a single entity and a pro rata charter. (62)

(6) Finally, it may be appropriate to note that a wet lease (an aircraft lease with crew) is regarded, under the United States regulations as a charter or series of charters of an aircraft and not as a true lease. (63)

NOTES

(1) See Chapter I.

(2) Jacob W.F. Sundberg, Air Charter: A Study in Legal Development, (Stockholm, 1961), p. 11.

(3) Ibid., p. 12; see also U.K. Air Ministry, "Report of the Committee to Consider the Development of Civil Aviation in the United Kingdom", (His Majesty's Stationery Office, London, 1937), p. 23.

(4) U.K. Air Ministry, op. cit., note 3 above, p. 9.

(5) ICAO Secretariat, "Policy Concerning International Non-Scheduled Air Transport", ICAO Circular 136-AT/42 (1977), p. 4; IATA, Working Paper Presented to the ICAO Special Air Transport Conference, Montreal, April 13-26, 1977, on the Agenda Item No. 2: "Policy Concerning International Non-Scheduled Air Transport", ICAO SATC-WP/5 (10/1/77), p. 3.

(6) ICAO Secretariat, op. cit., note 5 above, p. 4.

(7) Article 6 of the Chicago Convention of 1944.

(8) ICAO Secretariat, op. cit., note 5 above, p. 1.

(9) ICAO Secretariat, "A Review of the Economic Situation of Air Transport, 1969-1979", ICAO Circular 158-AT/57 (1980), p. 22.

(10) Ibid.

(11) ICAO Secretariat, op. cit., note 5 above, p.1.

(12) Ibid.

(13) Ibid.

(14) Ibid., p. 2.

(15) Jacob W.F. Sundberg, op. cit., note 2 above, p. 102.

(16) Bandouin M.A.J.B. van den Assum, "International Air Charter Transportation: Its legal regulations and implications", (Unpublished Thesis, Institute of Air and Space Law, McGill University, 1975), p. 133.

(17) ICAO Secretariat, op. cit., note 5 above, p. 5.

(18) IATA Resolution No. 045.

(19) Annex to Memorandum of Understanding between Civil Aviation Authorities of the States Members of the European Civil Aviation Conference (ECAC) on North Atlantic Charters, signed at Paris, June 5, 1975, para. 1.

This Memorandum was signed for the purpose that principles contained therein would govern any bilateral agreement or arrangement on North Atlantic charters that might be concluded or renewed with the Canadian or United States authorities pending the entry into force of a multilateral agreement between Canada, ECAC States and the United States which, up to the moment, never agreed upon, (part A of the above Memorandum). See also Article 2 (c) of the Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, Signed at Paris, April 30, 1956; ECAC Recommendation ECAC/4-3 (1961) as amended by Recommendation INT. S/2 (1969), para. 3; ICAO Secretariat, op. cit., note 5 above, p. 12; and IATA Resolution No. 045.

(20) Op. cit., note 5 above.

(21) Ibid., p. 12.

(22) Ibid., p. 9.

(23) Thus it was stipulated in ECAC Recommendation INT. S/3-7 (1971) on common ECAC practices in the field of transatlantic non-scheduled air transport that the association should have been in existence for at least two years, and, for the same reason, the Annex to Memorandum of Understanding between Civil Aviation Authorities of ECAC Member States on North Atlantic Charter (op. cit., note 19 above) added the condition that all passengers should have been full members of the association for at least 6 months before the start of the journey.

(24) For example, ECAC Recommendation INT. S/3-7 (1971) (op. cit., note 23 above) stipulated that the number of such groups may not exceed three.

(25) For further details see: Ibid.; IATA Resolution No. 045; ICAO Secretariat, op. cit., note 5 above, pp. 9-10; Annex to Memorandum of Understanding between Civil Aviation Authorities of ECAC Member States, op. cit., note 19 above; Baudouin M.A.J.B. van den Assum, op. cit., note 16 above, pp. 132-146; Irene Ai-yun Liang, International Non- Scheduled Air Transport, (Unpublished Thesis, Institute of Air and Space Law, McGill University, 1978), pp. 30-32.

(26) ICAO Secretariat, op. cit., note 5 above, p. 9; H.A. Wassenbergh, Public International Air Transportation Law in a New Era, (Kluwer-Deventer-The Netherlands, 1976), p. 61.

(27) Declaration of Agreed Principles, Elaborated at the Third International Meeting on Transatlantic Air Charter Services (TACS/3) Held in Ottawa, Canada, from October 17 to 19, 1972, Between Representatives of Canada, ECAC and the United States, para. 1.

(28) ICAO Secretariat, op. cit., note 5 above, p. 10.

(29) This advanced time was generally 60 days and in the United States it was reduced to 45 days then to 15 days. See for example: Andreas F. Lowenfeld and Allan I. Mendelsohn, "Economics, Politics and Law: Recent Developments in the World of International Air Charters", Journal of Air Law and Commerce, Vol. 44, 1979, p. 479; pp. 483-484.

(30) For Example 40 passengers which was reduced later on in the United States to 20 passengers. See ibid., p. 484.

(31) For example 14 days during the peak season and 10 days during other periods. In the United States, this requirement was reduced to 7 days, (ibid., p. 483).

(32) ICAO Secretariat, op. cit., note 5 above, p. 10.

(33) Ibid.; H.A. Wassenbergh, op. cit., note 26 above, pp. 66-67.

(34) ICAO Secretariat, op. cit., note 5 above, p. 10.

(35) Ibid., pp. 10-11.

(36) Cf. H.A. Wassenbergh, op. cit., note 26 above, p. 66 where he saw that the new type contained affinity, the difference lies in that the new affinity is "the willingness of passengers to commit themselves to specific travel arrangement at least three months in advance and to accomodate their travel arrangements so as to travel together with others." He, further, explained (in note 19 on the same page) that the ABC "criterion relates to a decision of the passenger as to his travel arrangements, while the prior-affinity criterion relates to a decision of the passengers, which was made completely without regard to air travel (non-travel related affinity)."

(37) See for example ICAO Secretariat, op. cit., note 5 above, p. 10. For further details on non-affinity group charters see: ICAO Secretariat, op. cit., note 5 above, pp. 10-11; Declaration of Agreed Principles on Transatlantic Air Charter Services, op. cit., note 27 above; ECAC Recommendation ECAC/INT. S/5 (SP)- Rec. (1972) on Introduction of a New Category of Non-Scheduled Operations on the North Atlantic to be known as "Advance Booking Charter"; Annex to Memorandum of Understanding between Civil Aviation Authorities of ECAC Member States on North Atlantic Charter, op. cit., note 19 above, para. II; H.A. Wassenbergh, op. cit., note 26 above, pp. 61-74; Baudouin M.A.J.B. van den Assum, op. cit., note 16 above, pp. 147-166; Irene Ai-yun Liang, op. cit., note 25 above, pp. 32-35.

(38) Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, signed At Paris on April 30, 1956, Article 2.

(39) ICAO Secretariat, op. cit., note 5 above, p. 5.

(40) Ibid.

(41) ECAC Recommendation ECAC/4-3 (1961) as amended by INT. S/2-6 (1969) and by INT. S/10-2 (1978) on Classification and definition of the various categories of non-scheduled operations, para. 8. It is interesting to note that the equivalent to this type may be offered on scheduled services as group inclusive tours (GITs) or within Europe as individual inclusive tours (ITXs) defined by IATA Resolution and are applicable only within Traffic Conference 2 (Europe-Mediterranean). However, neither GIT, sometimes known as bulk inclusive tour (BIT), not ITX are considered as non-scheduled services. See: ICAO Secretariat, op. cit., note 5 above, p. 11; IATA Resolution No. 080.

(42) ECAC/INT. S/7-4 (1974).

(43) Ibid.

(44) Op. cit., note 19 above, para. 4.

(45) ICAO Secretariat, op. cit., note 5 above, p. 11.

(46) See, e.g., Andreas F. Lowenfeld and Allan I. Mendelsohn, op. cit., note 29 above, pp. 482-483.

(47) ICAO Secretariat, op. cit., note 5 above, p. 11.

(48) Ibid., p. 12. For more details on inclusive tour charters see: Ibid., pp. 5; 11-12; H.A. Wassenbergh, op. cit., note 26 above, pp. 74-81; Baudouin M.A.J.B. van den Assum, op. cit., note 16 above, pp. 167-187; Irene Ai-yun Liang, op. cit., note 25 above,

pp. 35-37; Ramesh V. Ranadive, Inclusive Tours in International Air Transport, (Unpublished Thesis, Institute of Air and Space Law, McGill University, 1968); Jaap Kamp, Air Charter Regulation: A Legal, Economic, and Consumer Study, (Praeger Publishers, N.Y., U.S.A., 1976), pp. 50-56.

(49) ECAC Recommendation on Classification and Definition of Various Categories of Non-scheduled Operations, op. cit., note 41 above, para. 5.

(50) ICAO Secretariat, op. cit., note 5 above, p. 12.

(51) See, e.g., ECAC Recommendation on Non-scheduled Operations-Categorization, ECAC/4-3 (9161) as amended by INT. S/2-6 (1969), Clause 7.

(52) ECAC Recommendation on Classification and Definition of the Various Categories of Non-scheduled Operations, op. cit., note 41 above, para. 7.

(53) See, e.g., ECAC Recommendation on Introduction on Routes Where Advance Booking Charters Are Operated of an Additional Category of Non-scheduled Operations to be known as "Special Event Charters", ECAC/8-3 (1973); Annex to Memorandum of Understanding between Civil Aviation Authorities of ECAC Member States on North Atlantic charters, op. cit., note 19, para. 3; ICAO Secretariat, op. cit., note 5 above, p. 12; K. Veenstra, "Special Event Charter Flights and Scheduled Air Service: Some Problems of Interpretation", Air Law, Vol. 1, No. 5 (1976), p. 294; pp. 295-297.

(54) ICAO Secretariat, op. cit., note 5 above, p. 13.

(55) See United States Federal Register, Vol. 43 (August 18, 1978), p. 36604 et. seq. These rules were codified in Code of Federal Regulations (CFR), Title 14, Part 380, and were amended many times.

(56) For more details see: "Code of Federal Regulations (CFR), Title 14 (Revision of January 1, 1980), Part 380; Andreas F. Lowenfeld and Allan I Mendelsohn, op. cit., note 29 above, pp. 484-488, 489.
Though this new public charter was proposed to replace several different charter forms, charters conducted by educational institutions and charters for special events were retained and subjected, to a large extent, to the new public charter rules. See ibid.

(57) See, e.g., Andreas F. Lowenfeld and Allan I. Mendelsohn, op. cit., note 29 above, pp. 488-493.

(58) For more information and details see: ICAO Secretariat, "Report on the Third Meeting of Fares and Rates Panel, Working Paper presented to the Panel of Experts on Regulation of Air Transport Services" (Second Meeting, Montreal, April 2-12, 1979), ICAO, ATRP/2-WP/8 (19/3/79), Attachments A and B; J.Z. Gertler, "Regulatory Aspects of Part-charters: Canadian Experience with Contract bulk Inclusive Tours on Scheduled Services", Working Paper presented to the same above Panel and Meeting, ICAO, ATRP/2-WP/9, (16/3/79); H.A. Wassenbergh, op. cit., note 26 above, pp. 81-83.

(59) ICAO Secretariat, Policy Concerning International Non-Scheduled Air Transport, op. cit., note 5 above, p. 13.

(60) Ibid.

(61) Ibid.

(62) Ibid.

(63) Ibid.

CHAPTER FOUR

Problems Brought About by the Development of Non-scheduled Services and Attempted and Suggested Solutions

As non-scheduled international air transport services developed over the years and new concepts and types of charter services emerged, two basic problems became gradually distinct. The first related to the nature of each category, the definition of or distinction between scheduled and non-scheduled services. The second concerned the competition between scheduled services and certain types of non-scheduled services with its deteriorating effects on the viability of rendering adequate air transport services to the public resulted from overcapacity, fares and rates warfare, waste of resources, etc.

Reaction to these problems came from national governments, airlines, and consumers, in an individual or collective (1) manner, in an attempt to overcome those obstacles to the smooth running of the international air transport industry. Some commentators, studying and analyzing this situation, suggested some solutions to the course events might take in this context.

These problems and the attempted and suggested solutions thereto will be discussed in this chapter.

THE DISTINCTION BETWEEN SCHEDULED AND NON-SCHEDULED SERVICES

Before the Second World War there was hardly a need for definition of scheduled services, since they formed a very distinct category and any air transport enterprise, in order to attract a substantial amount of customers, had not only to carry out its services according to a schedule, but to advertise this schedule as widely as possible, whereas enterprises running charter services found little demand and, accordingly, operated relatively small aircrafts at a charge considerably above the scheduled air service rate (2).

As the Second World War came to an end, enterprises performing non-scheduled services got their chance in meeting the need for air transport service which enterprises performing scheduled services could not satisfy at that time. Moreover, enterprises performing non-scheduled services, attempting to attain the highest possible number of flying hours per year with their available resources, displayed a tendency to give their services a more or less regular character intruding more and more upon the confines of enterprises performing scheduled services which, consequently, exerted increasing pressure on their respective governments to put an end to this kind of competition (3). Searching for a solution, it was realized that, first of all, it should be decided what services were to be regarded as scheduled and which were to be considered non-scheduled (4). Since the Chicago Convention did not provide an answer to this question, ICAO Council, in 1952, adopted the definition of international scheduled air services (5). By exclusion, any service that does not meet the requirements of this definition was to be regarded as a non-scheduled service.

When non-scheduled services developed over the years and new concepts and types of this category evolved creating, as mentioned above, some problems that pushed all of those concerned with international air transport to find solutions, the question of distinction between scheduled and non-scheduled services got again to the core of the debate. What directions the debates have taken; what practices the States have followed; and what suggestions have been made by some distinguished commentators will be discussed in the following pages.

THE REVISION OF ICAO COUNCIL'S DEFINITION OF SCHEDULED SERVICES OF 1952

The classical forms of international non-scheduled air transport services, such as own-use, affinity group, and special event charters caused no problems, because they fit in easily within the category of non-scheduled services according to the ICAO Council's definition of 1952 (6), since these services were obviously neither open to use by members of the public not so regularly or frequently that they could be considered to constitute a recognizable systematic series (7).

However, as new types of non-scheduled services developed such as inclusive tour charters (ITCs) in the late fifties and early sixties, non-affinity group charters (ABCs and TGCs) since 1973 (8), and public charters (9), it became apparent that those services, which are sometimes called "programmed" or "schedulized" charters (10), have the following basic characteristics in common with scheduled

services:

> "(a) they operate as a systematic series between the same regions;
> (b) they are open to use by members of the public or accessible to a large segment of the public;
> (c) They operate according to a published timeable and at publicized tariff." (11)

On the other hand, scheduled airlines began providing some types of transport such as advance purchase excursion (APEX), group inclusive tour (GIT), charter class and part charter which approximate non-scheduled services offered by non-scheduled operators (12). All of these developments made it difficult to distinguish between scheduled and non-scheduled services (13) and rendered the 1952 ICAO Council's definition obsolete (14).

Realizing these facts, the ICAO Special Air Transport Conference, held at Montreal, April 13-26, 1977, recommended that the Council undertake studies aimed at "establishing a definition or guidelines which characterize international non-scheduled air transport operations and distinguish these from scheduled operations", and invited the same Council to examine the feasibility of "revising the Council's Definition of a Scheduled International Air Service." (15) A Panel of Experts was set up within ICAO to carry out, among other things, this recommendation.

The Outcome of the Panel's Studies

At the first meeting of the Panel, which was held at Montreal between July 17 and 28, 1978, some members doubted the need for maintaining a distinction between scheduled and non-scheduled services in the long run (16). Others questioned the possibility to arrive at useful distinctions since the new developments in the regulatory field

were rapidly taking place, especially, in the United States the new policies in this context have been to substitute reliance on competitive incentives for direct government economic regulation (17). However, the general view of the Panel was that the ICAO Council Definition of 1952 had become inadequate (18) and, therefore, it examined several alternative ways of establishing guidelines that would better reflect the current characteristics of scheduled and non-scheduled air services (19). These ways, or approaches, as summarized by the Panel, were:

> "(a) The first approach was similar to that adopted by the Council in 1952, namely to define one type of service, preferably scheduled service and thereby, in a negative manner, define the other by exclusion. This method was to have the advantage of ensuring that there was no overlap or undefined area between the two categories.
> (b) A second was to establish the distinguishing features of scheduled and non-scheduled services separately. Some Panel members feared that this might result in overlap or omission in borderline cases.
> (c) A third was to describe three categories: scheduled services, 'programmed' or 'schedulized' charters, and non-scheduled services. It was felt by some members that this approach would merely multiply the risk of overlap or omission.
> (d) A fourth was to consider also the type of market served (i.e. discretionary/pleasure travel and non-discretionary/business travel). The majority of the Panel members thought this to be unduly restricting and not to reflect the reality of the market place, in that there was only one market constituted by the deamnd for air transport.
> (e) A fifth was based on a description of the degree of access to the market, as determined by the different types of charter services and the charterworthiness rules governing them.
> (f) A sixth approach was based on the understanding that the only significant distinction was between commercial and non-commercial international air services." (20)

The Panel, at its first meeting mentioned above, proceeded along the lines of the second approach, that is to say establishing the distinguishing characteristics or features of scheduled and non-scheduled

services separately (21). These characteristics were grouped under two headings: economic criteria and legal and regulatory criteria as follows:

(1) Economic criteria:

a) Scheduled services are usually operated:

"—with a high degree of regularity of flights;
—according to a widely distributed schedule that specifies arrival and departure times;
—regardless of the payload carried on individual flights;
—offering on-demand service on a high proportion of occasions;
—over a network of routes with inter-lining facilities and interchangeability of tickets;
—subject to the filing of tariffs and their approval by governments;
—without passengers or shippers generally being subject to cancellation charges; and
—for mail and freight shipments of several sizes."(22)

b) Non-scheduled services are usually operated:

"—either on an ad hoc basis or on a regular but seasonal basis;
—subject to cancellation if a satisfactory payload is not available;
—with the financial risk for under-utilized payload being assumed mostly by the charter organizer rather than the aircraft operator;
—generally on a point-to-point basis;
—subject to substantial charges on passengers or shippers who cancel; and
—without the air carrier maintaining a direct control over retail prices." (23)

(2) Legal and regulatory criteria:

a) Scheduled services are usually:

"—under an obligation which may be assumed (which in some cases may not be legally binding), or statutory, in order to fulfill a public service requirement on a regular basis;
—subject to the terms of bilateral agreements or arrangements (governing inter alia, carrier designation, routes, frequency, capacity and tariffs);
—available to all individual members of the public and to shippers (in contrast to certain categories of non-scheduled service);
—subject to limited entry in the markets they serve; and
—operated pursuant to a charter contract but not covering the entire capacity of the aircraft." (24)

b) Non-scheduled services are usually:

"—not under an obligation to operate even though seats/space may have been sold, except for consumer protection limitations on cancellation by the carrier or charter-organizer;

—operated subject to seeking permission, or giving prior notification, for each flight or series of flights, from the country of origin or destination or both;
—generally operated pursuant to a charter contract with the intention of doing so on a planeload basis, but several charterers may contract for a minimum group or block of seats or shipment size;
—more often sold to individual members of the public through recognized intermediairies except for certain categories of charters not open to the general public; and
—subject to charterworthiness rules as applicable (e.g. advance booking charters, public charters, affinity group charters, inclusive tour charters, own use/single entity charters, and various types of special charters, such as special event, study group, student and military charters)."(25)

However, it was accepted by the Panel that some of these characteristics provide more meaningful distinctions than others and that some of the more traditional features were no longer applicable. The Panel also recognized the fact that many of these accepted characteristics were not exclusive to one category of service; besides, the situation was constantly changing and was not common to all countries. Nevertheless, the feeling was that the previous grouping of such features provided a general picture of each broad category (26).

When it came to the consideration of "programmed" or "schedulized" charters, the Panel, at its first meeting, was divided as to the need to define what is meant by these terms. Some took the view that this type of non-scheduled service should be further defined since it lay at the core of the problem being considered by the Panel, that is to say how to harmonize regulatory regimes. Others felt that it would add to the problem of definition or it was premature to attempt it at that stage (27). The Panel found that, in the light of the ICAO Council's Definition of 1952, "programmed" or "schedulized" charters have acquired some of the characteristics of scheduled services and, accordingly, may fulfill the conditions required to be classified as scheduled under this definition (28).

At its second meeting, the Panel agreed, in order to avoid the probability of confusion through overlapping or omission, it should attempt to define only one category of air services, thereby defining other services by exclusion. The Panel preferred to define or characterize the scheduled service and, as a result, directed its attention to the feasibility of amending the ICAO Council's definition of 1952 notwithstanding the fact that the Panel itself had agreed that,

> "because of the constantly evolving condition of the services offered to the public it would be difficult, if not impossible, to make a clear separation of these services between scheduled and non-scheduled by way of amending the 1952 Definition." (29)

This was more specifically identified to be, because of the evolution of "programmed" or "schedulized" charters, the difficulty of making a clear separation of these charter operations into scheduled and non-scheduled services (30), in other words, it is the "dynamic qualities" of such "programmed" or "schedulized" charters which made it very difficult if not impossible to decide whether these services be regarded as scheduled or non-scheduled in the meaning of the ICAO Council's definition of 1952 (31).

Nevertheless, the Panel concluded that:

> (1) The ICAO Council Definition of 1952 is sufficiently flexible to permit States to classify some charter operations, in particular, certain "programmed" or "schedulized" charters as scheduled.
> (2) This flexibility in the definition is emphasized through some modifications of the existing notes on the application of the definition contained in ICAO Doc. 7278, and by adding a general note thereto. (32)

ICAO Second Air Transport Conference, held at Montreal between February 12 and 28, 1980, accepted these conclusions arrived at by the Panel and recommended "that the Definition of a Scheduled International Air Service adopted by the Council in 1952 for the guidance

of Contracting States in the application of Articles 5 and 6 of the Convention (Doc. 7278) be maintained without revision" (33), and, with a very minor amendment in the language of sub-paragraph 4 of the general note, adopted the modifications to the Notes on Application of the Definition as proposed by the Panel (34).

The general note reads:

"This Definition typically encompasses a service:
(i) which is part of an international network of services, operating according to a published timetable;
(ii) where the on-demand passenger has a reasonable chance of securing accommodation;
(iii) which normally operates irrespective of short-term fluctuations in payload;
(iv) where stopover and interlining facilities are offered to the user with the appropriate ticket or air waybill, subject to the relevant international agreement, if any.

Because of the operational characteristics expressed by the Definition and subject to the considerations in note 6 below, States may, at their discretion, classify as scheduled a service which operates, for example:

(i) pursuant to a charter contract with one or more charterers with the intention of covering the entire capacity of the aircraft; and
(ii) frequently and with regularity." (35)

Note 6 mentioned above (36) was amended and the significant part of it, which has been added by the Panel's proposal, reads:

"A service may be regarded as open to the public, notwithstanding certain restrictions, which relate, for example, to the time of reservation, the minimum length of stay, or the obligation to deal with intermediary. It will be incumbent on each Contracting State, in respect of each air service having such characteristics, to assess the scope of these restrictions and decide whether the restrictions are so substantial that the service should be considered as non-scheduled." (37)

Evaluation and Conclusions

(1) It seems that the realities and practical facts, that is to say the "differing economic and political circumstances and

constantly evolving regulatory conditions" (38) surrounding international air transport shaped the final course taken by the Panel. Thus, notwithstanding the Panel's realization that "it would be difficult, if not impossible, to make a clear separation of "programmed" or "schedulized" charters into scheduled and non-scheduled services by means of amending the Council's 1952 Definition" (39), it took the opposite direction and decided that this definition is "sufficiently flexible without revision" and its flexibility "should be emphasized" by making some modifications to the existing notes on the definition application (40). For the same reason the Panels conclusion was generally well received by ICAO Second Air Transport Conference members of 1980 and, as regarded by some statements, was the only approach possible or the best that could be achieved (41).

(2) In practical terms the Panel's conclusion added nothing new to the existing situation. For the ICAO Council's 1952 Definition and the accompanying material contained in the ICAO Doc. 7278 did not have the legal status of standards or recommended practices (42). It was only "for the guidance of Contracting States in the interpretation or application of the provisions of Articles 5 and 6 of the Convention." (43) Therefore, States were completely free to take and implement their interpretations according to their respective national policies, and they made full use of this freedom (44). The Panel's conclusion gives virtually absolute freedom to States to classify some charter services, particularly, "programmed" or "schedulized" charters as scheduled services, the same freedom they have been enjoying with respect to economic regulation of international air services as a result of the existing regulatory regime of the Chicago Convention of 1944.

(3) To the extent that the Panel conclusion may be accepted by States the question of regulation of international non-scheduled air transport services and their harmonization with scheduled services will cease to be a major problem, since those charter operations seen as being competitive with scheduled services may be brought, by reclassifying them as scheduled, under the same regulatory regime (45). But this, in turn, requires that the States' acceptance be uniform, that is to say the same non-scheduled air services to be reclassified as scheduled are agreed upon between States (46), a step which might not be reached in the near future. The alternative to this step would be that States intending to implement the Panel's conclusion will have to negotiate classification of charters by "argumentation, bargaining, and if necessary, compromises" (47) within the existing and prevailing system of bilateralism (48). If a significant majority of States, including those with existing and potential importance in international air transport, e.g., States of North America and Western Europe, chose not to accept the Panel's conclusion at all or accepted it but not in an uniform manner, the present situation of international air transport uncertainty will continue and more efforts to find solutions thereto will still be needed.

(4) The uncertainty surrounding international air transport regulatory regime at the present time (49) may have played a role in encouraging States to retain their complete freedom of action which was regarded to be more valuable than any degree of uniform limitation (50). On the other hand, this fact together with the impasse posed by the question of whether "programmed" or "schedulized" charters be classified scheduled or non-scheduled, indicate a suggestion that the concept of scheduled and non-scheduled, on which the ICAO Council Definition of 1952 and the distinction between two categories in international air

transport services were based, might have been no longer valid—at least in some of the most advanced and matured markets, e.g., North Atlantic and Western Europe. Therefore new principles and ideas should be sought and explored for better identifying and understanding the nature of international air transport in order to find the appropriate solutions to the existing uncertainty.

States' Practices

On January 26, 1976, ICAO circulated a Questionnaire in which it asked Contracting States to provide data on matters relating to their respective international non-scheduled air transport policies. Analysing the answers received, ICAO Secretariat concluded, as to the methods of distinguishing non-scheduled from scheduled services, that States generally adopted one of two ways; either a negative or a positive approach. However, most replying States used the negative approach employed in the Chicago Convention, that is to say, air services which are not regarded as scheduled are to be considered non-scheduled. Some of these States use all the criteria of the ICAO Council's Definition of 1952, others employ one or more but not all of the elements of this definition, sometimes in conjunction with other criteria, and the rest rely solely on other criteria (51). According to these other criteria, scheduled air services may be: (1) covered by an air service agreement; (2) that operate at approved fares; (3) that provide on-demand service; (4) that can be booked directly through an air carrier; (5) that are approved on a regular basis; (6) that are provided by airlines which are designated; or (7) to whom an operating license has been granted (52).

The positive approach, which was adopted by some replying States, means that the non-scheduled air transport services are defined by either a general definition or by stating the specific characteristics of every type of non-scheduled services (53). The United Kingdom, using the positive general definition, defined charter flight as 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 charters for re-sale.
> (b) in the case of a flight for the carriage of passengers, the operator had 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 and equipment for ships." (54)

Some States, including Canada, France, and the United States, adopted the positive approach of defining non-scheduled services by stating the specific characteristics, conditions, and terms of every type of non-scheduled service permitted, e.g., single entity, affinity group, advance booking, etc. (55). This latter method was adopted by the European Civil Aviation Conference (ECAC) (56), the Arab Civil Aviation Council (ACAC) (57), and the African Civil Aviation Commission (AFCAC) (58). France mentioned a very good reason for choosing this method. It was that it offered "the most pragmatic way" (59), particularly, in view of the difficulties encountered by ICAO and ECAC in evolving a general definition (60).

COMPETITION BETWEEN SCHEDULED AND NON-SCHEDULED SERVICES

The second major problem emerged as a consequence of the development of non-scheduled services is the competition with scheduled services and the deteriorating effects of this competition on main-

taining reasonable services for satisfying the needs of the public as well as serving other national interests and goals.

Two basic demands have been discernible in the international air transportation. The first is the need for regular and dependably frequent services with extensive flexibility in length of stay and maintaining worldwide routes including routes to areas of low traffic volume (61). This need, which has been in existence since the inauguration of international scheduled services after the First World War (62) and still recognized throughout the world up to now, was catered for by scheduled services offered by scheduled carriers.

The second one began to gain its importance as the Second World War ended. This need developed from occasional, irregular and supplementary services for the use of single entities, some groups with prior affinity and common purpose other than transportation and for some special events and groups which scheduled services could not cater for to a growing demand for low-cost transportation with more or less regularity and flexibility. Non-scheduled services offered mainly by non-scheduled carriers catered for this need.

Non-scheduled services, with their inherent character of being able to operate at a very high load factor and with less expenses, thus offering a considerably low-cost travel, began acquiring many of the characteristics of scheduled services, such as regularity, more frequencies and, as many of the restrictions imposed thereupon were being gradually removed, more flexibility, without bearing any of the responsibilities of scheduled carriers to offer year-round on-demand services on their routes including those of low traffic. Moreover, non-scheduled carriers proceeded to operate on the same routes on which scheduled carriers had been operating and, consequently, in addition to generating new traffic, began diverting some

of the traffic that, otherwise, would have travelled on scheduled services (63). Trying to adapt to this situation, scheduled services offered many special fares, cheaper to varying degrees than their normal economic fares with the least restrictions known as promotional fares, which include advanced purchase excursion fares; standby fares; budget fares, etc. (64). Thereby a severe competition had started between international scheduled and non-scheduled services which, in consequence, led to excessive capacity on certain routes, insufficient capacity on others, and waste of resources (65). In turn the financial results of scheduled and non-scheduled carriers deteriorated considerably. Even the efficient air carriers were unable to make a modest return and for many bankruptcy, subsidy, or staff and service cutbacks became inevitable, in addition to the "two-fold result of insufficient cash generation to finance new equipment through internal funding and of insufficient profit generation to attract external funding from other market sources." (66)

As summed up by ICAO Special Air Transport Conference of 1977, these difficulties or problems "derive largely from the fact that, as conditions have developed, scheduled and non-scheduled (in particular so-called programmed charter) operations, which are governed by entirely different systems, compete in the international market under conditions which make it difficult to achieve the objective of ensuring that "international scheduled and non-scheduled operations together satisfy the needs of the public in a manner that permits the efficient and economical operation of both categories of service." (67)

The different systems mentioned by the Conference are, on the one hand, scheduled services operating generally under the regime of bilateralism, that is to say, since the Chicago Convention failed to

secure multilateral exchange of commercial rights between its parties, it was left to individual States, according to Article 6, to negotiate and reach bilateral arrangements on the commercial rights and control of operations of scheduled services. These arrangements may embrace access to the market, capacity and price control as well (68). On the other hand, non-scheduled services, by virtue of Article 5 are subject generally to unilateral regulations. Every nation regulates the operation of its non-scheduled services and those of other Contracting States within its territory according to the requirements of their national interests. This situation caused further problems.

First, under the terms of bilaterals, capacity for scheduled services is usually predetermined or postviewed and prices are generally developed through the conference system and subject to rigid government control, whereas capacity for programmed charters is often uncontrolled or, in some instances is unilaterally restricted by the receiving State, and charter prices are mostly free of government interference and where controlled, are controlled unilaterally (69). This added to the favourable position of the so-called "programmed" or "schedulized" charters in their competition with scheduled services and, consequently, impaired considerably the viability of the latter category. However, it did not seem that this situation had lasted so long, and, as scheduled services introduced more innovative promotional fares, the proportion of international passenger traffic carried on non-scheduled services, including those operated by scheduled carriers, declined considerably over the last decade. While the proportion reached about 32.2 per cent of the total international passenger traffic in 1971, it continued to decline to 30.9, 29.7, 27.2, 26.0, 24.9, 24.5, 22.0, 19.9, and 17.6 per cent in the years

1972, 73, 74, 75, 76, 77, 78, 79, and 80 respectively (70). This latter development in addition to the unfavourable economic climate and increased charter rates, necessitated by higher operating costs, especially fuel costs, led a large number of non-scheduled operators to either cease operations or experience severe financial difficulties in 1980 (71). The war of competition is still going on. For example, Air Canada and British Airways have announced a 459 Canadian dollars round trip from Montreal or Toronto to London or other European cities. This new fare, which will be applied between October 1, 1981, and February 28, 1982, represents a cut of more than 200 dollars from the lowest transatlantic fare now in force (72). This fare came as a result of the fares war between Wardair and Air Canada over the Florida and Caribbean market, which has been extended to the North Atlantic market (73).

Second, as regards to different national regulations of non-scheduled services, the lack of international harmonization contributed to widespread malpractice, made enforcement difficult, and might have hampered, in many cases, the development of non-scheduled services on some routes or in certain areas (74). For example, deferences between States exist as to the adoption of country of origin or destination rules, charterworthiness rules, practices of admission procedures, etc., the thing that made it difficult for charter operators to comply with all of their requirements and conditions (75).

What actions have been taken by States in their reaction to these difficulties and problems will be discussed in the following pages.

States' Practices in Their Attempts to Solve These Problems

In order to ensure that non-scheduled services do not impair the viability of scheduled services, regulate competition between non-scheduled carriers, and protect other national interests in air transport, States may impose various restrictions and controls upon non-scheduled operations. These restrictions and controls may be grouped into three categories:

(1) Restrictions on market access through definitions and charterworthiness rules in addition to geographical and route restrcitions;
(2) Capacity control;
(3) Price control.

Restrictions on the Market Access

States may restrict the access to the market by simply not permitting some types of charters, e.g., advance booking charters. Or, in other words, they may define specifically the types of charters which may be operated to their territories. Alternatively, they may subject charters authorized or particular type thereof to some rules which effectively limit their or its use. Restrcitions may also be geographical in nature, like permitting certain types of charters to operate within particular areas and to or between some areas. Charter services may be authorized on some particular route groups and restricted or prohibited on others. This is generally achieved through charter definitions and charterworthiness.

This method was followed by the European Civil Aviation Conference (ECAC) in the Multilateral Agreement on commercial rights of non-scheduled services in Europe of 1956, in the Annex to the ECAC Memorandum of Understanding on North Atlantic charters of 1975, and,

from time to time, in the various ECAC recommendations (76). Likewise, the same methods were adopted by the Arab Civil Aviation Council (ACAC) (77), and the African Civil Aviation Commission (AFCAC) (78). Other States as well adopted similar methods like the United States, Canada, Japan, and the South American States (79).

Capacity Control

Many States apply some form of control over capacity of all or some non-scheduled services. The form of control imposed may be absolute quotas, a relationship to scheduled traffic, a directional balance of third and fourth freedom, and varying treatment of fifth freedom traffic. For example, Japan and Australia enforce absolute quotas (80). Some ECAC Member States limit transatlantic inclusive tour charter flights to 5 per cent of the total number of scheduled flights operated between the countries concerned during the previous year (81). The United States has been known to traditionally adopt the policy of controlling the directional balance of traffic through establishing a relationship between the volume of third and fourth freedom traffic (uplift ratio principle) (82).

Price Control

Two basic methods are used by States in their control of the price of non-scheduled services. First, prices may be fixed by relationships to IATA tariffs, or, second they may be determined by reference to a minimum charter price based upon the estimated cost of service. In the latter category a distinction may be made between the wholesale price, that is to say, the price paid by the operator and the retail price which means the price paid by the passenger.

However, price control is usually applied to inclusive tour charters and advanced booking charters only. States that have not adopted particular price control, nevertheless exercise general surveillance over charter prices on an ad hoc basis (83). As an example of price control, ECAC resolutions call for the minimum price of the North Atlantic inclusive tour charter to be not less than 110 per cent of the appropriate mid-week IATA group inclusive tour basing fare with varying additions to cover accomodation costs for tours lasting more than seven nights (84). Canada and the United States apply the same method for all inclusive tour charters but it is based upon the lowest applicable promotional fare (85).

ICAO WORKS

ICAO Special Air Transport Conference

While the multilateral regulatory framework, which had been developed by States through International Civil Aviation Organization (ICAO) since 1944, has been dealing only with technical problems of international civil aviation, the multilateral approach proved more difficult in the commercial field and was almost completely abandoned after 1947 (86).

However, as international civil aviation developed, and many new problems in the commercial and economic field of international air transportation emerged like, inter alia, the severe competition between scheduled and non-scheduled services and its deteriorating effects on the viability of international air transport as discussed above, States, through ICAO, convened at Montreal in a Special Air

Transport Conference, from April 13 to 26, 1977, to study some of the emerging problems relating to the tariff enforcement, policy concerning international non-scheduled air transport, regulation of capacity in international air transport services, and machinery for the establishment of international air transport fares and rates (87).

Policy Concerning International Non-scheduled Air Transport

Under this Agenda Item the Conference identified the basic problem as being, as mentioned above, the competition between scheduled and non-scheduled services, especially the so-called "programmed" or "schedulized" charters, in the same market which deteriorated, as a result the viability of international air transport, and realized that the final objective is to ensure that both categories satisfy the needs of the public in a manner that permits their efficient and economical operations (88). To achieve this final objective, the Conference recommended that the Council undertake studies aimed at:

> "(a) establishing a definition or guidelines which characterize international non-scheduled air transport operations and distinguish these from scheduled operations;
> (b) establishing guidelines for the world aeronautical community in the regulation of international non-scheduled air transport; and
> (c) establishing policy in the field of international non-scheduled air transport giving consideration to important aspects such as capacity, tariffs and prices, variation in operational areas, travel organizers and control of services..." (89)

Furthermore, the Conference invited the Council to examine the feasibility of:

> "(a) amending Articles 5, 6 and 96 (a) of the Convention so as to reflect the regulatory provisions and principles governing both scheduled and non-scheduled air transport on the basis of the present and future characteristics and structure of the international air transport market; and
> (b) revising the Council's Definition of a Scheduled International Air Services." (90)

Regulation of Capacity in International Air Transport Services

Under this Agenda Item the Conference realized some of the related problems and the great majority was of the opinion that the regime for the regulation of international air transport capacity which had developed over the past years has become inadequate. Its inadequacy is apparent in the facts that, on many routes, capacity was not closely related to demand; that fair and equal opportunity for the carriers of the parties to an agreement did not seem to exist; and that the carrier of one party appeared to frequently ignore the interests of the carrier of the other party in addition to other problems, as discussed earlier, such as the excessive capacity associated with tariff violations (91). Thus, the Conference agreed that there was a need to reevaluate the principles on which regulation of scheduled services had in varying degrees been based since 1946 (92). However, the Conference generally recognized the necessity of having a regulatory system that covers, in this context, not only scheduled but also non-scheduled operations which are even less subject to consistent application of any internationally accepted rules (93).

In the light of the foregoing consideration the Conference agreed that an attempt should be made through ICAO to establish criteria as a basis for formulating alternative methods for the regulation of capacity on international scheduled and non-scheduled services and model clauses or guidelines for regulating capacity should be developed on the basis of the principle of prior determination and, if the Council saw fit, other principles (94). Accordingly, the Conference recommended that the Council undertake studies aimed at:

"(a) establishing criteria and using these to formulate alternative methods for regulating capacity on scheduled and non-scheduled international air transport services; and

(b) developing a model clause (or clauses) or guidelines for regulating capacity on the basis of prior determination for consideration, along with other clauses or guidelines, by Contracting States." (95)

ICAO Second Air Transport Conference

ICAO Assembly had approved the abovementioned recommendation with respect to policy concerning international non-scheduled air transport and regulation of capacity in international air transport services in its Resolution A22-23 and, in its Resolution A22-26, urged that action on them be treated as a matter of priority (96). A Panel of Experts was established by the Air Transport Committee to carry out these recommendations (97). On the basis of the recommendations, the Panel arranged its work in five stages and has completed the first three thereof. The first stage related to the problem of the distinction of non-scheduled from scheduled operations which has previously been discussed in full detail (98).

ICAO Second Air Transport Conference, which was held at Montreal, from February 12-28, 1980 (99), discussed and considered fully the results arrived at by the Panel of Experts on the second and third stages of its work relating to criteria and methods for regulating capacity and developing model clauses for regulating capacity respectively.

The Conference agreed with the Panel on the objectives to be sought through a system of capacity regulation. One of these objectives was "the harmonization of regulation of scheduled and non-scheduled operations in the same market." (100) Then the Conference approved the criteria for regulating capacity established by the Panel among which was "the need to harmonize the provision of non-

scheduled and scheduled capacity in relation to total demand." (101) The Conference also approved the guidelines developed by the Panel for the predetermination of capacity method (102) in order to facilitate the drafting of a model clause along the lines of this method on the basis of the approved criteria mentioned above (103). The two guidelines relating to the criterion quoted above read:

> (1) "When certain services, particularly, so-called 'programmed' or 'schedulized' charters, are classified as scheduled by both contracting parties, special measures may be necessary to designate the carriers and routes involved so that the capacity they offer may be regulated together with other scheduled capacity."
> (2) "In order to have the necessary information for harmonizing capacity, States may agree to exchange any data that may be useful on the level of capacity offered by non-scheduled services." (104)

After further discussion on the model capacity clause (predetermination method) proposed by the Panel, the Conference agreed on a text thereof that meets the approved objectives and criteria, and recommended that this clause "together with the criteria and guidelines for the predetermination method of capacity regulation, be transmitted to Contracting States for their consideration." (105)

The Establishment of International Non-scheduled Air Transport Fares and Rates and Their Harmonization With Scheduled Tariffs

The Special Air Transport Conference, mentioned earlier, discussed this subject on the basis of the Report of the First Meeting of the Panel of Experts on the Machinery for the Establishment of International Fares and Rates. The discussion covered the following subjects: multilateral mechanisms for the negotiation of fares and rates; governments' role in the development of fares; practices in the submission of and action on fare proposals; principles relating to

determination of fares; and supporting work by the ICAO Secretariat (106). The Conference concluded its discussion on these subjects with various recommendations. One of these recommendations encouraged the establishment of regular discussions between scheduled and non-scheduled carriers, whether members of IATA or not, for co-ordinating tariff policies (107). In another recommendation the Conference urged the Council to conduct a joint study by legal, economic and technical experts, according to Article 55 (c) of the Chicago Convention of 1944 (108), on the necessity or not of establishing a new intergovernmental machinery for the establishment of fares and rates, without excluding the convenience of maintaining the existing machinery, if the study justified that. The Council was requested to report the results to the Assembly or to a Diplomatic Conference as it thinks fit (109).

In the Second Air Transport Conference of 1980, international air transport fares and rates were discussed again on the basis of the results of the Special Air Transport Conference of 1977, the work of the Fares and Rates Panel since that Conference, and the recent developments in national policies and in the negotiating mechanisms of air carriers (110). A worldwide survey had been carried out on the policies and practices with regard to the establishment of non-scheduled passenger tariffs which covered the role of travel organizer, air carriers and governments in the establishment of tariffs in addition to policies and practices with respect to the filing, control, and surveillance of tariffs for each of the following five types of charter traffic: 1) Affinity Group; 2) Non-Affinity Group (e.g. advanced booking charters); 3) Inclusive Tour; 4) Own-Use (Single

Entity); and 5) Others (e.g. student or special event charters) (111). The Conference agreed with the Panel that recommendations on non-scheduled passenger tariffs should be regarded as applying primarily to the first three types of charter without, however, precluding the possibility of their applicability to other types (112). The Conference arrived at some recommendations including one which called upon States to consult with carriers and each other with a view to adopting procedures for joint regulation of non-scheduled tariffs by a group of governments or by the traffic origin and destination governments wherever actual or potential market volumes so warrant (113); second emphasized the desirability of harmonizing the diverse means by which scheduled and non-scheduled airlines set their tariffs and that States adopt, wherever possible, the Standard Bilateral Tariff Clause prepared pursuant to Assembly Resolution A21-27 since it takes into consideration the relevant Special Air Transport Conference recommendations as approved by the Assembly Resolutions A22-22 and A22-23, for both scheduled and non-scheduled operations (114); and third called upon States, bearing in mind the overall interests of passengers, to maintain an appropriate balance between the passenger tariffs available on scheduled and non-scheduled services and, consistent with this balance and those interests, impose the minimum necessary restraint on non-scheduled tariffs (115). Other recommendations aimed generally at achieving more cooperation, coordination and facilitating the operation of non-scheduled services with respect to tariff setting and enforcement as well as the establishment of scheduled and non-scheduled freight rates (116).

Continuation of ICAO Works

As mentioned earlier, the Panel of Experts on Regulation of Air Transport Services has completed its work on the first three stages; therefore, there are two more stages pending consideration by the Panel; one concerning the regulations of non-scheduled air transport and the second relating to the feasibility of amending Articles 5, 6 and 96 (a) of the Chicago Convention of 1944 (117). There is also the possibility that the Panel might need to supplement its work on the first stage (the distinction between scheduled and non-scheduled) since the Conference agreed thereon but, however, without reviewing the guidelines adopted by the Conference (118). Furthermore, the Conference recommended that, since a model clause on predetermination of capacity method has been worked out as mentioned earlier, the model clauses for the Bermuda I type and the free-determination methods of capacity regulation prepared by the Panel be referred back to the same body for analysis of the relationship between these methods and the objectives and criteria approved by the Conference (119). Finally, the Conference recommended that the Council examine the possibility of convening another Air Transport Conference at the appropriate time, in the light of progress made on the implementation of the recommendations of the Conference and of any significant changes which may have occurred in the international air transport field (120).

The Panel of Experts on Regulation of Air Transport Services held its fourth meeting at Montreal, December 8-19, 1980 (121), and developed guidelines for regulating capacity according to Bermuda I and free-determination methods (122), and it is only the Fares and Rates Panel that was scheduled to hold its fifth meeting in 1981, at Montreal, from October 13 to 23 (123).

SOME COMMENTATORS' VIEWS ON HOW THE PROBLEM OF INTERNATIONAL SCHEDULED AND NON-SCHEDULED AIR TRANSPORT SERVICES MAY BE SOLVED

Only the most important suggested solutions advanced by some distinguished commentators that, in our view, are still valid with respect to current circumstances of international air transport which might be further explored in the search for a solution to the present problems, will be outlined in general terms in the following pages.

The Edward's Report

The Committee of Inquiry into Civil Air Transport in its Report on British Air Transport in the Seventies (124) was of the view that ICAO's definition of a scheduled service of 1952 omitted, in its distinguishing between different types of airline operations, the vital characteristic that may be likened to the notion of a common carrier obligation to provide regular, continuous and reasonably available capacity for all who want that service. The demand for this service (scheduled) is "collective" in the sense 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." (125) The other types of operations are best distinguished, "not by reference to the regularity of flights operated, but by the lesser degree of the obligations of their operators." (126) This lesser degree of obligation reflects the differences in public demand for different kinds of air service (127). This means that in addition to the demand for scheduled services, that is the collective demand for continuously available service, there are large areas of demand in which continuous availability is of little consequence and the primary concern of the customer is to secure the cheapest possible price for a particular flight. In order to achieve

this end the customer is willing to adapt his own requirements, to some extent, to the requirements of other people if this guarantees a lower operating cost, partly through a better load factor, and hence a lower price for the individual seat (128).

It is the obligation of public service, which means that scheduled services can never be operated at a very high load factor, in addition to the vulnerability of scheduled services to ad hoc competition which has led to the view that the obligations of public service should be matched by some degree of protection for the scheduled operator. How far this protection should extend is the crucial question of the air transport policy (129).

The air transport market is characterized by its changing nature which appears to lie in the relative weights of the collective public demand for "common carriage" scheduled services and the other types of demand for cheap whole-aircraft-load travel (130). Thus, the task of air transport regulators is very difficult. While they should continue to afford the operators of shceduled air services an appropriate degree of protection to allow them to continue to carry out the obligations imposed on them, they must, at the same time, ensure that restictions imposed on the operation of whole-aircraft-load services of various kinds be kept to a minimum (131). However, because of the fact that undue protection of shceduled services in the changing pattern of air transport demand would, almost certainly, inhibit the development of air traffic, and since circumstances change from route to route and from time to time, it is desirable to have a regulatory authority that can keep the traffic requirements of all areas constantly under review and modify the degree of protection accorded to scheduled services in correspondence to the changing

circumstances of the market (132). In some instances it may be best to have specialist types of airlines to perform the different types of services, but there is no inherent reason why an airline which operates scheduled services should not also operate whole-aircraft-load services (133).

The Committee summarized its conclusions with respect to the problem of scheduled and non-scheduled services, on the basis of the discussions above, as follows:

> "(1) The definitions of scheduled and non-scheduled services adopted in international aviation since the Chicago Convention have outlived their usefulness.
> (2) An important distinction does, however, still exist between scheduled services and other services; the distinction resting upon the 'collective' nature of the demand for the first type of service and the obligations placed upon scheduled operators to provide continuously available service.
> (3) On routes where the preservation of scheduled serviecs is clearly of importance to 'collective' public demand, scheduled operations should be protected, to the extent necessary, from inclusive tour and other charter operations.
> (4) On routes of which the case for preserving scheduled services is less compelling, greater freedom from regulation should be permitted for the development of other services of all kinds." (134)

Dr. H.A. Wassenbergh

Dr. H.A. Wassenbergh is of the view that the problem lies in the fact that governments, in practice, want, but do not know how to divide traffic, and at what tariffs, between charter and scheduled services and carriers, and between their own national and foreign carriers (135). The obvious distinction is between group travel on the one hand and individual travel on the other (136). However, a group is easily formed by, for example, a consolidator, a travel agent, tour operator, or chartering organization through holding out air transportation to the general public, or solicitation of the gen-

eral public, which amounts to the offer of individual transportation. Thus, to separate charter service from regular service should not be directed at finding a definition of charterworthy traffic unless this is limited to own-use and closely defined bona fide prior-affinity and inclusive tour group charter traffic. This means that split-charter and non-affinity or advanced booking charter services cannot be properly and effectively distinguished, and, therefore, not be separated from regular services (137). In practice, any efforts to set group (charter) traffic apart from individually-ticketed (regular) traffic are not bound to succeed and, accordingly, a successful regulation to separate charter service from regular service should place the emphasis on entry and exit of carriers in a market and on the control of the fares and rates (138). He noted that two different approaches can be distinguished in this context,; first, confining the activities of charter carriers to closely defined charterworthy traffic (the qualitative approach), or second, confining these activities to a certain volume or geographically delimited part or segment of the market (quantitative approach). However, some States may wish to combine these approaches (139).

After discussing and commenting on some views (140) he concluded that the present problem is to find a solution to the unfair fare competition and restrict the number of carriers allowed to compete in the same market, and, bearing in mind that the distinction between charter and scheduled services has disappeared, the fact which is confirmed by replacing the affinity concept by non-affinity advanced booking concept, it appears that international civil aviation law should be adapted to the new situation (141). Along these

lines he suggested that:

(1) Scheduled services should include "programmed" inclusive tour, split-charter and non-affinity charter services.
(2) On the basis of traffic rights a valid distinction could be made, within scheduled services in the sense stated in (1) above, between non-commercial, semi-commercial and commercial operations. This distinction, however, could be further explored and elaborated for inclusion in the Chicago Convention of 1944.
(3) Non-commercial operations are those exercising only the first or second freedom of the air. Semi-commercial operations are those on which commercial traffic is carried making a stop in transit for a certain maximum period of time in the country concerned regardless of its origin or final destination. Commercial operations are those on which traffic is embarked for the first time or disembarked for a stop of a duration exceeding the maximum period specified for the semi-commercial operations in the country concerned.
(4) For non-commercial and semi-commercial operations a large measure of freedom could be granted. Bilateral agreements covering scheduled services should be amended to that effect and a balanced exchange of opportunities for the commercial landings in the operation of international scheduled and charter services could thereby be maintained without regard to the type of carrier designated to exercise the rights exchanged. For commercial operations traffic rights would be exchanged through bilateral negotiations and arrangements.
(5) The main instrument in this system would be bilateral agreements which cover scheduled and charter services. There is no need to specify in these agreements the routes or the frequencies allowed to be operated. Instead all operations could be made subject to thier economic viability on the basis of actual and anticipated traffic demands on the routes which the carriers choose to operate. The Bermuda I capacity clauses may still be applied to mitigate the competition between third and fourth freedom carriers and fifth freedom carriers on common route sectors. However, the definitions and conditions of group traffic to be carried on "charter" flights should be included in the provisions governing the approval of tariffs. These definitions and conditions, which will give justification of the fares and rates to be charged, should be agreed upon multilaterally, e.g., through carriers' negotiations, then be incorporated in bilateral agreements. Charter carriers should participate in the setting of tariffs and the establishment of the conditions of carriage for group (charter) traffic. The inter-carrier agreement on part-charters should be further explored. (142)

J.G. Thomka-Gazdik

After discussing some of the market devices and economic considerations he concluded that there are three alternatives available as a solution to the problem of international scheduled and non-scheduled air transport. These are (1) maintaining the status quo; (2) deregulating scheduled operations along the direction of charter regulation; and (3) bringing charter operations into a new system of agreed international controls (143).

First, should the present distinctions be left to stand? He answered this question by saying that carriers and governments realized that something is fundamentally wrong. The slackening in growth of demand, the amount of excess capacity, and the element of wasteful competition has put in jeopardy the regulatory assumptions and practices of the Chicago and Bermuda systems. Therefore, it is thought to be necessary that some structural changes should take place (144).

Second, deregulation of both scheduled and non-scheduled services is most unlikely to be considered by the majority of governments since this is what the Chicago and Bermuda systems were conceived to avoid. Especially less powerful aviation States will not allow their carefully built up flag routes and carriers to be crushed by the competition of carriers from large developed States, or to be sustained only by ever-increasing subsidies. Moreover, conservation of resources, wasteful competition, and the non-accessibility of privately owned carriers to public subsidy are considerations indicating that even the most developed States will not follow this direction (145).

Finally, there remains the possibility that charter operations can be brought into a new system of agreed international controls. If the distinction is to be eliminated, since there is no real difference between the so-called programmed charters and scheduled services,

it seems that the most attractive and easiest way of dealing with the total market would be to subject these charters to the same system of control as is applicable to scheduled services, that is to say bilateral agreements. In this context, non-scheduled carriers may be given the full scope of marketing devices open to scheduled carriers with, however, some restrictions. This solution, certainly, could run up against the protectionsists, but on the other hand, it is conceivable that it would permit elimination of many limitations and restrictions and provide carriers an equal opportunity in the marketplace, which in turn would, possibly, best serve the public interest (146).

Alternatively, governments may be wishing to keep the distinction between scheduled and charter services. Again it would be practical to make use of bilateral agreements to establish controls covering the following subjects: (1) the carriers which are permitted to operate; (2) the capacity that may be offered; (3) the area or areas which may be served; and (4) the fares and rates that may be charged and the conditions applicable to the sale of seats. After making some detailed suggestions which may be considered for inclusion in the bilaterl arrangements, he concluded with the acknowledgement tha the subject is a very complex one and while it may be easy to deal with it theoretically, it is very difficult to apply any results arrived at thereby (147).

Werner Guldimann

He is of the view that there are two basic problems. The first relates to the marketplace. It is the so-called programmed or schedulized charter operations which have acquired many of the characteristics of scheduled services. This problem has further been

complicated by the fact that national policies, positions, and regulations with respect to such charters differ significantly (148). The second relates to the choice of law. That is to say as a result of the differing national regulations conflicts of laws arise (14). This latter problem could be solved through substantive standardization between two or more States with similar basic philosophies and policies but it is not feasible, at present, to be solved multilaterally. Alternatively, it may be solved through standardization of the rules on the choice of law by adopting either the country of origin rule or the country of destination rule (150). However, he concluded that the present regulatory situation under Article 5 of the Chicago Convention is one of chaos and confusion and, in this respect, three main options for multilateral international action or inaction are open (151):

> (1) The first option is to do nothing. Let matters develop in their own way. Let national policy-makers bilaterally improve their respective positions and take their decisions according to the complete freedom as confirmed by ICAO Second Air Transport Conference and the short-term interests of their respective countries. While this way involves the least effort and resistance it will certainly not terminate the chaos (152).
> (2) The second option relates to programmed charter operations by realizing that there are three basic policy positions with respect thereto: free competition without substantial restrictions, free competition within well-defined user categories, and heavily restricted competition. First develop as much uniformity as possible within each of the three policy groups, for example, in the form of model clauses like what was done by ECAC and ICAO Air Transport Regulation Panels, and then try to work out rules for coordinating the model clauses developed for each group with those developed for the other two (153). There is the risk that these three positions may harden and crystallize and that it will, as a result, become more difficult later on to achieve overall uniformity (154).
> (3) The last option is to bridge the existing divergences through establishing a multilateral regulatory framework. This solution would have to be somewhere in between the two extreme positions, for example, near the ECAC framework which already has developed. However, under the present circumstances this solution is

very difficult to achieve. On the other hand, if the civil air transport falls into worldwide depression, all kinds of political pressures might develop and the chances for this option might dramatically improve (155).

Dr. Nicolas Matteesco Matte

After discussing the problems brought about by the developments taking place in the international air transport market since the Chicago Convention of 1944, he stated that three options, involving three different levels, are available to ICAO member States as a remedy (156). These options are: (1) on the regulatory level, to achieve a better coordinated system of capacity and price control with respect to scheduled and non-scheduled services leaving the distinction between them and their regulatory basis in the Chicago Convention unchanged; (2) on the level of definition, to modify the present distinction between both types of services, or introducing a new definition of non-scheduled services, leaving the regulatory regime and its basis in the Chiacago Convention unchanged; and (3) on the level of the regulatory basis in the Chicago Convention, to replace the dual-regulatory basis of Articles 5 and 6 of the Chicago Convention by new premises for the definition and regulatory problems involved (157).

However, his view is that the subject matter of the problems brought about by the developments of international air transport market may be characterized as a "special branch of 'international economic regulation'", since the economic aspects of the regulatory problems have emerged as the predominant ones, and, thus, as in other fields of economic regulation, the role of the law should be to provide a mere framework for the economic processes and adapt to their requirements instead of channelling or inhibiting them by rigid rules (158).

Accordingly, the economic reality of international air transport as well as the need for flexibility should constitute the basis on which the legal framework should be established (159).

At the drafting of the Chicago Convention two basic needs for international air transport existed:

> "(1) the need for regular and permanent services on certain predetermined routes, in accordance with a published timetable, open to any member of the public, and subject to 'common carrier' obligations of a public law nature; thus the need for a "public scheduled air service"; (2) the need for one time, low cost, non-scheduled transport on individually chosen routes, for certain kinds of passenger groups (or cargo), be it affinity groups, students, members of a chartering firm, pilgrims, etc., as well for taxi flights; thus, the need for a 'non-scheduled service'." (160)

Over the years, however, a major change has taken place, that is to say, a third basic need has emerged:

> "(3) the need for more or less regular and peramnent low cost services, on certain predetermined routes, in accordance with a timetable subject to change, open to any member of the public via a tour operator setting up planeload groups, not subject to 'common carrier' obligations but left to the initiative of the tour operator; thus, the need for a 'private scheduled air service'." (161)

The concept of the "private scheduled air service" corresponds to what has been termed as "schedulized" or "programmed" charters and to "public charter" concept introduced in the United States (162).

The predominant ratio legis of Article 6 of the Chicago Convention had been "to subject the economically relevant international air services to a close, mutual government control" (163), which resulted in developing a system of bilateral agreements, and since the economic significance of "private scheduled air services" becomes more and more comparable to that of "public scheduled services" it follows that the former services should come, in principle, under Article 6 of the Chicago Convention (164). However, the system of bilateral agree-

ments with its traditional regulatory tools should not be automatically applied to "private scheduled air services"; instead its contents should be adapted (165). Along these lines he has made some suggestions which may be adopted by States in their bilateral arrangements. such as controlling the entry by designating every carrier which is fit, willing and able to carry, no allocation of routes but general agreement on the areas which may be served, some form of capacity control closely coordinated with "public scheduled air services", no collective price control, fares being set by air carriers individually in cooperation with tour operators subject to the direct government control (166).

The adaptation could be effected either by "(1) reaching agreement on the uniform application of the respective clauses to 'private scheduled air services' on the bilateral level; or (2) amending the formal bilateral agreement; or (3) concluding a multilateral agreement on the regulation of 'private scheduled air services', setting out the regulatory regime for this type of service." (167) The last solution is preferable, especially, since its chances of success are better than they have ever been for "public scheduled air services", because there would be no difficulty of dealing with the fifth freedom rights which have been the main obstacle to concluding a multilateral agreement on the latter type, for "private scheduled air services" are exclusively, with rare exceptions, point-to-point services (168).

REGULATION OF INTERNATIONAL NON-SCHEDULED AIR TRANSPORT: A POSSIBLE COURSE

Pending the work of ICAO's Panel of Experts on Regulation of Air Transport Services upon stage 4 of the Panel's work programme relating to regulation of non-scheduled air transport as mentioned earlier, it seems relevant here to suggest, based upon the foregoing and other considerations and views, a possible course events may take in searching for a solution to the present problems caused by the developing and changing circumstances of international air transport.

Regarding the nature of the substance of this possible regime there are three basic theories of policies, each struggling to secure for itself the best possible position in international air transportation arena. These theories range from the most restrictive to the most liberal attitudes towards how international air transport should be regulated in order to achieve what States consider to be their mutual and divergent interests. These theories are based on three concepts: (1) deregulation of international air transport; (2) protection of national carriers (mainly scheduled carriers) and other national interests through imposing every possible restriction which might be considered to achieve this end; and (3) the concept which represetns the middle way between the foregoing two extremes. That is to say the regulated competition or the gradual and cautious liberalization to the extent it serves the public interests (consumers' needs, carriers' economic viability, and other national interests).

Deregulation or Liberalization of International Air Transport

The United States is the champion of this policy. Drawing

upon its domestic experience in deregulating its domestic air transportation it tried to pursue the same policy in its bilateral negotiations and arrangements with other countries. The United States' policy in this context was made more specific in the International Air Transportation Competition Act of 1979, which was signed into law by President Carter on February 15, 1980 (169). This Act, which was modeled after the domestic Airline Deregulation Act of 1978 (170), stated that the following, among other things, would be considered as being in the public interest and in accordance with the public convenience and necessity:

> (1) "...the placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital, taking account, nevertheless, of material differences, if any, which may exist between interstate and overseas air transportation, on the one hand, and foreign air transportation, on the other." (171)
> (2) "...the encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality and price of air transportation services." (172)

This Act set out the goals for the United States international aviation negotiating policy to be developed by the Secretary of State, the Secretary of Transportation, and the Civil Aeronautics Board which emphasizes the greatest degree of competition. These goals include, among other things:

> (1) The freedom for United States as well as foreign carriers to offer fares and rates which correspond with consumer demands;
> (2) The fewest possible restrictions on non-scheduled air transportation;
> (3) The maximum degree of multiple and permissive international authorization for the United States air carriers in order to be able to respond quickly to shifts in market demand;
> (4) The elimination, to the greatest extent possible, of operational and marketing restrictions; and

(5) The opportunity for foreign carriers to increase their access to the United States points if exchanged for benefits of similar magnitude for the United States' carriers or the travelling public with permanent linkage between rights granted and rights given away. (173)

However, the United States has been trying to execute this new international policy with its most obvious features of free entry and exit, multidesignation, extended fare freedom, and no capacity constraints (174) since 1978 when the first step in this direction came with the conclusion of a bilateral agreement with the Netherlands (175). In the same year President Carter issued a Statement on International Air Transportation Policy which affirmed, among other things, the principles of price competition and multiple entry as goals of United States international aviation relationships with other nations (176). Negotiations started with many countries and agreements were reached with some of them, e.g., Belgium, Singapore, Thailand, etc., through which a considerable progress has been made along the lines of this new policy (177). This limited success may be attributed, to some extent, to the fact that, generally, greater access to the United States market for foreign carriers, e.g., more gateways, greater frequency of operation, has been traded for greater freedom of operation for the United States carriers in the provision of capacity, routing and lower fares in accordance with the new policy goals (178).

Protectionism or Restrictionism

The new United States policy discussed above may not be accepted by the majority of nations for various reasons including:

(1) There are many governments which are committed to planned economy and, therefore, wish their international aviation services be developed in coordination with

other planned growth in service sectors and infrastructures. Accordingly, regulatory controls are essential as an element of basic national economic policy and the deregulation concept is philosophically unacceptable. (179)

(2) There are nations which are committed to the existence of their national carriers with the intent to use them for their economic development. These nations may be unwilling to risk their carriers by subjecting them to disciplines of the free market in which the inefficient must go the the wall no matter how their social role may be important, particularly, if these nations lack the means to provide direct subsidies and considered it fairer to sustain their carriers on a reasonable share of international revenues provided by relatively wealthy passengers. Moreover, these nations may not be prepared to see their national carriers merge with other carriers of other nations. (180)

(3) There are nations which consider that their vital communications and security interests require a broad international network of direct flag services, many of them between points where demand may be relatively limited. These nations may not, therefore, be able to rely on free market forces and will view intense competitive pressure on their carriers' prime routes as a limitation on their national interest. (181)

(4) It is almost impossible for most carriers of the third world to adopt the policy of deregulation since they are mostly operating on thin markets, are often high-cost operators (182), lack access to capital markets, to new technology, and to management skills, and particularly they will not be able to acquire the latest and most cost efficient equipment, a fact that would place them at a disadvantage in conditions of unreasonable competition. For these nations the political facts may be added to the foregoing purely commercial considerations. (183)

For these reasons a great number of nations will continue to stick to their protectionist or restrictionist attitudes. They will continue to protect their national carriers, mainly scheduled, State owned or subsidized, and other national interests of purely economic or political nature.

Regulated Competition or Gradual and Cautious Liberalization

Nations following this policy are of the view that while modernization is necessary to improve the results of the system such

modernization should be achieved through gradual evolution of the present regime rather than its replacement by a new order (184). This policy tends to constitute ad hoc responses to particular market situations, assume that ways be found for scheduled carriers to serve the price-sensitive market profitability, and, generally, aim at preserving or reinforcing the competitive situation of the national carriers (185). Whereas this policy, like the United States deregulation, put more emphasis on airline competition and cost-related fares, it differs in the means adopted to achieve that, for example, the tendency to limit the new promotional fares to third and fourth freedom carriers, market by market pricing, economics of through-flight service, and capacity limitations (186). In short, this policy adopts a regulated competition and is selective in its emphasizing the extent to which reliance upon free-market forces or protectionist means may be effected in order to achieve its goals, including the economic and political national interests with respect to each single situation comprising particular route or routes and particular area or areas.

Other Contributing Factual Factors

There are two factors each of which will play its role in the search for a solution to the present problems of international air transport:

> (1) It is not only the availability of cheaper fares and rates, satisfaction of different public needs and demands for varying types of air transportation, and the viability of air carriers, scheduled and non-scheduled, to operate economically, efficiently and with reliability that determines the international air transport policy for each nation, but there are, in addition to the foregoing elements other considerations relating, for

example, to national defense needs, national needs for the flow of international airmail, national requirement for communications to facilitate international commerce, safety implications, tourism and the balance of payments potentials, aerospace and industrial development, employment and environmental and energy implications (187). Each nation has its own priorities and its own interests in weighing some or all of these considerations when formulating the objectives and means of their international air transport policy. (188)

(2) The economic environment in which carriers were operating in the sixties and at the beginning of the seventies has changed considerably to the disadvantage of the carriers' management (189). For example, energy has become scarce and expensive (190). At present, fuel costs represent about 30 per cent of international carriers' direct operational cost (191). This increase together with other costs for labour and other government related charges for airport and navigation facilities, all of them are outside carriers' control, account for about as much as 70 per cent of the carriers' expenditure (192). Other external problems include the inflation rate with its effects of skyrocketing input costs and and an increasingly higher proportion of variable costs in direct operational costs (193) in addition to airport and airways congestion (194).

The Means or Methods by Which This Possible Course may be Approached

Two main groups are easily recognized within "non-scheduled" category of international air transport services. The first group includes those traditional or classical types of non-scheduled services which caused no problems to scheduled services since they are restrictied to bona fide prior affinity groups, own-use, and other special groups such as students, special events passengers, and all-cargo flights that are easily distinguishable from the general public (195). The second group comprises the so-called programmed or schedulized charters. It mainly includes advance booking, inclusive tour, and public charters (196). There is a general agreement that it is this group of non-scheduled services which caused the confusion in the present regulatory regime and other problems in international air transport since they have acquired most of the basic characteris-

tics of scheduled services without assuming their responsibilities to provide services under the common carrier obligations as discussed earlier.

1) As to the first group of "non-scheduled" services, which are largely recognized by most nations and regional bodies (197), there is a very good chance to reach an agreement between nations on their regulation on a global basis within ICAO efforts still going on. This agreement, following the example set out by the Multilateral Agreement on Commercial Rights of Non-scheduled Air Services in Europe of 1956, should be based on Article 5 of the Chicago Convention of 1944, and greater freedom should be accorded to these services through removing any restrictions that may be imposed under "regulations, conditions, or limitations" by States according to provisions of Article 5. It is unlikely that problems of the differing policies of nations, deregulation, regulated competition, and restrictionism will be raised in this context since these services cause no harm to scheduled services which are still regarded by most States as a very important element of international air transport. However, if reaching this agreement proved to be facing some difficulties, at least harmonization and liberalization of regulations governing these services may, to a large extent, be achieved by building world-wide consensus in the form of model clauses and guidelines for the guidance of governments and regional bodies.

2) With respect to the second group of non-scheduled services, the so-called programmed or schedulized charters, there is first the problem of determining their nature and whether they should be classified scheduled or remain under the category of non-scheduled services. As discussed and concluded earlier, ICAO efforts regarding this problem

brought, in practical terms, nothing new since States retained their freedom, which they already had, to classify these services as scheduled or non-scheduled according, of course, to their national interests in the first instance. Accordingly, in the present writer's view, a solution to this problem should still be worked out since this is a prerequisite for any further meaningful efforts to find a solution to the rest of the problems. In this respect the suggestion made by Dr. Nicolas Mateesco Matte that these services be classified as "private scheduled air services" in contrast to traditional scheduled services to be classified "public scheduled air services" has a strong appeal and should be explored further (198). First, by adopting this suggestion traditional scheduled services and the so-called programmed or schedulized charters will be brought under the same regime and regulated, generally, by the principles and rules governing scheduled services, the thing which seems to be quite in line with the majority of views expressed in both ICAO's two Special Air Transport Conferences held in 1977 and 1980. Second, thus, many of the problems brought about by the lack of harmonization between rules governing scheduled services and those applicable to programmed or schedulized charters will disappear. Third, this suggestion still retains the basic difference between traditional scheduled services and programmed or schedulized charters, that is the common carrier obligation assumed by scheduled services to provide continuously regular services without regard to the plane-load factor and whether the route or routes operated are economically viable or not as long as the public interest demands that. This difference should be reflected in that the "private scheduled services" should not be entirely governed by

the same rules governing "public scheduled services", but some special rules should be allowed for each type within the whole framework governing international scheduled air transport (199).

If this suggestion was accepted the next question is how it might be implemented. A comprehensive multilateral approach on global terms seems, bearing in mind today's realities, impossible in the foreseeable future (200). So, recourse to the bilateral approach is a compelling fact. However, in order to achieve as much harmonization and coordination as possible, the efforts going on within regional bodies (201) as well as ICAO (202) must continue to build, through recommendations, model clauses and guidelines, consensus on the regional level, between two or more regions, and on the global level (203). As to the substantive content of these bilateral agreements it seems that the United States in the first place adopted and supports the concept of deregulation while ECAC Member States generally lean towards regulated competition and gradual cautious liberalization. Most of the third world States or developing countries generally favour protectionist or restrictionist concepts. However, it will be left to bilateral negotiations and to the efforts of regional organizations as well as to ICAO to build as much as possible regional consensus and at least some global understanding on some aspects which might be found to serve mutual interests. The time alone will determine whether one of these policy trends is to predominate over the world or if coexistence between two or the three theories is inevitable.

Amending Articles 5, 6 and 96 (a) of the Chicago Convention

It is too early to say whether Articles 5, 6 and 96 (a) of the Chicago Convention should be amended or not, since this will depend

on the course to be taken by States towards ICAO's Second Air Transport Conference of 1980 Recommendations and, most importantly, on the pending work of ICAO's Panel of Experts on Regulation of Air Transport Services upon fourth and fifth stages mentioned earlier, in addition to States' reactions thereto. For example, if the foregoing proposal, which was based on Dr. Matte's suggestion, had found the necessary support among the majority of Contracting States, then it might be appropriate that:

(1) Article 5 be amended to the effect that no restrictions may be imposed on traditional non-scheduled services except with prior notification for, e.g., air traffic control, customs, and immigration purposes;
(2) Articles 6 and 96 (a) be amended to include "private scheduled services" and "public scheduled services" within the meaning of "scheduled services" contained in the provisions thereof.

FINAL CONCLUSIONS

(1) Events of the First World established and the Paris Convention of 1919 confirmed the principle of a State's sovereignty over the airspace above its territory. This principle was reiterated in Madrid's Convention of 1926, the Havana Convention of 1928, and the Chicago Convention of 1944 in addition to many national laws and some bilateral agreements; thus, it became a well established principle of the contemporary international law.

(2) While this principle was primarily established for security reasons, States found in it the best means to protect their other interests including economical and political ones. Since national interests in the international air transport differ considerably in correspondence with other differing national economical and political interests, the attempts made in the Paris Conference of 1919, the Madrid Conference of 1926, the Havana Conference of 1928, and the Chicago Conference of 1944 generally failed to secure a multilateral agreement on the economic regulation of international scheduled air transport; therefore, it was left to bilateral negotiations, arrangements, and agreements to exchange traffic as well as commercial rights for scheduled services between any given two nations.

(3) However, Article 5 of the Chicago Convention granted a realtively more flexible position to non-scheduled services since they were not regarded as important as scheduled services though in practice States availed themselves of the provision "regulations, conditions, or limitations" contained in the last part of the Article and made the whole Article almost unoperative.

(4) The Chicago Convention, while it made a distinction between

international scheduled and non-scheduled services according to Articles 5 and 6, it had not defined the terms "scheduled" and "non-scheduled". ICAO Council, in 1952, circulated, for the guidance of Contracting States, its definition of international scheduled service and its interpretation of Article 5.

(5) Traditional or classical types of non-scheduled services, including own-use, bona fide prior affinity group, student and special event charters fit in easily under the category of non-scheduled services according to ICAO Council's definition of 1952 and caused no harm or problems to scheduled services.

(6) As the marketplace developed, new types of non-scheduled services emerged, including inclusive tour, advance booking, and public charters. On the one hand, it was difficult to classify these services as scheduled or non-scheduled, and, on the other hand, their competition with scheduled services with its deteriorating effects (excessive capacity, fares and rates war, waste of resources, and bad financial results) affected the viability of international air transport.

(7) Attempts to find a solution through ICAO (Special Air Transport Conference of 1977 and the Second Air Transport Conference of 1980) seemed to have failed to get the appropriate answer on the level of distinction since the matter was left to the discretion of States to classify the so-called programmed or schedulized charters as scheduled or non-scheduled. On the regulatory level, it remains to be seen what results the ICAO Panel of Experts, on Regulation of Air Transport Services, will arrive at and how States will respond thereto.

(8) As a possible course events may take in the search for an appropriate solution, Dr. Matte's suggestion that the so-called programmed or schedulized charter be classified as "private scheduled services" and be brought under the same regime governing traditional scheduled services to be classified "public scheduled services" has a strong appeal and should be explored further since it seems to be in line with the majority of views expressed in both ICAO's Special Air Transport Conference of 1977 and Second Air Transport Conference of 1980 as well as it will resolve many of the present problems caused by the development of new concepts of charter services.

(9) It is too early to say whether Articles 5 and 6 of the Chicago Convention should be amended or not since this will depend largely on the results that may be reached by ICAO's Panel of Experts on Regulation of Air Transport Services in its work upon the fourth and fifth stages in addition to the States' reactions to these results. However, if, for example, the proposal mentioned in (8) above found the necessary acceptance by the majority of States, it may be appropriate to amend Article 5 so as to secure more freedom for traditional non-scheduled services, and Article 6 to include both "private scheduled services" and "public scheduled services" within the meaning of international scheduled services. Article 96 (a) should then be amended accordingly.

FOOTNOTES

(1) Through international global and regional organizations and trade associations.

(2) ICAO, First Assembly, Commission No. 3, Discussions, Vol. 3, "Distinction between Scheduled and Non-scheduled Operations in International Civil Air Transport", ICAO Doc. 4522, AL-EC/74 (1947), p. 15.

(3) Daniel Goedhuis, "Questions of Public International Air Law", Recueil Des Cours, Vol. 81 (1952), p. 201, at pp. 256-257.

(4) Ibid., p. 257.

(5) Discussed in the second chapter.

(6) See, e.g., Dr. W. Guldiman, Work Programme of the Panel; Working Paper presented to the ICAO Panel of Experts on Regulation of Air Transport Services (Second Meeting, Montreal, April 2-12, 1979), ICAO, ATRP/2-WP/7 (21/2/79), p. 2. See also his Article entitled: "The Distinction between Scheduled and Non-scheduled Air Services", Annals of Air and Space Law, Vol. 4 (I.C.A.S.L., McGill University, 1979), p. 135, at p. 143.

(7) ICAO Panel of Experts on Regulation of Air Transport Services, Examination of the Subject of Subjects Selected for Initial Consideration, Working Paper presented by the Secretary, ICAO, ATRP/1-WP/6 (12/7/78), p. 2.

(8) Ibid., see also Third Chapter.

(9) Discussed in the Third Chapter.

(10) Which include generally ITCs, ABCs and Public Charters.

(11) ICAO Panel of Experts on Regulation of Air Transport Services, Report on the First Meeting (Montreal, July 17-28, 1978), ICAO ATRP/1-Report (1978), p. 10.

(12) ICAO Panel of Experts on Regulation of Air Transport Services, op. cit., note 7 above, p. 2.

(13) Ibid.

(14) ICAO Secretariat, Policy Concerning International Non-scheduled Air Transport, ICAO Circular 136-AT/42 (9177), pp. 6-7.

(15) ICAO Special Air Transport Conference (Montreal, April 13-26, 1977), Report, ICAO Doc. 9199, SATC (1977), pp. 9-12.

(16) ICAO, Panel of Experts on Regulation of Air Transport Services, Report of the First Meeting (Montreal, July 17-28, 1978), ICAO, ATRP/1-Report (1978), p. 5.

(17) Ibid.

(18) Ibid., p. 6.

(19) Ibid.

(20) ICAO, Panel of Experts on Regulation of Air Transport Services, Report of the Third Meeting (Montreal, October 15-26, 1979), ICAO, ATRP/3-Report (1979), pp. 3-4. N.B. that those ways were realized first by the Panel at its first meeting held between July 17 and 28, 1978 (see the Panel's Report on its first meeting, op. cit., note 16 above, pp. 6-7).

(21) See the Panel's Report on its first meeting, op. cit., note 16 above, p. 7.

(22) Ibid.

(23) Ibid., p. 8.

(24) Ibid.

(25) Ibid.

(26) See the Panel's Report on the third meeting, op. cit., note 20 above, p. 4; the Panel's Report on the first meeting, op. cit., note 16 above, pp. 7 and 9.

(27) See the Panel's Report on the first meeting, op. cit., note 16 above, p. 9.

(28) Ibid., p. 10; ICAO Panel of Experts on Regulati of Air Transport Services, Report of the Second Meeting (Montreal, April 2-12, 1979), ICAO, ATRP/2-Report (1979), p. 3.

(29) See the Panel's Report on its Second Meeting, op. cit., note 28 above, p. 3.

(30) See the Panel's Report on its Third Meeting, op. cit., note 20 above, p. 6.

(31) J.Z. Gertler, "Some Observations on the Revision of the 1952 ICAO Council Definition of 'scheduled services'", Working Paper presented to ICAO Panel of Experts on Regulation of Air Transport Services (Second Meeting, Montreal, April 2-12, 1979), ICAO, ATRP/2-WP/16 (4/4/79), p. 1.

(32) See the Panel's Report on the Second Meeting, op. cit., note 28 above, p. 4; the Panel's Report on the Third Meeting, op. cit., note 20 above, p. 7.

(33) Second Air Transport Conference (Montreal, February 12-28, 1980), Report, ICAO Doc. 9297, AT Conf/2 (1980), p. 7.

(34) Ibid., pp. 6-12.

(35) Ibid., pp. 8-9.

(36) The new number 6 was substituted for the old number 8 of this note (see ibid., pp. 10-11).

(37) Ibid., p. 11.

(38) Ibid., p. 6.

(39) See the Panel's Report on its Third Meeting, op. cit., note 20 above, p. 7.

(40) Ibid.

(41) ICAO Second Air Transport Conference (Montreal, February 12-28, 1980), Report, op. cit., note 33 above, p. 6; Ralph Azzie, "Second Special Air Transport Conference and Bilateral Air Transport Agreements", Annals of Air and Space Law, Vol. 5 (I.C.A.S.L., McGill University, Montreal, 1980), p. 3, at p. 5.

(42) See, e.g., Werner Guldimann, "Scheduled and Non-scheduled International Air Services, Confirmation or Elimination of the Distinction?", ITA Bulletin, No. 22 (June 9, 1980), p. 497, at p. 498.

(43) ICAO, Definition of a Scheduled International Air Service, ICAO Doc. 7278-C/841 (10/5/52), p. 1.

(44) Werner Guldimann, op. cit., note 42 above.

(45) ICAO Secretariat, Consideration Regarding Regulation of Non-scheduled Air Transport, Working Paper presented to the Panel of Experts on Regulation of Air Transport Services, Third Meeting (Montreal, October 15-26, 1979), ICAO, ATRP/3-WP/5 (3/10/79), p. 4.

(46) It is interesting to note that the Delegate of Switzerland suggested that the 1952 Council Definition might be made useful by further amending Note 6 (old 8) on its application so as to provide clearer guidance to States on the question of when to include "programmed" or "schedulized" charters under the category of scheduled services, but this proposal was withdrawn after some discussion. See ICAO Second Air Transport Conference (Montreal, February 12-28, 1980), Report, op. cit., note 33 above, p. 6; Werner Guldimann, "The Distinction between Scheduled and Non-scheduled Air Services", Annals of Air and Space Law, Vol 4 (I.C.A.S.L., McGill University, 1979), p. 135, at pp. 145-146.

(47) Ralph Azzie, op. cit., note 41 above, p. 6.

(48) Ibid., where the author further explained that "if it is established through this process that services contemplated for operation are not scheduled in the traditional sense but warrant reclassification as scheduled because of their characteristics, it would be up to the two parties to modify accordingly all pertinent provisions of the bilateral agreement be it by explicit changes in the text or by supplementing the agreement by an exchange of notes."

(49) See, e.g., Z. Joseph Gertler, "Order in the Air and the Problem of Real and False Options", Annals of Air and Space Law, Vol. 4 (I.C.A.S.L., McGill University, 1979), p. 93, at pp. 94-96 and 123.

(50) Werner Guldimann, op. cit., note 42 above, p. 499.

(51) ICAO Secretariat, Policy Concerning International Non-scheduled Air Transport, ICAO Circular 136-AT/42 (1977), pp. 15-16.

(52) Ibid., p. 16.

(53) Ibid.

(54) Ibid.

(55) Ibid. For more details on States' practices as to the distinction between scheduled and non-scheduled services see: Ibid., pp. 15-17, 30 and 36; ICAO Secretariat, Summary of Material Received from Panel Members Relating to the Distinction of Non-scheduled from Scheduled Operations, Working Paper presented to the Panel of Experts on Regulation of Air Transport Services (Second Meeting, Montreal, April 2-12, 1979), ICAO, ATRP/2-WP/2 (9/3/79).

(56) See ECAC, Information on ECAC's Policy on International Non-scheduled Air Transport, Working Paper presented to the Special Air Transport Conference (Montreal, April 13-26, 1977), ICAO, SATC-WP/9 (13/1/77), pp. 7-8; ECAC's Working Paper on the Same Subject presented to the Second Air Transport Conference (Montreal, February 12-28, 1980), ICAO, AT Conf/2-WP/8 (22/11/79), p. 1.

(57) ICAO Secretariat, Multilateral Arrangements by Regional Groups of States, Working Paper presented to the Second Air Transport Conference (Montreal, February 12-28, 1980), ICAO, AT conf/2-WP/4 (7/12/79), p. 4.

(58) Ibid.

(59) ICAO Secretariat, Summary of Material Received from Panel Members Relating to the Distinction of Non-scheduled from Scheduled Operation, op. cit., note 55 above, p. 14.

(60) ICAO Secretariat, op. cit., note 51 above, p. 16.

(61) United States, Statement of International Air Transport Policy of 1970.

(62) See First Chapter, under the heading: Freedom of the Air for International Commercial Air Services before the Chicago Convention of 1944.

(63) International non-scheduled passenger traffic accounted for about 32.2 per cent of total international passenger traffic in 1971. See ICAO, A Review of the Economic Situation of Air Transport 1969-1979, ICAO Circular 158-AT/57 (1980), p. 22.

(64) See, for example, ICAO Secretariat, Survey of International Air Transport Fares and Rates, September 1976, ICAO Circular 138-AT/44 (1977), pp. 4-5; and for September 1980, ICAO Circular 161-AT/59 (1981), p. 4.

(65) See, for example, ICAO Secretariat, Policy Concerning International Non-scheduled Air Transport, op. cit., note 14 aobve, pp. 25-28; 40; 47-49.

(66) IATA, Policy Concerning International Air Transport, Working Paper presented to the Special Air Transport Conference (Montreal, April 13-26, 1977), ICAO, SATC-WP/5 (10/1/77), p. 6.

(67) ICAO Special Air Transport Conference (Montreal, April 13-26, 1977), Report, op. cit., note 15 above, p. 10.

(68) See, for example, Nicolas Mateesco Matte, Treatise on Air-Aeronautical Law, (ICASL, McGill University, Montreal, 1981), pp. 229-250.

(69) IATA, op. cit., note 66 above, p. 5.

(70) ICAO Secretariat, A Review of the Economic Situation of Air Transport, 1969-1979, op. cit., note 63 above; ICAO Council, Annual Report of the Council--1980, ICAO Doc. 9327 (1981), p. 14.

(71) ICAO Council, Annual Report of the Council--1980, op. cit., note 70 above, p. 16.

(72) "The Gazette", Saturday August 22, 1981, p. 1.

(73) Ibid., pp. 1 and 31.

(74) See, for example, ICAO Secretariat, Policy Concerning International Non-scheduled Air Transport, op. cit., note 51 above, pp. 27-28 and 43-44.

(75) Ibid.

(76) See, e.g., European Civil Aviation Conference, Information on ECAC's Policy on International Non-scheduled Air Transport, Working Paper presented to the ICAO Special Air Transport Conference (Montreal, April 13-26, 1977), ICAO, SATC-WP/9 (13/1/77); ICAO Secretariat, Analysis of Available Material on Action taken by the Regional

Civil Aviation Bodies on Methods of Distinguishing between Non-scheduled and Scheduled Operations, Working Paper presented to the Panel of Experts on Regulation of Air Transport Services (Second Meeting, Montreal, April 2-12, 1979), ICAO, ATRP/2-WP/3 (13/3/79), pp. 8-17.

(77) ICAO Secretariat, Analysis of Available Material on Action taken by the Regional Civil Aviation Bodies on Methods of Distinguishing between Non-scheduled and Scheduled Operations, op. cit., note 76 above, pp. 3-6; ICAO Secretariat, Multilateral Arrangements by Regional Groups of States, Working Paper presented to the ICAO Second Air Transport Conference (Montreal, February 12-28, 1980), ICAO, AT Conf/2-WP/4 (7/12/79), p. 4.

(78) ICAO Secretariat, Multilateral Arrangements by Regional Groups of States, op. cit., note 77 above, p. 4.

(79) ICAO Secretariat, Policy Concerning International Non-scheduled Air Transport, op. cit., note 51 above, pp. 21-22.

(80) Ibid., p. 22.

(81) Ibid.

(82) Ibid.; ICAO Secretariat, Supplement to ICAO Handbook on Capacity Clauses in Bilateral Air Transport Agreements (Circular 72-AT/9), Working Paper presented to the Panel of Experts on Regulation of Air Transport Services (Second Meeting, Montreal, April 2-12, 1979), ICAO, ATRP/2-WP/5 (26/3/79), pp. 23-24.

(83) ICAO Secretariat, Policy Concerning International Non-scheduled Air Transport, op. cit., note 51 above, pp. 22; 39; 46.

(84) Ibid., p. 23.

(85) Ibid.

(86) See, e.g., Dr. Assad Kotaite, in his Opening of the Second Air Transport Conference, ICAO DRAFT AT Conf/2-Min. P/1 (15/2/80), p. 1.

(87) ICAO Special Air Transport Conference (Montreal, April 13-26, 1977), Report, op. cit., note 15 above, pp. 1 and 35.

(88) Ibid., p. 10.

(89) Ibid., p. 11.

(90) Ibid., p. 12.

(91) Ibid., p. 13.

(92) Ibid., p. 14.

(93) Ibid.

(94) Ibid.

(95) Ibid., p. 16.

(96) Panel of Experts on Regulation of Air Transport Services, Report on the First Meeting, op. cit., note 16 above, p. 2.

(97) Ibid., p. 1.

(98) Refer to the discussions under the heading: The Distinction between Scheduled and Non-scheduled Services, at the beginning of this chapter.

(99) ICAO Second Air Transport Conference, Report, op. cit., note 33 above.

(100) Ibid., p. 13.

(101) Ibid., p. 14.

(102) It was recognized that there were three methods of regulating capacity. First, the predetermination method in which the governments set or approve capacity, with varying degrees of flexibility, according to the market requirements; second, the Bermuda I type method in which governments allow the airlines of the Contracting parties to determine their own capacity according to the principles set out by the governments and subject to ex post facto review; and, third; the free-determination method according to which the capacity is free from direct government control and is determined almost exclusively in accordance with the competitive pricing and scheduling responses of individual airlines to market forces. See ibid., p. 15.

(103) Ibid.

(104) Ibid., p. 19. However, it was noted that guidelines relating to this criterion will be considered more fully after the Panel has dealt with the Item comprising the fourth stage of the Panel's work, that is to say regulation of non-scheduled air transport. See ibid.

(105) Ibid., pp. 20-21.

(106) ICAO Special Air Transport Conference, Report, op. cit., note 15 above, p. 21.

(107) Ibid., p. 23.

(108) Article 55 (c) states that the Council may conduct "research into all aspects of air transport and air navigation which are of international importance, communicate the results of its research to the contracting States, and facilitate the exchange of information between contracting States on air transport and air navigation matters."

(109) ICAO Special Air Transport Conference, Report, op. cit., note 15 above, p. 25.

(110) Second Air Transport Conference, Report, op. cit., note 33 above, p. 27.

(111) Ibid., p. 41.

(112) Ibid.

(113) Ibid., p. 42.

(114) Ibid., p. 43.

(115) Ibid., p. 45.

(116) Ibid., pp. 41-54.

(117) Ibid., p. 5.

(118) Ibid., p. 7.

(119) Ibid., p. 21.

(120) Ibid., p. 61.

(121) ICAO Council, Annual Report of the Council--1980, op. cit., note 70 above, p. 200.

(122) Ibid., p. 97.

(123) Ibid., p. 208.

(124) Committee of Inquiry into Civil Air Transport, Report: "British Air Transport in the Seventies" (The Edward's Report), (London, Her Majesty's Stationary Office, 1969).

(125) Ibid., p. 57.

(126) Ibid.

(127) Ibid.

(128) Ibid., p. 58.

(129) Ibid., p. 57.

(130) Ibid., p. 58.

(131) Ibid., p. 59.

(132) Ibid., pp. 59-60.

(133) Ibid., p. 60.

(134) Ibid.

(135) H.A. Wassenbergh, Public International Air Transportation Law in a New Era, (Kluwer-Deventer-The Netherlands, 1976), p. 99.

(136) Ibid., p. 100.

(137) Ibid.

(138) Ibid.

(139) Ibid.

(140) Ibid., pp. 100-102.

(141) Ibid., p. 102.

(142) Ibid., pp. 102-104.

(143) J.G. Thomka-Gazdik, "The Distinction between Scheduled and Charter Transportation", Air Law, Vol. 1, No. 2 (1976), p. 66, at p. 71.

(144) Ibid.

(145) Ibid.

(146) Ibid., pp. 71-72.

(147) Ibid., pp. 72-73.

(148) Werner Guldimann, op. cit., note 42 above, pp. 499-500.

(149) Ibid., p. 501.

(150) Ibid.

(151) Ibid., pp. 501-502.

(152) Ibid., p. 502.

(153) Ibid.

(154) Ibid.

(155) Ibid.

(156) Nicolas Mateesco Matte, op. cit., note 68 above, pp. 163-165.

(157) Ibid., pp. 165-166.

(158) Ibid., pp. 166-167.

(159) Ibid., p. 167.

(160) Ibid., pp. 167-168.

(161) Ibid., p. 168.

(162) Ibid., p. 168, Footnote 178. However, since it is widely recognized that programmed charters and the new United States concept of public charters have almost the same characteristics of scheduled services, Dr. Matte noted that it might be contended that to attempt to establish a distinction between scheduled services and such charters would create a false problem. He defended his attempt by arguing that the question is to find the appropriate set of rules for this type of service "in order to establish a relationship with other types of services, which is economically reasonable and healthy, and which provides an overall approach." See ibid.

(163) Ibid., pp. 168-169.

(164) Ibid., p. 169.

(165) Ibid.

(166) Ibid., pp. 169-170.

(167) Ibid., p. 170.

(168) Ibid., pp. 170-171.

(169) Gloria Schaffer and Stephen H. Lachter, "Developments in United States International Air Transportation Policy", Lawyer of the Americas, Vol. 12, No. 3 (Fall 1980), p. 585, at p. 594.

(170) Ibid., pp. 594-595.

(171) Public Law 96-192-Feb. 15, 1980, 94 STAT. 35 (Reproduced in 1980 U.S. Aviation Reports, Vol. 1, p. 218, at p. 218).

(172) Public Law 96-192-Feb. 15, 1980, 94 STAT. 36 (1980 U.S. Aviation Reports, Vol. 1, p. 219).

(173) Public Law 96-192-Feb. 15, 1980, 94 STAT. 42 (1980 U.S. Aviation Reports, Vol. 1, p. 225).

(174) Jacques Lauriac and Hervé Garrault, "Liberalization Policies at a time of World Economic Crisis", ITA Study No. 6 (1980), p. 6.

(175) Gloria Schaffer and Stephen H. Lachter, op. cit., note 169 above, p. 587.

(176) Ibid.

(177) See, for example, ibid., pp. 587-589.

(178) See, for example, Dr. J. Macia, Chairman of ICAO's Air Transport Committee, in his addressing the First Plenary Meeting of ICAO Second Air Transport Conference (Thursday, February 12, 1980), ICAO, DRAFT AT Conf/2-Min. P/1 (15/2/80), p. 3, at p. 6.

(179) Knut Hammarskjold, Director General of the International Air Transport Association (IATA), in his Testimony before the Subcommittee on Aviation of the Subcommittee on Public Works and Transportation, House of Representatives, 96th Congress, 1st Session on H.R. 5481 (October 24 and 25, 1979), 1980 U.S. Aviation Reports, Vol. 1, p. 453, at p. 455.

(180) Ibid.

(181) Ibid.

(182) Jacques Lauriac and Hervé Garrault, op. cit., note 174 above, p. 8.

(183) ICAO Second Air Transport Conference, Report, op. cit., note 33 above, p. 22.

(184) Knut Hammarskjold, op. cit., note 179 above, p. 455.

(185) Jacques Lauriac and Hervé Garrault, op. cit., note 174 above, p. 7.

(186) Ibid., p. 6.

(187) See, e.g., J.G. Thomka-Gazdik, op. cit., note 143 above, p. 70.

(188) Ibid.

(189) Jacques Lauriac and Hervé Garrault, op. cit., note 174 above, p. 9.

(190) Ibid., p. 10.

(191) Jacques Lauriac, "Liberalization Policies in a Time of World Economic Crisis", I.T.A. Bulletin, No. 38 (November 10, 1980), p. 897, at p. 898.

(192) Statement by the Observer of International Air Transport Association at ICAO's Second Air Transport Conference, Second Plenary Meeting (Thursday, February 12, 1980), ICAO, DRAFT AT Conf/2-Min. P/2 (15/2/80), p. 9. As an example, the fuel cost as percentage of total operating costs of IATA international scheduled services rose from 12 in 1973 to 23 in 1979 and is estimated to be about 29 in 1980 and is forecast to reach about 31 in 1981. See Knut Hammarskjold, The State of the Air Transport Industry, Annual Report for the 36th Annual General Meeting (Montreal, October 27-30, 1980), p. 8.

(193) Jacques Lauriac and Hervé Garrault, op. cit., note 174 above, p. 10.

(194) Knut Hammarskjold, op. cit., note 179 above, pp. 455-456.

(195) See Chapter Three.

(196) ICAO Secretariat, Considerations Regarding Regulation of Non-scheduled Air Transport, Working Paper presented the Panel of Experts on Regulation of Air Transport Services (Third Meeting, Montreal, October 15-26, 1979), ICAO, ATRP/3-WP/5 (3/10/79), p. 6.

(197) See, for example, Multilateral Agreement on Commercial Rights of Non-scheduled Air Services in Europe of 1956; ECAC Recommendation ECAC/4-3 (1961) as amended by INT. S/2-6 (1969) and by INT. S/10-2 (1978); Memorandum of Understanding Between Civil Avia-

tion Authorities of the States Members of the European Civil Aviation Conference (ECAC) on North Atlantic Charters; Arab Civil Aviation Council Decision S-16-1: "Consolidated Regulations for Non-scheduled Operations", mentioned in ICAO Secretariat, Multilateral Arrangements by Regional Groups of States, Working Paper presented to ICAO Second Air Transport Conference (Montreal February 12-28, 1980), ICAO AT Conf/2-WP/4 (7/12/79), p. 4; African Civil Aviation Commission (AFCAC) Recommendation S3-4 (1975) on "Common AFCAC Policy on Regulations for Non-scheduled Operations", mentioned in ibid.; ICAO Secretariat, Policy Concerning International Non-scheduled Air Transport, ICAO Circular 136-AT/42 (1977), p. 37.

(198) Dr. Nicolas Mateesco Matte's suggestion was explained earlier under some distinguished commentators views.

(199) For further consideration regarding Dr. Matte's suggestion see ibid. and his book , op. cit., note 156, pp. 166-171.

(200) See, e.g., Z. Joseph Gertler, op. cit., note 49 above, p. 123.

(201) See, for example, ICAO Secretariat, Multilateral Arrangements by Regional Groups of States, op. cit., note 197 above; ICAO Secretariat, Analysis of Available Material on Action Taken by the Regional Civil Aviation Bodies on Methods of Distinguishing between Non-scheduled and Scheduled Operations, op. cit., note 76 above.

(202) ICAO Second Air Transport Conference (Montreal, February 12-28, 1980), op. cit., note 33 above.

(203) ICAO Second Air Transport Conferenoe Recommendations, especially with respect to those on the regulation of capacity in international air transport services, seem to confirm this direction. See ibid., pp. 13-24; Z. Joseph Gertler, op. cit., note 143 above, pp. 123-124; Ralph Azzie, op. cit., note 41. Dr. Matte suggested that "the chances of success for a multilateral agreement on 'private scheduled air services' should be better than they have ever been for 'public scheduled services'" since the difficulty of "dealing with Fifth Freedom rights has been the main obstacle for a multilateral agreement on the latter type of services" whereas for "'the private scheduled air services' being exclusively (with rare exceptions) point-to-point services, this obstacle would not stand in the way." See his book, op. cit., note 156 above, pp. 170-171. Werner Guldimann suggested that while the chances are very small for a multilateral regulatory framework, but "on the other hand, if civil air transport falls into a worldwide depression, all kinds of political pressures might develop and the chances of this option might dramatically improve." See his Article, op. cit., note 42 above, p. 502. However, the present writer, while conceding that unpredictable changes in the circumstances surrounding international air transport are not impossible, he still is convinced that, based on today's realities, no comprehensive multilateral approach on a worldwide basis may be achieved in the foreseeable future.

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